

**AMI/HTI Tarzana-Encino Joint Venture d/b/a Encino-Tarzana Regional Medical Center and American Federation of Nurses, Local 535, Service Employees International Union, AFL-CIO.**  
Case 31-CA-23592

October 27, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On September 23, 1999, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.

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

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 and to adopt the recommended Order.

In adopting the judge's finding that the Respondent did not violate the Act by unilaterally suspending its "call off" procedure during the 3 days following the Union's 1-day economic strike, the Board emphasizes that the General Counsel's complaint did not allege that the Respondent was obliged to reinstate the economic strikers immediately on their unconditional offer to return to work, notwithstanding its contractual obligation to guarantee the temporary replacements from the Staffing Agency a minimum of 4 days' pay. Cf. *Harvey Mfg.*, 309 NLRB 465, 470 (1992) (rejecting private contractual arrangement as defense to reinstatement obligation to temporarily replaced economic strikers (who have same rights as unfair labor practice strikers) but not disturbing holding in *Pacific Mutual Door Co.*, 278 NLRB 854, 856 (1986), cited by the judge. Accordingly, as the case is presented to us, it is uncontested that, during the 3 days at issue, the temporary employees were lawfully on the job. It is also uncontested, as the judge found, that there was insufficient work for both the strikers and the so-called "crossover" employees who had made themselves available for work during the 1-day strike. The narrow issue is whether, during that 3-day period, the Respondent was obliged to displace crossovers with returning strikers whenever the latter had a superior claim under the Respondent's "call off" procedure.

We agree with the judge that the foregoing circumstances are sufficiently analogous to those presented in *TWA v. Flight Attendants Union*, 489 U.S. 426 (1989), to warrant dismissal of the complaint. In *TWA*, the Court held that the employer was not obligated to displace

crossover employees who worked during the strike in order to reinstate more senior striking employees. The absence of immediate vacancies for the returning strikers was, in the Court's judgment, attributable solely to lawful actions of the employer in hiring permanent replacements and of the crossover employees in choosing not to participate in the strike, and therefore simply a risk inherent in the "gamble" of a strike. As the Court reasoned,

Because permanent replacements need not be discharged at the conclusion of a strike in which the union has been unsuccessful, a certain number of prestrike employees will find themselves without work. We see no reason why those employees who chose not to strike should suffer the consequences when the gamble proves unsuccessful. Requiring junior crossovers, who cannot themselves displace the newly hired replacements . . . to be displaced by more senior full-term strikers is precisely to visit the consequences of the lost gamble on those who refused to take the risk.

Id. at 438-439.

In the circumstance presented here, the temporary employees provided by the Staffing Agency are analogous to the permanent replacements in *TWA*. That is so because, for the duration of the 3-day period at issue, the General Counsel has conceded their right to remain on the job in preference to the strikers. Thus, here, as in *TWA*, the seniority and other factors that form the basis for returning strikers' claims would function only to put strikers back on the job in preference to the crossovers, while leaving the Staffing Agency temporaries in place. That is not a permissible result under the principles of *TWA* and warrants our dismissal of the complaint.<sup>1</sup>

ORDER

The complaint is dismissed.

*Ann L. Weinman, Esq.*, for the General Counsel.

*Robert J. Kane, Esq. (Stradling, Yocca, Carlson & Rauth)*, of Newport Beach, California, for the Respondent.

*James Rutkowski, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld)*, of Los Angeles, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. This case was tried in Los Angeles, California, on June 28,

<sup>1</sup> In view of the foregoing, the Board finds it unnecessary to pass on the judge's additional finding that animosity of striking employees towards the replacement employees also provided a substantial business reason for the Respondent's refusal to offer immediate reinstatement to the strikers.

1999. The charge was filed October 29, 1998,<sup>1</sup> by American Federation of Nurses, Local 535, Service Employees International Union AFL-CIO (the Union), and the complaint was issued March 23, 1999. At issue is whether AMI/HTI Tarzana-Encino Joint Venture d/b/a Encino Tarzana Regional Medical Center (the Respondent) violated Section 8(a)(1), (3), and (5) of the Act by suspending its “call-off” procedure to determine staffing during the 3 days following the Union’s economic strike.

The parties were afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue the merits of their respective positions. On the entire record, which was stipulated to me, and after considering the oral argument of counsel for the General Counsel and the brief filed by counsel for the Respondent, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

Respondent, a corporation, with an office and place of business in Tarzana, California, has been engaged in the operation of a hospital providing inpatient and outpatient medical care. During calendar year 1998, Respondent purchased and received goods valued in excess of \$50,000 directly from points outside the State of California and derived gross revenues in excess of \$250,000. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act and that it is a health care institution within the meaning of Section 2(14) of the Act.

### II. LABOR ORGANIZATION STATUS

The parties agree and I find that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

### III. ALLEGED UNFAIR LABOR PRACTICES

Since about 1984, based on Section 9(a) of the Act, the Union has been the designated exclusive collective-bargaining representative of the unit employees, described below, and since 1984 the Union has been recognized by Respondent as the exclusive representative. This recognition has been embodied in successive collective-bargaining agreements. One such agreement was effective by its terms from September 1, 1996, through August 31, 1998, and was extended to on or about September 14, 1998, and thereafter expired. A renewal collective-bargaining agreement, the most recent agreement, was entered between the parties on December 11, 1998, with effective dates of September 1, 1998, to August 31, 2000. The employees described in article 1.1, set forth below, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. The unit is:

All full-time professional employees, regular part-time professional employees, and per diem professional employees, including Registered Nurses, Clinical Nurses I, Clinical Nurses II, Dietitians, Registered Physical Therapists, Staff

Occupational Therapists, Utilization Review Nurses, Medical Technologists I, Medical Technologists II, Epidemiologists, Social Work Assistants, Discharge Planning Coordinators, Coordinators of the Home Apnea Monitoring Program, In-Service Instructors, Employees Health Nurse-Physicians’ Assistant, MCH Marketing Liaisons, Assistant Directors of Education, Nursing Educators and Pharmacists, employed by the [Respondent] at its facility located at 18321 Clark Street, Tarzana, California, excluding all other employees, including Diet Technicians, Utilization Review Coordinators, Pharmacy Interns, Directors of the GI Lab, Guards and Supervisors, as defined in the Act.

Section 10.10 of the 1998–2000 agreement incorporated by reference a policy entitled “Calling Off Staff.” This is referred to as the “Call-Off Policy” (COP). The COP was applicable to all nursing units except the main operating room. Respondent followed the COP in all nursing units except the main operating room.

Jo Lewis is vice president of human resources and education. Janet Brooks is chief nursing officer. The parties agree that they are supervisors and agents within the meaning of Section 2(11) and (13) of the Act.

By letter of October 12, 1998, the Union provided Respondent 10-day notice pursuant to Section 8(g) of the Act that the Union, “will commence a strike at 6:30 a.m. on Friday, October 23, 1998, ending at 6:30 a.m. on Saturday, October 24, 1998.” The letter continued, stating that it served, “as notice of the Union’s unconditional offer and request on behalf of all striking Bargaining Unit members to return to their positions on October 24, 1998 at 6:30 a.m.”

On receiving the October 12, 1998, 8(g) notice, Respondent made arrangements with a temporary staffing agency (the Staffing Agency) for a professional staff, the great majority of whom were registered nurses, to serve as temporary replacements for the strikers. The Staffing Agency required Respondent to provide each temporary replacement a minimum guarantee of 48 hours’ work. Such requirement was stated in a written contract entered between Respondent and the Staffing Agency. The temporary replacements worked 12-hour shifts beginning at 7 a.m. on October 23, 1998, and ending at 6:59 a.m. on October 27, 1998.

*Deviation I:* Prior to the date and time the strike was noticed to commence, Respondent established a procedure (the “procedure”) whereby bargaining unit employees who worked their scheduled shift during the 24 hours for which the strike was noticed would also be permitted to work any shifts for which they had previously been scheduled during the 3-day period following the noticed 1-day strike, which was the remaining period during which the temporary replacements from the Staffing Agency would continue to work, i.e., October 24 at 7 a.m. until October 27 at 6:59 a.m. (the 3-day period). According to the procedure, bargaining unit employees who worked their shift during the 24-hour period for which the strike was noticed would work their scheduled shifts during the 3-day period even if employees who had struck and were scheduled would have worked those shifts if they were willing to do so ad

<sup>1</sup> All dates are in 1988 unless otherwise indicated.

were the COP applied. To this extent, Respondent did not apply the COP during the 3-day period.

*Deviation II:* In one instance, an employee who was not able to work during the 24 hours for which the strike was noticed for reasons unrelated to the strike and who had worked during the previous strike called by the Union in the bargaining unit commencing on September 15, 1998, was permitted to work a scheduled shift during the 3-day period even though an employee who had struck and was scheduled would have worked that shift were the COP applied and were that employee willing to so work. To this extent also Respondent did not apply the COP during the 3-day period.

*Deviation III:* In certain instances, employees who had worked during the 24-hour period for which the strike was noticed were added to the schedule and worked shifts during the 3-day period even though employees who had struck and were scheduled for those days were not permitted to work and would have worked were the COP applied. To this extent also Respondent did not apply the provisions of the COP during the 3-day period.

Respondent did not bargain with the Union regarding the decision to adopt the procedure and not to apply the COP to the extent stated in deviations I–III, during the 3-day period.

As a result of Respondent's decision to adopt the procedure and not to apply the COP to the extent stated in deviations I–III, employees worked shifts during the 3-day period that employees who struck and were scheduled during the 3-day period would have worked if they were willing to do so as follows:

In labor and delivery on October 24, 1998, on the night shift RN Georgette El Khoury was scheduled and worked instead of RN Elina Lerman; and on October 25 on the night shift RNs Sharon Owings and Christine Goner (the RN referred to in deviation III) were scheduled and worked instead of RNs Anita Mauch and Elina Lerman; and on October 26 on the night shift RNs Georgette El Khory and Christine Goner (the RN referred to in deviation III) were scheduled and worked instead of RNs Maria Cananea and Elizabeth Hartman.

In the emergency room on October 25 on the day shift RN Catherine Wallace was added to the schedule (as referred to in deviation III) and worked instead of RN Deborah Hall-Patti; and on October 26 on the day shift RN Catherine Wallace was scheduled and worked instead of RN Teri Pfeiffer; and on October 26 on the night shift RN Olga Kirunchyk worked instead of RN Bruce Busse.

In the cardiovascular intensive care unit (CVICU) on October 24 on the night shift RN Alejandro Razo was added to the schedule (as referred to in deviation III) and worked instead of RN William Perry; on October 25 on the day shift RN Alejandro Razo was again added to the schedule and worked instead of RN Yvonne Villegas; and on October 26 on the day shift Alejandro Razo was again added to the schedule and worked instead of RN Anacleta Avila.

In the medical surgical unit on October 26 on the night shift RN Helen Goodwin was scheduled and worked instead of RN Bolette Arancel; and on October 26 on the day shift RN Earlene Ends was scheduled and worked instead of RN Thea Lane-Juarez.

In the postpartum unit on October 24 on the night shift RN Mojgan Bashiri was scheduled and worked instead of RN Victoria Ballesteros; and on October 26 on the night shift RN Eleanor Evans was scheduled and worked instead of RN Victoria Ballesteros.

In the nursery on October 25 on the night shift RN Gene Hubbard was scheduled and worked instead of RN Allison Collins.

In the main operating room the COP has not been followed in the past since there have always been enough volunteers when someone who has been scheduled is not needed. In that unit on October 26 on the day shift RNs Risa Bublitz, Laura Gorocica, and Lynn Miles worked, whereas if seniority had been used instead of the procedure to decide who would work and who would be called off on October 26, RNs Lana Kingham, Anita Allen, and Myly McDivitt would have worked instead.

The identification of specific employees who worked shifts during the 3-day period and employees who would have worked those shifts were the COP applied and were those employees willing to work those shifts, and those employees who would have worked those shifts in the main operating room were seniority used instead of the procedure, is subject to an audit of the schedules for the 24-hour period for which the strike was noticed and for the 3-day period.

The issue of willingness to work of employees who would have worked were the COP used instead of the procedure during the 3-day period is reserved for litigation in the compliance hearing, if such proceedings are necessary.

#### IV. ARGUMENTS

Counsel for the General Counsel asserts that Respondent suspended its COP for the 3-day period without consulting the Union. Accordingly, any employee scheduled to work on the day of the strike who in fact worked on that day, was given priority to work his or her scheduled shifts for the 3 days after the strike even if the employee would have been "called off" had the strike not occurred. Moreover, any employee who honored the strike was off work for a total of 4 days, even though the possibility existed that under the COP the employee might have normally worked.

Counsel does not contend that Respondent's refusal to reinstate strikers who had been temporarily replaced was a violation of the Act. However, counsel does contend that failure to utilize the COP and instead following a new strike procedure for nonstriking regular employees, without notice or opportunity to bargain being afforded the Union, violates the Act. Further, counsel contends that failure to reinstate the strikers immediately violates the Act. Counsel relies on *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938); and *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969), *cert. denied* 397 U.S. 920 (1970).

Counsel argues that by allowing crossover employees to bump strikers from working shifts that they might have worked, had the COP been utilized, Respondent discriminated against the strikers in violation of Section 8(a)(3). Moreover, counsel asserts that Respondent's actions were inherently destructive of

protected rights. Alternatively, even if Respondent's actions only slightly adversely impacted employees' Section 7 rights, counsel asserts that Respondent has not demonstrated a legitimate and substantial business justification for its actions within the meaning of *Caterpillar Tractor Co.*, 321 NLRB 1130 (1996), and *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

Finally, counsel notes that Respondent relies on *TWA v. Flight Attendants Union*, 489 U.S. 426 (1989). Counsel asserts that *TWA* is distinguishable because the employer acted according to its own past practices and the strike replacements therein were permanent rather than temporary. Counsel also notes that Respondent relies on *Lonestar*, 279 NLRB 550 (1986) (*Lonestar I*), enfd. mem. in part and remanded in relevant part 813 F.2d 472 (D.C. Cir. 1987); on remand 298 NLRB 1075 (1990) (*Lonestar II*), remanded sub nom *Teamsters Local 822 & 592*; on further remand 309 NLRB 430 (1992) (*Lonestar III*). Counsel asserts that the *Lonestar* series of cases is distinguishable because the ultimate holding in *Lonestar III* is that an employer who breaches a strike settlement agreement to recall employees in order of seniority violates Section 8(a)(3).

Regarding the issue of nonstrikers working their already scheduled shifts during the 3-day period, Respondent asserts that *TWA v. Flight Attendants*, 489 U.S. 426 (1989), controls the issue of whether it violated the Act by allowing nonstriking employees to work their scheduled shifts during the 3-day period. Respondent concedes that *TWA* involved permanent replacements while it utilized temporary replacements for a 4-day period, as required by the Staffing Agency. However, counsel notes that in both *TWA* and the instant case, once strikers were reinstated, there was no loss of seniority.

Counsel asserts that the *TWA* permanent replacement employees (including nonstrikers and less than full-term strikers) are analogous to the temporary replacement employees furnished by the Staffing Agency. All parties concede that Respondent was obligated to retain the temporary replacement employees for a 4-day period. As a result, there was insufficient work for other employees during the 3-day period. With this background in mind, counsel then asserts that the Court's rationale with regard to junior crossover (nonstriking or less than full term strikers) is equally applicable to the nonstriking employees here. The Court held, "Requiring junior crossovers who cannot themselves displace the newly hired permanent replacements, who 'rank lowest in seniority . . . to be displaced by more senior full-term strikers is precisely to visit the consequences of the lost gamble [of the strike] on those who refused to take the risk.'"

Counsel reasons that exactly the same result would prevail here if the General Counsel's argument is accepted. That is, counsel notes that the same anomaly of temporary replacements from a staffing agency being immune from displacement during the 3-day period, while allowing strikers to displace those who chose not to strike by utilizing the COP during the 3-day period visits the consequences of the strike on those who lawfully decided not to take part in it.

Regarding the four shifts for which nonstrikers were added to the schedule during the 3-day period, Respondent asserts that the reason all employees who were scheduled to work during the 3-day period were not needed was the lawful presence of

temporary replacements. Use of the COP, to the extent it would result in nonstrikers being called off their scheduled shifts and strikers working them, would result in temporary replacements having greater rights than nonstriking employees. Respondent relies on *TWA*, noting that this result would once again shift the consequences of the strike from those who participated to those who refused to participate.

Finally, Respondent asserts that it had legitimate and substantial business reasons for denying or delaying reinstatement of strikers after an unconditional offer to return to work was made. The first reason was to provide a short learning curve for the Staffing Agency employees. Respondent notes that the personnel supplied by the Staffing Agency were unfamiliar with the hospital. Accordingly, the same crossover employee was placed in the same department for 4 days rather than moving crossover and striking employees from department to department during the 4-day period while the Staffing Agency personnel were present. Second, Respondent relies on the obvious animosity between the temporary replacements and the strikers in asserting that these individuals should not work side by side. Third, Respondent avers that the COP was never intended as a means of recalling strikers.

Alternatively, Respondent notes the opinion of the General Counsel in *Sidney Square Convalescent Center & Personal Care Residence*, Case 6-CA-27897, 1996 NLRB GCM Lexis 37 (Aug. 30, 1996). From this opinion, Respondent argues that an offer to return to work made prior to the beginning of a 1-day strike is not an unconditional offer to return to work and does not become unconditional absent some further communication by the Union to perfect the offer as unconditional.

#### V. ANALYSIS

The complaint sets forth two discrete issues. First, did Respondent violate Section 8(a)(1) and (5) of the Act by unilaterally establishing the procedure? Second, did Respondent violate Section 8(a)(1), (3), and (5) by refusing reinstatement to striking employees during the 3-day period and by replacing the striking employees during the 3-day period with nonstriking employees? These issues are interrelated.

Following receipt of the strike notice, Respondent polled its employees in order to determine who intended to work during the strike. Based on information obtained from this poll, Respondent entered into a contract with the Staffing Agency to provide temporary replacements. The Staffing Agency contract required Respondent to guarantee 48 hours (4 days, 12-hour shifts) of work to each temporary replacement.

There is no evidence to indicate at what point during the 10-day notice period Respondent became aware that it would be necessary to hire replacements for 4 days rather than for the 1 day specified in the strike notice. In any event, Respondent made this decision as well as the decision to suspend the COP during the 3-day period as part of its strike replacement strategy. The parties agree that Respondent's use of the Staffing Agency employees for the day of the strike plus the 3-day period was lawful. This position is consistent with Board authority. Once a contract for temporary replacements has ceased, the obligation to reinstate strikers who have unconditionally offered to return to work matures. However, until the contract has

been canceled or satisfied, an employer has a legitimate and substantial business justification for delaying reinstatement of strikers.<sup>2</sup>

Assessment of the complaint allegations herein must be made in light of the status of the temporary replacements as legitimate members of the work force during the 3-day period. In Respondent's view, use of the COP during the 3-day period would work an extreme injustice. The only reason that everyone who was scheduled during the 3-day period was not needed was the lawful presence of the temporary replacements. Use of the COP would result in nonstrikers being called off their scheduled shifts and strikers working those shifts with the contract employees, thus giving contract employees greater rights than those of the nonstriking employees and shifting the burden of the strike to nonstriking employees.

In agreement with Respondent, I find that this case presents facts analogous to those in *TWA*. In *TWA*, the Court held that an employer was not obligated to displace employees who worked during a strike in order to reinstate striking employees. Although this holding was based on permanent replacement of striking employees, the facts here are similar. In this case, in order to meet patient needs, Respondent was forced to hire temporary replacements for 4 days even though the strike was a 1-day strike. During this 4-day period, Respondent suspended the COP and treated its entire work force, both contract employees and crossover employees, as a replacement work force.

The General Counsel contends that this destroyed Section 7 rights because strikers were not immediately reinstated after the 24-hour strike. However, it is conceded that none of the Staffing Agency employees would have been affected by reimplementation of the COP during the 3-day period. Accordingly, it appears, as in *TWA*, that had Respondent reinstated the COP during the 3-day period, the employees who decided not to strike would have suffered the consequences of the strike.

Given the contours of the replacement situation, Respondent had substantial business reasons to require that nonstriking employees and contract employees work together during the entire 4-day period. The nonstriking employees were familiar with the operations and able to provide uniformity and stability in coordinating Staffing Agency care for the patients. Insertion of striking employees into the equation during the 4-day period would have created further learning curves for the replacement employees. Moreover, there was substantial animosity on behalf of the striking employees toward the replacement employees. The October strike was the second 1-day strike in a period of 45 days. Following the first 1-day strike, the Union published a newsletter containing a heading: "Scab nurses render Questionable Care." The newsletter explained,

Many members have informed the Union that there were numerous serious incidents throughout the hospital because the replacement scab nurses were not adequately oriented to the hospital.

The hospital's use of scab agency nurses while they locked out the highly skilled nurses of [Respondent] jeop-

ardized patient care and wasted over \$500,000 that could have been put towards a wage offer.

In *Caterpillar, Inc.*, 321 NLRB 1130 (1996), the Board held that the employer violated Section 8(a)(1) and (3) of the Act when it excluded crossovers from its poststrike, postreinstatement restaffing. The Board emphasized this distinction between the facts in *Caterpillar* and the facts in *TWA*:

There is nothing in *TWA* that privileged the Respondent to grant such a preference to the crossovers. In sum, *TWA* has no application here because this case does not involve the initial placement of returning strikers, but rather discrimination against strikers after their reinstatement. According, we conclude that by excluding crossovers from its June restaffing, the Respondent gave preferential treatment to the crossovers and discriminated against the reinstated strikers.

On the other hand, the instant case does present facts analogous to *TWA*. The suspension of the COP was made prior to reinstatement of strikers. I find that Respondent did not violate the Act in suspending the COP during the 3-day period. There was no preference given to crossovers during the 3-day period. Rather, the entire work force during the 3-day period was for purposes of striker replacement and was necessitated by the concededly lawful 4-day duration of the Staffing Agency contract.

It appears that Respondent determined not to utilize the COP during the 3-day period based on the 4-day requirement of the Staffing Agency contract as that requirement interfaced with striking and nonstriking employees. Respondent did not consult with the Union regarding its decision. Although the obligation to bargain is not suspended by a strike,<sup>3</sup> in these circumstances, I find there was no duty to bargain regarding implementation of the procedure.

I note initially that the procedure was a temporary measure applied solely during the 3-day period. Implementation of the procedure in effect suspended the COP for the 3-day period. However, the COP was not changed and, in fact, remains in place. Thus, the procedure may be viewed as an isolated departure from the COP which was utilized solely for striker replacement purposes. Moreover, an employer may lawfully make changes in terms and conditions of employment of replacement workers during a strike. It is conceded that the COP was not utilized with regard to replacement employees. I find that the employer's extension of that policy to the nonstriking employees, who were together with the contract employees, treated as the replacement work force during the 3-day period, was not subject to the duty to bargain.

#### CONCLUSIONS OF LAW

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

2. Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act.

<sup>2</sup> *Pacific Mutual Door Co.*, 278 NLRB 854, 856 (1986).

<sup>3</sup> See generally *General Electric Co.*, 163 NLRB 198 (1967), *enfd.* in relevant part 400 F.2d 713 (5th Cir. 1968), *cert. denied* 394 U.S. 904 (1969).

ORDER

The compliant is dismissed.