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Interstate Bakeries Corporation and Kirk Rammage

Teamsters Local Union No. 523, Affiliated With International Brotherhood of Teamsters¹ and Kirk Rammage. Cases 17–CA–23404 and 17–CB–6146

June 30, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND PEARCE

On October 31, 2006, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel and the Charging Party each filed exceptions and supporting briefs. The Respondent Union filed an answering brief to the General Counsel's and the Charging Party's exceptions. The Respondent Employer filed an answering brief to the Charging Party's exceptions.²

On September 25, 2008, the two sitting members of the Board issued a Decision and Order in this proceeding, which is reported at 353 NLRB 122 (2008).³ In that decision, the Board found that the Respondent Employer violated Section 8(a)(3) and (1) and the Respondent Union violated Section 8(b)(1)(A) and (2) by agreeing to endtail, rather than dovetail, the seniority of Charging Party Kirk Rammage, following the merger of two represented units and the inclusion of the previously unrepresented Rammage in the merged unit.

Thereafter, the Respondent Union filed a petition for review in the United States Court of Appeals for the Tenth Circuit, and the General Counsel filed a cross-application for enforcement. On December 22, 2009, the Court of Appeals for the Tenth Circuit enforced the Board's Order. 590 F.3d 849 (10th Cir. 2009). The Respondent Union then petitioned the United States Su-

¹ We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

² No exceptions were filed to the judge's finding that the Respondent Employer violated Sec. 8(a)(1) by advising Charging Party Kirk Rammage that he would have to join the Union as a condition of continued employment.

³ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the powers of the National Labor Relations Board in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Thereafter, pursuant to this delegation, the two sitting members issued decisions and orders in unfair labor practice and representation cases.

preme Court for a writ of certiorari. On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, holding that under Section 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegatee group of at least three members must be maintained. Thereafter, on October 4, 2010, the United States Supreme Court granted the petition for writ of certiorari, vacated the court of appeals judgment, and remanded this case to the court of appeals.⁴ On October 29, 2010, the court of appeals vacated the Board's Order and remanded the case to the Board for further proceedings.⁵ Subsequently, the Respondent Union filed a supplemental brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.⁶

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.⁷ Our rationale for so holding is set forth below.

The judge found that the Respondent Union and the Respondent Employer did not violate the Act by agreeing to endtail, rather than dovetail, the seniority of Charging Party Rammage, following the merger of two represented units and the inclusion of the previously unrepresented Rammage in the merged unit. For the following reasons, we disagree with the judge and find that the Respondent Employer violated Section 8(a)(3) and (1) and the Respondent Union violated Section 8(b)(1)(A) and 8(b)(2), as alleged.

I. BACKGROUND

The Employer manufactures and distributes bakery products under various names, including Dolly Madison, Hostess, and Wonder Bread. Until late 2005, the Employer's sales routes were structured along product lines. Some of the route representatives were assigned to sell and deliver only Dolly Madison products, while others were assigned Hostess and Wonder Bread products. The

⁴ 131 S.Ct. 109 (2010).

⁵ 624 F.3d 1321 (10th Cir. 2010).

⁶ Consistent with the Board's general practice in cases remanded from the courts of appeals, and for reasons of administrative economy, the panel includes the remaining member who participated in the original decision. Furthermore, under the Board's standard procedures applicable to all cases assigned to a panel, the Board member not assigned to the panel had the opportunity to participate in the adjudication of this case at any time up to the issuance of this decision.

⁷ In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we shall require that backpay shall be paid with interest compounded on a daily basis. We shall also provide for the posting of the notices in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010).

Union has historically represented the Dolly Madison and the Wonder Bread/Hostess sales representatives in separate units with separate collective-bargaining agreements. The Dolly Madison contract, covering employees in Tulsa and Muskogee, Oklahoma, ran from July 7, 2002, through November 5, 2005. The Wonder Bread/Hostess contract, covering sales representatives in Tulsa, Bartlesville, Ponca City, Woodward, Stillwell, and Enid, Oklahoma, ran from August 19, 2001, through August 19, 2006.

Kirk Rammage, the Charging Party, has been a Dolly Madison sales representative for the Employer for about 15 years, beginning before the Employer purchased the Wonder Bread/Hostess product lines. Rammage was based in Ponca City, Oklahoma, where he originally worked by himself from a Dolly Madison warehouse. Then, after the Employer's 1996–1997⁸ acquisition of Wonder Bread/Hostess, and for cost-saving reasons, Rammage was moved to the Wonder Bread/Hostess warehouse in Ponca City. Unlike the Ponca City Wonder Bread/Hostess sales representatives based at that facility, however, he continued delivering and selling only Dolly Madison products. Rammage was not included in either of the bargaining units. Rammage was considered by the Employer to be an unrepresented employee, and he received company benefits rather than the benefits provided under either union contract.

Sometime before November 2005, the Employer decided to consolidate routes: all sales representatives would deliver and sell all products, and there would be no differentiation between Dolly Madison and Wonder Bread/Hostess routes. In early November 2005, Randy Campbell, the president of the Union, met with various representatives of the Employer, and they agreed that the Dolly Madison and Wonder Bread/Hostess units would be merged.⁹ The Dolly Madison contract, which was set to expire, would not be renewed, and the employees covered by it would be dovetailed according to unit seniority with the Wonder Bread/Hostess sales representatives, whose contract would remain in effect as the sole contract. In addition, the parties agreed that one Ponca City route would be eliminated.

During that discussion, Mike Stewart, one of the Employer's senior managers, informed the Union of Rammage's employment at Ponca City and that he had not been included in either unit. The Union was previously unaware of Rammage. The parties agreed that Rammage

should be included in the merged unit, and they discussed where he would be placed on the seniority roster.

Although Rammage had no unit seniority, he had the most company seniority of any sales representative based in Ponca City. The Employer considered him to be its best Ponca City employee and did not want to lose him. Accordingly, it proposed that Rammage be dovetailed into the merged unit according to his company seniority. Union President Campbell refused, stating that the Union's duty of fair representation to the employees it represented would be breached if the Union allowed that to occur. Campbell insisted that Rammage be placed at the bottom of the merged unit's seniority roster, beginning on the date he entered the unit. Ultimately, the Employer agreed.

Subsequently, Division Manager Rodney Roberts, Rammage's supervisor, informed him that the Employer and the Union had decided to use "union seniority" for route bidding and vacation scheduling. In mid-December 2005, Roberts told Rammage that the route of one of the Ponca City sales representatives, Terry Tyler, was to be eliminated and that Tyler had exercised his contractual option to bump Rammage in accordance with "union seniority." Rammage continued working in Ponca City until about January 12, 2006, when Sales Manager Kirk Summers gave Rammage the option of working as a sales representative out of the Bartlesville terminal if he wanted to have a job. Summers told Rammage that he was one of his best men and he did not want to lose him. Rammage ultimately accepted the Bartlesville position, which required him to commute over 70 miles each way.

II. JUDGE'S DECISION AND EXCEPTIONS

The judge found that the Respondent Employer violated Section 8(a)(1) of the Act by advising Rammage that he would have to join the Union as a condition of employment. No exceptions were filed to that finding. The judge concluded, however, that neither the Respondent Employer nor the Respondent Union violated the Act by agreeing to entail Rammage's seniority.

The judge relied on *Riser Foods, Inc.*, 309 NLRB 635 (1992). In that case, which involved the merger of two employers, the Board held that a union, having a duty of fair representation toward bargaining unit employees, did not violate the Act by dovetailing the seniority of employees it had represented in different units prior to the merger, but entailing employees it had not formerly represented who became unit employees as a result of the merger. The Board found that the union had no duty of fair representation to those employees that it did not yet represent. The judge rejected the General Counsel's con-

⁸ The judge inadvertently stated that the acquisition occurred in 1977.

⁹ The Muskogee employees, part of the Dolly Madison unit, were to be transferred to a different unit and were no longer to be represented by the Union.

tention that *Riser* is distinguishable because it was a duty of fair representation case.

The judge declined to apply *Whiting Milk Corp.*, 145 NLRB 1035 (1964), enf. denied 342 F.2d 8 (1st Cir. 1965), on which the General Counsel and the Charging Party had relied. In that case, the Board held that it was unlawful in a unit merger situation to enttail employees who were not formerly represented by any union, while dovetailing employees represented in different units by the same local union. While acknowledging that *Whiting Milk* was “analogous if not identical” to the instant case, the judge asserted that the Board “seems” to have “obliquely” overruled *Whiting Milk* in *Stage Employees IATSE Local 659 (MPO-TV)*, 197 NLRB 1187, 1189 fn. 8 (1972), enf. mem. 477 F.2d 450 (D.C. Cir. 1973), cert. denied 414 U.S. 1157 (1974). He further concluded that because the Board in *Riser* did not “distinguish or even mention *Whiting Milk*,”¹⁰ the Board “prefers its more current *Riser* analysis” “to the extent the Board’s holding in *Whiting Milk* is inconsistent with *Riser*.” Applying *Riser*, the judge dismissed the endtailing complaint allegations against both the Respondent Union and the Respondent Employer.

In their exceptions, the General Counsel and the Charging Party contend, in essence, that *Whiting Milk* is controlling precedent and that it compels a finding that the Employer and the Union violated the Act by endtailing Rammage.

III. ANALYSIS

The Board has drawn a clear distinction between discrimination based on *unit* seniority and that based on *union* seniority. A union and an employer do not discriminate in a manner prohibited by the Act by contracting to vest certain employment rights based on seniority in a represented unit. Nor do the parties to a collective-bargaining agreement engage in unlawful discrimination by placing a single employee or a group of employees hired or merged into the unit at the end of the seniority list on the grounds that they lacked seniority in the unit. “It is settled,” the Board has held, “that a bargaining representative for the employees of a particular unit has the right to give an inferior seniority ranking to employees transferred from another unit.” *General Drivers and Helpers Local 229 (Associated Transport, Inc.)*, 185 NLRB 631, 631 (1970). In short, “a union may lawfully insist on the endtailing of new bargaining unit employees’ seniority when it is based on unit rather than union considerations.” *Riser Foods*, supra, 309 NLRB at 636.

¹⁰ The judge in *Riser* extensively discussed and distinguished *Whiting*.

What is unlawful under the Act is for such parties to place employees at the end of the seniority list because they were unrepresented by a particular union or any union in their prior employment. That is the form of discrimination which was at issue in *Whiting Milk*. In that case, the contract provided for the dovetailing of seniority in the event of merger with “another Union Company.” Id., 145 NLRB at 1036. The Board found that “[t]he term ‘Union Company’ is construed by the parties as meaning an employer whose employees have been represented by the Respondent Union.” Id. Thus, the Board found that the selection of employees for lay-off based on endtailed seniority “was substantially related to their earlier lack of membership in the Union.” Id. at 1037. The same is true in other cases in which the Board found endtailing unlawful. See *Woodlawn Farm Dairy Co.*, 162 NLRB 48, 50 (1966) (“This sentence [of the contract], on its face, affords preferential treatment to employees of new branches or plants who are Local 869 members and discriminates against those who are not.”); *Teamsters Local 435 (Super Valu, Inc.)*, 317 NLRB 617, 617 fn. 3 (1995) (“the unions advocated granting less seniority to one of the employee groups on the impermissible basis that the employees in that group had not been represented by a union as long as the employees in the other group.”); *Teamsters Local 480 (Hilton D. Wall)*, 167 NLRB 920, 920 fn. 1 (1967) (agreement provided that Wall would be placed on the bottom of the seniority list “because employees of Cookeville Motor Lines had not been represented by a labor organization”).

The judge in this case found that the Respondents discriminated based on unit rather than union seniority. The judge found:

There is no record evidence that the Union has either said anything or done anything that could be deemed to be inconsistent with [Union President] Campbell’s express rationale for the Union’s treatment of Rammage as a new unit employee. Additionally, it is significant that the Union has always been highly protective of continuous unit seniority and has required unit members, who had left the unit to take supervisory positions, to return to the unit at the bottom of the seniority list because they had forfeited their prior unit seniority.

That analysis is flawed because it fails to recognize that neither unit continued to exist, as before, once the Employer and the Union discontinued the Dolly Madison unit and merged all of the sales representatives into a single unit under the Wonder Bread/Hostess agreement.

That circumstance is significant. If the units had never been merged and Rammage had worked for another employer and been placed into one of the units after Re-

spondent Interstate purchased his employer, the Respondents could lawfully have placed him at the end of the seniority list if they had done so based on his lack of unit seniority, i.e., without regard to whether he was previously represented or unrepresented. But, here, the units were merged, and the parties did not preserve unit seniority in either unit. Indeed, the Union abandoned the principle of protecting the seniority of the Wonder Bread/Hostess unit when it agreed to dovetail the previously represented Dolly Madison employees.

The only difference between Rammage and those employees in regard to unit seniority was that he had *not* been previously represented by the Union. Moreover, the Dolly Madison contract had defined “Seniority” simply as “length of continued service with the company” (Rammage had more service than any other Ponca City sales representative) and had further provided that seniority as so defined should govern in the event of layoff and resulting bumping. Under these circumstances, we find that the parties did not enttail Rammage in order to protect unit seniority but in order to protect union seniority.¹¹

Having made that finding, we nevertheless observe that the administrative law judge’s decision in *Hilton D. Wall* and the Court of Appeals’ decision overturning our *Whiting Milk* decision, *NLRB v. Whiting Milk Corp.*, 342 F.2d 8 (1st Cir. 1965), suggest another lawful distinction that might have been drawn in merging the two units and integrating Rammage into the two existing, collectively-bargained seniority systems: that between employees with preexisting, enforceable seniority rights and employees without such rights. In *Hilton D. Wall*, the Board’s finding of unlawful discrimination was based on the judge’s factual finding: “On this record, I am convinced that Local 480’s conduct herein was based not on the existence or nonexistence of formal seniority rights but on the existence or nonexistence of prior representation by (1) locals of the International with which Local

480 was affiliated, or (2) any other labor organization.” *Id.* at 923–924. Similarly, the First Circuit in *Whiting Milk* reversed the Board on the grounds that the employees’ nonunion status was simply a proxy for lack of enforceable seniority rights. “As non-union men,” the First Circuit reasoned, “they had no seniority rights for that is not an incident of employment, like the right to a reasonably safe place to work. ‘Seniority arises only out of contract or statute’ and ‘The seniority principle is confined almost exclusively to unionized industry.’” 342 F.2d at 10 (quoting *Trailmobile Co. v. Whirls*, 331 U.S. 40, 53 (1947)).

While, for the reasons explained above, we do not fully accept the First Circuit’s logic, it suggests that parties do not unlawfully discriminate by respecting preexisting, enforceable seniority rights (usually, if not necessarily,¹² linked to union representation), but not simple length of service not linked to any enforceable employment rights. Thus, it is arguable that the Respondents here might lawfully have sought to preserve existing seniority rights just as they might lawfully have sought to preserve existing wage rates (even if the represented employees had higher or lower wages than the unrepresented employee). That is, they might lawfully have agreed that all employees would retain any preexisting enforceable seniority rights.¹³ But that is not the rationale they offered for their treatment of Rammage.

The Union was legitimately concerned about its duty to the employees it already represented. Nevertheless, *Whiting Milk*, *Woodlawn Farm Dairy*, *Super Valu*, and *Hilton D. Wall* all hold that, in the context of a unit merger, a union and an employer are not lawfully permitted to discriminate against all or, as in this case, some of the merged employees on the basis of their previously unrepresented status. Accordingly, we find that the Respondents violated the Act by agreeing to enttail Rammage on the unit seniority list, permitting Rammage to be bumped from his job at the Ponca City facility, and transferring Rammage to a job at the Bartlesville facility, all because he was not previously represented by the Union.

¹¹ Although not determinative, Division Manager Roberts’s post-merger statements to Rammage that the parties had decided to abide by “union seniority” are consistent with our finding a violation here.

Riser Foods, Inc., supra, is not to the contrary. *Riser*, unlike this case, was pleaded as a violation of the union’s duty of fair representation. The Board rejected that theory on the grounds that at the time the union agreed to the enttailing, the enttailed employees were not yet part of the unit and thus the union owed them no duty of fair representation. 309 NLRB at 636. Moreover, even assuming such a duty existed, the Board found that the union’s contract with the premerger employer had a successorship clause that was binding on the new employer. Therefore, the Board found that the union had a duty to enforce that clause in order to protect the seniority of the formerly represented employees. *Id.* For this reason as well as those in our discussion of *Whiting Milk* above, we reject the judge’s suggestions that *Riser* overruled *Whiting Milk* sub silentio.

¹² As the Court noted in *Whiting Milk*, “[a] different situation which we need not consider might be presented had White Brothers’ non-union Hyannis employees individually bargained for and obtained ‘vested’ seniority rights which were superseded or cancelled by [the challenged clause].” 342 F.2d at 11 fn. 6.

¹³ We do not believe, as suggested by the First Circuit in *Whiting Milk*, that previously represented status can be used as a proxy for enforceable seniority rights. We thus continue to follow our own holding in *Whiting Milk* as explained above.

AMENDED CONCLUSIONS OF LAW

1. The Respondent Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. The Respondent Employer has violated Section 8(a)(1) by telling Charging Party Kirk Rammage that he would have to join the Union as a condition of continued employment and that he lost his seniority because he was not previously represented by the Respondent Union.

4. The Respondent Employer has violated Section 8(a)(3) and (1) by agreeing with the Respondent Union to enttail Charging Party Kirk Rammage on the unit seniority list, enttailing Rammage on the unit seniority list, permitting Rammage to be bumped from his job at the Ponca City facility, and transferring Rammage to a job at the Bartlesville facility, because he was not previously represented by the Union.

5. The Respondent Union has violated Section 8(b)(1)(A) and (2) by demanding that Respondent Employer enttail Rammage on the unit seniority list, agreeing with Respondent Employer to discriminate against Kirk Rammage with respect to seniority, on the basis of his prior lack of membership in, or representation by, the Respondent Union, permitting Respondent Employer to enttail Rammage on the unit seniority list, permitting Rammage to be bumped from his job at the Ponca City facility, and permitting Rammage to be transferred to a job at the Bartlesville facility based on his placement on the unit seniority list.

6. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent Employer and the Respondent Union violated Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2), respectively, we shall order the Respondents to cease and desist from such conduct and to take certain affirmative action designed to effectuate the purposes of the Act. We shall order the Respondents to credit Rammage with unit seniority based on the length of his employment with the Respondent Employer. The Respondent Employer shall be ordered to give Rammage the opportunity that he did not have when the units merged to bid on a route based on that seniority, and award Rammage the route to which he would have been entitled by his bid. The Respondent Union shall be ordered to notify Rammage and the Respondent Employer in writing that it has no objection to the dovetailing of Rammage's seniority based on the length of his employment with the Respondent Employer, to allowing

Rammage to bid on a route based on that seniority, or to awarding Rammage the route to which he would have been entitled by his bid. We shall also order the Respondents, jointly and severally, to make Rammage whole for any losses suffered as a result of the discrimination against him. Backpay shall be computed in the manner prescribed in *F.W. Woolworth*, 90 NLRB 289 (1950), with interest compounded on a daily basis as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987) and *Kentucky River Medical Center*, supra, 356 NLRB No. 8. The Respondents shall also be ordered to grant Rammage any other rights and privileges to which he would have been entitled absent the discrimination against him.

ORDER

The National Labor Relations Board orders that

A. The Respondent Employer, Interstate Bakeries Corporation, Kansas City, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that joining the Union is a condition of employment or that they lost seniority because they were not previously represented by the Respondent Union.

(b) Entering into, maintaining, or giving effect to any agreement with Teamsters Local Union No. 523, affiliated with International Brotherhood of Teamsters, which discriminates against Kirk Rammage or any employee with respect to seniority, on the basis of his prior lack of membership in, or representation by a labor organization.

(c) Discriminatorily enttailing Rammage on the unit seniority list, permitting Rammage to be bumped from his job at the Ponca City facility, and transferring Rammage to a job at the Bartlesville facility, because he was not previously represented by the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

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

(a) Credit Rammage with unit seniority based on the length of his employment with the Respondent Employer, give Rammage the opportunity to bid on a route based on that seniority, award Rammage the route to which he would have been entitled by his bid, and grant him any other rights and privileges to which he would have been entitled absent the discrimination against him.

(b) Jointly and severally with the Respondent Union, make Rammage whole for any losses suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful loss of Rammage's seniority, his bumping from the Ponca City facility, and his transfer to Bartlesville, and within 3 days thereafter, notify him in writing that this has been done and that the unlawful conduct will not be used against him in any way.

(d) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, time cards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amounts due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities covered by the 2001–2006 Wonder Bread/Hostess contract, copies of the attached notice marked "Appendix A."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent Employer's authorized representative, shall be posted by the Respondent Employer and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent Employer customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent Employer to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent Employer has gone out of business or closed the facilities involved in these proceedings, the Respondent Employer shall duplicate and mail, at its own expense, a copy of the notice to all employees employed by the Respondent Employer since November 2005.

(f) Post at the same places and under the same conditions as set forth above, as soon as forwarded by the Regional Director, copies of the attached notice marked "Appendix B."

(g) Sign and return to the Regional Director for Region 17, sufficient signed copies of "Appendix A" for posting by the Respondent Union at its business offices and

meeting halls, where notices to employees and members are customarily posted.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to steps that the Respondent Employer has taken to comply.

B. The Respondent Union, Teamsters Local Union No. 523, affiliated with International Brotherhood of Teamsters, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Entering into, maintaining, or giving effect to any agreement with Interstate Bakeries Corporation, which discriminates against Kirk Rammage or any employee with respect to seniority, on the basis of his prior lack of membership in, or representation by, a labor organization.

(b) Causing or attempting to cause Interstate Bakeries Corporation to deprive employees of seniority rights because of their lack of membership in or representation by the Respondent Union or any other labor organization.

(c) Discriminatorily demanding that Respondent Employer enttail Rammage on the unit seniority list, permitting Respondent Employer to enttail Rammage on the unit seniority list, permitting Rammage to be bumped from his job at the Ponca City facility, and permitting Rammage to be transferred to a job at the Bartlesville facility, because he was not previously represented by the Union.

(d) In any like or related manner restraining or coercing employees in the exercise of their Section 7 rights.

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

(a) Credit Rammage with unit seniority based on the length of his employment with the Respondent Employer and grant him any other rights and privileges to which he would have been entitled absent the discrimination against him.

(b) Notify Interstate Bakeries Corporation and Rammage in writing that it has no objection to the dovetailing of Rammage's seniority, to allowing Rammage to bid on a route based on that seniority, and to awarding Rammage the route to which he would have been entitled by his bid.

(c) Jointly and severally with the Respondent Employer, make Rammage whole for any losses suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(d) Within 14 days after service by the Region, post at its business offices and meeting halls, copies of the at-

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tached notice marked "Appendix B."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent Union's authorized representative, shall be posted by the Respondent Union and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent Union customarily communicates with its employees and members by such means. Reasonable steps shall be taken by the Respondent Union to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Post at the same places and under the same conditions as set forth above, as soon as forwarded by the Regional Director, copies of the attached notice marked "Appendix A."

(f) Sign and return to the Regional Director for Region 17 sufficient copies of "Appendix B" for posting by the Respondent Employer at its facilities covered by the 2001-2006 Wonder Bread/Hostess contract, where notices to employees are customarily posted.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to steps that the Respondent Union has taken to comply.

Dated, Washington, D.C. June 30, 2011

Wilma B. Liebman,	Chairman

Craig Becker,	Member

Mark Gaston Pearce,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

¹⁵ If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A

NOTICE TO EMPLOYEES
 POSTED BY ORDER OF THE
 NATIONAL LABOR RELATIONS BOARD
 An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT tell employees that joining Teamsters Local Union No. 523, affiliated with International Brotherhood of Teamsters (the Union) is a condition of employment or that they lost seniority because they were not previously represented by the Union.

WE WILL NOT enter into, maintain, or give effect to any agreement with the Union, which discriminates against Kirk Rammage or any employee with respect to seniority, on the basis of his prior lack of membership in, or representation by a labor organization.

WE WILL NOT discriminatorily enttail Kirk Rammage on the unit seniority list, permit Rammage to be bumped from his job at the Ponca City facility, or transfer Rammage to a job at the Bartlesville facility, because he was not previously represented by the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of your rights set forth above.

WE WILL credit Kirk Rammage with unit seniority based on the length of his employment with us, WE WILL give him the opportunity to bid on a route based on that seniority, WE WILL award him the route to which he would have been entitled by his bid, and WE WILL grant him any other rights and privileges to which he would have been entitled absent the discrimination against him.

WE WILL, jointly and severally with the Union, make Kirk Rammage whole for any losses suffered as a result of the discrimination against him, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful loss of Rammage's seniority, his bumping from the Ponca City facility, and his transfer to Bartlesville, and within 3 days thereafter, WE WILL notify him in writing

that this has been done and that the unlawful conduct will not be used against him in any way.

INTERSTATE BAKERIES CORPORATION

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with your employer on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT enter into, maintain, or give effect to any agreement with Interstate Bakeries Corporation, which discriminates against Kirk Rammage or any employee with respect to seniority, on the basis of his prior lack of membership in, or representation by a labor organization.

WE WILL NOT cause or attempt to cause Interstate Bakeries Corporation (the Employer) to deprive employees of seniority rights because of their lack of membership in or representation by us or any other labor organization.

WE WILL NOT discriminatorily demand that the Employer endtail Rammage on the unit seniority list, permit the Employer to endtail Rammage on the unit seniority list, permit Rammage to be bumped from his job at the Ponca City facility, or permit Rammage to be transferred to a job at the Bartlesville facility, because he was not previously represented by us.

WE WILL NOT in any like or related manner restrain or coerce any of you in the exercise of your rights set forth above.

WE WILL credit Rammage with unit seniority based on the length of his employment with the Employer and grant him any other rights and privileges to which he would have been entitled absent the discrimination against him.

WE WILL notify Interstate Bakeries Corporation and Kirk Rammage in writing that we have no objection to the dovetailing of Rammage's seniority, to allowing Rammage to bid on a route based on that seniority, and

to awarding Rammage the route to which he would have been entitled by his bid.

WE WILL, jointly and severally with the Employer, make Kirk Rammage whole for any losses suffered as a result of the discrimination against him, plus interest.

TEAMSTERS LOCAL UNION NO. 523,
AFFILIATED WITH INTERNATIONAL
BROTHERHOOD OF TEAMSTERS (LABOR
ORGANIZATION)

Michael Werner, Esq., for the General Counsel.
Gregory D. Ballew, Esq. (Fisher & Phillips, LLP), of Kansas City, Missouri, for the Respondent Employer.
Steven R. Hickman, Esq. (Frasier, Frasier & Hickman, LLP), of Tulsa, Oklahoma, for the Respondent Union.
John C. Scully, Esq., National Right to Work Legal Defense Foundation, Inc., of Springfield, Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in Tulsa, Oklahoma, on August 15, 2006. The charges in the captioned matters were filed by Kirk Rammage, an individual, on January 13, 2006. An amended charge in Case 17-CB-6146 was filed on April 25, 2006. Thereafter, on April 28, 2006, the Regional Director for Region 17 of the National Labor Relations Board (Board) issued a complaint and notice of hearing alleging violations by Interstate Bakeries Corporation (Respondent Employer or Employer) of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (Act), and by Teamsters Local Union No. 523, affiliated with International Brotherhood of Teamsters, AFL-CIO (Respondent Union or Union) of Section 8(b)(1)(A) and (2) of the Act. The Employer and Union, in their answers to the complaint, duly filed, deny that they have violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from Counsel for the General Counsel (General Counsel), counsel for the Employer, counsel for the Union, and counsel for the Charging Party. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Employer is a corporation with corporate headquarters in Kansas City, Missouri, and facilities throughout the United States including multiple facilities located in Oklahoma, and are engaged in the manufacture, distribution, and nonretail sale of baked goods. In the course and conduct of its business operations the Employer annually purchases and receives at its Oklahoma facilities goods valued in excess of \$50,000 directly from

points outside the State of Oklahoma, and sells and ships goods valued in excess of \$50,000 from its Oklahoma facilities directly to points outside the State of Oklahoma. It is admitted and I find that the Respondent Employer is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find that the Union is and at all times material herein has been a labor organization within the meaning of Section 2(5) of the Act,

III. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issue in this proceeding is whether the Union and Employer have discriminated against the Charging Party, Kirk Rammage, by agreeing to enttail rather than dovetail his seniority with the Employer.

B. Facts

The Union and Employer were parties to two separate collective-bargaining agreements covering certain employees at various locations in Oklahoma. One contract, known as the Wonder/Hostess contract, extended from August 19, 2001 through August 19, 2006. This contract covered various classifications of employees, including sales department employees, known as sales representatives. The contract provides that departmental seniority shall prevail, inter alia, for selection of new jobs and for lay-off and recall. The contract further provides that

In the event a route is eliminated, the Sales person affected shall be entitled to bid on the next open route in line of their seniority. In the event of route elimination, if the Route Sales person whose route is being eliminated has seniority, he/she shall be entitled to displace the Route Sales person with the least seniority, which shall in turn be entitled to displace the Sales person with the least seniority.

The other contract, known as the Dolly Madison contract, covered only sales representatives, and extended from July 7, 2002 through November 5, 2005. This contract provides that, "Seniority from length of continued service with the company shall prevail . . ." inter alia, for selection of new jobs and for lay-off and recall, and contains a similar, but not identically-worded seniority/bidding provision in the event of route elimination, namely, that the person whose route is being eliminated may bump the employee with the least seniority.

Kirk Rammage, the Charging Party, has been a Dolly Madison sales representative for the Employer for nearly 15 years, beginning his employment prior to the time the Employer purchased Wonder Bread/Hostess. Rammage was based in Ponca City, Oklahoma, where he worked out of a Dolly Madison facility. Then, after the 1977 acquisition, for cost-saving reasons, he was moved to the Wonder Bread/Hostess warehouse in Ponca City. However, unlike the other Ponca City Wonder Bread/Hostess sales representatives, he continued delivering and selling only Dolly Madison products. As a result first of anomaly and inadvertence, and then by choice, he was not included under either the Wonder/Hostess contract or the Dolly

Madison contract: The three other sales representatives at Ponca City were covered under the Wonder/Hostess contract and sold and delivered Wonder Bread and Hostess products but not Dolly Madison products; and the Dolly Madison contract covered sales representatives who sold only Dolly Madison products in various locations but not in Ponca City.¹

This arrangement was fine with Rammage, as he either was not interested in being represented by the Union or did not understand that he could have requested to be included in a collective-bargaining unit. He was considered by the Employer to be a nonunion employee, and as the union contract did not apply to him he was given company benefits rather than the benefits required under the union contract. Rodney Roberts, a division manager and Rammage's supervisor, testified that the Employer was also happy with this state of affairs because of the greater flexibility it afforded the Employer in dealing with Rammage. And apparently the Ponca City Wonder/Hostess sales representatives were not concerned with Rammage's situation, as Dolly Madison sales representatives were not included in their collective-bargaining unit. Accordingly, neither Rammage, nor the Employer, nor the other Wonder/Hostess unit employees advised union representatives of Rammage's unique situation. Thus, over a period of many years, Rammage was not included within either unit.

Sometime prior to November 2005, the Employer, for reasons of cost savings and efficiency, had decided to consolidate the routes so that all sales representatives would be delivering and selling all products, and there would be no differentiation between Wonder Bread/Hostess routes and Dolly Madison routes. In early November, 2005, Randy Campbell, president and principal officer of the Union, met with various representatives of the Employer to discuss the matter and it was agreed that the Wonder/Hostess and Dolly Madison units would be merged. Accordingly, the Dolly Madison contract, which was set to expire, would not be renewed, and the Tulsa sales representatives under that contract would be dovetailed according to unit seniority with the Tulsa sales representatives under the Wonder/Hostess contract which remained in effect.² It was also made known to Campbell that since the routes were being restructured or consolidated, one Ponca City route was to be eliminated.

During this discussion, according to Campbell, he was advised by Mike Stewart, Senior Manager, Labor Relations, of one sales representative, Rammage, who had not been included in either unit. As noted, prior to this occasion Campbell had not known that Rammage was even an employee. Both parties agreed that Rammage should be included within the merged unit, and his seniority placement within the unit was discussed. Although Rammage had no unit seniority, he had the most

¹ It appears that when the Union filed a petition to represent the Dolly Madison sales representatives it was not known that the Employer had a sales representative, Rammage, based in Ponca City. Therefore, the Union was certified as the collective-bargaining representative of Dolly Madison sales representatives only in Tulsa and Muskogee.

² However, the Muskogee sales representatives under the Dolly Madison contract were transferred into a different local, Local 516, and were no longer represented by the Union.

company seniority of any sales representative in Ponca City; indeed, the Employer considered him to be its best Ponca City employee. The Employer did not want to lose Rammage, and proposed that Rammage be dovetailed into the merged unit according to his company seniority as he had no unit seniority. Campbell refused, stated that the Union's duty of fair representation to the unit employees would be breached if this were allowed to occur, and insisted that Rammage's unit seniority begin on the date he became included within the unit, that is, that he be endtailed.³ Believing that it could not prevail if the matter went to arbitration, the Employer agreed to endtail Rammage.

The parties entered into a "Side Agreement" dated November 16, 2005, memorializing their agreement, inter alia, to dovetail the seniority of the unit employees. The side agreement did not mention the verbal agreement reached concerning Rammage.

Rammage testified that in mid-November, 2005, apparently after the parties had entered into the aforementioned November 16 "Side Agreement," he was told by Division Manager Roberts that the company and the union had decided to use "union seniority" for route bidding and vacation scheduling.

Rammage testified that in mid-December 2005, Roberts told him that the route of one of the Ponca City sales representatives, Terry Tyler, was to be eliminated and that Tyler had exercised his option to bump Rammage in accordance with "union seniority." Rammage asked Roberts to put that in writing, and Roberts did so as follows:⁴

On Dec 19-2005 Because of Union Contracts you will loose (sic) your Route. The Company & the Union has (sic) decided to use Union Seniority for Route Bidding. Terry who has to (sic) Union Seniority & whose Route has been cut has decided to bump you & take your Route. You will be an extra man Running Vacations & Riding with other Route men [.]

After Roberts handed Rammage the note, Rammage asked Roberts to explain "why they can do this to me," and Roberts replied, according to Rammage, "because I was not in the Union."

Rammage continued working in Ponca City until about January 12, 2006. On that day Kirk Summers, Sales Manager, in the presence of Roberts, gave him the option of working as a sales representative out of the Bartlesville terminal if he wanted to have a job, and told him that he (Rammage) was one of his best men and he did not want to lose him. Rammage said he would talk with his wife about the offer.⁵ According to Rammage, Summers told him, "Two or three—gosh, it was four or five different times, he mentioned that I would have to join the

Union."⁶ Rammage again asked Summers, as he had asked Roberts, why this was happening to him, and Summers said it was because he was not in the Union. On cross-examination, asked whether Summers had told him to "go see" the Union rather than to "join" the Union, Rammage answered, "Absolutely not."

Rammage testified that he did not "fully understand" the "union stuff" that was being explained to him by Roberts and Summers, and kept asking why this was happening to him. During his conversation with Summers, Rammage claims that he still did not know he was a unit employee covered under the collective-bargaining agreement, stating, "I did not know, at that time. I did not know what I had fallen under or nothing." He stated that he never asked anyone if he was covered by any union agreement, and was never told by anyone that he was covered by a union contract. In fact, he claims that until the discussion on the record at the instant hearing, he had not known that he was covered under the union contract. And when asked, "You do realize that it is possible to be represented by the Teamsters without joining the Teamsters," Rammage replied, "Not fully, I do not understand it at all."

Summers testified that he had several conversations with Rammage about the matter, and that either during a conversation with Rammage on November 21, 2005, or a second conversation with Rammage on January 12, 2006, he told Rammage he would no longer be covered by the company benefits, but would be covered by the "Collective Bargaining" benefits, and further, that there would be no more deductions from his paycheck for the Employer's 401(k) plan, as he would now be covered under the Union's pension plan as contained in the contract.

On January 12, 2006, Summers offered Rammage the position in Bartlesville, possibly repeating what he may have said on November 21, namely, that the position was covered by the benefits in the union contract, that he was no longer being covered by the company benefits, and that he would no longer be able to contribute to the company 401(k) plan. On direct examination Summers did not unequivocally deny he told Rammage he would have to join the union, but the substance of his testimony is that he was not supposed to tell employees this; rather his practice is to tell employees they must go down and talk to the Union, as required by the Union contract.⁷ However, on cross-examination, Summers, when asked whether it was his understanding that Rammage "needed to join the union," and "had an obligation to join the union," answered affirmatively, stating, "Because he was going to a job that was covered by the Collective Bargaining Unit."

Roberts, who testified briefly about this January 12, 2006 conversation between Summers and Rammage, also alluded to the fact that employees who become covered by the contract

³ Rammage became a unit member on December 5, 2005, the date the two units were officially merged.

⁴ This document was received into evidence as GC Exh. 11, but has not been included in the official exhibits. Therefore the wording of the document has been copied from the General Counsel's brief. There is no dispute regarding its accuracy.

⁵ Rammage did accept this position and is currently a unit employee working out the Bartlesville facility, requiring a commute of some 73 miles each way from his home in Ponca City.

⁶ The contract contains a maintenance of membership provision, requiring that "all present employees who are members of the Local Union on the effective date of this Agreement shall remain members of the Local Union in good standing as a condition of employment . . ."

⁷ Art. 3 (A) of the contract provides: "Each newly hired employee will be sent to the Union Office before starting work, for an identification card which will be issued by the Union without obligation on the part of said applicant."

are told they need to see the Union. However, like Summers, Roberts did not unequivocally deny Rammage's testimony that Summers told Rammage he needed to join the Union.

Summers testified that various employees covered by the instant contract, who were initially in the bargaining unit, then became supervisors or managers for a period of time, and then returned to the bargaining unit, were not given seniority credit under the union contract for their tenure outside the bargaining unit and were required to be treated for seniority purposes as new unit employees as of the date they returned to the unit. This record evidence is un rebutted.

Rammage has not joined the Union, nor has he been sent by the Employer to the union office upon becoming covered by the collective-bargaining contract, nor has he been approached by any union representative regarding the matter.

B. Analysis and Conclusions

The Union and Employer rely on *Riser Foods, Inc.*, 309 NLRB 635 (1992). The Board states in *Riser* that "a union may lawfully insist on the endtailing of new bargaining unit employees' seniority when it is based on unit rather than union considerations." (Footnote omitted.) In *Riser* the Board held, in a unit merger situation, that the union, having a duty of fair representation toward bargaining unit employees, did not violate the Act by dovetailing the seniority of employees it had represented in different units prior to the merger; and conversely, it had no such duty toward employees it had not formerly represented who became unit members as a result of the merger and were endtailed. Further, the Board stated it did not matter when the union, by virtue of the merger, also acquired a duty of fair representation toward the formerly nonunit employees, because its treatment of these employees, i.e. relegating them as new unit employees to the bottom of the unit seniority list, "was not unfair or discriminatory and thus not unlawful."⁸

The General Counsel in *Riser* argued that since the underlying collective-bargaining agreements contained no language regarding placement of unit employees in unit merger situations, the union "was therefore obligated to treat all these employees [i.e. the formerly represented and unrepresented employees] the same" as having equal status as of the date of the merger. The Board found this argument to be without merit. The General Counsel in the instant matter makes a seemingly identical argument, maintaining that in the absence of specific contract provisions regarding placement of unit employees in merger situations, a "new unit" was formed as a result of the merger and all such new unit employees should have been treated the same. Relying upon the Board's language in *Riser*, I similarly find this argument to be without merit.

The Charging Party asserts that by dovetailing the units the Union "abandoned the concept of protecting the integrity" of

each of the distinct units it represented, and therefore "cannot argue that the endtailing of Kirk Rammage was done for purposes of protecting the integrity of bargaining unit seniority." While not entirely clear, it appears the Charging Party is arguing that the Union, by agreeing to dovetail the units, has compromised and in effect abandoned its duty of fair representation to the employees in each separate unit, and therefore its insistence upon preferential treatment for these employees upon the merger of the units, to the detriment of Rammage, was no longer required of it as a "duty," rather, its decision to endtail Rammage should be viewed as a discriminatory act favoring union over nonunion employees. In effect, the Charging Party's argument seems to be another version of the General Counsel's aforementioned argument that the merger created a new unit with all of the unit employees beginning on an equal footing. Again, as noted above, the Board in *Riser* has found this argument to be without merit. Further, contrary to the Charging Party's apparent contention that dovetailing connotes an abandonment of a union's duty to fairly represent unit employees, the Board in *Riser* states, at page 636:

Local 507 clearly fulfilled its duty of fair representation toward both the Fisher and Seaway warehousemen by dovetailing their seniority when they were merged into the single *Riser* warehousemen unit, insuring that these employees retained their relative seniority. (Emphasis supplied)

The General Counsel, in distinguishing *Riser*, maintains that the Board's analysis in *Riser* is premised on complaint allegations alleging that the union breached its duty of fair representation, but the complaint in the instant case advances a different theory, namely, discriminatory conduct against Rammage because of his nonunion status. However, it is clear that this is a distinction without a legal difference as the underlying legal principles in each situation are identical, namely, what is the union's motivation for giving seniority preference to particular groups of employee over another employee or group of employees. The General Counsel would also distinguish *Riser* from the instant case on the basis that the underlying union contracts in *Riser* contained successorship clauses that required the successor employer, *Riser*, to honor the contracts' unit seniority provisions, while in the instant case there are no such successorship clauses. The simple answer is that the Employer in the instant case is not a successor but has remained the same employing entity both before and after the unit merger.

The General Counsel and Charging Party rely principally on *Whiting Milk Corp.*, 145 NLRB 1035 (1964), enf. denied 342 F.2d 8 (1st Cir. 1965). In *Whiting Milk* the Board seemingly held that it was unlawful in a unit-merger situation to endtail employees who were not formerly represented by any union, while dovetailing employees represented in different units by the same local union, a factual situation analogous if not identical to the instant facts. In a later case, however, the Board seems to obliquely overrule this holding by relying on the analysis in yet another case as the correct holding in *Whiting Milk*. Thus, in *Stage Employees IATSE Local 659 (MPO-TV)*, 197 NLRB 1187, at 1189 (1972), enf. 477 F.2d 450 (D.C. Cir. 1973), the Board states, at fn. 8, "Although enforcement was

⁸ Citing *Riser* with approval, the Ninth Circuit in *McNamara-Blad v. Flight Attendants*, 275 F.3d 1165 (9th Cir. 2002), a case under the Railway Labor Act, states, at p. 1173:

Forc[ing] unions to protect the interests of any person who might become a bargaining unit member to the detriment of current bargaining unit members . . . would contravene the union's statutory duty to protect the interests of its own bargaining unit members.

denied in *Whiting*, we believe the rationale in *Hilton D. Wall*⁹ to be correct, and we respectfully disagree with the court's rationale in *Whiting*.¹⁰ Therefore, the Board seems to be stating that its original rationale in *Whiting Milk* should be understood as modified or explained in *Hilton D. Wall*.

In *Hilton D. Wall*, another case upon which the General Counsel and Charging Party rely, the trial examiner, discussing *Whiting Milk*, relied upon the unlawfulness of the explicit contract provision in *Whiting Milk* that permitted dovetailing in merger situations with "another Union company," i.e., a company whose employees are represented by any union, not necessarily the same union that had initially represented both groups of employees in separate units. Accordingly, if one such group of employees came from a nonunion rather than a union company, those employees would be discriminatorily relegated to the bottom of the seniority list. It follows that *Whiting Milk* was deemed by the Board in IATSE Local 659 to be applicable to unit merger situations in which a union gave preferential treatment to employees of any union company regardless of whether the union owed those employees a duty of fair representation. The Board's holding in *Hilton D. Wall* is consistent with this analysis: Although there was no similar explicit contract language, the Board, affirming the analysis and conclusions of the trial examiner, found that employee Wall had been placed at the bottom of a merged seniority list because he had not formerly been a union employee, and not, as in the instant case, because he had not formerly been in a unit represented by the union.¹⁰

The General Counsel and Charging Party also rely upon *Woodlawn Farm Dairy Co.*, 162 NLRB 48, 49 fn. 2 (1966). This case is also inapposite. In *Woodlawn Farm* the Board found it was unlawful in a unit merger situation to discriminate against employees who had not formerly been "union members," namely, members of Local 869. In contrast, the Union herein insists that it subordinated Rammage's unit seniority not because Rammage was not formerly a union member, but because he was not formerly a unit member represented by the Union.

The General Counsel and Charging Party maintain that Division Manager Roberts' mid-December, 2005 note and concomitant statement to Rammage, and Sales Summers' subsequent mid-January, 2006 statements to Rammage—namely that Rammage had not been a member of the Union, that his seniority was subordinated because he had no union seniority, and by repeatedly advising Rammage that he would have to join the Union—reveal the Union's and Employer's true motivation in relegating Rammage to the bottom of the merged seniority list.¹¹ I disagree. There are no similar statements made by rep-

⁹ *Teamsters Local 480 (Hilton D. Wall)*, 167 NLRB 920 (1967), enf.d. 409. F.2d 610 (6th Cir. 1969), also sub. nom. *Potter Freight Lines*.

¹⁰ The Board in *Riser* does not distinguish or even mention *Whiting Milk*, even though the administrative law judge in *Riser* extensively discusses that case, beginning at p. 660. Accordingly, it appears to the extent the Board's holding in *Whiting Milk* is inconsistent with *Riser*, the Board prefers its more current *Riser* analysis in such situations.

¹¹ The Employer maintains that Rammage was simply confused and admittedly did not comprehend what he was being told by Roberts and

representatives of the Union to either the Employer's representatives or supervisors or to Rammage. Indeed, no representative of the Union has ever spoken to Rammage. Further, Rammage's status was agreed upon in November, 2005, during a meeting between representatives of the Union and Employer, and neither Roberts nor Summers were in attendance. At that meeting Union President Campbell insisted that Rammage be placed at the bottom of the seniority list because the Union had a duty of fair representation toward its current unit members who had accrued unit seniority as required by the two collective-bargaining agreements. There is no record evidence that the Union has either said anything or done anything that could be deemed to be inconsistent with Campbell's express rationale for the Union's treatment of Rammage as a new unit employee. Additionally, it is significant that the Union has always been highly protective of continuous unit seniority and has required unit members, who had left the unit to take supervisory positions, to return to the unit at the bottom of the seniority list because they had forfeited their prior unit seniority.

On the basis of the foregoing I find the Union has not violated Section 8(b)(1)(A) and (2) of the Act by insisting upon Rammage's placement at the bottom of the merged seniority list, and, accordingly, I further find the Employer has not violated Section 8(a)(1) and (3) of the Act by agreeing to Rammage's placement at the bottom of the merged seniority list. *Riser* (supra).

The complaint alleges as an independent violation the statements to Rammage by Supervisor Roberts and Sales Manager Summers that joining the Union was a requirement for continued employment. The applicable collective-bargaining agreement contains a provision, Article 1, "Union Shop" requiring only that "present employees who are members of the Local Union...shall remain members of the Local Union in good standing as a condition of employment . . ." ¹² Accordingly, Rammage, as a new unit employee, was not required to become a member of the Union. I therefore find, as alleged in the complaint, the Employer has violated Section 8(a)(1) of the Act by advising Rammage that he would have to join the Union as a condition of employment. See *Yellow Freight System of Indiana*, 327 NLRB 996, 997 fn. 6 (1999); *Rochester Mfg. Co.*, 323 NLRB 260, 262, fn. 8 (1997).

On the basis of the foregoing, I find that the Employer has violated Section 8(a)(1) of the Act by advising Rammage that

Summers, and therefore misunderstood Summers's remarks that he "see" or "talk" to the Union as a directive that he would have to "join" the Union. However, Rammage's insistence that he was told he would have to join the union was persuasive, and, as noted, both Roberts and Summers did not categorically deny Rammage's testimony in this regard. Accordingly, I credit the testimony of Rammage.

¹² In September 2001, Oklahoma amended its constitution to include a right-to-work provision, Okla. Const. Art XXXIII, Sec. 1A, prohibiting any person "as a condition of employment or continuation of employment" to [p]ay any dues, fees assessments, or other charges of any kind or amounts to a labor organization." However, the parties herein take the position that the applicable clause in the 2001–2006 Wonder/Hostess collective-bargaining agreement, effective by its terms prior to the constitutional amendment, remained in effect during the term of that contract.

joining the Union was a requirement for continued employment.

CONCLUSIONS OF LAW AND RECOMMENDATIONS

1. The Respondent Employer is an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act.

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

3. The Respondent Union has not violated the Act as alleged.

4. The Respondent Employer has violated the Act only to the extent found herein.

THE REMEDY

Having found the Respondent Employer has violated and is violating Section 8(a)(1) of the Act, I recommend that it be required to cease and desist therefrom and from in any other like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. I shall also recommend the posting of an appropriate notice, attached hereto as "Appendix."

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The Employer, Interstate Bakeries Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Advising employees that joining the Union is a condition of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action, which is necessary to effectuate the purposes of the Act

(a) Within 14 days after service by the Region, post at its facilities covered by the 2001–2006 Wonder/Hostess contract copies of the attached notice marked "Appendix."¹⁴ Copies of

¹³ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Na-

the notice, on forms provided by the Regional Director for Region 17, after being duly signed by the Employer's representative, shall be posted immediately upon receipt thereof, and shall remain posted for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Employer to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Within 21 days after service by the Regional Office, file with the Regional Director for Region 17a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, DC October 31, 2006

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
 Choose representatives to bargain with us on your behalf
 Act together with other employees for your benefit and protection
 Choose not to engage in any of these protected activities.

WE WILL NOT advise employees that joining the Union is a condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the foregoing rights guaranteed them by Section 7 of the Act.

INTERSTATE BAKERIES CORPORATION

tional Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."