

**Wright Motors, Inc. and Local 215, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 25-CA-8920**

August 15, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO  
AND TRUESDALE

On May 4, 1978, Administrative Law Judge Abraham Frank issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Wright Motors, Inc., Evansville, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

<sup>1</sup> In adopting the Administrative Law Judge's Decision, we place no reliance on the fact that Respondent chose to litigate the question of its obligation to bargain. Cf. *Continental Nut Company*, 195 NLRB 841 (1972).

DECISION AND RECOMMENDED ORDER

ABRAHAM FRANK, Administrative Law Judge: The charge in this case was filed on May 9, 1977,<sup>1</sup> and the complaint, alleging violations of Section 8(a)(5) and (1) of the Act, issued on July 29. The hearing was held at Evansville, Indiana, on October 25.<sup>2</sup> The General Counsel and the Respondent filed briefs, which have been duly considered.

The issue in this case is whether Respondent, since November 9, 1976, refused to bargain with the Union in good

<sup>1</sup> All dates are in 1977 unless otherwise indicated.

<sup>2</sup> The motion of the parties to correct the transcript in minor respects is granted.

faith with a sincere intention to enter into a final collective-bargaining agreement.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. *Preliminary Findings and Conclusions*

The Respondent, Wright Motors, Inc., is an Indiana corporation engaged in the business of servicing and distributing new and used cars in Evansville, Indiana. Respondent admits, and I find, that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The Charging Party, hereinafter called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

B. *Background*<sup>3</sup>

On October 19, 1973, over Respondent's objections, the Union was certified by the Board as the exclusive bargaining representative for a unit of Respondent's employees stipulated by the parties and hereinafter found to be appropriate. Respondent refused to accept the validity of the certification or to meet with the Union for any purpose. On January 23, 1975, in a summary judgment proceeding, the Board found that the Respondent's refusal to meet and bargain with the Union was violative of Section 8(a)(5) and ordered bargaining (216 NLRB 279). Thereafter, on January 20, 1976, the Board's Order was enforced by the Court of Appeals for the 7th Circuit in an unpublished decision (529 F.2d 529). Respondent's petition for a writ of certiorari was denied by the Supreme Court on October 4, 1976 (429 U.S. 826).

On January 30, 1974, and in successive letters thereafter, dated July 8, 1974, February 4 and March 20, 1975, and March 3, 1976, the Union demanded bargaining. Respondent or its attorneys responded in letters to the effect that Respondent was testing the validity of the Board's certifi-

<sup>3</sup> At the outset of the hearing, counsel for the General Counsel offered into evidence a settlement agreement between the Board, the Union, and the Respondent in Cases 25-CA-6576 and 25-CA-5742, executed on November 14, 1973. By the terms of the settlement agreement, the Respondent posted a notice that it would not engage in various unfair labor practices relating to the right of its employees to join or assist the Union or any other labor organization, including the institution of stringent work rules, creating the impression of surveillance, discriminating against employees by discharge or transfer, interrogating employees, threatening to discharge employees, threatening to close its facility, threatening that its employees would lose compensation, and threatening to negotiate with a closed mind in the event the employees selected the Union to represent them. Two employees, Gregory Witherspoon and James Capps, were made whole for loss of earnings as a result of the discrimination against them. By executing the settlement agreement the Respondent did not admit the commission of any unfair labor practices. Counsel for the General Counsel also offered to prove by the testimony of Witherspoon and Capps that Respondent engaged in certain conduct which was the subject of the aforementioned settled cases. The proffered exhibits and testimony were rejected by me on the ground that the Board will not rely upon a prior settlement agreement or the testimony of an individual relating to the subject matter of the settled case even as background evidence of Respondent's hostility in a subsequent unfair labor practice proceeding. *Edgewood Nursing Center, Inc.*, 230 NLRB 1021, fn. 1 (1977). This case is more recent than the cases upon which the General Counsel relies, represents the Board's considered view, and is one with which I cannot claim unfamiliarity.

cation and that it would not meet with the Union while the matter was pending in the courts.

### C. Bargaining Negotiations

On November 15, 1976, C. K. Arden, president and business manager of the Union, formally requested Respondent to meet and bargain. In reply, Respondent's sales manager advised Arden to contact Respondent's attorney, Arthur Rutkowski. On January 3 Arden wrote to Rutkowski, again requesting a meeting for the purpose of negotiating a contract. Rutkowski responded on January 17, suggesting a meeting date of February 14. In separate letters, dated January 20 and January 25, respectively, Arden and the Union's staff counsel, Anne Cavanaugh Thomas, protested the delay in meeting. Rutkowski remained firm and the Union yielded.

The parties met in seven bargaining sessions, beginning on February 14 and thereafter on March 9, April 5, May 24, June 14, and October 18 and 21. Representing the Respondent at these sessions were Rutkowski and Mac Clayton, Respondent's sales manager. Representing the Union were Lewis Smith, business representative, and Thomas.

At the first bargaining session, on February 14, the Union presented a proposed basic contract, which did not include wage rates but included, *inter alia*, provisions for Recognition, Union Security, Discharge and Suspension, a Probationary Period of 60 days for new employees, a No Strike-No Lockout clause, a Grievance Procedure leading to binding Arbitration, and Employer Contribution to the Union's Pension Fund. The Union requested that Respondent furnish information on the current wages of the unit employees and their fringe benefits. Rutkowski asked for the Union's constitution and bylaws and the amounts of the dues and initiation fees. Smith stated that the constitution and bylaws were being amended, but that the Union could furnish Respondent with the current bylaws. Dues were \$8-\$12 per month and initiation fees \$25-\$50, subject to modification by the Executive Board and the International. Rutkowski asked questions about the meaning of specific articles and clauses, and these were discussed briefly. At the conclusion of the meeting Rutkowski promised to give the Union's proposals serious consideration. He indicated that he would go over them with the Company and would have counterproposals to make. He also promised to have the wage information and the list of benefits requested by the Union in the mail by the end of the week. The parties agreed to meet the following March 4. The Union undertook to reserve a meeting room.

On February 21, Rutkowski sent Smith a letter, which listed the wage or commission rate paid various categories of employees and the Respondent's health, welfare, and vacation benefits in general terms. Smith responded on March 1 that he needed the actual dollar amount of pay and benefits paid each individual employee and that such information was needed prior to the next meeting, which had been rescheduled from March 4 to March 9. On March 4, Rutkowski responded that the Union had access to the W-2 statements of earnings for the employees and could get the information itself and that, moreover, a good part of the unit was on a 50:50 commission basis. With

respect to benefits, Rutkowski stated that the company did not have any of its benefits broken down in actual dollar amounts for each employee.

At the negotiation session of March 9, Respondent offered its first counterproposal, with the understanding that it was subject to total agreement on all parts of the contract and subject further to the submission of all tentative agreements on specific items to the Company's Board of Directors for approval. In pertinent part, the Respondent's proposed agreement provided: (1) recognition of the Union for the unit of employees certified by the Board; (2) an open shop in which the Union would not interfere with the employees' choice concerning union activities or pressure any employee to join the Union or to sign a checkoff for union dues and initiation fees; (3) a management-rights article, giving Respondent the exclusive right "to select and direct the working force; to determine and from time to time to redetermine the number, location and types of its plants and operations and the methods, processes and materials to be employed; to hire, promote, suspend or discharge for cause; to establish, allocate, and change work schedules and assignments; to transfer employees from one job classification to another or to relieve employees from duties because of lack of work or other legitimate reasons; the right to study or introduce new or changed production methods, machinery, tools and equipment or facilities and to determine the quantity and quality of the materials and workmanship required; to establish, determine, maintain and enforce standards of production; to determine and redetermine repairs to the plant, equipment or machinery; subcontract work, whatever may be the effect on employment; to expand, reduce, combine or cease any job, department, operation or service; to determine starting and quitting times and determine the number of hours and shifts to be worked; to alter, rearrange or change, to extend, limit, or curtail its operations or any part thereof, or to shut down completely or any part thereof whatever may be the effect upon employment; to make such reasonable rules and regulations, not in conflict with this Agreement as it may from time to time deem best for the purpose of maintaining order, safety and the effective operation of the business and after advance notice of such rules and regulations to require compliance therewith." Management also retained all other rights and prerogatives, including those exercised unilaterally in the past, subject only to the express restriction of such rights in the Agreement. The exercise of none of the specific management rights would be subject to the grievance procedure; (4) a no strike-no lockout article in which the Union would agree to fine any employee engaging in a work interruption and issue a statement that such interruption was unauthorized by the Union and in violation of the agreement and that any established picket line should be ignored. Under this article the Union would also refrain from engaging in any form of "economic pressure by publication, advertisements, picketing, handbilling, or otherwise, directed against the Company, its owners, or Management, or the products or services of the Company." In the event of a claimed violation of this article "by any employee or group of employees," the Company was granted the right to seek an injunction in state or Federal court and file suit for damages against the

Union without first arbitrating the claimed violation. The Union, "its officers, agents and members" would be liable, collectively and individually, for damages resulting from the claimed violation. The Union would waive its right to remove any action for damages from a state or Federal court, when instituted by the Company. Further, the parties would agree to execute and post a performance bond of \$20,000, to be forfeited as liquidated damages in the event either party violated the agreement. In addition to the above remedies, the Company reserved the right to discharge or otherwise discipline any employee violating the no-strike clause. In the event a grievance was filed, the arbitrator's jurisdiction would be limited to determining whether the employee engaged in the prohibited conduct. The degree of discipline or the selection of the employee to be disciplined would not be in issue before the arbitrator. (5) Among other obligations of employees, each employee would be required to have a valid current driver's license, each mechanic would be required to pass the mechanic's certification test in the time period determined by the Company, and no mechanic would be permitted to perform outside commercial work in the automotive field. (6) The Company would continue its practices with respect to health and safety.

Smith looked over the Company's proposal briefly and asked Rutkowski to explain some of the provisions. As to the performance bond, Rutkowski said that it was intended to show financial responsibility and was in addition to actual damages suffered by the Company. With respect to wage rates, Smith asked if Respondent was refusing to negotiate on hourly wage rates. Rutkowski responded, "No, that is our proposal that hourly wage rate set at our discretion, but we'll negotiate on that too." Smith and Rutkowski discussed briefly the obligations of employees to have valid licenses, to take the mechanic's certification test, and to refrain from outside mechanical work. The parties then discussed Respondent's refusal to furnish the Union the specific information previously requested. Smith insisted that the Union needed the specific amount of wages and benefits paid each individual and asked, "Are you going to give me that information or not?" Rutkowski replied that he did not know (1) whether the Company had those figures and (2) whether the Union was entitled to such information. The Union could get it from the employees' W-2 forms. Clayton explained in general terms the Company's profit-sharing pension plan (NADART),<sup>4</sup> the guarantee of monthly income paid weekly, the flat rate and the 50/50 commission rate, the warranty rate, and health, life, and disability insurance. Rutkowski promised to provide the Union with whatever information the Company had relating to these benefits. The Respondent would also provide figures on holidays and uniforms. Rutkowski agreed to check if the Company had the dollar figures paid to each individual and whether the Union was entitled to it.

On March 29, Smith wrote to Rutkowski, asking that the requested information, which Rutkowski in the interim had indicated would be available at the next negotiation session of April 15, be forwarded to Smith prior to that date. On March 31, Rutkowski acknowledged receipt of Smith's let-

ter and confirmed the meeting date of April 15, but did not refer to Smith's request for information. On April 4, Smith again wrote to Rutkowski, renewing his request that the information be submitted to Smith prior to April 15. On April 5, Rutkowski's secretary wrote Smith that Rutkowski was out of town and would return on April 8. On the latter date Rutkowski forwarded the requested information to Smith.

The parties met on April 15 at 1:35 p.m. in a bargaining session that lasted about 3 hours. At the beginning and end of the meeting Clayton gave the union representatives additional specific details as to the cost to employees of the various benefits currently available to them, i.e., life, disability, and health insurance and the Company's retirement pension plan. Clayton also explained the Respondent's current practice with respect to the lunch period, reporting and quitting time, break periods, special schooling for employees, tools furnished by the Company, discounts for service and purchase of new cards, seniority, and discharge.

The parties compared several articles of their respective proposals, but there was little movement. As to management rights, Smith and Thomas expressed concern that the Respondent's article gave the Company the right to shut down its business without regard to the effect on employment. Rutkowski agreed, and stated further that the Company would not have to bargain about closing its business unless the Union was successful in obtaining a provision in the contract specifically restricting the Company's right to do so. Smith also pointed out that the Respondent's management rights article would not be subject to the grievance procedure. Again Rutkowski agreed, stating, "If it's not important enough to you to raise it at the table, we retain the right."

With respect to the no strike no lockout article in Respondent's proposal, Smith protested the requirement for a performance bond, stating that they could not live with that—it would cut their throats if something happened. Rutkowski repeated his position expressed at the previous meeting that the bond was in addition to other remedies. Smith also objected to Respondent's proposal that the Union fine members under the no-strike provision, that the Union waive its right to move a case from a state or Federal court, and that an arbitrator's discretion be limited in a grievance case. Thomas pointed out that Respondent's article bound the Union for acts of individual members. To this Rutkowski replied that if the Union could not control its members it should not be their exclusive representative; it should stop getting members. Smith indicated that the Union could move on its language, but not to Respondent's. Rutkowski said, "You haven't told me anything wrong." However, Rutkowski noted that he was not married to every comma and would take into consideration the bond if the Union agreed to Respondent's clause.

The parties recessed and returned to discuss the article on probationary employees. Smith objected to Respondent's 1-year requirement for probation, suggesting that 50 days was enough. Rutkowski rejected the shorter period, stating, "You haven't given me any reason to move off a year." As to the Respondent's proposal on leave of absence, Smith said he saw nothing wrong with the first para-

<sup>4</sup> National Automobile Dealers Association Retirement Trust.

graph and agreed to it. Other clauses under this article were discussed and the parties agreed to hold them open for a while. On the clause relating to activities of the union steward, Smith agreed that the steward would not be able to solicit grievances. Rutkowski agreed to consider some of the Union's language to the effect that the steward could process grievances after hours. As to plant visitation for union representatives, Smith saw no problem with the Respondent's proposal. Smith also was willing to accept Respondent's proposal as to the use of the Company's bulletin board by the Union. However, the issue was left open because Smith would not agree that a department head had to initial a union notice. Questions on health and safety and the nondiscrimination clause were put on hold. Smith agreed to Respondent's language as to agreement and recognition. The Union's article on discharge and suspension of employees was discussed and left open. The parties then considered their respective articles on grievance and arbitration. Smith objected strenuously to Respondent's provision for permissive arbitration, saying that it was unfair and unreasonable and undermined the grievance-arbitration procedure. Smith asked if Rutkowski would take anything other than Respondent's language on arbitration. Rutkowski replied, "No, not right now." It would depend on the entire agreement reached. Thomas asked why Respondent did not want mandatory arbitration. Rutkowski responded that he didn't want the arbitrator being there to decide the very things that could decide the very livelihood of the Respondent's business. However, Rutkowski indicated that if they could get some language Respondent might be able to agree to some form of mandatory arbitration. Rutkowski said that the union representatives had not given him any reason to set any of Respondent's proposals aside.

Smith suggested they go back and start with page 1. However, Rutkowski would not accept the language of the Union's initial "Agreement" clause or the "Purpose and Intent" of the agreement. Rutkowski took the position that if the Union wanted any current practice continued it had to be raised at the table. Smith asked if Rutkowski had agreed to anything at that meeting. Rutkowski replied that Respondent had said it would consider things. Smith said, "We need to redraft our proposals then." Rutkowski answered, "Whatever you need to do."

As indicated above, the charge was filed on May 9 and served on Respondent on that date.

The fourth meeting of May 24 was brief. Rutkowski at this time presented counterproposals relating to management rights, arbitration, the no-strike clause, and other minor provisions. The parties agreed to meet on June 14 for the next session. In addition to a number of minor changes, the Respondent's counterproposals: (1) removed Respondent's proposed limitation on the arbitrator's authority as to grievances filed under the no Strike no Lockout article; (2) substituted a period of 9 months for Respondent's original proposal of 1 year for probationary employees; (3) eliminated the requirement for permissive arbitration in favor of mandatory arbitration; (4) eliminated the provision removing management rights from the grievance procedure; (5) eliminated the requirement that a department head initial all Union notices posted on the Company's

bulletin board, such notices, however, to be subject to approval of company management.

At the fifth meeting of June 14 the Union agreed to a number of minor proposals of Respondent, such as the general provisions, with minor changes, use of the bulletin board, reporting and call-in pay, examinations of employees, and the intent, purpose, and scope of the agreement. Respondent offered to consider permitting the steward to process grievances on company time with pay. The parties were still far apart on the probationary period, the Union insisting that 60 days was enough. Rutkowski suggested there might be different periods for different groups of employees and Smith indicated that was a possibility.

Smith offered new written proposals for a maintenance-of-standards clause and a revised, shorter management-rights clause. Rutkowski insisted that Respondent's management-rights clause was not a tradeable item. Rutkowski also took the position that any past practice of Respondent that the Union wanted to preserve would have to be specifically listed in the contract. If it was important enough to the Union, then it would have to be proposed and put down in writing. There was no agreement as to these items.

Smith indicated that the Respondent had made some real movement and so had the Union. He suggested that they get the language items out of the way at the next meeting and move to monetary items. Thomas proposed the next meeting be held on June 27. Clayton proposed June 28.

No meeting was held on June 28, or, indeed, from the date of the last meeting, June 14, to October 18. The June 28 meeting was canceled by Smith due to an emergency in his family. Rutkowski was not available in July because of trial commitments. Smith was not available in August and September because he was busy negotiating other contracts. Thomas was on vacation during the week bridging August and September. Moreover, the Union believed there was no point in requesting a meeting after the complaint in this case issued because Respondent had refused to meet with the Union while litigating the previous unfair labor practice.

The Regional Director had advised the parties on July 29 that the hearing in this case would be held on October 25.

On September 30, at the suggestion of the General Counsel, Smith wrote Rutkowski asking for another negotiating session. On October 6 Rutkowski responded, suggesting that they hold two meetings, one on October 18 and another on October 21. The parties met on these two dates.

The meeting on October 18 began at about 1:45 p.m. and lasted until sometime before 3 p.m. The parties reviewed their differences with respect to the no strike-no lockout provision, the arbitration language, requiring a written submission agreement to be entered detailing the dispute at issue, processing of grievances by the steward, the management-rights clause, and the probationary period. There was considerable discussion of the Respondent's current promotion policy, the flat rate, and assignments to various jobs. Smith said the Union would seriously consider Respondent's proposal for different probationary periods for different classifications of employees. The Union would accept the Respondent's language on

stewards if the Respondent would permit the steward to process grievances on company time. Smith also said the Union would consider the Respondent's management-rights clause if the Respondent would consider the Union's maintenance-of-standards clause.

The bargaining meeting of October 21 began at about 1:30 p.m. and lasted until about 5:30 p.m. At the outset of the meeting, Thomas presented Respondent's representatives with a written proposal spelling out circumstances under which employees not included in the bargaining unit could perform bargaining unit work. The matter was discussed in some detail and was left open. Discussed also were the Respondent's proposals with respect to holidays and seniority. Thomas requested that a copy of the seniority list be furnished the Union.

The meeting adjourned to permit the Respondent's representatives to caucus. Upon their return, Rutkowski responded to the Union's positions. As to the limitation on bargaining unit work by employees not employed in the unit, Rutkowski said the Union's proposal was too broad; that the Respondent might consider some other form of restriction, but not the Union's language. With respect to holidays, the Respondent agreed to modify several paragraphs of its March 9 proposal. With respect to seniority, the Respondent agreed to modify its March 9 proposal and accept several of the Union's counterproposals on this item. Respondent agreed to furnish the Union with a copy of the seniority list.

Rutkowski also presented the union representatives with written counterproposals. (1) The Respondent now offered to modify its May 24 article on no strike-no lockout by: (a) eliminating the requirement that the Union fine an employee for engaging in a prohibited strike; (b) eliminating the provision that union officers would be liable collectively and individually for damages resulting from a violation of this provision; (c) eliminating the Union's waiver of its right to remove any action for damages from a state or Federal court; (d) eliminating the requirement for a \$20,000 performance bond. (2) The Respondent offered to modify its March 9 proposal for probationary employees to require a 120-day probationary period for hourly employees, but retaining the 1-year period for mechanics, bodymen, and painters. (3) The Respondent offered to modify its proposal on stewards to permit the steward to process grievances on working time for 1-hour a week, provided it did not interfere with his work or the work of any other employee and the steward notified and secured permission of the foremen to be absent. (4) The Respondent offered to delete provisions in its arbitration article: (a) requiring that a written submission agreement be entered into detailing the dispute at issue; (b) denying the arbitrator the right to rule on any arbitrable matter except while the Agreement was in full force and effect; (c) denying the arbitrator the right to change or establish any wage or to pass on matters having to do with new or changed jobs; (d) restricting submission of grievances to an arbitrator to one at a time unless otherwise mutually agreed. (5) The Respondent dropped its proposal that all promotions and methods of promotion be made at the sole discretion of the Company. (6) The Respondent offered to modify its proposal with respect to mechanics' outside work to permit such work if

not in competition with the Company. (7) The Respondent offered to drop its article on open shop with the understanding that there would be an open shop. (8) The Respondent offered to negotiate the minimum wage rate for each individual hourly rated employee and to eliminate the provision that wage rates be set at the discretion of the Company. (9) The Respondent also proposed minor changes under the article on grievance procedure.

The Union accepted the Respondent's proposals on no strike-no lockout but objected to the clause granting the Respondent the sole right to discharge or determine the discipline for an employee engaging in a prohibited strike; accepted Respondent's proposals on arbitration, promotions, and the right of the steward to process grievances on working time but held open the proviso that such processing not interfere with work. There was basic agreement on grievance procedure and, as indicated above, on holidays and seniority. Other proposals were discussed without resolution. The minutes of Rutkowski show that the parties were to meet for the next negotiating session on November 2.

#### *D. Summary of Bargaining Negotiations*

No agreement was reached on any issues during the first two meetings of February 14 and March 9.

On April 15, the parties agreed, with minor changes, to Respondent's proposal of March 9 relating to agreement, recognition, and plant visitation. Under leave of absence, the Union accepted Respondent's proposal for a 30-day leave of absence to be granted at the Respondent's sole discretion. The Union also accepted Respondent's language forbidding the union steward to solicit grievances. On June 14, the parties agreed, with minor changes, to the articles relating to certain general provisions, bulletin board, reporting pay, call-in pay, examinations, and the intent, purpose, and scope of the agreement.

On October 21, there was basic agreement on holidays, seniority, union representation, the grievance procedure, arbitration, and no strike-no lockout. Dropped by Respondent were its proposals that wage rates and promotions be determined at Respondent's sole discretion and that the contract contain a specific article guaranteeing an open shop.

Discussed, but unresolved during the meetings, were articles on management rights (Respondent's lengthy paragraph against the Union's shorter paragraph); the Union's proposals of maintenance of standards; obligations of employees as set forth in the Respondent's March 9 proposal; probationary employees; nondiscrimination, relating to employees' right to refrain from union activity; nonbargaining unit employees, relating to work by such employees or supervisors in the bargaining unit; and the Union's article on discharge and suspension.

Not discussed during any of the meetings were wages, hours, fringe benefits (except for holiday eligibility), overtime and premium pay, union security and checkoff, union pensions (except for questions as to its status under ERISA and IRS), duration of the contract, temporary transfers, separability and savings, classifying employees, aspects of the agreement in full contained in Respondent's March 9

proposal, and some provisions of protection of rights and general provisions contained in the Union's proposal of February 14.

#### ANALYSIS AND FINAL CONCLUSIONS OF LAW

It is the position of the General Counsel that Respondent from the beginning of the 10(b) period to the date of the hearing in this case did not bargain in good faith with the Union with a sincere intention to reach agreement. Although the complaint was issued prior to the last two meetings, Respondent's total conduct was thoroughly litigated in this proceeding, and I have taken all of it into consideration in reaching my judgment.

Section 8(d) of the Act obligates the parties to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . ." Although neither party is required to agree to a proposal or make a concession and the Board may not substitute its judgment for that of the parties, *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395 (1952); *H. K. Porter Co., Inc., Disston Division Danville Works v. N.L.R.B.*, 397 U.S. 99 (1970), that is the beginning, not the end, of an inquiry into allegations of surface bargaining. "Enforcement of the obligation to bargain collectively is crucial to the statutory scheme. And, as has long been recognized, performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences." *N.L.R.B. v. American National Insurance Co.*, *supra* at 402. Put in different and eloquent words by Judge Brown in *N.L.R.B. v. Herman Sausage Co., Inc.*, 275 F.2d 229, 232 (C.A. 5, 1960): "On the other hand while the employer is assured these valuable rights [the right to maintain its position free from the Board's direction], he may not use them as a cloak. In approaching it from this vantage, one must recognize as well that bad faith is prohibited though done with sophistication and finesse. Consequently, to sit at a bargaining table, or to sit almost forever, or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail. Hence, we have said in more colorful language it takes more than mere 'surface bargaining,' or 'shadow boxing to a draw,' or 'giving the Union a runaround while purporting to be meeting with the Union for purpose of collective bargaining.'"

The Board too has emphasized that collective bargaining is something more than the mere meeting of employer and representatives of his employees. It is essential that there be a serious intent to adjust differences and reach an acceptable common ground. *Wal-Lite Division of United States Gypsum Co.*, 200 NLRB 1098 (1972), on major, substantive issues of collective bargaining. *Borg-Warner Controls, a Division of Borg-Warner Corporation*, 198 NLRB 726 (1972). See also *Flambeau Plastics Corporation*, 167 NLRB 735, 749-50 (1967), *enfd.* 401 F.2d 128 (C.A. 7, 1968), *cert. denied* 393 U.S. 1019. Where there have been lengthy negotiations, the question is whether it can be inferred from "the totality of the employer's conduct that he went through the motions of negotiation as an elaborate pretense with no sincere desire to reach agreement, or that he bargained in

good faith but was unable to arrive at an acceptable agreement with the Union." Quoting *N.L.R.B. v. Reed & Prince Manufacturing Company*, 205 F.2d 131, 139-140 (C.A. 1, 1953); *Sweeney & Co. Inc.*, 176 NLRB 208, 211 (1969).

I have set forth in considerable detail, perhaps too much detail, the minutiae of the bargaining relationship between the Union and the Respondent, including the history of legal steps antedating the 10(b) period in this case.

On this record one fact stands out. In June 1973, a majority of Respondent's employees in the appropriate unit voted to be represented by the Union. As of the date of this Decision, almost 5 years later, there has been no bargaining on the primary, statutory subjects of collective bargaining, wages, and hours.

For 3 years, Respondent pursued its legal right to appeal the Regional Director's determination<sup>5</sup> that the challenges to the ballots of two employees, Joe Wright and Steve Groves, should be sustained on the ground that they are close relatives of management. Wright is the son of George Wright, president of Respondent. George Wright owned 51 to 52 percent of Respondent's stock at the time of the election. Groves is George Wright's nephew. Groves's mother at the time of the election owned 28 percent of Respondent's stock. There was not bargaining during this period and the employees remained unrepresented.

The Supreme Court denied certiorari on October 4, 1976. On November 15, 1976, the Union requested bargaining. Respondent referred the Union to Rutkowski, its attorney and chief negotiator. On January 3, the Union wrote to Rutkowski. It would take another month, until February 14, before Rutkowski was willing to meet. Ordinarily, a delay of a month or so in scheduling an initial meeting would not in and of itself be evidence of bad faith. But these employees had been denied their bargaining rights for the preceding 3 years while Respondent litigated its obligation to bargain. In such circumstances good faith on the part of the Respondent required that it respond with alacrity to the Union's first request rather than merely providing the Union with the name of Respondent's attorney, who then insisted upon further delay.

Little, if anything, was accomplished at the meeting of February 14. The Union presented its basic contract and asked for current wage and fringe benefits information, to which it was clearly entitled. Respondent vacillated, first providing the information in general rather than specific dollar amounts, then asserting that the Union could get the wage information itself, that the Company did not have the dollar amounts of fringe benefits, and finally that Rutkowski was not sure the Union was entitled to this information. Almost 2 months later, on April 8, after further, urgent correspondence, Rutkowski forwarded the requested information to the Union.

In the interim, the parties met on March 9 and Respondent presented 36 written counterproposals. Some of these proposals would have put the employees in a far worse position with the Union than without it. Others would have so damaged the Union's ability to function as the employees' bargaining representative that Rutkowski, a skillful

<sup>5</sup> I take judicial notice of Regional Director's Report on Objections and Challenged Ballots in Case 28-RC-5320, issued on August 9, 1973.

and experienced practitioner, could not possibly have expected that they could result in serious and meaningful collective bargaining. The provisions are set forth above; I repeat the more flagrant ones here. An "open shop" was guaranteed, limiting the Union's right to secure members and check off authorizations to pay for the costs of union representation. A lengthy management rights clause, not subject to the grievance procedure, gave the Company exclusive control over hours, work rules, and production and authorized the Company to subcontract, curtail, or shut down its business completely without regard to the effect on employment. An extraordinary no strike-no lockout clause required the Union to fine "any employee" who engaged in a prohibited work interruption, granted the Company the right to seek an injunction and damages against the Union without arbitrating the claim, made the Union, "its officers, agents, and members" liable individually and collectively for damages, required the Union to waive its legal right to remove a suit from a state or Federal court, provided for a \$20,000 bond to be forfeited as liquidated damages in the event of a violation of the article (in addition to actual damages), and limited the authority of an arbitrator in providing a remedy. An article on arbitration provided for only limited and permissive arbitration. Hourly wage rates and promotions would be set at the Company's sole discretion.

Not until May 24, after the charge in this case was filed, did Respondent agree to mandatory arbitration, remove its limitation on the arbitrator's authority under the no strike-no lockout provision, agree that management rights would be subject to the grievance procedure, and eliminate lesser, but equally unacceptable, language.

Not until October 21, after the complaint in this case was issued and 4 days before the hearing, did the Respondent withdraw other of its extreme proposals of March 9 under its no strike-no lockout article, the article on arbitration, the specific requirement for an open shop, and the provisions that wage rates and promotions be set at the Company's sole discretion. More than a year after its obligation to bargain in good faith under Section 8(a)(5) and (d) of the Act was finally judicially determined, the Respondent offered to negotiate the minimum wage rate for each individual hourly rated employee.

Information as to the dollar amounts of the employees' current wage rates and fringe benefits, which the Union had urgently requested in February and which were reluctantly yielded in April, were of no use to the Union because there was no bargaining on these monetary, substantive issues. The seven negotiating sessions over a 10-month period were occupied mainly with long discussions of Respondent's proposals, examples of which are set forth above.

It is a fact, as Respondent reminds me in its brief, that Rutkowski never took an adamant position on any of Respondent's 36 initial bargaining articles. It is also a fact that the proposals which presented the greatest obstacle to agreement on language were withdrawn by Respondent after the charge and complaint in this case issued. Rutkowski made it clear from the very beginning that he was not wedded to every comma in Respondent's proposals. He was willing, he said, to negotiate, depending on the entire

agreement. Confronted by Smith with the question whether Respondent was refusing to negotiate on wages, Rutkowski responded quickly that that was only the Respondent's proposal. Respondent was willing to negotiate the question whether it would negotiate on wages! Considering his competence and long experience, Rutkowski must have known better than that. Wages are mandatory subjects of bargaining. They *must* be negotiated.

Respondent would have me conclude that it was engaged only in hard bargaining. Contrary to Respondent, its failure to take an adamant position on any bargaining subject is not a complete defense to the charge of surface bargaining. Indeed, the law is clear that an employer's position, to which he is deeply and honestly committed, may be maintained forever, though it produce a state mate. *N.L.R.B. v. Herman Sausage, supra* at 231. *Gehrich & Gehrich, Inc.*, 232 NLRB 1122 (1977). An employer or a union may bargain hard on an issue of importance to it, recognizing that it must give something of substance for what it gets and striving always for an acceptable compromise to reach final agreement. Hard bargaining is not bargaining interminably over straw men and then yielding precipitously on the hard-fought issues without final agreement or hope of final agreement on all issues. This type of bargaining compels the inference that its purpose is not to arrive at a hard bargain but to insure no bargain through the tactics of delay. It does not appear that any of Respondent's proposals from which it retreated after months of delay were proposed out of deep conviction, high principle, or economic necessity.

I conclude that Respondent, forced finally to recognize and bargain with the Union, embarked upon a plan or strategy to frustrate and insure the failure of the collective-bargaining process by: (1) delaying meeting with the Union; (2) delaying providing the Union with relevant bargaining information; (3) engaging in surface bargaining with no sincere intention of reaching agreement.

By such conduct, Respondent has violated Section 8(a)(5) and (1) of the Act.

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

The appropriate unit is: All mechanics, bodymen, painters, general laborers, partsmen, and service writers employed by the Employer at its Evansville, Indiana, establishment; but excluding all office clerical employees, dispatchers, all professional employees, all guards, and supervisors as defined in the Act.

#### THE REMEDY

Having found that Respondent has engaged in the unfair labor practices set forth above, I shall recommend that it cease and desist from such conduct or like or related conduct, and take certain affirmative action to effectuate the policies of the Act. I shall also recommend that Respondent be ordered to bargain collectively in good faith, upon request, with the Union as the exclusive bargaining representative of its employees in the above unit; in the event that an understanding is reached, to embody such understanding in a signed agreement; and to post the attached notice.

In order to insure that the employees will be accorded the statutorily prescribed services of their elected bargaining agent for the period provided by law, I shall recommend that the initial year of certification begin on the date the Respondent commences to bargain in good faith with the Union as the bargaining representative in the appropriate unit. *Southern Paper Box Company*, 193 NLRB 881, 883 (1971).

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER <sup>6</sup>

The Respondent, Wright Motors Inc., Evansville, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively and in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with Local 215, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, by delaying meeting with such labor organization, delaying furnishing relevant bargaining information, and engaging in surface bargaining with no sincere intention of reaching agreement. The appropriate unit is:

All mechanics, bodymen, painters, general laborers, partsmen, and service writers employed by the Employer at its Evansville, Indiana, establishment; but excluding all office clerical employees, dispatchers, all professional employees, all guards, and supervisors as defined in the Act.

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

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

(a) Upon request, bargain collectively and in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with the above-named Union as the exclusive bargaining representative of its employees in the above-designated unit, and embody in a signed agreement any understanding reached. The initial year of the Union's certification as the exclusive bargaining representative of the employees in the above-designated unit will begin on the date the Respondent commences bargaining in good faith with the Union as such representative.

(b) Post at its establishment in Evansville, Indiana, copies of the attached notice marked "Appendix."<sup>7</sup> Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are cus-

tomarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

<sup>6</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>7</sup> In the event that 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

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

WE WILL NOT refuse to bargain collectively and in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with Local 215, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of our employees in the unit set forth below, delaying meeting with said Union, delaying furnishing relevant bargaining information, engaging in surface bargaining without a sincere intention to reach agreement. The appropriate bargaining unit is:

All mechanics, bodymen, painters, general laborers, partsmen and service writers employed by the Employer at its Evansville, Indiana, establishment; but excluding all office clerical employees, dispatchers, all professional employees, all guards and all supervisors as defined in the Act.

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

WE WILL, upon request, bargain collectively and in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with the above-named Union as the exclusive bargaining representative of our employees in the above-described unit and embody in a signed agreement any understanding reached. The initial year of the Union's certification as the exclusive bargaining representative of the employees in the above-designated unit will begin on the date we commence bargaining in good faith with the Union as such representative.

WRIGHT MOTORS, INC.