

We find that, even assuming union responsibility for the work stoppages, the Union did not have a proscribed object within the meaning of Section 8 (b) (4) (D). Accordingly, we find that we are without authority to determine the present dispute, and shall quash the notice of hearing issued in this proceeding.

[The Board quashed the notice of hearing.]

**Beth E. Richards d/b/a Freightlines Equipment Company and
William R. Bray.** *Case No. 4-CA-1508. June 25, 1958*

DECISION AND ORDER

On August 2, 1957, Trial Examiner Ralph Winkler issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel filed exceptions and a supporting brief and the Respondent filed a brief in reply.

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Leedom and Members Rodgers and Bean].

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 the briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent consistent herewith.

The Trial Examiner found that the Respondent did not violate Section 8 (a) (3) and (1) of the Act by replacing the Charging Party and 10 other employees named in the complaint with former employees, at the request of Local Union 229, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. In so doing, the Trial Examiner found that the replacement was not based on considerations of union membership or loyalty but on considerations of employment seniority which the Respondent ascertained from its own records. He, therefore, concluded that the replacement did not constitute discrimination which would encourage union membership within the meaning of the Act. As the evidence persuades us that the Respondent replaced the employees in question in order to give their jobs to members of Local 229, we find that the Respondent discriminated against the replaced employees so as to encourage mem-

bership in Local 229 in violation of Section 8 (a) (3) and (1) of the Act.

The facts, which are substantially undisputed, are briefly as follows:

Prior to 1951, John Richards operated Richards Motor Freight Lines in Scranton, Pennsylvania. Due to financial difficulties, he went into bankruptcy and, in 1952, the receiver, who was appointed by the court to operate the business, laid off all the drivers. At that time, Richards was a signatory to an automatically renewable contract executed in 1950 with Local 229, which contained union-shop and seniority provisions. Also, in 1952, Richards organized the Respondent Freightlines Equipment Company in his wife's name and hired new drivers. This was a Delaware, New Jersey, operation and, until 1954, all drivers were based there. Commencing in 1954, equipment and employees were transferred from Delaware and gradually Freightlines evolved into a Scranton operation over which Local 229 claimed jurisdiction.

The Trial Examiner found, and we agree, that the 1950 contract had become ineffective by reason of the defunctness of a party. Nevertheless, after Richards resumed operations in Scranton, Local 229 claimed jobs for Richards' drivers, although their employment with him had terminated years before. For this reason, Local 229 also refused to accept into its membership the Respondent's employees who are named in the complaint. Concerned that they were in danger of losing their jobs because of Local 229's demands, an informal committee of the employees¹ told the Respondent that they were submitting their complaint to the International. Thereafter, at Local 229's insistence, the Respondent replaced the named employees with members of Local 229.²

The Respondent contends that it lawfully effected the replacement on the basis of the superior seniority rights possessed by members of Local 229. The General Counsel, on the other hand, urges that the Respondent replaced its employees because of considerations of membership in Local 229 and therefore violated Section 8 (a) (3) and (1) of the Act.

We find no merit in the Respondent's contention. The record convinces us that the Respondent replaced the employees in question, at

¹ There is no evidence in the record concerning the nature, selection, composition or authority of this committee. Contrary to the Respondent's contention, we find no commitment by the employees to be bound by the International's determination. In any event, the International's determination cannot preclude the Board from finding, as we do, unlawful discrimination against the replaced employees. Cf. *Monsanto Chemical Company*, 97 NLRB 517, 519-520, enf'd. *N. L. R. B. v. Monsanto Chemical Company*, 205 F. 2d 763 (C. A. 8).

² The Respondent transferred to its Delaware, New Jersey, operation those replaced employees who were willing to go there and laid off those employees who declined to transfer. There were 14 drivers who were laid off but only 11 of these are named in the complaint.

Local 229's insistence, solely in order to give preference in employment to members of that organization and not because Local 229 members had superior seniority rights. Not only was there no operative contract in existence entitling Local 229's members to seniority rights, but the evidence shows that Richards was not disposed to recall his former employees until Local 229 claimed the jobs. Indeed, in its September 8 letter to the replaced employees, the Respondent admitted that its replacement "action was brought about by orders from National Headquarters of Teamsters and Chauffeurs Union," and that its Scranton operation would be conducted by "drivers of Local 229." Further indicating that the Respondent was not motivated by considerations of seniority in replacing its employees with Local 229 members are its admissions in its letters of January 11 and February 15, 1956, to the Board's Regional Office. In the first one, in response to the Region's notification of the filing of the charge herein, the Respondent stated that the replacement of employees "was a matter handled in accordance with instructions that I received from Local 229." In its second letter, the Respondent explained that Local 229 wanted "a contract claiming jurisdiction in the Scranton area" and that its "members go back on the job . . . [or] I would have had a labor tieup if their demands were not met."

As it is clear from the foregoing evidence that the Respondent's discriminatory conduct was based on considerations of union membership, its action was such as encourages union membership and the Respondent thereby violated Section 8 (a) (3) of the Act.³ By this conduct, the Respondent further interfered with, restrained, and coerced employees in violation of Section 8 (a) (1) of the Act.

THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent, as set forth above, which have been found to constitute unfair labor practices, occurring in connection with the operations of the Respondent, 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.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices, we shall require it to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

We have found that the Respondent on September 8, 1956, dis-

³ *The Radio Officers' Union of The Commercial Telegraphers Union, AFL (A. H. Bull Steamship Company) v. N. L. R. B.*, 347 U. S. 17.

criminatorily replaced the employees named below.⁴ Accordingly, we shall order the Respondent to offer the discriminatees immediate and full reinstatement to their former or substantially equivalent positions and to make them whole for any loss of pay which they may have suffered by reason of the discrimination practiced against them by payment to each of them of a sum of money equal to the amount each normally would have earned as wages from September 8, 1956, the date of the discrimination, to the date of the Respondent's offer of reinstatement, less his net earnings during this period. Back pay shall be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*.⁵ However, as the Trial Examiner had recommended dismissal of the complaint herein, back pay shall be tolled for the period between the issuance of the Intermediate Report and the issuance of this Decision and Order.

As we are persuaded that the Respondent's past conduct reveals an attitude of opposition to the purposes of the Act, we find a potential threat of future violations and shall, therefore, include a broad cease and desist order.

CONCLUSIONS OF LAW

1. The Respondent Beth E. Richards d/b/a Freightlines Equipment Company is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. By discriminating in regard to hire and tenure of employment of the employees named above and encouraging membership in a labor organization, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

3. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor

⁴ These are as follows: William Doyle, William Ross, LeRoy Morden, Al Zuchlewski, Douglas Riley, Charles Zentel, Gerald Power, Frank Munafò, Glen Evans, and William Bray. With respect to another alleged discriminatee, LeRoy Rought, it is undisputed that a week before the replacement herein, Rought was laid off because of lack of work. However, the evidence is not clear whether his employment was thereby terminated, as the Respondent contends, or whether he simply was in a temporarily laid-off status. In any event, the Respondent took no specific action against Rought when it discriminated against its other employees. In these circumstances, the record is insufficient to sustain a finding of discrimination against Rought and, accordingly, we shall dismiss the allegations of the complaint with respect to him.

⁵ 90 NLRB 289

Relations Board hereby orders that the Respondent Beth E. Richards d/b/a Freightlines Equipment Company, Scranton, Pennsylvania, her agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Encouraging membership in Local Union 229, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or in any other labor organization, by laying off, transferring, or discharging employees, or in any other manner discriminating against them in regard to their hire or tenure of employment or any term or condition of employment, except to the extent permitted by Section 8 (a) (3) of the Act.

(b) In any manner interfering with, restraining, or coercing her employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection, or to refrain from any or all such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer William Doyle, William Ross, LeRoy Morden, Al Zuchlewski, Douglas Riley, Charles Zentel, Gerald Power, Frank Munafò, Glen Evans, and William Bray full and immediate reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges.

(b) Make whole the above-named individuals for any loss of pay they may have suffered by reason of the Respondent's discrimination against them, in the manner set forth in the section of this Decision and Order entitled "The Remedy."

(c) Preserve and make available to the Board or its agents upon request, for examination and copying, all payroll records, social-security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the rights of employment under the terms of this Order.

(d) Post at its offices in Scranton, Pennsylvania, and Delaware, New Jersey, copies of the notice attached hereto marked "Appendix." ⁶ Copies of said notice, to be furnished by the Regional Director for the Fourth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by Respondent for a period of sixty (60)

⁶ 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"

consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that the complaint, insofar as it alleges that the Respondent violated Section 8 (a) (3) and (1) of the Act, by discriminating against LeRoy Rought, be, and it hereby is, dismissed.

APPENDIX

NOTICE TO ALL EMPLOYEES

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 our employees that:

WE WILL NOT encourage membership in Local 229, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or in any other labor organization, by laying off, transferring or discharging employees, or in any other manner discriminating against them in regard to their hire or tenure of employment, except to the extent permitted by Section 8 (a) (3) of the Act.

WE WILL NOT in any manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection, or to refrain from any or all such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

WE WILL offer William Doyle, William Ross, LeRoy Morden, Al Zuchlewski, Douglas Riley, Charles Zentel, Gerald Power, Frank Munafo, Glen Evans, and William Bray full and immediate reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

WE WILL make whole the above-named individuals for any loss of pay they may have suffered by reason of our discrimination against them.

All our employees are free to become, remain, or refrain from becoming or remaining, members of any labor organization, except to the extent that this right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

BETH E. RICHARDS D/B/A FREIGHTLINES
EQUIPMENT 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.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

Upon charges filed by William R. Bray, an individual, the General Counsel of the National Labor Relations Board issued a complaint, dated April 2, 1957, against Beth E. Richards, d/b/a Freightlines Equipment Company, herein called Respondent, alleging that Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the Labor Management Relations Act, 1947, 61 Stat. 136, herein called the Act. Copies of the complaint and charges were duly served upon Respondent, in response to which Respondent filed an answer denying the unfair labor practices alleged.

Pursuant to notice, a hearing was held on May 6 and 7, 1957, at Scranton, Pennsylvania, before the duly designated Trial Examiner. The General Counsel and the Respondent were represented at the hearing and were given full opportunity to examine and cross-examine witnesses and to introduce evidence bearing on the issues; they were also given opportunity for oral argument at the close of hearing and to file briefs as well.¹

Upon the entire record in the case, and upon the observation of the demeanor of witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a sole proprietorship, is engaged in motor trucking business, with its office in Scranton, Pennsylvania. Respondent performs exclusively for Richards Freight Lines, Inc., a Pennsylvania corporation engaged as a common carrier with freight terminals in New York, New Jersey, and Pennsylvania. Respondent's gross income exceeded \$1,000,000 and Richards Freight Lines' income exceeded \$1,500,000 in 1956, more than half of the latter's income being derived from operations in New York and New Jersey.

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

II. THE LABOR ORGANIZATION INVOLVED

Local Union 229, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, herein called Local 229, is a labor organization within the meaning of Section 2 (5) of the Act.

III. THE UNFAIR LABOR PRACTICES

John Richards, the husband of Respondent Beth E. Richards, has been in the interstate trucking business for many years. Before 1951, he had been operating in Scranton, Pennsylvania, as an individual proprietorship under the name of Richards Motor Freight Lines; Richards Motor Freight Lines held ICC rights, owned

¹ I desire to acknowledge the helpful and able briefs filed by both the General Counsel and the Respondent.

trucking equipment and facilities, and employed drivers. Richards had some financial difficulties in 1951 and underwent a proceeding under chapter 11 of the Bankruptcy Act in connection with which a receiver was appointed to operate the business. Richards' motor equipment was repossessed, meanwhile; and in 1952 the receiver laid off all of Richards' drivers and operated on a reduced scale afterwards with leased operators.

Sometime in May or June 1952 Richards organized Freightlines Equipment Company in his wife's name, he was still in receivership at the time, and he arranged for Freightlines Equipment Company to take over some of his repossessed equipment. This operation was based in Delaware, New Jersey, a small town across the Pennsylvania-Jersey line, about 50 miles from Scranton. Richards hired drivers for this Delaware operation from both the Scranton and the New Jersey areas. The mentioned receivership concluded in December 1953, and at about this same time Richards organized and became sole owner of Richards Freight Lines, Inc., which organization succeeded to the ICC rights formerly held by Richards Motor Freight Lines. Freightlines Equipment Company leases all its trucks and drivers to Richards Freight Lines, Inc., which does not itself have employee drivers.

There was a gradual improvement in Richards' business following the aforementioned reorganization events of December 1953, and he expanded his operations accordingly. By 1954 Richards was bringing the equipment of Freightlines Equipment Company to Scranton for servicing and he began to dispatch many runs out of Scranton, where the dispatching and maintenance setup is presently located. In early 1956 Freightlines Equipment Company acquired other equipment and hired additional drivers, mostly from the Scranton area, and by September 1956 Freightlines Equipment Company had 33 drivers, most of whom were working out of Scranton on trucks based in Scranton. Richards still maintains some facilities at Delaware, New Jersey, and he also has other terminals in New Jersey, New York, and Pennsylvania.

George Morgan is operating manager of Richards Freight Lines, Inc. He directs all the work done by Freightlines Equipment Company and it is he who actually hires and supervises the latter's drivers.

On or about September 8, 1956, as more fully discussed hereinafter, Freightlines Equipment Company laid off the newly hired drivers involved in this case and replaced them with drivers who had been in Richards' employ at the time of the mentioned bankruptcy proceedings and whom the receiver had laid off in 1952.

Labor Relations History

Before his business reverses and resulting bankruptcy in 1951, Richards had collective-bargaining agreements covering his Scranton operations with Teamsters Local 229, the last such contract having been executed in October 1950. Local 229's geographical area is Scranton and vicinity and the mentioned 1950 agreement, a so-called master agreement, recites that it was between Local 229 and "Inter-State Trucking Companies of Scranton and vicinity." Each employer party to the agreement, including Richards, separately signed the so-called master agreement, and the record discloses that Richards is not and has not been a member of any trucking association confined to the Scranton area. The contract phrase, "Inter-State Trucking Companies of Scranton and vicinity," is therefore descriptive only and does not connote the existence of an employer or trade association of that name and also does not otherwise denote membership by Richards in any such organization or association. The 1950 contract was for a 2-year term with a renewal provision for yearly periods in the absence of notice to the contrary; the contract contained a union-shop provision and also provided, *inter alia*, for seniority practices in connection with which Richards was required to maintain, and he did maintain, a seniority list of his employees based on their comparative employment with the Company. All of Richards' drivers were members of Local 229 at the time of their layoff by the receiver in 1952, as required by the 1950 contract; and during that period Richards made available to Local 229 the seniority standings of his drivers, also in conformity with the 1950 agreement.

Richards, either personally or under a trade name or under the receivership, had no employee drivers in Scranton from about January 1952 until sometime in 1954. Local 229 and the other employer signatories to the 1950 contract executed subsequent industry contracts; the last such contract was negotiated and executed in or about October 1955 by a newly formed association of Scranton truckers in behalf of the association's members. These successive contracts were executed after Local 229 had given notice of termination of the 1950 agreement to all employer parties thereto except Richards. Richards was not given such notice because, as Local 229's business agent (Joe McHugh) testified, Richards was not operating in Scranton at the time. Richards did enter into a new contract with Local 229 in

November 1956, similar to the mentioned October 1955 agreement; but this is of no relevancy, as such agreement was executed after the events under consideration here.

Joe McHugh has been Local 229's business agent for more than 15 years. After Richards resumed his Scranton operations, as stated above, some of the drivers, who had been laid off by the receiver in 1952, told McHugh that they desired to return to Richards' employ. McHugh discussed the matter with Richards. Meanwhile, Richards' new drivers endeavored to join Local 229 and to have Local 229 represent them in dealing with Richards; but McHugh informed them that Local 229 could not represent them as he considered the employees laid off in 1952 to have preference for Scranton jobs with Richards on the basis of their greater seniority at the time of their layoff in 1952.

After Richards' business expanded and he acquired new equipment and hired additional drivers in 1956 and he in effect otherwise resumed his Scranton operations, as set forth above, Richards nevertheless sought to have this Scranton operation be considered a Delaware, rather than a Scranton, operation and he stated this position in his discussions with McHugh. Richards meanwhile had been advising the newly hired drivers that "we had to be very careful to maintain our Delaware status, because any change in that would bring us up against a seniority problem" vis-a-vis the drivers laid off in 1952. Gerald Power, one of the drivers who was laid off on September 8, 1956, thus testified to his awareness that Richards' "former employees . . . thought they had seniority to come back on our jobs"; upon being asked when he was "first aware of the seniority problem," Power replied: "Well, that has been a standing thing since Mr. Richards went bankrupt in 1951, and he started back up into a new business, a new company, I knew it right along."

There were further discussions regarding the seniority matter between Richards and his new employees and between Richards and McHugh. In August 1956, a committee of employees representing his current employees advised Richards that they and McHugh had attended a meeting in Philadelphia with the "International Brotherhood" to discuss the seniority question; the committee informed Richards that the "International Brotherhood" would hand down a decision on the matter and that the present employees would be governed by the decision. Richards then told the committee that the present employees would probably lose their jobs, whereupon the committee replied that they were nevertheless "satisfied to be governed by whatever the decision was." McHugh thereafter informed Richards that Richards' Scranton operation was in fact a Scranton operation (and it was) and that the former drivers were to be recalled for Scranton employment in preference to the current drivers with less company seniority.

A short while later, on or about August 25, Richards offered to transfer all Scranton-based drivers to Delaware, which was beyond the jurisdiction of Local 229; 19 drivers accepted such transfer, 14² did not. By letter dated September 8, 1956, Richards notified the drivers who did not transfer as follows:

This will notify you that effective week ending September 8, 1956, your services will no longer be required.

Future operations of FREIGHTLINES EQUIPMENT based at Scranton terminal will be by drivers of Local 229.

This action was brought about by orders from National Headquarters of Teamsters & Chauffeur Union.

Wages due will be available Monday, September 10, 1956 at 1 P. M.

Sometime before September 8, 1956, and after discussing the matter with Richards, McHugh contacted and held several meetings with all drivers³ appearing on Richards' 1952 seniority list to ascertain which drivers desired to return to Richards' employ; in doing so, McHugh also contacted former drivers on the seniority list who had left the Scranton area to work elsewhere and also those drivers who had meanwhile taken out withdrawal cards from Local 229. Fifteen of Richards' former drivers indicated their desire to return to Richards' employ and McHugh submitted their names to Richards. On instructions from Richards, Morgan (the operating manager) arranged the 15 names in accordance with the seniority standings shown by the Company's personnel records and without regard to their present membership or non-membership in Local 229. Richards then recalled the 8 highest men on the list and somewhat later recalled the 4 next highest men. All of the men recalled had greater seniority with Richards than any of the men replaced, some of the recalled drivers having had as much as 20 years' employment with Richards. Richards testified that

² The complaint alleges discrimination only as to 11 of these drivers

³ McHugh was unable to contact 1 or 2 of these individuals until a short while later.

the replaced drivers were laid off rather than terminated and that they take their respective places on the seniority list for purposes of further recalls.

Upon receiving a copy of the charge in this case and an accompanying letter from the Board's Regional Office, Richards replied as follows on January 16, 1956:

This will acknowledge your letter of January 11, 1957, and copy of charge made by William R. Bray.

It would seem that this matter would be primarily with Local 229 of the Teamsters Union in Scranton, since this was a matter which was handled according to instructions that I received from Local 229; and drivers who lost their jobs were replaced by members of Local 229 who were former employees of the company.

And, on February 15, 1956, Richards sent another letter to the Regional Office, reading as follows:

As outlined in our discussion on the telephone, regarding the driver's complaint you are handling, my position is as follows:

These drivers, apparently went to the executive offices of the International Brotherhood of Teamsters. They were referred to Local 229 in Scranton, who notified me they were not accepting new members, but wanted former drivers of the company put back on the job and also, a contract claiming jurisdiction in the Scranton area.

The drivers who were working were offered positions in New Jersey, outside of the jurisdiction. A number accepted, however the drivers who filed their complaint with you refused. Accordingly, I do not feel there is any responsibility on the part of the company for their loss of work. I also feel that this is a matter between these drivers and Local 229, as their position at the time of the trouble was that their members go back on the job and I would have had a labor tieup if their demands were not met. Local 229 made no attempt to interfere with the men who were kept on the job, but removed from their jurisdiction.

Of course, there are many more details to this matter, however the above is the part that I can speak of from my own knowledge.

If there is anything further we can do it will receive our full cooperation. Also, enclosed is statement you prepared for George Morgan.

Richards testified that he recalled his former employees because "they were the senior men as far as the situation at that time was concerned" and not because they were Local 229 men, and he further testified that he was also governed by the aforementioned position stated by the committee of the new employees to Richards, namely, their willingness to be governed by the "International Brotherhood" determination.

Conclusions

Mindful that the layoff notice of September 8, 1956, and that Richards' two letters to the Regional Office suggest, if not state in so many words, that the drivers were laid off on September 8 to make room for members of Local 229, I nevertheless find on the basis of all the facts and circumstances here that union membership in Local 229, or the lack of it, of either the replaced or the recalled drivers, played no part in the determination of either Respondent or Local 229 to effect such replacement. I conclude, rather, that Respondent laid off the individuals named in the complaint because of Local 229's insistence that the driver jobs in Richards' Scranton operation be filled on an employment seniority basis; and I find that Respondent effected the layoffs and recalls on such basis after making its independent determination of the drivers' respective standings.

It is apparently agreed by all parties that there would not be a violation here if the seniority provisions of the 1950 contract remained operative in September 1956 when the events under consideration occurred. The parties disagree, however, as to the effectiveness of the contract at that time. Respondent asserts that, by its own terms, the 1950 contract continued in force until terminated by notice as provided in the agreement. In support of its claim that the contract remained operative, Respondent relies on the fact that neither Local 229 nor Respondent gave termination notice to the other even though Local 229 had served such notice on the other employer parties to the 1950 agreement and executed subsequent agreements with them. The General Counsel, on the other hand, in asserting the inoperativeness of the 1950 contract in 1956, points to the difference in business identities between John Richards d/b/a Richards Motor Freight Lines (party to 1950 contract) and Beth E. Richards, d/b/a Freight Lines Equipment Company (nominal employer of the drivers in 1956);

he also relies on the fact that Richards Motor Freight Lines became defunct and ceased to exist as such for several years before September 1956 and he also refers to the fact that, by whatever name the business enterprise be known, Richards had no driver employees covered by the 1950 contract in the Scranton area for several years. I have no question but that John Richards is and was the real party in interest in the variously named enterprises involved here and that all these businesses were his. However that may be, I also have no question but that the 1950 contract became a nullity and was impossible of performance upon Richards' receivership and the layoff of his drivers by the receiver and during the subsequent period of several years during which Richards' Scranton business was defunct and he had no employee drivers there. I accordingly sustain the General Counsel's contention that the renewal provision of the 1950 contract did not operate to renew such agreement for defunctness of a necessary party thereto and I conclude on this issue that no operative contract existed in September 1956 between Respondent and Local 229.

Coming now to the ultimate issue in this case, I shall attempt to illustrate the problem by a series of hypothetical situations.

Suppose an employer lays off all his employees for economic reasons and later resumes operation with new employees. His former employees call upon him for jobs and in this discussion with him they mention their long, faithful service in his employ. The employer is persuaded by this appeal, whereupon he lays off the new employees and recalls the older ones in the order of their past employment with him. Clearly this conduct would not violate the Act as it in no way may be said "to encourage or discourage membership in any labor organization" within Section 8 (a) (3) of the Act.

Suppose the employer in our first hypothetical refused to accede to his former employees' request, whereupon they tell him that they will publish their appeal in a local newspaper in order to win public support for their position. The employer thereupon capitulates and agrees to lay off the new employees and to recall his former (more senior) employees in the order of their past employment, which he does. Certainly there is nothing here to support a finding of encouragement or discouragement in any labor organization within section 8 (a) (3) of the Act.

It may therefore be concluded that, if Respondent had taken the layoff and recall action in September 1956 without union insistence or suggestion or any other union involvement, such conduct clearly would not have violated the Act, even though Respondent's action might have been caused by the concerted action set forth in the second hypothetical.

Suppose, to continue our supposititious situations, an employer and a union have a valid contract with seniority provisions. Instead of recalling a laid-off employee, as required by the contract, the employer violates the contract by hiring a new employee. The union calls a meeting of the employees to consider the situation and the employees decide on strike action to support the laid-off employee who was entitled to be recalled under the contract. The union communicates the employees' strike intention to the employer, whereupon the employer lays off the newly hired employee and recalls his laid-off employee. I scarcely believe this action to violate Section 8 (a) (3) even though done at the union's insistence and even though the newly hired employee was laid off for reasons other than "his failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining [Union] membership" (Section 8 (b) (2) of the Act).

So far as I can ascertain from a study of Board decisions, including those cited in the General Counsel's brief, I am unable to find a square line of authority to support his proposition that employment action by an employer, which is not otherwise unlawful under the Act, necessarily becomes a violation merely because a union caused the employer so to act. There are, it is true, *dicta* to such effect; square holdings, I do not find. The General Counsel also relies on the *Radio Officers* case⁴ as holding that it is "unlawful to hire one union member as against another union member merely because one is sponsored by the union" (General Counsel's brief, 5). But the facts in the *Radio Officers* case show more to have been involved there than a union supporting the job preference of an employee having greater unemployment seniority than another union member (Fowler); in that case, unlike the instant one, the seniority practice sought to be enforced was part of the obligation of union membership; moreover, the union in the *Radio Officers* case attempted to take away Fowler's union membership and it also told him in effect that he would never obtain

⁴ *The Radio Officers' Union of the Commercial Telegraphers Union, AFL (A. H. Bull Steamship Company) v. N. L. R. B.*, 347 U. S. 17, affg. 196 F. 2d 960 (C. A. 2), enf. 93. NLRB 1523

employment with the steamship line which had hired Fowler, and with which the union was under contract, and it later told him, in effect, that a consequence of his violating union policy ("trying to break the Union" by going to the *Frances* without first getting a 'clearance,' and by thus knocking another member out of a job") was that he would never obtain employment with any other companies under contract with it (93 NLRB 1523, 1538-1539). Speaking of the *Radio Officers* and the companion *Teamsters* cases, the Court stated: "In each case the employer discriminated upon the instigation of the union. *The purposes of the unions in causing such discrimination clearly were to encourage members to perform obligations or supposed obligations of membership.* Obviously, the unions would not have invoked such a sanction had they not considered it an effective method of coercing compliance with union obligations or practices" (347 U. S. 52). [Emphasis supplied.]

The General Counsel's position is in effect a "*per se*" doctrine, namely a violation follows union causation. Trial Examiner Arthur Leff explored this proposition learnedly and exhaustively in *Studebaker Corporation*, 110 NLRB 1307, 1322-1327; I agree with, and hereby adopt, his analysis and see no reason to repeat it here. He concluded, as I do in this case, that an employer does not violate Section 8 (a) (3) of the Act where allegedly discriminatory conduct taken at the behest of a union is "unrelated to any aspect of union membership or union fealty, and within the Company's allowable freedom of action" (110 NLRB 1307, 1327).⁵ In a subsequent case, *Daugherty Company, Inc.*, 112 NLRB 986, 989, involving discharge action caused by a union, the Board sustained Trial Examiner (now Board Member) Bean's holding that "A finding of causation does not *ipso facto* lead to the conclusion . . . that since the discharges resulted from other reasons and inducement thereof than failure to pay dues, Section 8 (a) (1) and (3) and 8 (b) (1) (A) and (2) of the Act were transgressed" (112 NLRB 1003). Distinguishing the *Radio Officers'* case, the Board held: "As these employees were thus discharged for reasons unrelated to union membership or the performance of union obligations, we find that the Respondent Company did not discriminate against them to encourage union membership within the meaning of Section 8 (a) (3)" (112 NLRB 986, 989).

I find that Respondent's action here was based on objective criteria of seniority standings,⁶ which Respondent itself ascertained, and that these seniority standings were not referable to considerations of union membership or fealty. Whether or not such objective criteria are prescribed in a current or even a former agreement, I conclude that Respondent's conduct in this case does not violate Section 8 (a) (3) and (1) of the Act.⁷

[Recommendations omitted from publication.]

⁵ The Board did not reach this issue in the *Studebaker* case and, without expressing any opinion regarding it, specifically reserved ruling thereon.

⁶ See *Local 542, International Union of Operating Engineers, AFL (Koppers Company, Inc.)*, 117 NLRB 1863, regarding "an objective criterion unrelated to union membership."

⁷ One of the alleged discriminatees, Rought, was laid off on September 1, 1956, and Respondent asserts that Rought's layoff was for economic reasons. Essentially, however, Rought's case is in the same legal position as that of the other alleged discriminatees, whether the complaint be sustained or dismissed.

Consolidated Chemical Industries, Division of Stauffer Chemical Company and Oil, Chemical and Atomic Workers International Union, AFL-CIO. *Case No. 39-CA-626. June 25, 1958*

DECISION AND ORDER

On January 17, 1958, Trial Examiner Reeves R. Hilton issued his Intermediate Report in the above-entitled proceeding finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report