PHELPS DODGE COPPER PRODUCTS CORPORATION *and* WESTERN MECHANICS LOCAL 700, INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS. *Case No. 21–CA–1058. October 19, 1951*

Decision and Order

On July 13, 1951, Trial Examiner Martin S. Bennett issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, as amended, and recommending that the amended complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel filed exceptions, supported by a brief, only to that portion of the Immediate Report recommending dismissal of the allegation that the Respondent refused to bargain with respect to "a provision requiring membership in Local 700 as a condition of employment."[1] The Respondent also filed a brief in support of the Intermediate Report.

The Board[2] has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, except as hereinafter stated.

In finding, in agreement with the Trial Examiner, that the Respondent did not refuse to bargain collectively within the meaning of Section 8 (a) (5) of the Act with respect to a demand for a union shop arrangement, we rely solely on the express written waiver provisions in the existing contract which operated to release the Respondent from the obligation to bargain as to union-security demands during the term of the contract. We find it unnecessary to pass upon the additional ground, also relied on by the Trial Examiner, that the parties discussed the Union's demand for a union-shop clause before executing the contract of April 2, 1950, without incorporating it therein.[3]

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor

[1] The Trial Examiner also found that the evidence did not sustain the remaining allegation that the Respondent refused to bargain by dealing directly with the employees and thus bypassing the Union. As no exception has been filed to this finding, we adopt it.

[2] Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Herzog and Members Reynolds and Styles].

[3] *Member Reynolds* concurs in the result reached herein, but does so for the reasons set forth in his dissenting opinion in *The Jacobs Manufacturing Co.*, 94 NLRB 1214.

Relations Board hereby orders that the amended complaint herein against the Respondent, Phelps Dodge Copper Products Corporation, be, and it hereby is, dismissed.

Intermediate Report and Recommended Order

STATEMENT OF THE CASE

The General Counsel of the National Labor Relations Board issued a complaint, dated May 3 and amended May 23, 1951, based upon a charge duly filed on March 7, 1951, by Western Mechanics Local 700, International Union of Mine, Mill and Smelter Workers, herein called the Union, against Phelps Dodge Copper Products Corporation, Los Angeles, California, herein called Respondent. The amended complaint alleged that Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8 (a) (1) and (5) of the National Labor Relations Act, as amended 61 Stat. 136, herein called the Act. Copies of the charge, complaint, amended complaint, and notice of hearing thereon were duly served upon Respondent and the Union.

Specifically, the amended complaint alleged that Respondent on or about December 1, 1950, and thereafter (1) had refused to bargain with the Union relative to a provision requiring membership therein as a condition of employment; and (2) had bypassed the Union and negotiated directly with employees relative to a wage increase. In its amended answer, Respondent denied the commission of any unfair labor practices and pleaded affirmatively that the Union had waived the right to bargain with respect to a union-security provision. Respondent also filed a motion for a bill of particulars; this was referred to the undersigned for ruling, prior to the hearing, and was granted in part and denied in part.

Pursuant to notice, a hearing was held at Los Angeles, California, on June 12, 1951, before the undersigned Trial Examiner, Martin S. Bennett. All parties were represented by counsel who participated in the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. During the hearing, the undersigned denied a motion by Respondent to (1) dismiss the complaint insofar as it alleged unfair labor practices prior to the date of the charge and accompanying documents;[1] and (2) dismiss the allegations of bypassing the union representatives on the ground that such alleged conduct was not specified in the charge. *Kansas Milling Co.* v. *N. L. R. B.*, 185 F. 2d 413 (C A. 10); *U. S. Gypsum Co.*, 94 NLRB 112; *McKesson & Robbins, Inc.*, 92 NLRB 1432; and *American Shuffleboard Co.*, 92 NLRB 1272. Respondent also moved to dismiss the complaint on the ground that the Union was not in compliance with the provisions of Section 9 (f), (g), and (h) of the Act. The General Counsel announced he had administratively determined that the Union had effected such compliance and Respondent offered no evidence of failure to comply or of defects in said compliance. *N. L. R. B.* v. *Red Rock Co.*, 187 F. 2d 76 (C. A. 5); cf. *Sunbeam Corp.*, 93 NLRB 1205.

The undersigned also denied a motion to dismiss the complaint on the ground that the charge had been served by the Regional Director for the Twenty-first Region rather than by the charging union. Section 10 (b) of the Act does not provide that the charge must be served solely by the charging party. Moreover, although Section 102.14 of the Rules and Regulations of the Board places the responsibility for service on the charging party, it also envisages that service

[1] The charge was filed on March 7, 1951, and bore an attachment consisting of two letters dated February 12 and 14, 1951, respectively.

may be effected by the Regional Director. This the undersigned finds to be adequate, since the primary purpose of service of the charge is to put a respondent on notice that it is being charged with the commission of unfair labor practices in the preceding 6-month period, and Respondent herein concedes that it was so put on notice. The undersigned fails to see how Respondent was prejudiced, under the circumstances, by the use of one medium rather than the other.

At the conclusion of the hearing, the parties were afforded an opportunity to argue orally before the undersigned and Respondent presented its argument. The parties were afforded at the same time an opportunity to submit briefs and/or proposed findings of fact and conclusions of law. Briefs have been received from all parties as well as proposed findings and conclusions from Respondent.[2]

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Phelps Dodge Copper Products Corporation is a Delaware corporation whose principal offices are in New York City. It maintains a plant at Los Angeles, California, which is the sole plant involved in this proceeding, where it is engaged in the manufacture and sale of copper tubing. In the course of its business, Respondent purchases and causes to be shipped to its Los Angeles plant large quantities of raw materials. It annually produces and ships from its Los Angeles plant to States of the United States other than the State of California manufactured products valued in excess of one million dollars. The undersigned finds that Respondent is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Western Mechanics Local 700, International Union of Mine, Mill and Smelter Workers is a labor organization admitting to membership employees of Respondent.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The alleged refusal to bargain*

1. The issues

The complaint alleges that Respondent has refused to bargain with its employees in two respects, (1) that Respondent has refused to discuss a union-security agreement, which it admits; and (2) that Respondent by-passed the Union and negotiated directly with the employees relative to a wage increase. To the first, Respondent replies that the Union had expressly waived the right to bargain on all bargainable issues for the life of the contract then in effect, and furthermore that the request of the Union to discuss this topic constituted a request for a modification of the contract and was therefore violative of Section 8 (d) of the Act. As will appear, this issue is resolved in favor of Respondent based upon its defense of a waiver and it consequently becomes unnecessary to

[2] Proposed findings 1 through 20 are accepted save for that designated 8 on which, in view of the findings hereinafter, it is unnecessary to pass. Proposed conclusions 2 through 4 are accepted; proposed conclusion 1 is not passed upon for the same reason as proposed finding 8. Conclusions 5 and 6 are rejected for they have already been passed upon in the foregoing rulings.

take up the defense predicated upon Section 8 (d). To the second allegation, Respondent replies that it was within its rights in meeting with certain employees and informing them of its position relative to the wage increase.

2. Majority representation in an appropriate unit; union-security authorization

The parties agree and the undersigned finds that all hourly rated production and maintenance employees of Respondent's Los Angeles tube mill, including mill or production clerks and inspectors, but excluding foremen, assistant foremen, supervisors, technical and engineering employees, timekeepers, watchmen, guards, and office and clerical employees other than mill or production clerks, constitute a unit appropriate for the purposes of collective bargaining. Since on or about March 14, 1946, Respondent has recognized and does currently recognize the Union as the representative of the employees in the above-described unit.

On or about February 2, 1951, after the holding of a union-security election, the Board certified that a majority of the employees of Respondent had voted to authorize the Union to make an agreement with Respondent requiring membership in the Union as a condition of employment, in conformity with the provisions of Section 8 (a) (3) of the Act.

3. Sequence of events

a. *Introduction*

As stated, Respondent and the Union have enjoyed contractual relations for some years. Respondent originally entered into a contract in May 1945 with another local of International Union of Mine, Mill and Smelter Workers; however, Local 700 replaced the other local and was party to a contract entered into in March 1946. This was followed by a contract in September 1947 which, by a later amendment, suspended, pending compliance with the provisions of the Act, the application of a maintenance-of-membership clause found in the 1945 contract and incorporated in the 1946 contract. Another contract followed in June 1948 with an expiration date of July 1950. However, on April 21, 1950, and again on December 8, 1950, the parties entered into the agreements which are pertinent to this proceeding.

b. *Negotiations in March 1950; the April contract*

The 1948 contract was not permitted to run until its scheduled expiration date in July of 1950; in March of that year, the Union presented Respondent with a list of 15 proposals for a new contract and on April 21, the parties entered into a new contract. The sole testimony concerning these negotiations came from Otto Klopsch, works manager for Respondent and also in charge of labor relations. He credibly testified that the union representatives presented him with a list of 15 demands on or about March 10. This list was introduced in evidence and item 14 thereof states:

> We request subject to the laws applied in the National Labor Relations Act, that the Company will agree to a Union Shop.[3]

[3] The General Counsel in effect attacked the authenticity of this document, pointing out that items 13 through 15 were typed, as is apparent on the face of the document, with a different typewriter than the first 12 items. His further contention that the last 3 items were added at a later date is unsupported, for no evidence was adduced concerning the preparation of the document by the Union and Klopsch's testimony that the document bore the 15 items when initially presented to him stands uncontroverted and is credited. Significant too is the fact that item 15 is a request for a 5-cent per hour wage increase, that there was discussion of this request at meetings, and that an increase in precisely that amount was later granted in the April contract.

As was their custom, the parties at their initial meeting on March 10 went over each of the 15 demands and Klopsch announced that he would consider them between then and the next meeting. He specifically testified herein that item 14 was raised and discussed on March 10, and that at a following meeting on March 17 he rejected the request. Approximately five meetings in all were held and shortly before April 20 the final word on the acceptance of contract terms was apparently left in the hands of the Union, for on that date it notified Klopsch that it was ready to sign the agreement. Klopsch replied that he would draw up his understanding of what they had agreed upon and, on April 21, 1950, the parties met and signed a contract with an expiration date of November 1, 1951. The several articles purported to make certain changes in the 1947 and 1948 agreements; the holiday arrangement was adjusted; Article 4 agreed to increase wages by 5 cents an hour; and Article 5, the last article in the agreement, appeared in a separate paragraph directly over the signatures of the parties thereto and stated:

> 5. The parties hereto specifically waive any rights which either may have to bargain with the other during the life of the Agreement between the parties, as heretofore and hereby modified and extended, *on any matter pertaining to rates of pay, wages, hours, or other terms and conditions of employment whether or not covered by such Agreement.* [Emphasis added.]

Klopsch was unable to recall whether the above item was discussed at this meeting. To be discussed hereinafter is Respondent's claim that this clause constituted an absolute waiver by the Union, under the circumstances, of any right to bargain on union security for the life of the contract.

c. *Negotiations in September and October 1950; the December 8 contract*

Although the April 1950 agreement was not due to expire until November 1, 1951, it was followed by a later agreement in December 1950, under the circumstances set forth below. As will be apparent, there were actually two parallel series of negotiations between the parties during the period prior to the signing of the agreement, one pertaining to union security and the other to a wage increase.

On September 1, 1950, the Union wrote to Respondent and announced that it intended to file a petition with the Board for a union security election, pointing out that in excess of 90 percent of the employees favored the negotiation of union-security provisions. The letter also referred to the maintenance-of-membership clause incorporated by reference from prior agreements but not operative since the effective date of the Act, and stated that the Union preferred to negotiate a union-shop provision in its place. It then asked (1) if Respondent was agreeable to the holding of a union-security election; (2) whether Respondent agreed with the Union that a majority vote in favor of a union shop would reinstate the maintenance-of-membership provisions; and (3) whether in the event of a favorable vote, Respondent would negotiate a union-security agreement in place of the maintenance-of-membership clause contained in the existing agreement.

On September 23, the Union again wrote to Respondent, alluded to the existing economic situation (apparently the rising cost of living), and asked Respondent to meet and discuss "the scale of wages to be paid under our current agreement." On October 9, Respondent replied to the Union's earlier communication of September 1 relative to union security and stated that it was not agreeable to the holding of a union-security election. The letter further pointed out, as follows:

It will make no difference to us whether or not you obtain any such election because *our existing contract is not subject to further negotiations on any matter during its life and the Company will not reopen the contract to negotiate any type of union shop* provision. [Emphasis added.]

The maintenance of membership clause that you referred to is inoperative and must remain so under existing law.[4]

Respondent again wrote to the Union on October 11 in reply to the Union's letter of September 23 relative to a wage increase; on this occasion Works Manager Klopsch again pointed out that the existing agreement of April 1950 did not provide for reopening on any issue prior to its scheduled expiration on November 1, 1951. He stated that Respondent was therefore unwilling to meet and discuss wage scales, but that it was willing to meet and hear the Union's argument "in favor of trying to convince us that we should voluntarily consider a demand from you for a general across-the-board extra cents per hour wage increase." This offer was accepted by the Union.

Several meetings were held between the parties in October at one of which Respondent offered to grant a 10-cent per hour *voluntary* wage increase *on the condition that* the existing contract be extended for 1 year to November 1952. According to Executive Secretary Marcotti of the Union, he, at a meeting held on or about October 18, or 19, protested the extension and limitation upon bargaining because the union committee wanted to bargain on other issues during the life of the contract; he specifically named group insurance and hospitalization as one of the matters he wanted to take up at a later date with Respondent. This was in accord with the testimony of Klopsch who further testified, although his testimony is not clear on the latter point, that the waiver clause was also discussed *on December 8*. The union negotiating committee then rejected Respondent's offer.[5] On October 25, Marcotti wrote to Respondent and confirmed the rejection by the Union of Respondent's proposal of a 10-cent per hour increase coupled with a 1-year contract extension. The Union proceeded to file a petition for a UA election and on November 13 Respondent was notified of this by a letter from a Board field examiner. Respondent on November 16 replied by a letter to the field examiner stating that it was not agreeable to a union shop "at any time."

Shortly before December 8, the Union contacted Respondent and stated that it had changed its mind and was prepared to accept Respondent's offer. The parties met on December 8 and inspected a proposed contract which had been prepared in the interim by Klopsch. This document contained four articles which the parties proceeded to read. Clause 1 was a substitution for Article 1 of the April 1950 agreement and provided for the extension of that agreement to November 1, 1952. Clause 2 in part set up a procedure for modification of the agreement not more than 65 days prior to November 1, 1952. Clauses 3 and 4 provided as follows:

3. The Company agrees to pay an increase of ten (10c) cents as an extra (sic) for each hour worked to each hourly rated employee within the bargaining unit at the Los Angeles Tube Division, *thus settling all negotiable matters for the life of the existing Agreement as hereby modified and extended except as provided below in the following paragraph*, such in-

[4] For the purposes of this proceeding it is unnecessary to decide whether the inoperative maintenance-of-membership clause provided for a greater degree of union security than that permitted by the Act.

[5] The allegation of the complaint relating to the bypassing of the Union refers to a meeting by Klopsch with certain employees during this period and is treated in a later section of this Report.

crease to go into effect upon the date of the signing and executing by the parties of this Agreement.

4. *The parties hereto specifically waive any rights which either may have to bargain with the other during the life of the existing Agreement between the parties,* as heretofore and hereby modified and extended, on any matter pertaining to rates of pay, wages, hours or other terms and conditions of employment, *whether or not covered by such Agreement, except that on or after the first day of November 1951, and prior to the first day of November 1952, the Union shall have the right only once to open negotiations and then only with respect to a demand for a general across-the-board extra cents per hour wage increase.* [Emphasis added.]

The four articles in the contract proposed by Respondent were read and the contract signed on December 8. There was no discussion of union security or of the union-security election sought by the Union. As is apparent, clauses 3 and 4 incorporate and amplify the waiver language of the April 1950 agreement. It may also be noted that the Union did not dispute that this wage increase was a purely voluntary act on the part of Respondent.

Respondent again communicated with the Board Field Examiner on December 26, after being contacted by him on November 25, in relation to the holding of the union-security election. Klopsch referred to his letter of November 16 and again stated that he was not agreeable to a "Union Shop at any time" and hence would not consent to sign the election agreement. Klopsch uncontrovertedly testified that he spoke by telephone to the Field Examiner at or about the times he sent the November 16 and December 26 letter and pointed out that Respondent's position, as expressed in the letters, was predicated on its view that the contracts were not open for bargaining until a much later date and that as a result it was not interested in an election which would have no weight. The Regional Director proceeded with the election, which the Union won; it was duly certified by the Regional Director on February 2, 1951, as eligible to enter into a union-security agreement. On February 12 the Union wrote to Klopsch and asked that he meet with it for the purpose of negotiating a union-shop clause. Klopsch replied as follows on February 14:

> Answering your letter of February 12, 1951 we have heretofore advised you that our Company is not agreeable to a Union Shop at any time and that it would make no difference to us whether or not you went through with a Union Shop election.
>
> You are well aware that our existing collective bargaining agreement is not subject to any negotiations, on any matter, during its life (except with respect to a demand on or after the first day of November 1951 and then only for a general across-the-board extra cents per hour wage increase), and we again repeat what we have told you before that our Company will not reopen the contract to negotiate any type of Union Shop provision.
>
> Therefore, no useful purpose could be served by any meeting with your Union Shop Committee as you request in your letter of February 12, 1951.

Thereafter the charge on which this proceeding was predicated was filed on March 7, 1951.

4. Concluding findings concerning the alleged refusal to bargain on union security

The foregoing sequence of events establishes that the Union, prior to entering into the April 1950 agreement, presented 15 demands to Respondent, including 1 for a union shop; that this request was discussed on March 10; and

that it was rejected by Respondent on March 17. The ultimate agreement on April 21 contained no provisions for union security and, in addition, clearly and specifically on its face waived any and all rights to bargain during its term "on any matter pertaining to rates of pay, wages, hours, or other terms and conditions of employment whether or not covered" by the Agreement.

The topic of a union shop remained dormant until September 1, 1950, when it was again raised by the Union. Respondent again manifested its opposition to the union shop, pointing out on October 9, as it did thereafter, that the exising contract was not subject to further negotiations *on any matter* during its term and that the term would not expire until November 1951. The parties did meet thereafter, pursuant to the Union's request for a voluntary wage increase, and Respondent in the December 1950 contract voluntarily granted this increase. The new contract term was until November 1952; the contract stated that all negotiable matters were settled for the life of the agreement, and that any rights to bargain with each other for the life of the agreement were specifically waived "on any matter pertaining to rates of pay, wages, hours, or other terms and conditions of employment whether or not covered by such Agreement," save for the right to negotiate for a wage increase on or after November 1951.

Thereafter, the Regional Director proceeded with the processing of the Union's petition for a union-authorization election, and it is true that on two occasions, in letters to a Board field examiner on November 16 and December 26, respectively, Respondent made reference to its opposition "to a union shop at any time"; it also made a similar statement on February 14 in a letter sent to the Union in reply to a further demand for the union shop made on February 12. However, the evidence is uncontroverted that Klopsch in telephone communications with the field examiner on or about the dates of the two letters, explained that Respondent's opposition to union security was predicated on the fact that the respective contracts were not open for bargaining until much later dates, as was the fact. Furthermore, in a later paragraph of the February 14 letter, Respondent emphasized the same point to the Union, stating that the December 1950 contract was not subject to negotiations until November 1952, its termination date, on any matter, save a wage increase and that was negotiable only in November 1951. Respondent reiterated its opposition to reopening the contract for the purpose of negotiating a union-shop provision. The undersigned accordingly finds that Respondent's position was simply that union security was not a bargainable issue for the life of either contract. This is particularly so because the two requests of the Union in September of 1950 and again in February of 1951 were manifestly for union-security provisions to be made effective *during the terms expiring in November 1951 and November 1952, respectively,* and were not directed to union security for a future period *after* the expiration of the contracts and their waiver clauses.[6]

That union security is normally a subject for collective bargaining is too well established to require discussion. *N. L. R. B.* v. *Andrew Jergens Co.*, 175 F. 2d 130 (C. A. 9) cert. denied 338 U. S. 827; *Larrance Tank Corp.*, 94 NLRB 352; *U. S. Gypsum Co.*, 94 NLRB 112; and *Hudson Motor Car Co.*, 82 NLRB 402. It is the position of Respondent, however, that union security was bargained away in April 1950, and further that the express provisions

[6] As is apparent, no claim of unfair labor practice has been made with respect to the negotiations in March and April 1950 which culminated in the April 1950 contract. It may be noted, however, that not only had there not been a union-security election, but, in addition, that the topic was in fact raised by the Union, considered by Respondent, and rejected by the latter at the time.

of the April 1950 and December 1950 contracts constituted waivers on the part of the Union of the right to bargain on all bargainable issues during the contract terms, irrespective of whether they were treated in the respective contracts. In view of the treatment of the union-security issue in the negotiations leading up to the April contract, the undersigned finds that it was bargained away for the duration of that contract. *The Jacobs Manufacturing Company*, 94 NLRB 1214. A similar view would apply to the December contract in view of the issue having been raised shortly prior thereto. However, as will appear, the waiver argument treated hereinafter is dispositive of the issue.

Turning to the waiver defense, the Board has recognized that the parties to a collective bargaining agreement may waive for the contract term their rights to bargain on an issue, the sole limitation being that there must be "a clear and unmistakable showing of a waiver of such right." *Standard Oil Co.*, 92 NLRB 227; *Tidewater Oil Co.*, 85 NLRB 1096. In the very recent decision of *The Jacobs Manufacturing Company, supra*, the Board has reaffirmed this principle, stating:

> And if the parties originally desire to avoid later discussion with respect to matters not specifically covered in the terms of an executed contract, they need only so specify in the terms of the contract itself.

Significantly, the Board cites in this decision, as an example of an effective waiver, a paragraph in a contract between General Motors Corporation and United Automobile Workers of America, CIO, which is substantially similar to the waiver clauses found herein. A similar reference to that waiver is found in *Regulation of Collective Bargaining by the National Labor Relations Board—Another View*, Findling and Colby, 51 Columbia Law Review 170, February 1951.

It is noteworthy that the Board has recognized waiver clauses where the language is less clear and unmistakable than in the present case. In *General Controls Co.*, 88 NLRB 1341, a contract provision, following after bargaining on the topic, gave the employer the right to determine in the first instance an employee's right to a periodic merit increase; this was held to constitute a waiver by the union of the duty on the part of the employer to bargain with respect to individual merit wage increases during the life of the contract. And, of course, the Jacobs case, in which, as in the General Controls decision, there was no express waiver language, has reaffirmed this view.

In the instant case, not only was union security raised, discussed, and rejected in the meetings prior to the April 1950 contract, but the contract contained a clear and unmistakable waiver clause. This was inserted in even more detail in the December 1950 contract which modified the earlier agreement; there is therefore no merit to the contention that the foregoing decisions are not controlling herein.

Moreover, any lingering doubt is removed by the fact that this waiver language appeared in separate paragraphs at the end of each of these relatively short contracts. The record shows that in discussions leading up to the December 1950 contract the union representatives expressed perturbation over this waiver language and, in fact, had originally refused to sign because they realized that it would preclude them from raising during the contract term various desired changes including one with respect to group insurance and hospitalization. In addition, Marcotti admitted that there was no obligation to discuss wages at the time.

While it appears that under this view of the case the action of the Regional Director in conducting a union-security election was nugatory as bearing upon a union security clause which might be effective prior to the expiration of the

contract in November 1952, on the other hand contracts are frequently opened up or terminated for various reasons, as has in fact been done by the parties herein on various occasions. However, it is not within the province of the undersigned to pass in this proceeding upon the effect of such an election. Suffice it to say that the certification cannot serve to override the clear and unmistakable waiver language found in both contracts. This language is controlling not only with respect to the period prior to the union authorization election and the certification of the Union on February 2, 1951, but in the following period as well. Cf. *M. T. Grant Co.*, 94 NLRB 1133.

The waivers were broad in scope, expressly applied to subjects *not* covered by the contracts, as well as to those covered, and were limited to a definite, reasonable, and logical term; namely, the life of the respective contracts. They concisely and clearly, contrary to the contention of the General Counsel, set forth their intent. They were read by the parties prior to signing and their effect, at least in December 1950, was outwardly acknowledged by the Union. In essence, the contracts stabilized, as Respondent contends, all conditions of employment for their respective durations. *Timken Roller Bearing Co.* v. *N. L. R. B.*, 161 F. 2d 949 (C. A. 6).

The General Counsel in effect claims that the parties had the duty to confer in order to establish whether, under the contracts, union security was a topic foreclosed from collective bargaining. On the other hand, Respondent took the position that the subject was foreclosed and chose to run the risk of an adverse Board order. The undersigned believes and finds that inasmuch as this topic was effectively foreclosed from collective bargaining, Respondent was under no duty to discuss the pros and cons thereof in order to ascertain whether or not it was a bargainable topic; moreover, Respondent did explain its position to the Union concerning this subject. Cf. the unanimous decision by the Board with respect to grievances in the *Jacobs* decision, *supra*. In view of the foregoing, the undersigned will recommend that this allegation of the complaint be dismissed.[7]

5. The alleged bypassing of the Union

The complaint alleges that Respondent bypassed the Union and negotiated directly with employees relative to a wage increase. As discussed hereinabove, Respondent gave consideration in the fall of 1950 to the Union's request that it *voluntarily* grant a wage increase. At a meeting held in mid-October with the union negotiating committee, Klopsch, who had cleared the matter with Respondent's main office in New York City, offered a 10 cents per hour voluntary wage increase if the Union would on its part agree to extend the April 1950 contract for another year until November 1952, subject only to reopening once, after November 1, 1951, on the issue of a wage increase. This was rejected by the Union at the meeting and again in a letter sent to Respondent on October 25, 1950. The refusal was predicated upon the opposition of the Union to a 1-year extension of the contract. The matter then remained dormant for several weeks.

During the second week of November, 215 to 220 identical post cards were received in New York City through the mail by Chairman Brown of Respondent's Board of Directors. Each had been mailed from the Los Angeles area, was signed by an employee of the Los Angeles plant, and stated as follows:

> In the interest of continued good labor relations and as one of your employees in the Los Angeles Tube Division I am requesting that you grant the

[7] As stated, the undersigned deems it unnecessary, in view of these findings, to treat with Respondent's further defense that the Union in these negotiations engaged in conduct violative of Section 8 (d) by attempting to obtain a union-security provision which was different from the existing, although suspended, maintenance-of-membership provisions.

10 cents per hour voluntary wage increase, without insisting that the Union extend its Contract for a period of one year.

Klopsch uncontrovertedly testified that Brown telephoned him, after receipt of the post cards, and asked him to call a meeting of the employees and explain Respondent's position on the wage increase. Brown added that it would be too time-consuming to reply to each of the post cards. Klopsch forthwith summoned four employees, whom he deemed to be representative of the various sections of the plant, in the expectation that they would relay his message to the remaining employees. He purposely selected four men whom he knew to be union members and included Edward Parker, president of the Union and chairman of the negotiating committee, as well as a union steward. This meeting took place in approximately mid-November and the sole testimony on the meeting is that of Parker and Klopsch. This is the sale incident relied upon under this allegation of the complaint.

Klopsch testified that he opened the meeting and announced that a large number of individuals had sent cards to Brown. He stated that it would take too much of Brown's time to reply to each of the post cards, and that he had been asked by Brown to advise the employees of the current status of contract negotiations, inasmuch as the employees had seen fit to contact the chairman of the board on the subject. He repeated to the employees Respondent's offer of a voluntary 10-cent per hour wage increase coupled with a contract extension for 1 year. Parker substantially agreed with the above offer, but claimed that Klopsch had added that Respondent would not go beyond its offer and that if it were not accepted in the near future it would be withdrawn and the employees would receive nothing. Parker stated that he would have to take the matter back to the membership. Klopsch denied that he had in any way threatened to withdraw the company offer.

Although the undersigned is of the belief that the actual content of the speech lies between the two versions, he deems it unnecessary to resolve this conflict for, even on the face of Parker's testimony, the facts, under the circumstances herein present, do not warrant a finding that the Act has been violated. It is conceded that the Union had prevailed upon Respondent to offer a voluntary wage increase after it had effectively, under the April contract, bargained away the right to an increase before November 1951.[8] Respondent, apparently in the interests of contract stability during a period of rising costs, desired, in exchange, to stabilize its labor situation for another year; this the Union opposed and rejected. Respondent was then deluged by in excess of 200 post cards from employees of the Los Angeles plant, acting in individual capacities.

Klopsch summoned a representative group of employees, including the union president and chairman of the negotiating committee, and in effect replied to the post cards. Inasmuch as the Union had at the time already rejected Respondent's offer, the undersigned believes that Respondent was within its rights in replying in such fashion to the post card campaign. In view of the long history of collective bargaining between the parties; the fact that Respondent had previously, despite the waiver, voluntarily offered the wage increases; the post card campaign and Klopsch's instructions to reply to same; and the fact that, in any event, the group included the union president and chairman of the negotiating committee; this does not impress the undersigned as an attempt to undermine the fully recognized collective bargaining representative or as a rejection

[8] It will be recalled that the April 1950 agreement granted the employees an increase of 5 cents an hour and contained a specific waiver, discussed previously, of the right to bargain for the life of the agreement on the various conditions of employment.

of the collective bargaining principle. Accordingly, the undersigned will recommend that this allegation be dismissed.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The operations of Respondent affect commerce within the meaning of Section 2 (6) and (7) of the Act.

2. Western Mechanics Local 700, International Union of Mine, Mill & Smelter Workers, is a labor organization, within the meaning of Section 2 (5) of the Act.

3. All hourly rated production and maintenance employees of Respondent's Los Angeles Tube Mill, including mill or production clerks and inspectors, but excluding foremen, assistant foremen, supervisors, technical and engineering employees, timekeepers, watchmen, guards, and office and clerical employees other than mill or production clerks, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

4. Since March 14, 1946, and at all times thereafter, Western Mechanics Local 700, International Union of Mine, Mill & Smelter Workers, has been and now is the representative of a majority of the employees in the above-described appropriate unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

5. Respondent has not refused to bargain collectively with Western Mechanics Local 700, International Union of Mine, Mill & Smelter Workers, and has not engaged in unfair labor practices within the meaning of Section 8 (a) (5) and (1) of the Act.

Recommendation

In view of the foregoing findings of fact and conclusions of law, the undersigned will recommend that the instant complaint be dismissed in its entirety.

In the event no exceptions are filed, as provided by the Rules and Regulations of the Board, Series 6, the findings, conclusions, and recommendations herein contained shall, as provided in said Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be waived for all purposes.

DOW JONES & COMPANY, INC. *and* DOW JONES EMPLOYEES ASSOCIATION OF NEW YORK, INC., PETITIONER. *Case No. 13-RC-2094. October 19, 1951*

Decison and Direction of Elections

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Edward T. Maslanka, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Herzog and Members Reynolds and Styles].