

American Parts System and Chauffeurs, Teamsters and Helpers Local Union No. 776. Case 4-CA-8291

September 16, 1977

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS
JENKINS AND MURPHY

On April 14, 1977, Administrative Law Judge Frank H. Itkin issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

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 brief and has decided to affirm the rulings, findings, 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, American Parts System, Harrisburg, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

FRANK H. ITKIN, Administrative Law Judge. The Union filed an unfair labor practice charge in this case on October 28 and a complaint issued on November 29, 1976. A hearing was held in Harrisburg, Pennsylvania, on January 11 and 12, 1977. The issue presented is whether Respondent Company violated Section 8(a)(5) and (1) of the National Labor Relations Act by negotiating with the Union with no intention of entering into any final or binding collective-bargaining agreement. Upon the entire record, including my observation of the witnesses, and after due consideration of the briefs filed by the parties, I make the following findings of fact and conclusions of law:

FINDINGS OF FACT

Respondent, a Delaware corporation, is engaged in the operation of an automobile parts distribution center in Harrisburg. During the past year, Respondent sold and shipped products valued in excess of \$50,000 directly to firms located outside Pennsylvania. It is undisputed and I

find and conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. In addition, it is undisputed and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

On May 3, 1976, the Regional Director for Region 4 of the Board certified the Union as exclusive bargaining agent of Respondent's employees in the following unit:

All customer service employees, drivers, and warehouse employees employed at the 48 North Cameron Street, Harrisburg, Pennsylvania, facility, excluding all other employees, guards, office clericals, and supervisors as defined in the Act.

The Respondent and the Union thereafter met at five bargaining sessions (June 25, July 13, August 16, September 27, and October 19, 1976). The evidence pertaining to what transpired at these sessions is summarized below.

A. The June 25 Session

Erwin Lerten, an attorney specializing in labor relations, was chief negotiator for Respondent Company in its negotiations with the Union. Lerten, relying upon his notes which were taken during the course of the five bargaining sessions,¹ testified with respect to the first bargaining session on June 25 as follows:

According to Lerten, the first session started at 10:08 a.m. Present for the Union were Arthur Hunsberger, president of the Union, and Wayne Shughart, business representative of the Union. Present for the Company were Lerten and Earl Lauver, general manager at the Company's Harrisburg facility. At the beginning of this session, Shughart submitted to the company representatives the Union's written contract proposal (G.C. Exh. 3). Lerten "pointed out to the Union that [he] had asked to have the contract proposal submitted in advance" and "since the Company had not had a chance to look at it, the Company would have to go over this proposal and come back with a proposal of their own." Lerten "then asked if there was any information which the Union wanted from the Company." Hunsberger "requested a copy of the Company's group insurance plan." Lerten gave Hunsberger a booklet pertaining to the group insurance plan. Lerten also gave Hunsberger a copy of the Company's retirement plan. Lerten, in turn, requested copies of the Union's proposed health and welfare and pension plans. The Union did not have copies of these plans available.

Lerten recalled:

Mr. Hunsberger then stated that the union shop clause [as contained in its proposed contract] is a must and he [Hunsberger] wanted to make it very clear that there could be no contract unless the Union got a union shop. [Lerten] stated this may or may not be a problem, that the Company recognized that the issue of union security was a negotiable item.

¹ Resp. Exh. 3 (June 25); Resp. Exh. 4 (July 13); Resp. Exh. 5 (August 16); Resp. Exh. 6 (September 27); and Resp. Exh. 7 (October 19). Lerten's notes were received into evidence without objection.

Shughart stated "that any wage increase that was negotiated should be made retroactive to . . . June 25" Lerten replied "that the Company would not agree to retroactivity"²

Lerten "asked" when the union representatives would be "available to meet again." Lerten wanted bargaining sessions to be scheduled "two days in a row" because he had "to travel from California" and did not want "to break continuity." The parties "agreed to meet July 13 at 9 a.m., with the understanding that [they] would not meet on the afternoon of July 13, and [would meet] on July 14 at 9 a.m."³ According to Lerten, "There were no other subjects discussed . . ." at this initial session. This session adjourned about 11:25 a.m.⁴

Union President Hunsberger, in his testimony, recalled that at this first session "we didn't get into any real specifics." Hunsberger claimed that Lerten stated at this session, *inter alia*, "in no way, shape or form would they consider union shop"; that the Company "was not going to pour any money into a pension plan that was administered in part by the Teamsters because they had no intention of pouring money down a rathole"; that the Company wanted a 1-year contract and the Union wanted a 3-year contract; and that the Company "would not agree to retroactivity." On cross-examination, Hunsberger acknowledged that his letter and memorandum to the Region during the investigation of this case, dated November 18, 1976 (Resp. Exh. 2), does not contain a statement "that the Company said . . . at the first meeting that there was no way that they could agree to a union security clause." Hunsberger claimed that he "didn't put it in the letter." Hunsberger acknowledged that the letter and memorandum recites: "the Company stated that they [were] opposed to a closed union shop." Hunsberger assertedly had made notes at this bargaining session; however, Hunsberger's notes were not brought to the hearing.⁵

B. The July 13 Session

Lerten testified that the second session started 9:10 a.m. on July 13. Present for the Union "at the beginning of the meeting" were Hunsberger and Shughart. Present for the Company were Lerten and Lauver. Lerten recalled that he submitted the Company's written counterproposal to the union representatives (G.C. Exh. 4). The parties "then started in a review of the Company's counter-proposal." Lerten recalled that, as for "Section 1, Recognition" (G.C. Exh. 4), Shughart noted that "the location was wrong since the Company was going to move." Lerten "agreed on behalf of the Company to add the address to which the Company was going to move"

Lerten testified:

We then discussed Section 2, Union Security [G.C. Exh. 4]. . . . Mr. Hunsberger stated that the union shop is a must, that if the Company would not agree to

² Lerten recalled inquiring about dues and initiation fees. Hunsberger replied that union dues were \$9 per month and the initiation fee was \$30 for an employee earning less than \$4.75 per hour.

³ Hunsberger was unavailable to meet during the afternoon of July 13.

⁴ General Manager Lauver attended all five bargaining sessions. According to Lauver, at the June 25 session, "Hunsberger said it must be a

a union shop, there's no use talking about anything else. [Lerten] replied that this was a negotiable item Mr. Hunsberger stated that the Union did not have any contracts without a closed shop and there's not going to be one in American Parts. [Lerten] replied, is the Union saying that it will not negotiate on union shop. Mr. Shughart replied, that's right.

According to Lerten, Hunsberger then referred to "Section 4, Rights of Management" (G.C. Exh. 4). Hunsberger stated that "it takes away every right from employees except the right to have a baby." Lerten replied: "this is one of the most important provisions to the Company; however, [the Company is] not going to say the same thing as the Union; [the Company is] willing to negotiate on the subject of management rights as well as anything else we have proposed."

Lerten recalled that Shughart "commented" on "Section 16, Wage Rates" (G.C. Exh. 4). Shughart asserted: "that's less than the people are making now." Lerten replied: "that isn't true; that's what the people are making now; we don't have any problem getting people at those rates." The Union then examined various portions of the Company's counterproposal for about 10 or 15 minutes. Hunsberger, referring to "Section 27, Employer Investigations" (G.C. Exh. 4), asserted that "polygraph tests are illegal." Lerten disagreed. Hunsberger replied: "we are not going to let anyone assent to a polygraph test." Lerten also recalled that, with respect to "Section 28, Termination Of Employees For Health Reasons" (G.C. Exh. 4), Hunsberger asserted that "it is illegal to terminate anyone at age 65." Lerten disagreed.

Lerten testified:

Mr. Hunsberger then stated, their Union bylaws require joining the Union after 30 days. [Lerten] replied, what you are saying is that because of . . . Union bylaws, you can't even negotiate on union shop. The Company is willing to negotiate on union security; if the Union wants to propose anything less than a full union shop, the Company will look at it. There was no reply from the Union representative when [Lerten] made this statement.

In addition, as Lerten further testified:

It was at this point that [Union Representative] Don Thomas arrived in the meeting room. Shortly thereafter, Mr. Hunsberger stated that we are at what you call an impasse; without a full union shop we are just sitting here spinning our wheels. Mr. Shughart then suggested bringing in federal or state mediation.

Lerten agreed to mediation. Lerten asked if the Union "wanted to meet tomorrow" as scheduled. Hunsberger

union shop" and Lerten "said it may or may not be a problem, but [it] is an item for negotiation."

⁵ Hunsberger claimed that Walter Smithson, regional operations manager and controller for the Company, was also present at this session. Lerten and Smithson testified that Smithson was not present at this session. Lerten's notes do not show Smithson present at this session (Resp. Exh. 3).

"replied no; we cannot get a mediator that fast." This session adjourned about 11:45 a.m.⁶

Hunsberger recalled, *inter alia*, that at this second session the Company "said that they would in no way recognize union security"; the Company "felt that no employee should be forced to join the Union"; the Union asserted that "we had no contracts which did not have a union security clause" and "we were accountable to our Executive Board"; the Union stated that "there were too many" items in the Company's proposed "Rights of Management" clause; "we touched on a few things like seniority, but it was very brief" — "this was a rather short meeting as [Hunsberger] had a previous engagement in Lancaster"; and the Union stated that the Company's proposed section on "Discipline and Discharge" was "far too long." Hunsberger also recalled stating, *inter alia*, that "it looks like you don't plan to increase the employees' wages and [the Company] said, well, we have a never-ending supply of applicants, and we can hire people at this rate, and we are not going to grant an increase, period." Hunsberger also recalled that the Union "objected strenuously to the polygraph test and [the Company] said that was a requirement . . ."⁷

Donald Thomas, business agent for the Union, testified that he "arrived late" at the second bargaining session. Thomas asserted, *inter alia*, "I remember [the company representative] saying that the Company . . . did not want to have a union shop" — "the only thing that I remember they had suggested is that they would not accept ours and that they were looking at an open shop."

C. The August 16 Session

According to Lerten, the third session started at 9:10 a.m. on August 16. Present were Federal Mediator Harry J. Aiken, Lerten, Lauver, Hunsberger, Shughart, and Smithson. Mediator Aiken "asked both parties to state their positions." Lerten testified:

Mr. Hunsberger stated in reply to this request . . . that the parties had two meetings, that the parties were miles and miles apart, that the Company proposal was not going to do the job, that basically we will talk about union security and polygraph tests among many, many issues, that the Union felt their proposal was a proper one since it was standard Teamster language.

Lerten "replied that the Union has refused to bargain on union shop . . ." Hunsberger "replied that the Union is going to insist on a union shop since the Union bylaws require it." As for the proposed provision concerning polygraph tests, Lerten explained that the Company "widely used polygraph tests" and the tests were proper. The Union, according to Lerten, was "strongly opposed" to the use of polygraph tests "in any shape or form."

⁶ Lauver, in his testimony, recalled that "Hunsberger said that the union shop is a must, and if it can't be agreed upon, there's no use of talking any further." Lerten responded: "It is a negotiable item."

⁷ On cross-examination, Hunsberger acknowledged that he "might have" said that "the Union did not have any contracts without a closed shop and there's not going to be one at American Parts." Hunsberger also acknowledged that "we discussed areas of dispute in only general terms . . ."

There was a discussion concerning the "right to honor picket lines." Lerten asserted "that the Company could not have its employees honoring picket lines," noting that "most of its customers are non-union . . . and we cannot afford to let our employees have the right to honor a picket line during the terms of the contract . . ." There was discussion on the Union's "proposal on seniority." Lerten asserted: "seniority should only apply in layoffs when people would be losing their jobs"; on other issues, "skill and ability should be the determining factor . . ." Lerten noted that "under the Company's proposal . . . if there was a disagreement as to skill and ability . . . this issue could be determined under the arbitration clause as proposed by the Company . . ."

The parties discussed the "pension plan as proposed by the Union." Lerten, as he testified, "pointed out that the Company had its own pension plan" and "it was wrong to pull the people out of that pension plan." Lerten added that the Company actually "had no control whatsoever in the Teamsters pension plan." Lerten "pointed out that in view of what happened to the [Teamsters] Central States Pension Plan, with the charges of corruption, et cetera . . . the Company in no way would agree to place its money into a Teamsters plan."

Shughart, according to Lerten, agreed on the Company's proposal on "jury duty" (sec. 23.02, G.C. Exh. 4) and its proposal on "military service" (sec. 29.01). The parties turned to "Checkoff, Article XVIII of the Union's proposal" (G.C. Exh. 3). Lerten recalled:

I [Lerten] stated that this in my opinion was tied in with union shop . . . Mr. Shughart, at that point, stated that the Union didn't really need checkoff. Mr. Hunsberger contradicted [Shughart] and said that the Union was going to insist on checkoff.

The parties turned to "sick leave." Lerten, as he testified, "stated that the Company has a counter-proposal on sick leave, and this was Section 21 of the Company proposal. Mr. Shughart stated that the Company proposal on sick leave was O.K." The parties turned to "bereavement pay" and Lerten again "pointed out that the Company has a counter-proposal on this, Section 23.05. And, Mr. Shughart stated that the Company proposal on bereavement pay was O.K."

the parties discussed wages. Lerten recalled that "Mr. Shughart stated that a straight progression was O.K. but the Company would have to up wages." Lerten replied: "The basic test . . . was the ability to [attract] and retain skills"; the "wages proposed by the Company . . . met this test because we had no problem attracting and retaining the necessary skills." Lerten testified:

At this point, Mr. Aiken commented that the parties were apart on 19 substantial issues. Does anybody have a new counter-proposal? [Lerten] replied the Company

Hunsberger claimed that Smithson was also present at this session. Lerten and Smithson testified that Smithson was not at this session. Lerten's notes support his testimony (Resp. Exh. 4).

Shughart, called as a rebuttal witness by the General Counsel, admitted that he was present at this session, but he was asked no questions about what transpired at the session.

has no new counter-proposal. Mr. Shughart then replied that wages is one of the major issues.

There was a recess in this session at 11:05 a.m. to enable the mediator to confer separately with the parties. The parties reconvened about 1:35 p.m. According to Lerten, Hunsberger, at this point, proposed a change in the preamble. Lerten agreed. However, as Lerten testified:

Mr. Hunsberger stated that the Union still wanted a union shop. On polygraph tests, he feels it is against the law in Pennsylvania. [Lerten] replied, if the Union can show it is against the law, [Lerten] will take out the polygraph test. Mr. Hunsberger then stated that on the right to honor a picket line, he was not against his members making a delivery to customers unless the customer is on strike, [he did not] want to be a party to an agreement if one of the members gets injured. [Lerten] stated that this was just an excuse On health and welfare and pension, Mr. Hunsberger stated that the Union could go along with the Company's health and welfare and pension program for a first contract; however, he wanted the Company to pay the full premium on the health and welfare, that the Company should pay for dependents. [Lerten] replied that the Company's feeling is that it's the obligation of the employee and not the employer. . . .

In addition, as Lerten recalled, Hunsberger asserted "that the Company should not have the right to subcontract if people were laid off"; "he wanted a successors and assigns clause"; "he saw nothing wrong with the Union shop stewards clause"; "as long as the business agent calls and makes an appointment," he did not "see any problem" on the subject of the "business agent"; he "wanted checkoff"; the Union's proposal "on discipline and discharge . . . covers it well" and the Company "could put up work rules if it wants"; "on holidays, vacations and wages . . . the Union would accept some kind of compromise" Lerten testified:

I [Lerten] replied I see no point in this if the Union is going to insist on a full union shop; and Hunsberger replied that the Union had to insist on a full union shop since this was required by the Union bylaws. And [Lerten] replied that as long as the Union's feet are set in concrete there's no place to go.

Lerten recalled that Smithson noted that "union shop is a problem" at another company warehouse "because of the initiation fees"; "the Company lost good applicants because of the compulsory union membership" The mediator then called a recess and met with the parties

* Lauer recalled that "Hunsberger said a union shop is a must because it's required by the bylaws" and Lerten responded: "Since the Union stands in concrete on the union shop, there is no place to go." Lauer recalled that Smithson referred to union shop as a "problem" at another company warehouse because "it did affect hiring new employees because of the initiation fee." Lauer noted that there was no discussion on "agency shop" or "something less than union shop" at this or any other session. Lauer recalled that Lerten "said if it isn't a union shop, there is no need for checkoff . . . Mr. Shughart said there was no need for checkoff but Mr. Hunsberger said it was necessary for checkoff."

Walter Smithson, regional operations manager and controller for the

separately. Finally, the mediator called the parties together and adjourned the session at about 2:25 p.m.⁸

Hunsberger, in his testimony, claimed that at this third session "we explained to Mr. Aiken some of the stumbling blocks we were encountering"; "we went through our contract at length and we discussed several issues in the contract that we could not live with"; and "we stated our position . . . that we have no contracts in the area that do not have a union security clause and this was going to be a must in a negotiated contract." Hunsberger "stated that we wanted our seniority clause" — "they [the Company] felt that their contract was what they wanted" According to Hunsberger, the Company proposed 7 holidays; the Union proposed 11 holidays; the employees were receiving 7 holidays. On the "health and welfare plans," the Company "wanted to keep their own plan." The Company was "not going to have anything to do with any plans that the Teamsters have any control over" On the subject of "vacations," according to Hunsberger, the Company "felt their plan was sufficient." Various other subjects were assertedly discussed including subcontracting. Hunsberger recalled that the "Company said that they would not agree to" the Union's proposed checkoff or security clause "in any way, shape or form . . ." and that the Company "went so far as to say all Teamsters are mafia connected" Hunsberger recalled, *inter alia*, that the Company stated that "they had an unending supply of applicants at the wage rates they were presently paying and they were not going to increase the rates" — "they weren't even going to discuss the rate increase."

Hunsberger further recalled that there had been agreement on "the change in the recognition clause"; "the military clause" — "we agreed that we could live with" the Company's military clause"; "we could live with their jury duty clause"; "we said that we could live with their sick leave provision"; and "we agreed that we could go along with their bereavement pay . . ." and "funeral leave" proposals. Hunsberger asserted that during this session,

[W]e had stated that we might be able to move maybe towards an agency shop. The Company said no way would [they] have anything to do with anything other than an open shop.

Hunsberger further asserted that,

[W]e could reduce our demands on wages, vacations, holidays, and funeral leave . . . and we could reduce our demands in other areas The Company took

Company, attended the August 16, September 27, and October 19 sessions only. At the August 16 session, according to Smithson:

Mr. Hunsberger said that the union shop was a necessary item for us to have a contract with the Teamsters Union and that it was required by the Union bylaws and that they have no contracts from . . . their particular local that did not have a union shop clause

Lerten replied: "a union shop was a negotiable item." Smithson recalled citing the "problems" in recruiting personnel which the Company had encountered by having a union shop at another warehouse.

the position that [their] counter-proposal . . . was their proposal and that was it.⁹

Thomas testified that at this session "Mr. Lerten took the position that" the union shop clause "was not acceptable to them." Thomas claimed:

[A]s I recall it, we had a break, and we spoke to both parties, both parties had a break; and then I asked them, and I was the one who initiated it . . . whether or not they would accept an agency shop.

Thomas claimed that Lerten said "no." Thomas further testified:

[A]t the third meeting, we were trying to find some common ground, and we told them [the Company] that we would be willing to move relative to wages, holidays and vacations . . .¹⁰

D. The September 27 Session

Lerten testified that the next session started at 10:09 a.m. on September 27. Present were Mediator Aiken, Lerten, Lauver, Smithson, and Hunsberger. Also present, according to Lerten, were Donald Thomas, business agent for the Union, and Joe Biggie, a company representative. Mediator Aiken asked the parties "to review their positions." Lerten testified:

Mr. Hunsberger was the first to reply and stated number one is union shop; Company has [not] budged for it; union shop is a must under the Union bylaws; that the Union won't go along with the polygraph tests; that the Union took issue with people not having the right to honor a picket line; and that the seniority clause proposed by the Company is fully unacceptable. Mr. Hunsberger further stated that the Union wanted an increase in holidays; that the Union wanted the Union health and welfare and pension plan; that the Union wanted an increase in vacations; that the Union wanted a subcontracting clause and that the subcontracting clause proposed by the Union is in all their contracts; that the Union wanted their merger and consolidation clause; that the Union wanted their transfer of title clause; that the Union wanted their Art. XI protection of rights, that this was a standard clause in all of their contracts; that the Union wanted their grievance and arbitration provision and wanted their shop steward clause; and the Union wanted a Union representative to be on the Company premises whether with Company permission or not; that the Union wanted a checkoff, that this was standard procedure,

⁹ On cross-examination, Hunsberger acknowledged that the Union's executive board "would not approve" a contract without a "full union shop" clause. Hunsberger claimed that Shughart was not at this meeting. Shughart testified on rebuttal that he "attended the June and July meetings only."

¹⁰ On cross-examination, Thomas initially placed this third meeting on or about October 6. Lerten testified that Thomas was not at the third session. Lauver and Smithson also testified that Thomas was not present at this meeting. And, Lerten's notes (Resp. Exh. 5) do not show Thomas present at this session.

¹¹ Lauver testified that at this session "Mr. Hunsberger said that a union shop was necessary for a contract and Mr. Lerten said it's a negotiable item."

namely, a checkoff; that the Union wanted their discharge clause, that this was standard language so far as the Union was concerned; that the parties were far apart on wage rates.

I [Lerten] then stated that the Union was right so far as the issues were concerned, but I considered there to be other issues

* * * * *

I stated that the Company's position has not changed on any of these issues at this time.

Mr. Aiken then stated that it might be profitable to list the provisions on which there is agreement. Mr. Aiken stated that the parties were in agreement on the preamble, recognition, sick leave, jury duty, funeral pay, and military leave. There was then a recess for a Union caucus at 10:30 a.m. We then met, that is the Company met with the Mediator at 12:35 p.m. The parties reconvened with the Mediator at 1:45 p.m. At that time the Mediator stated with both parties present, after several conferences with both parties, both parties are far apart; that the Union has to meet with its members and see where they are; that it was best to set another date for a meeting.

This meeting adjourned about 1:50 p.m.¹¹

E. The October 19 Session

The final session was on October 19. The session started at 11:15 a.m. Present were Mediator Aiken, Hunsberger, Thomas, Lerten, Lauver, and Smithson. According to Lerten, Mediator Aiken "asked the parties to state their positions, whether they had any change in positions since the last meeting." Lerten recalled that "Hunsberger replied first that the Union was unable to move on union security or any of the economic issues, that there was no way the Union was going to be embarrassed by a . . . substandard contract in any way, shape or form." Lerten, as he testified, accused the Union of "not negotiating in good faith." Union Representative Thomas asked, "is the Company closing the door to changes in economic positions." Lerten replied:

The Company was not closing the door on changes in economic positions; however, the Company was not proposing any increases in wages or benefits at this time.

Hunsberger "asked for the Company's final proposal." Lerten replied: "the Company has given the Union a proposal." According to Lerten, "Mr. Hunsberger stated

Hunsberger recalled that at this session "there wasn't too much discussed"; "there wasn't any movement by the Company in any area [and] I again accused them of bargaining in bad faith" Hunsberger asserted that

Mr. Lerten took the position that this contract that he proposed . . . was the best thing for them and he would not move from it in any way, shape or form.

Hunsberger acknowledged stating that "union shop was a must"

he didn't have the Company's proposal because he tore it up." Lerten recalled:

Mr. Thomas stated that the Union will contact the Company through Aiken's office.

The meeting adjourned about 11:45 a.m. According to Lerten, "since October 19, 1976, I have not been contacted by Mr. Aiken or the Union with reference to any further meeting."¹²

At this fifth session, according to Hunsberger, "there was little or no discussion of anything" and "the Company would not move from [its] contract." According to Hunsberger:

I again accused them of bad faith and they said, no, we're not bargaining in bad faith; I again asked the Company if this was their final proposal and they said, no it wasn't; and their only answer to me was we're here; as long as we're here, we're bargaining in good faith.¹³

As shown above, there are conflicts in testimony concerning who was present and what was said during the five bargaining sessions. I find and conclude, on the entire record, that the testimony of Company Negotiator Lerten, as detailed *supra*, is a reliable and trustworthy account of the bargaining sessions. His testimony is corroborated in part by the credible testimony of Lauver and Smithson. His testimony is corroborated in part by his longhand notes which were prepared at the bargaining sessions.¹⁴ His testimony is also substantiated in part by the acknowledgements of Union Representatives Hunsberger and Thomas. Moreover, the testimony of Hunsberger and Thomas was, at times, vague and unclear as to exactly what transpired at these sessions. Therefore, insofar as the testimony of Lerten, Lauver, and Smithson conflicts with the testimony of Hunsberger, Thomas, and Shughart, I credit the former as more reliable and complete on this record.

Discussion

General Counsel argues that Respondent Company violated Section 8(a)(5) and (1) of the National Labor Relations Act by negotiating with the Union with no intention of entering into any final or binding collective-bargaining agreement. In *N.L.R.B. v. General Electric Company*, 418 F.2d 736, 762 (C.A. 2, 1969), cert. denied 397 U.S. 965 (1970), the Court stated:

[T]he statute clearly contemplates that to the end of encouraging productive bargaining, the parties must

¹² Lauver recalled that "Mr. Hunsberger said they were unable to move on" the "union shop." Lauver also recalled Hunsberger saying that they were "unable to move on" the "economic items." And, Lauver recalled that "we ended when Mr. Thomas said that they would contact the Mediator, contact the Company through the Mediator."

Smithson recalled:

Mr. Hunsberger stated that the Union could not accept the contract without a union shop due to their bylaws.

¹³ On cross-examination, Hunsberger acknowledged that he "might have" opened this fifth session "by telling Mr. Aiken that the Union was

make "a serious attempt to resolve differences and reach a common ground," *N.L.R.B. v. Insurance Agents' Int'l Union*, 361 U.S. 477, 486, 487, 488 (1960), an effort inconsistent with a "predetermined resolve not to budge from an initial position." *N.L.R.B. v. Truitt Mfg. Co.*, 351 U.S. 149, 154-155 (1956) (Frankfurter J., concurring).

* * * * *

A pattern of conduct by which one party makes it virtually impossible for him to respond to the other — knowing that he is doing so deliberately — should be condemned by the same rationale that prohibits "going through the motions" with a "predetermined resolve not to budge from an initial position." See *N.L.R.B. v. Truitt Mfg. Co.*, *supra* (concurring opinion).

In *N.L.R.B. v. Herman Sausage Co., Inc.*, 275 F.2d 229, 231-232 (C.A. 5, 1960), the court stated:

The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained. It does not permit the Board, under the guise of finding of bad faith, to require the employer to contract in a way the Board might deem proper. Nor may the Board ". . . directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements . . ." for the Act does not "regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement."

* * * * *

On the other hand, while the employer is assured these valuable rights, 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. [Citations omitted.]

More recently, in *Borg-Warner Controls, a Division of Borg-Warner Corporation* 198 NLRB 726, 729-730 (1972), the Board, Chairman Miller dissenting, stated:

[T]his case does not present a simple case of whether the Respondent's actions constituted an outright refusal to bargain with the certified representative of the employees, but rather whether the record establishes that the Respondent engaged in a lengthy series of bargaining conferences with no intention of reaching agreement with the union.

unable to move on union security or the economic issues." Hunsberger then added: "not the economic" issue; "it had already been established, that we were willing to move at the third meeting."

Thomas, in his testimony, claimed that "Mr. Hunsberger said that it was the desires of the local to have a union shop and again [Lerten] said that [he] would not bargain on that." Thomas also claimed that he "personally suggested . . . an option of agency shop." Lerten assertedly refused.

¹⁴ I am persuaded here that Lerten's longhand notes of the bargaining sessions (Resp. Exhs. 3 through 7) are more reliable than the Union's typewritten statement and memorandum which was submitted to the Region during the investigation of this case (Resp. Exh. 2). The above exhibits were received into evidence without objection.

The issue is not, as Respondent suggests, that Respondent did not make enough concessions. Rather, the issue is whether Respondent's approach to bargaining demonstrated an unyielding rigidity during negotiations which made collective bargaining a futility. Respondent's unyielding rigidity is clearly established both in terms of Respondent's substantive proposals and its conduct relative to the procedural considerations of bargaining. Accordingly, the totality of Respondent's conduct during its bargaining compels the conclusion that Respondent only went through the elaborate motions of bargaining and adapted its tactics to its own ends with no sincere desire of reaching an agreement. [Footnote omitted.]

And, as the Board noted in *Borg-Warner*, "no case involving an allegation of surface bargaining presents an easy issue to decide"; "no two cases are alike"; and "none can be determinative precedent for another, as good faith bargaining 'can have meaning only in its application to the particular facts of a particular case' . . ." quoting from *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395, 410 (1952).

Applying these principles to the credited evidence recited above, I find and conclude that here, like in *Borg-Warner Controls*, *supra*, the Company's "approach to bargaining demonstrated an unyielding rigidity during negotiations which made collective bargaining a futility . . ." At the first session, the Union submitted its proposed written contract (G.C. Exh. 3). At the second session, the Company submitted its proposed written contract (G.C. Exh. 4). Each party pressed for its contract. A mediator was brought in at the request of the Union. The Union thereupon agreed to the Company's sick leave, military service, jury duty, and bereavement pay clauses. And, as Company Negotiator Lerten recalled, "[Union Representative] Hunsberger stated that the Union could go along with the Company's health and welfare and pension program for a first contract . . ." Hunsberger, however, urged the Company to "pay the full premium" on the health and welfare program. Lerten refused. According to Lerten, Hunsberger also stated: "on holidays, vacations and wages . . . the Union would accept some kind of compromise . . ." Lerten, as he testified, "replied, I see no point in this if the Union is going to insist upon a full union shop."

The Company made clear that, although willing to talk, it was in effect insisting upon its proposed contract. According to Lerten, the Company "was not proposing any increases in wages or benefits at this time . . ." In addition, the Company's proposed contract provided for, *inter alia*, a broad "rights of management" clause containing some 26 sections; a broad "discipline and discharge" clause listing some 51 "just cause" grounds for discharge; a "grievance procedure" and "arbitration" clause with the "result of [a] polygraph test . . . binding upon all parties . . ." and excluding from its coverage "any matter reserved solely to the rights of Management, or to the discretion of the Employer . . ." and a no-strike clause. The Company's proposed "rights of management" clause reserved to the Employer, *inter alia*, the "location of the business, including the establishment of new warehouses or departments . . . and the relocation or closing of warehouses,

departments [etc.] . . ." "the determination of the employees who are to be transferred because of lack of work. . ." "the placing of service, maintenance or distribution work with outside contractors or subcontractors"; "the determination of safety, health and property protection measures. . ." and "the right to terminate, merge or sell the business . . ." The Company's proposal on "wage rates" provided that "nothing herein shall preclude the paying of a higher wage or salary at the sole discretion of the Employer . . ." The Company's proposed "strikes, lockouts and boycotts" clause provided that "violation of any provision of this Section . . . by the Union shall be just cause for the Employer's immediate termination of the Agreement without notice . . ." and "violation of any provision of this Section . . . by any employee . . . shall be just cause for the immediate discharge of that employee regardless of whether or not that employee or any of the employees . . . are engaged in a strike which is found by the NLRB or any court . . . to be an 'unfair labor practice strike' . . ."

A close examination of the Company's proposed contract makes it "difficult to believe that the Company with a straight face and in good faith could have supposed that this proposal had the slightest chance of acceptance by a self-respecting union, or even that it might advance the negotiations by affording a basis of discussion; rather, it looks more like a stalling tactic by a party bent upon maintaining the pretense of bargaining." Cf. *N.L.R.B. v. Reed & Prince Manufacturing Company*, 205 F.2d 131, 139 (C.A. 1, 1953), cert. denied 346 U.S. 887. Indeed, as the Board found in *American Steel Building Company, Inc.*, 208 NLRB 900, 910 (1974):

[R]espondent made no significant concession toward granting the employees any job security or economic benefit. While respondent's representatives denied having verbalized a determination not to agree to any significant changes in existing terms and conditions of employment, the course of their bargaining eloquently and unmistakably conveyed that message. Under respondent's purported contract proposals, the employees would have secured no substantial benefit. On the contrary, in some major respects they would have been worse off with Respondent's proposed contract than without any contract. For example, while the employees would have renounced all right to strike, Respondent would have retained "the unrestricted right and privilege to suspend, transfer, cease, relocate or resume, at its discretion, the operation of its business, or any part thereof" and "the right to subcontract any work or job." Without a contract, the Union would have been entitled to negotiate on such matters and if necessary to strike. Without a contract, the Union could strike for higher wages, whereas Respondent offered no general wage increases and proposed a contractual agreement that individual increases could not be considered "discriminatory" . . .

Moreover, as stated by the Board in *San Isabel Electric Services, Inc.*, 225 NLRB 1073 (1976), the company's proposed contract in effect "would strip the Union of any effective method of representing its members on the issues

of safety and work rules . . .” further excluding it “from any participation in decisions affecting important conditions of employment . . . thus exposing [the company’s] bad faith.”

It is true, as Respondent argues, that the Union made clear throughout the bargaining sessions that “union shop” is “a must” and “there could be no contract unless the Union got a union shop.” It is also true, however, as found above, that the Union manifested some willingness to compromise after the mediator entered the negotiations. The Union accepted some proposals of the Company and expressed a willingness to “go along with the Company’s health and welfare and pension program for a first contract” if the Company would pay the “full premium for dependents.” The Union indicated that it “would accept some kind of compromise. . . .” on holidays, wages, and vacations. The Company, with minor exception, refused to budge from its initial written proposal. When pressed, Lerten asserted:

I see no point in this if the Union is going to insist on a full union shop.

In short, although the Union expressed some willingness to compromise, management blocked any effort to get it to move from its initial proposal.¹⁵

I am persuaded here that Respondent presented and thereafter rigidly adhered to a proposed contract which it understood would not be accepted. Efforts by the Union in this case to discuss and effect compromise were summarily blocked by the Company by citing the Union’s position on union shop and union security. I am persuaded here that Respondent’s conduct during negotiations makes it clear that it had no intention of reaching an agreement with the Union. As the Board noted in *Borg-Warner Controls, supra*, “we do not find, nor do we suggest, that Respondent’s refusal to make concessions with regard to economic matters violates the Act.” Nevertheless, I am persuaded here that an analysis of Respondent’s proposals and its conduct “showed a rigidity so intense as to warrant an inference that Respondent was seeking the avoidance rather than the obtaining of an agreement”; that “Respondent was actively pursuing a course of bargaining that was designed to compel the Union to reject its proposal; [and] that [Respondent] patently [engaged] in surface bargaining without a good-faith intention of reaching agreement” in violation of Section 8(a)(5) and (1) of the Act. (*Ibid.*)

CONCLUSIONS OF LAW

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

¹⁵ The Company argues that “the Union’s bad faith bargaining precluded any Company bad faith bargaining,” citing *Continental Nut Company*, 195 NLRB 841 (1972). That case is distinguishable. There, as the Administrative Law Judge found, “the Union’s refusal to bargain in good faith . . . removed the possibility of negotiation and precluded the existence of a situation in which [the Company’s] good faith could be tested” In the instant case, the Charging Party Union had not “removed the possibility of negotiation”; on the contrary, it had manifested a willingness to effect a compromise on significant issues.

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

3. The Union is the certified bargaining agent for the Company’s employees in the following appropriate unit:

All customer service employees, drivers, and warehouse employees employed at the 48 North Cameron Street, Harrisburg, Pennsylvania, facility, excluding all other employees, guards, office clericals, and supervisors as defined in the Act.

4. The Company violated Section 8(a)(5) and (1) of the Act by, from about June 25 to October 19, 1976, negotiating in bad faith with the Union with no intention of entering into any final or binding collective-bargaining agreement.

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

REMEDY

Having found that Respondent engaged in the unfair labor practices as set forth above, I recommend that it cease and desist from engaging in such conduct or like and related conduct, and take certain affirmative action designed to effectuate the policies of the Act. I also recommend that Respondent be ordered to bargain collectively and in good faith, upon request, with the Union as the exclusive bargaining representative of its employees in the unit set forth above; 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 selected bargaining agent for the period provided by law, I recommend that the initial year of certification begin on the date that 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).

ORDER¹⁶

Respondent American Parts System, Harrisburg, Pennsylvania, 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 or conditions of employment with Chauffeurs, Teamsters and Helpers Local Union No. 776 as the exclusive representative of its employees in the appropriate unit described below:

All customer service employees, drivers and warehouse employees employed at the 48 North Cameron Street,

¹⁶ 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.

Harrisburg, Pennsylvania facility, excluding all other employees, guards, office clericals 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 by Section 7 of the Act.

2. Take the following affirmative action which is 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 representative of its employees in said unit, and embody in a signed agreement any understanding reached.

(b) Post at its facility in Harrisburg, Pennsylvania, copies of the attached notice marked "Appendix."¹⁷ Copies of said notice, on forms provided by the Regional Director for Region 4, 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 customarily 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 4, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

¹⁷ In the event that the Board's 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."

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 Chauffeurs, Teamsters and Helpers Local Union No. 776, as the exclusive bargaining representative of our employees in the unit described below:

All customer service employees, drivers and warehouse employees employed at the 48 North Cameron Street, Harrisburg, Pennsylvania, facility excluding all other employees, guards, office clericals, and 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 their rights guaranteed in Section 7 of the 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 Union as the exclusive bargaining representative of our employees in the appropriate bargaining unit as stated above and embody any understanding reached in a signed agreement.

AMERICAN PARTS SYSTEM