

Carolina Freight Carriers Corp. and James Burke

Local 560, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Ind. and James Burke. *Cases Nos. 22-CA-213 and 22-CB-98. November 27, 1959*

DECISION AND ORDER

On July 9, 1959, Trial Examiner Reeves R. Hilton issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents 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 to the Intermediate Report and a supporting brief, and the Respondent Company filed a reply brief in support of the Intermediate Report. The Respondent Union also filed a brief supporting the Intermediate Report.

Pursuant to Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with these cases to a three-member panel [Chairman Leedom and Members Bean and Fanning].

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.¹

[The Board dismissed the complaint.]

INTERMEDIATE REPORT

STATEMENT OF THE CASE

Upon charges filed by James Burke, the General Counsel duly issued a consolidated complaint, dated January 27, 1959, which alleges in substance that the Respondents, by executing and maintaining an agreement or understanding whereby the Respondent Company delegated to the Respondent Union exclusive control over the seniority of its employees at its Carlstadt, New Jersey, terminal, which determines the order of employment and layoffs of employees, thereby engaged in and are engaging in acts and conduct proscribed by the Labor Management Relations Act. The answers of the Respondents deny the commission of any unfair labor practices. Pursuant to notice a hearing was held on March 16, 17, and 18, 1959, at Newark, New Jersey. All parties were present and represented by counsel. At

¹ Like the Trial Examiner, we deem this case to be controlled by the decision in *Armour and Company*, 123 NLRB 1157 (Member Rodgers dissenting), rather than by *Pacific Intermountain Express Company*, 107 NLRB 837, *enfd.* as mod. 225 F. 2d 343 (C.A. 8).

As in the *Armour* case, we find here only adoption by the Company of a solution of the seniority dispute between the two unions involved, which had at least colorable support in the Company's existing contract with Local 560, and which was deemed by the Company to be satisfactory to both unions as an interim arrangement.

the conclusion of the testimony counsel presented oral argument and thereafter briefs were submitted by the General Counsel and counsel for the Respondent Company.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The complaint alleges and the answer admits the Company, a North Carolina corporation, performs motor transportation and related services and has its principal office at Cherryville, North Carolina, as well as trucking terminals in New Jersey and other States. In the year preceding the issuance of the complaint the gross revenue of the Company was in excess of \$1,000,000, of which more than \$100,000 was derived from interstate operations between and among the States of North Carolina, New Jersey, and other States. I find the Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Respondent Union Local 560 and Local 641, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Ind., are labor organizations as defined in Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The issue*

The broad issue is whether the Company by agreement or understanding delegated to Respondent Local 560 exclusive control over the seniority of its employees, including employees who were members of Local 641.

B. *The Company's operations and relationship with Local 560 and Local 641*

For some time prior to 1958, the Company maintained trucking terminals at Jersey City, New Jersey, and Paterson, New Jersey, which were under the supervision of George Wyatt, company vice president.

Following negotiations between joint committee representing various local unions and employers, the Company became signatory to separate agreements with Local 560 and Local 641, covering drivers, helpers, and other employees at its Paterson and Jersey City terminals, respectively. The agreements, part of a general trucking agreement,¹ were identical in terms and were effective from September 1, 1956, to August 31, 1958. The general agreement contains a union-security clause and with respect to scope and seniority provides:

Article I—Scope of Agreement, Section 1. The execution of this Agreement on the part of the Employer shall cover all truck drivers, helpers . . . as may be presently or hereafter represented by the Unions, . . . within the jurisdiction of the Local Unions signatory to this agreement.

Article V—Seniority, Section 1. Seniority shall prevail in that the Employer recognizes the general principal that senior employees shall have preference to choose their shifts and to work at the job for which the pay is highest, provided such employee is qualified for such work. Seniority does not give an employee the right to choose a specific unit, run, trip, or load.

Section 2. (a) Within thirty (30) days after signing of this agreement, the Employer shall post in a conspicuous place at the Employer's terminal, a list of employees arranged according to their seniority. Claims for corrections to such lists must be made to the Employer within ten (10) days after posting and after such time the lists will be regarded as correct. Any controversy over the seniority standing of any employee on such list if raised within such ten (10) day period shall be submitted to the Grievance Procedure as established by this Agreement.

(b) New employees shall be placed on the regular seniority list, with seniority dating from date of hire, as provided in Article II, Section 2(b) [union shop] of this Agreement.

¹The agreement is captioned "Metropolitan New York-New Jersey Area Freight Council of the Eastern Conference of Teamsters, Express and General Trucking Agreement." It covers employers of private, common, contract, and local cartage carriers, in the jurisdiction of seven local unions, including Locals 560 and 641.

Pursuant to the seniority provisions the Company maintained separate seniority lists for the employees at Paterson and Jersey City and there was no interchange of employees between the terminals.

In the early part of 1957 the Company, as related by Wyatt, decided to close down the Paterson and Jersey City terminals and to conduct combined operations from a new terminal to be erected in Carlstadt, New Jersey. The plan or move was prompted by economic reasons. Wyatt informed the employees or their representatives of the plan. Thus, between January and July 1958, he had a few brief discussions with Local 641 about the new terminal but little was said of seniority. In several discussions with Paul Ciampi, business agent for Local 560, Ciampi claimed his local should have top seniority. Wyatt told him the question of seniority would have to be negotiated. The Carlstadt terminal was completed on August 1, 1958. However, the Company was anxious to close down the Paterson terminal, so on July 14 it commenced operations at Carlstadt and on that date transferred all Paterson employees to Carlstadt. Counsel stipulated that as of July 13, the Company's seniority list contained the names of 12 men, whose seniority dated from January 1, 1954, to November 10, 1955, all of whom were members of Local 560. Counsel further stipulated that three new employees were hired on July 14.

On August 1, 1958, the employees at Jersey City were transferred to Carlstadt. Counsel stipulated that as of July 31, the Company's seniority list contained the names of 21 men, whose seniority dated from 1939 to 1954, all of whom were members of Local 641.

C. The dispute concerning the seniority of employees when assigned to Carlstadt

Nicholas Rafferty, shop steward at Jersey City, stated that around May or June 1958, Wyatt held a meeting of employees during which one of the men inquired where they would stand when they moved to the new terminal. Wyatt replied the men would not be hurt and he would prefer to use company seniority at Carlstadt. Later, about 3 weeks before the closing of the Jersey City terminal, Rafferty asked Wyatt where the men would stand when intermingled with Local 560 men and he answered the Company did not want to get involved in any dispute with the two locals, that he was leaving it up to the locals to reach some agreement.

James Burke was present at a meeting in May when Wyatt was asked what would happen when they moved to Carlstadt. Wyatt replied he would try to see that they were there first, that they would not be hurt and the men would be transferred on company seniority.

Wyatt testified that at a safety meeting in May, someone brought up the subject of the Carlstadt terminal and what was going to happen to the Jersey City men. He responded he did not know what would happen and hoped the older men would not be hurt by the move. Wyatt denied making any commitments at that time and he could not recall saying company seniority would prevail, if it was up to the Company.

On August 1, the 21 Jersey City men reported at Carlstadt, accompanied by Mike Calabrese, vice president of Local 641. Also present were some 16 members of Local 560 accompanied by Fred Meyers, an officer of the local.

According to Rafferty, he, Calabrese, and Meyers got together and Meyers, acting for the regular business agent, declared, "we have 16 men belonging to Local 560 that was employed on this job and them 16 men are going to work ahead of any of you 641 men." Rafferty said that was a raw decision, that Local 641 men were entitled to seniority rights since they were following their old jobs. After arguing for about half an hour Meyers stated a meeting would be held on Monday morning, August 4, when the regular business agent could be present. Meyers suggested they try to get the trucks moving and he and Calabrese agreed the men should work on a "one-for-one" basis until Monday. Under that system the top man on the Local 560 seniority list would get the first job assignment, the top man of the Local 641 seniority list would get the second assignment and subsequent jobs alternately assigned to the men in the same manner. Rafferty, Meyers, and Paul Ciampi, Jr., Local 560 steward, notified Wyatt of the arrangement, which he accepted. Rafferty and Ciampi, Jr., gave their respective seniority lists, described above, to the dispatcher and the men were dispatched in accordance with these arrangements.

There is no substantial dispute concerning these events. Wyatt did add that Russell Cook, vice president in charge of all terminal operations, was present at the meeting.

On the morning of August 4, Rafferty and Calabrese met with Tony Provenzano, president of Local 560, Ciampi, and Meyers outside the terminal building. As related by Rafferty, Provenzano inquired if they could not agree to a seniority list

on the one-for-one basis and Rafferty replied it was not fair to Local 641 men who had many years of service to work under that system with Local 560 men who had much less seniority. Provenzano stated it was a good deal, in fact Local 560 was not required to accept the men on the list. Rafferty told him to use his own judgment, if Local 641 men could not get a fair deal they would take the case "to a labor court or some sort like that." Provenzano remarked Rafferty had "two strikes" against him if he went to a labor court and Rafferty said the men were willing to take their chances. Ciampi declared if Rafferty wanted to fight the case he would "fight it from the bottom of 560's list, so go ahead and do what you want." Rafferty then called a meeting of Local 641 men, explained the situation to them, and they unanimously voted to reject the offer. The representatives held further discussions on the subject which concluded with Ciampi stating Local 641 men would go to the bottom of the Local 560 list.

Calabrese testified Local 641 exercises jurisdiction in Hudson County and jurisdiction of Local 560 extends to Hudson, Bergen, Passaic, and Sussex Counties. Jersey City is located in Hudson County, Paterson in Passaic, and Carlstadt in Bergen County. Neither Calabrese nor Provenzano gave any explanation concerning the apparent current jurisdiction of the locals in Hudson County, but I do not consider that point material. However, Provenzano, when asked why the Jersey City men were under Local 641, stated when employees move into an area they have the right to select their own locals and the Jersey City employees must have approached Local 641 to represent them rather than Local 560. Admittedly both locals had a few agreements outside their geographical areas.

Calabrese related that prior to July 1958, Rafferty advised him of the move to the new terminal and brought up the question of seniority. Calabrese replied he could not give an answer because of the past practices in the area. For many years, he stated, it had been accepted practice, or the contract had been so interpreted, that where a group of employees was transferred to another terminal where the employees were under agreement with another local, the group thus transferred would go to the bottom of the seniority list. Describing the practice in another way, he said when employees moved from the jurisdiction of one local to another local it had been an accepted fact that they automatically go to the bottom of the seniority list. Calabrese took the position, which he maintained throughout, that that since the Paterson men had been working at Carlstadt from July 14, under the Local 560 contract, Local 641 men would go to the bottom of the list under established practice. Calabrese admitted the Local 641 agreement contained no provisions for seniority under the circumstances of this situation. Further, Calabrese considered the seniority question a jurisdictional dispute rather than a grievance and tried to reach some agreement with Local 560, without success. On August 1, it was agreed to work on a one-for-one basis and to meet on August 4, when Ciampi could be present. The meeting on the latter date concluded with Ciampi stating that Local 560 men were taking top seniority. The Local 641 men then voted to present the matter "to the N.L.R.B." The representatives thereupon met with Wyatt and Cook in the terminal at which time Ciampi notified them Local 560 was taking top seniority and Local 641 men would go to the bottom of the list. Calabrese did not say anything at this meeting and denied he told Wyatt or Cook that his men would take the bottom of the list. Wyatt accepted this arrangement.

Provenzano stated that on August 4, at the meeting with Wyatt and Cook, "I told them that it was the demands of the members of Local 560 that they maintain their seniority at the terminal." He believed Calabrese said his men would take the bottom of the list. Wyatt accepted the arrangements. Provenzano asserted the general freight agreements provided for terminal seniority and under long-recognized practice "the employees of the moving company always went to the bottom of the list." Provenzano claimed seniority was determined by the Local 560 agreement, but he was unable to point out any specific provision covering the present situation.

Wyatt stated that at the meeting with representatives of the locals on August 4, Calabrese announced his men, contrary to his recommendation, would not accept seniority on the basis of one-for-one, that they were going to the bottom of the list and "take it before the board." Ciampi declared his men should go to the top of the list, "that he was willing to go along on the one-for-one but they wouldn't accept, so he was in agreement that 641 go to the bottom of the list and take it to the board." Wyatt "agreed that that's the thing to do, take it to the board, to that effect." Wyatt understood the reference to the "board" to be the arbitration board.

According to Wyatt there had been no prior agreement covering seniority and the seniority terms of the August 4 agreement were negotiated, at least partially, on the

fact Local 560 men had moved into the terminal 2 weeks before the 641 men. In this connection Wyatt also testified that from the commencement of operations at Carlstadt, Local 560 was recognized as the bargaining agent and terms and conditions of employment were regulated under the Local 560 agreement. He further stated that after the Jersey City terminal closed he had no contractual relations with Local 641. Admittedly, Local 560 men have had top seniority since August 4.

Cook was in charge of the Company's 22 terminals and said employee seniority was on a terminal basis. Cook, of course, was fully cognizant of the circumstances leading to the establishment of and operations at the Carlstadt terminal. He was also familiar with the current agreements with Local 560 and Local 641 and knew there was no express provision in the agreements covering the situation existing at Carlstadt in respect to seniority. Cook, therefore, came to Carlstadt to participate in negotiations with the locals on the question of seniority. He testified that at the August 4 meeting, Provenzano reported the prior discussions between the men and stated since the Jersey City men had turned down an offer of one-for-one, "he was offering to us the seniority of the 641 men behind the 560 men." Provenzano was talking to Wyatt, so Cook asked Calabrese for his views on the matter. Calabrese said his men had rejected his recommendation to accept Provenzano's offer, so "We are taking the bottom of the list" and "the men are going to take their chances with the board." Like Wyatt, Cook understood board to mean a grievance or arbitration board. Cook and Wyatt agreed that was the thing to do and gave Local 560 top seniority.

Sometime later, around the end of September or early October, Ciampi called the 641 men together and informed them they had to turn over their books and transfer to Local 560, otherwise they could not work for the Company. Rafferty turned over all the books to Ciampi, Jr., and about October 10 or 15, the men received books from Local 560.

Concluding Findings

The parties are in accord on the basic facts of the case, with the exception noted below. In brief, the Company, for purely economic reasons, decided to combine the Paterson and Jersey City operations at the new Carlstadt terminal and on July 14, moved the Paterson personnel and operations to that terminal, followed by a similar move of Jersey City on August 1. The Company and Local 560 and Local 641 were parties to separate, but identical, agreements covering the employees at Paterson and Jersey City, respectively, which agreements were in force from September 1, 1956, to August 31, 1958. Unquestionably, the employees became involved in a dispute over their seniority standing at the new terminal and the resolution of the dispute by representatives of the Company and the locals on August 4, which was unfavorable to the Jersey City men, led to the filing of unfair labor practice charges and the present proceedings.

The complaint does not challenge the validity of either of the above-mentioned agreements² and I see nothing unusual, much less illegal, in the provisions defining the scope of the contract and the union-security and seniority clauses. Nor does the complaint raise any question concerning the appropriate bargaining unit at Carlstadt or the representation of the employees for the purposes of collective bargaining. Consequently, any question concerning the representation of employees that may have arisen by reason of the new terminal is not an issue in this case. Further, there is no allegation or contention the Company refused to bargain collectively with the statutory representative of its employees in violation of Section 8(a)(5), or that it rendered assistance or support to Local 560 violative of Section 8(a)(2) of the Act.

It is undisputed that from the beginning of operations the Company recognized Local 560 as the exclusive bargaining agent for the employees at Carlstadt and terms and conditions of employment were governed by their existing agreement. Both Cook and Calabrese agreed the Company's seniority plan was established and maintained on a terminal basis. Moreover, Calabrese properly conceded his agreement made no provision for the retention or transfer of terminal seniority under the circumstances herein and the agreement became inoperative or ineffective upon the

² Paragraph XII of the complaint alleges since on or about July 1, 1958, the Company and Local 560, "have been parties to, and have maintained in effect and enforced, an agreement, arrangement, understanding and practice whereby Respondent Carolina Freight delegated to Respondent Local 560 the final and exclusive control over the seniority ranking of status of Carolina Freight employees at the Carlstadt terminal." I do not construe this broad allegation as placing the 1956 agreement between the Company and Local 560 in issue. Moreover, there is no evidence whatever indicating the Company entered into any such arrangement with Local 560 on or about July 1.

closing of Jersey City and the assignment of the employees to Carlstadt. Since there was an existing agreement covering the employees at Carlstadt when the 641 men moved to the terminal their seniority and other rights and privileges were determined by the terms of that agreement. There is no contention that illegal considerations prompted the Company's transfer of operations to Carlstadt or its subsequent recognition of Local 560 and adherence to the agreement. From these findings I conclude the Respondents did not engage in any conduct violative of the Act.

It is the theory of the General Counsel that Local 641 men would have maintained their seniority on the basis of company, rather than terminal employment, absent the Company's unlawful delegation of seniority to Local 560. Both Rafferty and Burke testified Wyatt made statements to that effect. Wyatt admitted saying he hoped the older men would not be hurt but denied making any statement or commitment that company seniority would be established at the new terminal. The assertions of Rafferty and Burke are neither convincing nor plausible, while Wyatt's testimony is consistent with that of Cook's, Calabrese, and Provenzano, as well as the terms of the agreements. I accept Wyatt's testimony and find he made no statement, commitment, or promise that Local 641 men would retain their seniority or that seniority at Carlstadt would be determined on the length of company service rather than terminal employment.

To support his position the General Counsel seeks to bring this case within the doctrine announced in the *Pacific Intermountain Express case*.³ In the *P.I.E.* case and subsequent cases⁴ the Board held that a contract provision which gives to the bargaining agent the authority to settle controversies relating to seniority is unlawful. The Board's rationale underlying the *P.I.E.* doctrine (p. 845) is that it is to be expected that a union granted such broad power will exercise its control over seniority to discriminate against the employees on the basis of union adherence, and, consequently,

. . . it is to be presumed . . . 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.

There is no contention that the agreements with Locals 560 and 641 delegated exclusive authority over seniority to the respective locals within the meaning of *P.I.E.* doctrine. Granting the seniority provisions of the contracts made no express provision for the determination of seniority under the particular circumstances, or that seniority was determined independently of the Local 560 agreement, I am still of the opinion the case does not come within that doctrine. It is abundantly clear the parties knew the establishment of the Carlstadt terminal would create problems concerning the seniority of the employees. From the very outset Wyatt announced the Company did not want to become involved in a dispute with the locals and the question of seniority should be resolved by the locals themselves. Certainly, the Company's position was a fair and reasonable one and I do not see how it can be criticized or penalized for following this course. Plainly, these facts are insufficient to warrant the conclusion or inference that the Company thereby delegated exclusive authority over seniority to either or both the locals contrary to the principles laid down in the *P.I.E.* case. Nor do subsequent events justify a different conclusion. On August 1, the locals agreed to work that day on a one-for-one basis which was acceptable to the Company. I find nothing illegal in this arrangement. On August 4, there were discussions between representatives of the locals and among the representatives and Local 641 men. It is undisputed that Provenzano and Ciampi contended Local 560 was entitled to top seniority but offered to settle seniority on the basis of one-for-one. However, the offer was rejected by the 641 men who said they would take the matter to the Board. The meeting ended with Ciampi stating Local 641 men would go to the bottom of the list. Burke characterized the foregoing as an agreement or arrangement between Local 641 and Ciampi. Immediately thereafter the representatives advised Cook and Wyatt of the

³ *Pacific Intermountain Express Company*, 107 NLRB 837, enfd. as modified *sub nom. N.L.R.B. v. International Brotherhood of Teamsters, etc.*, 225 F. 2d 343 (C.A. 8).

⁴ *Minneapolis Star and Tribune Company*, 109 NLRB 727; *North East Texas Motor Lines*, 109 NLRB 1147, enfd. *sub nom. N.L.R.B. v. Dallas General Drivers, etc.*, 228 F. 2d 702 (C.A. 5); *Chief Freight Lines Company*, 111 NLRB 22; *Kenosha Auto Transport Corporation*, 113 NLRB 643; *Interstate Motor Freight System*, 116 NLRB 755; *Gibbs Corporation*, 120 NLRB 1079; *Meenan Oil Co., Inc.*, 121 NLRB 580.

discussions at their meeting and the conclusion thereof. After some discussion of the matter the Company accepted the above-mentioned agreement or arrangement.

It must be noted that at no time during the discussions did Rafferty or Burke claim seniority on the basis of the 641 agreement (with which they were familiar), or upon any past practice or custom. Nor did they make any mention of the Local 560 agreement or lack of agreement with the Company. Indeed Rafferty's sole complaint was that it was not fair to have 641 men with long seniority competing with 560 men with less seniority. I can readily appreciate Rafferty's position but whether the Respondents engaged in unfair labor practices is not to be determined by the equities or inequities of the situation.

The General Counsel argues that acceptance of the above arrangement, or decision by Ciampi, by the Company constituted an unlawful delegation of control over seniority to Local 560. I find no merit in this argument. Undoubtedly, there was serious question as to whether the seniority provisions of the Local 560 contract could be applied, or be interpreted to apply, to conditions existing at Carlstadt. That being the case, the Company and Local 560, as the recognized bargaining agent, had the right to resolve the question through further bargaining negotiations. This they did, albeit preliminary discussions were had between the representatives of the locals. I am convinced all parties were acting in good faith in the matter and the quick acceptance by the Company of the proposal or decision of Local 560 does not justify any adverse inference. Nor does this action involve an unlawful delegation of power of the kind contemplated by the *P.I.E.* doctrine, for that doctrine is bottomed on the existence of an agreement wherein an employer abdicates to a union complete and blanket control over the determination of seniority. There is no such agreement here.

In essence the General Counsel urges that, though not required by the agreement to do so, the action of the Company in allowing Local 560 unilaterally to resolve the seniority controversy, coupled with the Company's subsequent acquiescence in the local's requested resolution, constituted without more an unfair labor practice under the Act. That theory was advanced by the General Counsel in the *Armour* case⁵ and rejected by the Board. In finding the employer had not delegated complete control over seniority to the Union within the meaning of *P.I.E.* the Board stated:

The present case arose from an honest disagreement as to the meaning of an ambiguous contract clause that was susceptible of two possible equally valid constructions. The Company indicated that either was acceptable and that it would leave to the Union the choice to be made. If during contract negotiations the Company had submitted two lawful seniority proposals to the union leaving to the latter the choice of accepting either, it could hardly be contended that offering a choice to the Union would have been unlawful. Moreover, once the Union made its choice of the two possible constructions of the contract clause, admittedly on a nondiscriminatory basis, its power with respect to seniority ended. It no longer had the authority to determine or settle controversies regarding seniority or to use such power to encourage membership in the Union. This is the salient point of difference with the *Pacific Intermountain Express* case.

In view of the above authority, I find neither the Company nor the Local 560, by resolving the seniority controversy in the manner found herein, thereby engaged in any unfair labor practices.⁶

It is true, of course, that the movement of the Paterson employees to Carlstadt 2 weeks prior to the Jersey City employees resulted in the latter employees, who had greater company service, losing their seniority to the former employees. Although the result may be unfortunate it is not unlawful for in making its decisions the Company acted solely for business reasons, not for discriminatory purposes. Section 8(a)(3) of the Act, as the Supreme Court pointed out in the *Radio Officers* case,⁷ "does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimi-

⁵ *Armour and Company*, 123 NLRB 1157.

⁶ Apparently, the General Counsel believes some unfavorable inference may be drawn from the fact that after August 4, seniority was recognized in accordance with the separate seniority lists, instead of computing seniority as of the date of actual transfer of individual employees to Carlstadt. I fail to see the significance of this point. In any event none of the interested parties ever suggested seniority be determined in that manner.

⁷ *The Radio Officers' Union of the Commercial Telegraphers Union, AFL v. N.L.R.B.*, 347 U.S. 17, 42-43.

nation as encourages or discourages membership in a labor organization is proscribed." And, as the Board has held, it does not follow from the fact that a union has instigated employer action impairing an employee's employment status that such action tends to encourage or discourage union membership, if, as in this case, it is otherwise clear that the action was urged and taken "for reasons unrelated to union membership or the performance of union obligations."⁸

Finally, assuming the dispute was settled independently of any agreement, I would reach the same conclusion. Here, as stated above, no question of representation is involved nor is it claimed that discriminatory motives played any part in the Company's decision to move and the resolution of the seniority issue. In these circumstances the Company was free to establish any system of seniority, or no seniority system at all, without violating the Act.

It is the theme of the General Counsel's brief the Company would have adopted a companywide seniority system, under which the Jersey City men would have retained their seniority, but for the unlawful delegation of authority over seniority to Local 560. I have already found the evidence does not support any such finding. Nor do the cases cited⁹ support the General Counsel's theory for they are plainly distinguishable. In the *IAM Lodge 727* case¹⁰ the Board held the enforcement of seniority provisions penalizing the employees for exercising their right to be represented by a union of their own choosing was discriminatory in that it discouraged membership in such union. The *Richards* case¹¹ did not involve any contract and as the court stated: "Reduced to simplest concepts, the case is one of an employer discharging employees in order to replace them with men favored by the union." These cases bear no relation to the facts and law of the present case.

For the reasons stated above, I find that the Respondents have not engaged in unfair labor practices as alleged in the complaint in this proceeding.

[Recommendations omitted from publication.]

⁸ *Armour* case, *supra*; *International Longshoremen's and Warehousemen's Union, Local No. 10, Ind., etc. (Pacific Maritime Association)*, 121 NLRB 938; *Daugherty Company, Inc.*, 112 NLRB 986, 989.

⁹ The General Counsel discusses at some length the finding of unfair labor practices by the Trial Examiner in *Reick Dairy*, IR-496. I think it sufficient to say that while I am bound to follow Board precedent, that obligation does not extend to findings, conclusions, or recommendations contained in intermediate reports.

¹⁰ 123 NLRB 627.

¹¹ *N.L.R.B. v. Beth E. Richards d/b/a Freightlines Equipment Company*, 265 F. 2d 855, 861 (C.A. 3).

Swanson's, Inc. and International Brotherhood of Firemen and Oilers, AFL-CIO. *Cases Nos. 10-CA-3410, 10-CA-3527, and 10-CA-3573. November 27, 1959*

DECISION AND ORDER

On April 22, 1959, Trial Examiner Max M. Goldman issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions and a supporting brief.

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 brief, and the entire record