that time and has been in continuous operation to the present. Although picketing is still being carried on, the last meeting between the Employer and the Intervenor relative to a settlement of the strike was in May 1949. There are now 117 employees at work in the foundry, of whom 18 are strikers who have returned to work.[6] On the entire record, the Board finds that the strikers' positions have been permanently filled by replacements hired since May 18, 1949. As the instant situation involves an economic strike none of those individuals presently on strike is entitled to reinstatement and we accordingly find they are not eligible to vote in the election hereinafter directed.[7]

[Text of Direction of Election omitted from publication in this volume.]

[6] Three other strikers returned to work and later quit their employment. Of the remainder, 17 notified the Employer they wished to end their employment. 1 striker died, and 39 strikers, according to the Intervenor, now occupy temporary positions elsewhere pending the termination of the dispute.

[7] See *Midwest Screw Products Company,* 86 NLRB 643 and cases cited therein.

WESTERN ELECTRIC COMPANY, INCORPORATED *and* COMMUNICATION WORKERS OF AMERICA, CIO, PETITIONER. *Case No. 5–RC 790. April 27, 1951.*

Decision and Order

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before David C. Sachs, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The request for oral argument is denied as we believe that the issues, the positions of the parties, and the arguments are adequately reflected in the record.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organizations involved claim to represent certain employees of the Employer.[1]

3. No question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act, for the following reasons:

The Employer and Point Breeze Hourly Employees Association, Inc., herein called the Intervenor, allege as a bar to this proceeding their contract,[2] which provides in pertinent part as follows:

[1] International Brotherhood of Electrical Workers, AFL, herein called IBEW, intervened specially at the hearing for the purpose of having its name placed on the ballot in the event an election were directed.

[2] The Intervenor was certified by the Board on September 23, 1949, as the exclusive bargaining representative of the employees here in question.

> This Agreement shall become effective July 13, 1950, and when so effective shall continue in full force and effect until midnight *July 12, 1952.* Provided, however, that starting and job rates as provided in Paragraph 1 of ARTICLE 15, WAGES, and BASE RATES, as defined in ARTICLE 3, DEFINITION OF TERMS, or both, *may be opened once* by each party during said period subject to the following conditions and limitations: the party desiring such opening shall give written notice of such desire to the other party *on or after May 13, 1951* and negotiations shall be conducted by the parties during the sixty (60) day period immediately following the receipt of such notice; the opening shall be for the purpose of considering upward or downward adjustments of such starting and job rates and such BASE RATES, or both; *the adjustments, if any, agreed to as the result of such opening, shall not be effective earlier than July 13, 1951* [emphasis added].

Two supplemental agreements were reached by the parties in advance of the wage reopening date provided in the contract. (1) On September 19, 1950, a supplemental agreement was executed defining the general employment rights of employees on military leave of absence. (2) On September 25, 1950, the Intervenor notified the Employer by letter of its desire to reopen the contract for an immediate adjustment in wage rates, for the reasons, e. g., the rapid and continuing rise in the cost of living; the fact that many other companies in the area had granted cost of living wage increases; and the necessity that a wage adjustment be effected before the imposition of an impending wage freeze by the Government. On November 10, 1950, the Employer and the Intervenor conferred for the purpose of permitting the Intervenor to present its wage demands. On December 1, 1950, the parties met again and successfully negotiated a further supplemental agreement which provided for (a) wage increases, (b) the elimination from the terms of the original contract of certain exceptions by the Intervenor to its no-strike pledge, and (c) no further reopening of the contract. On December 3, 1950, the agreement was duly ratified by the Intervenor's membership. The petition herein was mailed to the Board on Saturday, December 2, 1950, and received and docketed by the Board on December 4, 1950.[3]

The Petitioner contends, in substance, that the contract cannot operate as a bar to a present election because (1) it was reopened by the parties before the May 13, 1951, reopening date provided in the contract, and (2) the modifications agreed upon substantially exceeded the scope of the wage reopening provision in the contract.

[3] The Petitioner previously had made a claim upon the Employer on September 8, 1950, and filed a petition with the Board on September 13, 1950. The petition was dismissed by the Regional Director on October 23, 1950, on the ground that the Employer's contract with the Intervenor constituted a bar. No appeal was taken, and no further claim was made by the Petitioner before filing the instant petition.

It has been the Board's practice to hold that an exclusive bargaining contract was "opened up" and thus rendered inoperative as a bar to a pending petition which would otherwise be premature, if the contracting parties (a) undertook modification of any of the contract provisions in the absence of a reopening clause,[4] or (b) negotiated or modified contract provisions beyond the scope of a reopening clause in the contract.[5] Until recently, the Board held, to the same general effect, that a contract was immediately opened up to a petition when the contracting parties modified the contract by prematurely extending its *terminal date*.[6] But in *Republic Steel Corporation*,[7] the Board revised its premature extension doctrine expressly "in the interest of industrial stability," holding

> The premature extension of a collective bargaining agreement, while it may not lengthen the period of contract bar, should not in and of itself render the extended agreement ineffectual as a bar during the period that the original contract would have remained in effect had it not been so extended (footnote omitted).

In performing the Board's continuing function of effectuating the broad purposes of the Act, we believe it necessary at this time further to adjust the Board's contract bar rules by extending the principle enunciated in *Republic Steel* to cases where the parties voluntarily undertake modification of *any* of the provisions of their collective bargaining agreement during its term. Stated more specifically, we hold that whether or not an exclusive bargaining contract contains a provision for modification, and regardless of the scope of such a modification provision if provided for in the contract, the parties may renegotiate or modify any of the provisions of the contract during its term, if done by mutual assent, without "opening up" the contract to an otherwise prematurely filed petition. As in *Republic Steel*, rival union petitions will of course continue to be timely if appropriately filed in relation to the original contract term.

A number of factors impel this determination. Foremost among these is the need for increased stability in industrial relations. By this holding, such stability will be achieved in relatively large measure, at a minimum sacrifice of the sometimes conflicting statutory policy of protecting employees' freedom to change their representatives. As time has gone on, employees have become increasingly familiar with their collective bargaining rights under the Act and have acquired a

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[4] E g, *John Oster Manufacturing Company*, 86 NLRB 113; *Boston Consolidated Gas Company*, 79 NLRB 337, *Atlas Felt Products*, 68 NLRB 1; *Great Bear Logging Company*, 59 NLRB 701; *Chapman Valve Manufacturing Company*, 40 NLRB 800.

[5] E. g., *Gay Games, Inc*, 88 NLRB 250; *Shopwell Foods, Inc, et al.*, 87 NLRB 1112; *United States Vanadium Corporation*, 68 NLRB 389; *Olin Industries, Inc.*, 67 NLRB 1043. These decisions are hereby *overruled*.

[6] See e. g, *American Can Company*, 82 NLRB 257; *Don Juan, Inc.*, 71 NLRB 734.

[7] 84 NLRB 483.

better knowledge of the unions available and chosen to represent them.[8] This being so, an apposite modification of Board contract bar rules to encourage continuity will not operate seriously to prejudice any party concerned. Rival union petitioners normally expect, and are expected, to file for change of bargaining representative only at the appropriate time before the contract's automatic renewal date or terminal date, as the case may require. They are not entitled to governmental encouragement of a practice of filing at a time entirely dependent upon the fortuity of the contracting parties' mutual undertaking to modify their contract, while it is still current, although without the benefit or beyond the scope of a modification clause in the contract. Employees will not be prejudiced, as they stand to gain in the form of benefits becoming immediately available as a result of modified contract provisions freely negotiated, in the light of changed conditions, by their employer and the incumbent union.[9]

Technically, of course, a contract may be altered in major and minor respects *by mutual assent* of the contracting parties and not, by reason of such action, suffer any abatement in its fixed term.[10] Under previous Board decisions contracting parties have effected extensive modifications in their bargaining agreements during their term without thereby rendering the contracts vulnerable to a rival union's petition, simply because of their initial insertion in the contract of an appropriate modification clause.[11] Under this decision, the contracting parties, by their mutual agreement at any time *during* the original contract term, may accomplish the same result, without our requiring them specifically to include an equally broad modification clause in the contract itself. Substantial stability in bargaining relations is thereby encouraged, by barring third parties from taking untimely advantage of a change thought desirable by those already bound to one another.

This is a representation case. Therefore this holding imposes upon neither party to a contract any additional *obligation* to negotiate or to agree to any modification in existing contract terms. In that other respect, contracts which do have a modification clause continue clearly distinguishable from those which do not. Section 8 (d) of the amended Act, relative to certain collective bargaining duties of parties to a contract, governs. It provides that:

> . . . the duties so imposed shall not be construed as *requiring* either party to discuss or agree to any modification of the terms

[8] See *Reed Roller Bit Company*, 72 NLRB 927.

[9] See e. g., *S & W Fine Foods, Inc.*, 74 NLRB 1316.

[10] See e. g., *N. L. R. B.* v. *Newark Morning Ledger Co.*, 120 F. 2d 262, 267 (C. A. 3), cert. den. 314 U. S. 693; *Rudin* v. *King, Richardson Co.*, 37 F. 2d 637; *Nourse* v. *United States*, 25 Ct. Cl. 7; *Restatement of the Law of Contracts*, Sec. 437; 17 C. J. S. Contracts, 373.

[11] *Green Bay Drop Forge Company*, 57 NLRB 1417, *S & W Fine Foods, Inc.*, *supra*.

and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract [emphasis added].

We conclude, therefore, that the Employer and the Intervenor, by modifying, their contract in the manner described above, did not "open up" the contract in such a way as to render it vulnerable to a pending claim or petition—whether or not, as contended, they acted in advance of the contract reopening date or within the scope of the wage modification provision. Moreover, the petition herein was untimely filed on December 4, 1950, after the execution of the last supplemental agreement.[12] Accordingly, we shall grant the Intervenor's motion to dismiss the petition, on the ground that the contract constitutes a bar to a present determination of representatives.

Order

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

MEMBER REYNOLDS took no part in the consideration of the above Decision and Order.

[12] The Petitioner's representation claim of September 8, 1950, antedating the supplemental agreements in question—cannot be considered validly related to the present petition because, *inter alia*, it was merged in the petition of September 15, 1950, dismissed by the Regional Director, and no appeal was taken. Cf. *General Electric X-Ray Corporation*, 67 NLRB 997.

ONONDAGA POTTERY COMPANY *and* FEDERATION OF GLASS, CERAMIC & SILICA SAND WORKERS OF AMERICA, CIO, PETITIONER. *Case No. 3–RC–559. April 27, 1951*

Decision and Order Setting Aside Election

On November 1, 1950, pursuant to a stipulation for certification upon consent election, an election by secret ballot was conducted under the direction and supervision of the Regional Director for the Third Region among the employees in the appropriate unit. Upon completion of the election a tally of ballots was issued and duly served by the Regional Director upon the parties concerned. The tally reveals that of approximately 1,731 eligible voters, 1,575 cast valid ballots, of which 474 were for the Petitioner and 1,101 were against. The tally also showed that there were 8 void ballots and 9 ballots which were challenged.

On November 2, 1950, the Petitioner filed objections to the election. On February 16, 1951, the Regional Director issued a report on ob-