In the Matter of LIBBY, MCNEILL & LIBBY *and* CANNERY WORKERS UNION, LOCAL NO. 20707, A. F. of L.

Case No. 19–C–1330.—Decided February 7, 1946

DECISION
AND
ORDER

On June 20, 1945, the Trial Examiner 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, and recommending that the complaint be dismissed, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Union filed exceptions to the Intermediate Report. Oral argument before the Board at Washington, D. C., was not requested, and none was had.

The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the Union's exceptions, its brief filed with the Trial Examiner, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the modifications hereinafter set forth.

The Trial Examiner found that the respondent did not refuse to bargain collectively with the Union in violation of Section 8 (5) of the Act and recommended dismissal of the complaint. In view of the particular facts herein, we approve the Trial Examiner's recommendation. In doing so, however, we find it unnecessary to, and do not, pass upon or adopt so much of the Intermediate Report as appraises the legal effect of the respondent's unilateral action.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the complaint issued herein against the respondent, Libby, McNeil & Libby, Portland, Oregon, be, and it hereby is, dismissed.

INTERMEDIATE REPORT

Joseph D. Holmes, Esq, of Seattle, Wash., for the Board.
Harry George, Esq., of Portland, Oreg., for the Union.
David L. Davies, Esq, of *Hart, Spencer, McCulloch, & Rockwood*, of Portland, Oreg., for the respondent

STATEMENT OF THE CASE

On a charge duly filed September 4, 1944, by Cannery Workers Union Local No. 20707, A. F. of L., herein referred to as the Union, the National Labor Relations Board, herein called the Board, on March 22, 1945, by the Regional Director for the Nineteenth Region (Seattle, Washington), issued its complaint against Libby, McNeill & Libby, Portland, Oregon, herein called Respondent, alleging that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) and (5) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint together with copies of the charge and a notice of hearing, were duly served upon the Union and Respondent.

Concerning unfair labor practices, the complaint alleges that since early in 1941, the Union has been the representative for purposes of collective bargaining, of the employees of Respondent at its plant in Portland, Oregon, exclusive of clerical and supervisory employees, as a unit appropriate for the purposes of collective bargaining; that on or about August 1, 1941, and at all times thereafter, Respondent refused and continues to refuse to bargain collectively with the Union as the exclusive respresentative of the employees in the above unit, in respect to rates of pay, wages, hours of employment, and other conditions of employment and, more particularly, refused to discuss or negotiate incentive pay regulations governing the wages, hours of employment, and other conditions of employment of its employees in the unit, which regulations it unilaterally established and is now maintaining at its plant; and that the above action of Respondent constitutes an unfair labor practice affecting commerce within the meaning of Section 8 (1) and (5) of the Act.

Respondent duly filed its answer admitting the allegations in the complaint concerning the corporate existence of Respondent, the maintenance of an office and place of business in the State of Oregon, and the nature and extent of the business done by it which affects commerce; that the Union is a labor organization within the meaning of Section 2 (5) of the Act; and that all the employees of Respondent at its plant in Portland, Oregon, exclusive of clerical and supervisory employees, constitute a unit for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act. The answer denies, for lack of information, that the Union is the exclusive representative of the employees with the unit; specifically denies that Respondent refused or continues to refuse to bargain collectively with the Union in respect to rates of pay, wages, hours of employment, or conditions of employment; alleges that it did so bargain and that as a result thereof written agreements were made with the Union for the years 1942, 1943, 1944; that Respondent has explained and discussed its incentive pay plan with the Union's representative and with the Union's negotiating committee from time to time since 1941 and that the Union refused to discuss or negotiate the incentive pay plan. The answer further specifically alleges as follows:

> The incentive plan was unilaterally established in 1941 at a time when there were no negotiations or union requests pending in connection therewith. It has been thoroughly and repeatedly discussed with the representa-

tives of the Union and with all employe members of the Union who showed any interest in it.

The answer further alleges that the rates of pay, wages, hours of employment, and conditions of employment are governed by collective bargaining agreements with the Union; that the hourly pay system has never been changed or the rates varied by any unilateral action of Respondent, but that all hourly rates of pay agreed upon with the Union have been paid, and that in addition thereto, the Respondent voluntarily instituted an incentive pay plan in 1941 to pay its employees for extra production as a premium over the agreed hourly rate; that in 1944, the Union demanded that all provisions for piece work and for incentive pay be eliminated, and that when this demand was presented to the War Labor Board, the Union's demand was denied and a directive order issued requiring that the contract, effective as of April 1, 1944, contain a provision:

> Any proposed changes in piece work or in incentive pay shall be the subject for collective bargaining between the parties.

The answer further states that incentive pay regulations have not been changed since that agreement was executed, and that no changes are contemplated.

Pursuant to notice of hearing issued by the Regional Director and duly served upon the parties, a hearing on the complaint was held at Portland, Oregon, on April 26 and 27, 1945, before the undersigned, R. N. Denham, the Trial Examiner duly designated by the Chief Trial Examiner. The Board, the Union, and Respondent appeared and were represented by counsel. All parties participated in the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to present evidence pertinent to the issues. At the close of the hearing the motion of counsel for the Board to conform the pleadings to the evidence in all matters of form was granted without objection and made applicable to the correction of the spelling of names, dates, and other minor matters that do not go to the main issues in the case. There was no argument by counsel at the close of the hearing, but briefs have been received from counsel for the Board, for the Union, and for the Respondent.

Upon the basis of the foregoing and on the entire record, after having heard and observed the witnesses and considered all the evidence offered and received, the undersigned makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, Libby, McNeill & Libby, is a corporation duly organized and existing under and by virtue of the laws of the State of Maine and licensed to do business in the State of Oregon. It maintains an office and place of business in the City of Portland, Oregon, where it is engaged in the processing and packing of fruits and vegetables in cans and glass jars, and occasionally in wooden containers. The fruits and vegetables used are obtained from the States of Oregon and Washington, and occasionally from some other States, and are valued at more than $1,000,000 per annum. Approximately 50 percent of the production of the Portland plant is delivered to fill war contracts. Respondent concedes that it is engaged in commerce within the meaning of the Act.

II. THE ORGANIZATION INVOLVED

Cannery Workers Union, Local No. 20707, affiliated with the American Federation of Labor, is a labor organization admitting to membership the employees of Respondent at its plant in Portland, Oregon.

III THE ALLEGED UNFAIR LABOR PRACTICES

A. *The appropriate unit*

It was stipulated by all the parties and admitted in the answer of Respondent, that all the employees of the Respondent employed at its plant in Portland, Oregon, exclusive of clerical and supervisory employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act. It is accordingly found that the foregoing described unit is a unit appropriate for purposes of collective bargaining within the meaning of the Act.

B. *Representation of employees by the Union*

In 1937, the Union was recognized by Respondent as the representative of a majority of the employees within the above-described unit and as the exclusive representative for purposes of collective bargaining, of all the employees within the unit. Since the original recognition in 1937, Respondent has continuously, and at all times up to the present time, so recognized the Union[1] and has, each year, entered into a contract with the Union as such exclusive representative, concerning matters having to do with wages, hours, rates of pay, conditions of employment and other matters normally the subjects of collective bargaining.

It is found that the Union is now and at all times since 1937 has been, the bargaining representative designated by a majority of the employees within the above-described appropriate unit, and, by virtue of such designation has been and is the exclusive representative of all the employees in such appropriate unit for purposes of collective bargaining with regard to matters concerning wages, rates of pay, hours of employment, and other conditions of employment.

C. *The alleged refusal to bargain*

Aside from the fact that the Union has been recognized by Respondent and has represented the employees within the above-described appropriate unit as their exclusive representative for purposes of collective bargaining since 1937, the relations of Respondent and the Union prior to 1941 are not material herein.

The 1940 contract expired April 1, 1941. In anticipation of this expiration, and in accordance with established custom, negotiations were entered into by the Union and Respondent in the early months of 1941, looking to the negotiation of a new contract for the period April 1, 1941–March 31, 1942. These negotiations were concluded in the early part of June and resulted in a contract which was approved and executed by the Union and Respondent on June 12, 1941, retroactive to April 1, 1941. This contract contains the usual type of provisions in labor contracts covering minimum hourly rates for straight time, overtime rates, differentials between male and female workers where such differentials were indicated, holidays, the adjustment of grievances, seniority, a no-strike provision, and a scale of minimum wages Piece work for certain jobs has been customary for many years and the minimum wage schedule provided "all piece work rates must be approved by the Union"

In 1940, Respondent engaged the services of a firm of efficiency engineers to make time studies of all the operations concerned with the handling and canning of the different fruits and vegetables processed by Respondent at its plant in Portland, with a view to determining the normal average production in each operation for a given unit of time, and, by deduction from these findings, to determine

[1] At the hearing, Respondent stipulated that the Union, since 1937, has been and is now the exclusive representative of all the employees within the unit.

average normal costs to Respondent of each unit of production, broken down into the component units of operation which go to make up the finished products. Having determined from these studies the average cost of unit production based upon the average production of the various employees in the plant, the engineers set up an elaborate system of bonuses to pay the employees over and above their agreed hourly rate, for production in excess of the experienced average normal production reflected by the time studies. By this incentive pay system, none of the established hourly pay rates were disturbed and in no event was the established pay of any individual reduced The plan did no more than provide a medium whereby an employee capable of producing more than the normal average[2] could receive additional compensation for such over-production. It was a pay increase conditioned on increased production.[3]

On or about June 30, 1941, the employees in the warehouse were assembled and the new incentive pay system was explained to them by the officials in charge. It was immediately put into effect in that department. From time to time thereafter it was installed in other departments as the time studies progressed, the latest installation being in the pickle department in January and February 1944[4] There is no evidence that Respondent's intention to introduce the incentive pay plan was discussed with the Union during negotiations culminating in the contract of June 12, 1941. In fact, Respondent makes no contention that the plan was ever negotiated in any respect with the Union prior to its introduction on June 30, 1941. The following excerpt from the record reflects that fact and the Company's position pertaining to the introduction of this plan:—

> Mr. DAVIES [counsel for Respondent] . There is no question by the Company that this was not negotiated by the Union as a union matter; it is the Company's position and has been the Company's position that it didn't require negotiating, that we would be willing to state without further testimony on that score it was not negotiated with the Union.
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> Trial Examiner DENHAM I gather from reading the Answer that the Company is not making any contention that there was any negotiation on the matter of the installation of the incentive pay system, and the sole position taken by the Company in the pleadings, it seems to me, is that the Company was paying all the employees on an hourly rate and that the hourly rate was a negotiated rate, bargained for each year, and that the incentive pay system was something that was over and above the hourly rate, and not a part of the contract, not negotiated even, and

[2] While the mechanics of the plan, its basic factors for purposes of computing premiums, and the relative rate of pay reflected by such computations, were discussed by some of the witnesses, the merits of the plan as a medium for fair evaluation of over-production earnings is not in issue here. It is material only that the working of the plan did not disturb the amount of money paid any employee as wages under the provisions of the contract.

[3] The introduction of this plan was in line with a general policy of Respondent to install the plan in its plants throughout the United States. Although it still is not universal in all plants, most of them on the West Coast operate under it.

[4] According to McLane's testimony (McLane is a union representative), notice of a desire to renegotiate the contract was supposed to be given 60 days prior to expiration and negotiations were supposed to start within 15 days after the notice, which would place the beginning of negotiations about February 15 McLane testified that to the best of his recollection, the system was introduced in the warehouse in February or March 1941 However, McLane was unable to state that negotiations were then under way "because negotiations didn't always start on the time designated, but they were supposed to" Against this indefinite and unsatisfactory testimony, the officials of Respondent, with records by which to be guided, testified that the plan was inaugurated June 30, 1941 That date has been accepted as the correct one

simply superimposed on the hourly rate voluntarily by the Company and without conference with the Union; is that correct?

Mr. DAVIES. That is a correct statement.

Shortly following the foregoing colloquy, counsel for Respondent made the following statement on the record:

> . . . the Company stipulates that it engineered and established this incentive pay plan and bonus plan; that it was unilaterally established, without negotiations between the Company and the Union or the negotiating committee with respect thereto; that the incentive bonus plan provides for bonuses over and above the minimum rates for each classification involved, and set up in the bargaining agreement between the Company and the Union. In making this stipulation, the Company wishes the examiner to understand and the record to show that it expects to offer evidence of numerous discussions and explanations of the incentive bonus plan with many of the employees including, of course, many union members and union officials; but that these discussions and conversations were not negotiations in the manner outlined in the contract.

It was further agreed by counsel for Respondent that "nothing with reference to the establishment, the engineering, and the installation and changing or the amending of the application of the plan has ever been negotiated with the Union."

Since the inauguration of the plan, each employee who has exceeded the normal unit of production on what is termed the "labor index," has received two checks on his pay day; one check represents his regular pay at the agreed terms of the contract, and the other represents bonus earnings for the pay period. These double payments, starting in July 1941, have continued through to the present time and were well known to the Union and union officials from the beginning. The basis of computation is not a simple one and, as a result, frequent questions have been raised by employees and frequent conferences have been held by individual employees and groups of employees, at their request, with the manager of the "Cost Control" (incentive pay system), in which the manager was called upon to explain the working of the system and its applicability to the pay checks of the persons who might at that time be inquiring. These conferences involved non-member employees, union employees, and union officials alike. There can be no question but that the existence of the incentive pay system and its general workings were well known from its inception to practically every employee in the plant, including the members and officers of the Union.

The Union voiced no objection to the plan when it was introduced, and in early 1942, negotiated a new contract with Respondent, with extended provisions concerning wages and the methods for computing them together with a much more comprehensive schedule of wages for the various classifications than had been contained in the contract for the previous years. This contract is silent, however, on the subject of the incentive pay system and the record indicates that during these negotiations the subject of the plan was not discussed by either the Union or the Company. That the 1942 contract was entered into with full knowledge by the Union of the existence of the plan and its operation, and was made in contemplation of it, may be presumed in the light of all the foregoing.

During the life of the 1942 contract, which expired April 1, 1943, only once was a question concerning the operation of the plan raised by the Union, as is hereinafter noted, although its application to their own pay was discussed with and explained to all who inquired, including union officials. In early 1943, when a new contract was to be executed, again the matter of the incentive pay

plan was not injected into the negotiations by either of the parties. The contract of April 1, 1943, follows very much the line of the previous contract and is entirely silent on the subject of incentive pay or bonuses, notwithstanding that the plan had then been in operation for almost 2 years.

On March 15, 1943, a meeting was held to consider certain changes in the operation of the plan as to the warehouse work. This was called at the insistence of L. D. McLane, a warehouse employee who had just become business manager of the Union, and was attended by K. C. Hardwicke, the Northwest District Superintendent of Respondent, a Mr. Dempster, president of the Union, McLane, and one or two other company officials. Hardwicke's testimony on the matters considered at the meeting, and the results accomplished, is uncontroverted and uncontradicted, and reads as follows:

> . . . We discussed ways and means of best checking the production being turned in by the warehouse and adopted several suggestions of the Union representatives at that time. They requested—the men were checking themselves—and they requested that there be checkers put out and that there be more education given to the men in the warehouse, and that there be employees who should check the production records every day, and all the points concerning it.
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> * * * * * * *
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> We went out of the meeting and actually put into operation the various suggestions with respect to checking following that meeting; from my checks with Mr. Dempster and with Mr. McLane, whether they were satisfied, and they apparently were.

The purpose of this meeting was to clarify some questions that had been raised in the warehouse as to the method of securing production figures for these men, on which to base their premiums. So far as the testimony of any of the witnesses discloses, this was the first incident when the matter of the operation of the incentive pay plan was discussed between officers of the Company and representatives of the Union, and anything of the nature of collective bargaining with reference to the plan, was engaged in.

In May 1943, Frank Morris was placed in charge of administering the plan. Numerous employees had complained about their inability to figure their premiums and had asked to have the working of the plan explained to them. This was done in every instance, using the inquiring employee's production as the working example. The confusion of the employees over the plan which obviously is highly complicated, resulted in Morris calling in Dempster, the president of the Union, and officially inviting the Union to designate some representative from among its numbers or of its selection, to go into the office and devote as much time as might be necessary, which Morris estimated would be 6 months, to a study of the incentive pay plan and its application, with his salary during the period of study, paid by the Company, in order to provide the Union with someone who could serve it as an expert on the application of the plan and assist the Union in handling any grievances or negotiations involving the plan. Nothing was ever done with this proposal and no reply ever made by the Union, either accepting it or rejecting it.[5]

[5] There is some testimony that in September 1943, at a meeting of the foreladies called to discuss with Hardwicke the type of production reports they were to turn in for the computation of the bonus, one of those present asked that McLane be called into the meeting but the request was refused on the ground that this was a matter of management administration and did not involve matters with which the Union was concerned. It is found that the position then taken by Hardwicke was appropriate and not in derogation of any of the rights of the Union or its representative.

In the negotiations for the 1944 agreement which began in the early part of that year, the Union brought the subject of the incentive pay plan into the bargaining negotiations for the first time since its inauguration on June 30, 1941. It presented a proposed contract which contained the following as Section VI, paragraph c:—

> There shall be no company form of piece work or incentive pay in any given plant without the approval of the bargaining agent of the employer and the local union concerned.

When this question was reached in the negotiations (April 25, 1944), Respondent offered to and did bring Morris and another man associated with the administration of the plan into the meeting to explain and discuss it with the Union's negotiation committee. The committee, however, refused to discuss the plan with them or anyone else representing Respondent, saying that they did not want to discuss "Cost Control" but "wanted to get rid of it."

These negotiations resulted in an impasse between Respondent and the Union on the questions of the incentive pay plan, retention of piece work, check-off, overtime, and vacations, and in due course the entire dispute was referred to the Regional War Labor Board for disposition. Meantime, the Company had been holding some further discussion with the representatives of the Union concerning the labor indices under the incentive plan and, on June 30, 1944, wrote the Union suggesting certain changes which would reduce the index of minimum production to a point where the computation of the premium would begin at a lower production level, thus putting the employees in the premium earning group somewhat sooner and, in effect, increasing the earnings of all who could meet the new reduced minimum. This could only be done with approval by War Labor Board and the Director of Stablization, and required a War Labor Board Form 10 application. In the letter transmitting this proposal to the Union, Respondent renewed its suggestion that the Union select someone to study and assist in checking the cost control work standards (the incentive pay plan), and, as the main subject of the letter, advised the Union of its desire to submit the proposed increase to the War Labor Board on a Form 10 if the Union would join in the execution of such application, in order to put the potential increase in pay into effect. The Union failed to reply to the letter after considering it in its meetings As a result, the original schedules are still in effect and the Union has as yet made no effort to familiarize itself with the structure and operation of the plan, pursuant to the invitation of Respondent to do so

On September 21, 1944, the Twelfth Regional War Labor Board handed down its directive concerning the dispute over the terms of the 1944 contract, in which it stated, with reference to the demands of the Union, that the incentive pay plan be abolished:—

> Section VI, paragraph C of the proposed Union agreement shall not be incorporated in the Collective Bargaining Agreement between the parties but said Collective Bargaining Agreement shall provide that any proposed changes in piece work or in incentive pay shall be the subject for collective bargaining between the parties.

Following the above directive, the contract to cover the period from April 1, 1944, to March 31, 1945, was placed in final form and executed by the parties, with the following provision incorporated:

> Any proposed changes in piece work or in incentive pay shall be the subject for collective bargaining betwen the parties.

After the directive of September 21, 1944, and the execution of the 1944 contract, no changes were made in either the piece-work rates or in the incentive pay rates; consequently the collective bargaining features provided for in the contract were not invoked.[6]

Throughout this controversy, Respondent has taken the position that the inauguration and maintenance of the incentive pay plan is one of the prerogatives of management and not properly a subject of collective bargaining.

In appearing before the Regional War Labor Board in connection with the dispute over the provisions of the 1944 contract, Respondent filed a comprehensive brief in which it took this position before the Board In its brief to the War Labor Board, it said:

PIECE WORK AND INCENTIVE PAY

> Section 6, paragraph C, on page 5 of Contract submitted by the Union, provides:
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> > There shall be no company form of piece work or incentive pay in any given plant without the approval of the bargaining agent of the employer and the local Union concerned.
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> The position of the employer with respect to this question is that it relates entirely and solely to management and is not to be regarded as a subject for collective bargaining. Piece-rate work is historical. It has been the practice in the canning industry almost from the beginning of commercial canning. By the reason of the highly seasonal nature of the work required to be performed in canneries, piece-work and an incentive is the appropriate means whereby seasonal and perishable products may be saved from spoilage.
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> The maintenance of piece work and incentive payment is a function of and prerogative of management. As required, the base rates are paid for these operations and the piece earnings and incentive may be in excess of these base rates. The premiums earned over and above bases are due to superior skill or greater effort exercised by the worker. It is equitable and logical to pay such premiums based on the worker's actual performance.

That such a position is untenable as a matter of general principle, has been long established by this Board, but the installation of an incentive pay plan without first consulting with the Union is not necessarily an unfair labor practice, *per se.* Whether the unilateral establishment of this plan falls in the proscribed class will be discussed subsequently herein, in the light of all the surrounding circumstances.

In March 1945, negotiations were opened for the 1945 contract. In these negotiations the Union again took the position that the incentive pay plan should be abolished and stated that the Union could not understand it or its application As a condition to negotiating the plan, the Union demanded that the Company furnish it with a complete copy of all the schedules, data, and statistics as well

[6] Some question was raised during the hearing, concerning an alleged change in the method of computing the premium on cutting cauliflower. It developed however that there was no change in the method of computing the premium but that a method was changed with reference to determining the weight of the cauliflower handled by the operators, by making actual records of the weight of the vegetable handled instead of using estimated weights and average weights as had been done in the past, under which system it was possible for operators to only partially fill their boxes but to get credit for full boxes It was to correct this practice that the weighing of the actual cauliflower handled by each operator was adopted It did not result from any change in the method of computing the premiums, or in the operations, and was solely an administrative action to permit accurate compliance with the rules then existing

as the rates and other material upon which the computation of the incentive pay premiums were based, and further demanded that a copy of the same material be attached to and be made a physical part of any contract that should be negotiated. Actually, according to the testimony of the Union's officers, the Union wanted only one thing—the abolition of the plan. The Respondent's representatives protested that the demand of the Union for such copies was impracticable in view of the fact that the data consisted of a volume about 8 inches thick, made up of typewritten schedules and statistics, and that such a volume could not be reproduced within the range of practicability; but at the same time, announced that the data was all available in the office and could be examined at any time by the Union or its representative. Again Respondent called attention to its offer to pay the wages of any person whom the Union might select to go into the office and make a study of and receive an education on the operation of the plan. The Respondent volunteered however to make up a sample sheet and résumé of typical operations of the plan, which would illustrate the manner in which it worked, although it could only give spot examples of the actual application of the premium system to specific operations. This demand of the Union and suggestion of the Respondent was made at the last meeting held previous to the hearing and was in the presence of a Conciliator of the United States Department of Labor. Two days later, such sample sheet and résumé were prepared and delivered to the Union's officials. Again, in the transmittal document which accompanies the sample schedules, Respondent advised the Union as follows:

> The Company holds its records available at all times for checking by any operator or by someone designated by the union to represent the workers. The Company will give this man the training which is necessary to fit him for the job of checking on any situation that may arise regarding standards or the application of this plan.

The Union continued to ignore this offer and suggestion of Respondent, and has made no effort to inspect the data but has stood firm in its position that it desires only the elimination of the piece-work system and the incentive pay plan heretofore dealt with.

At all times, both before and since the directive of the Regional War Labor Board on September 21, 1944, and up to and including the hearing, Respondent has neither made nor suggested any changes in the plan without first referring them to the Union with an invitation that the Union confer with it about them. Respondent has bargained with the Union on every occasion when the latter has requested it, with reference to the existence and provisions of the plan. In some of these meetings, agreements have been reached on matters concerning the administration of the plan, but in those meetings, when the Union has demanded the abandonment of the plan, the result has been an impasse. Respondent has evidenced its willingness to bargain on the provisions of the plan and so stated at the hearing, but indicated that it is Respondent's policy, however, not to abandon the plan, although counsel for the Respondent stated for the record in making a reply to an inquiry from counsel of the Board, that bargaining with reference to the provisions very well could consist of bargaining for the elimination of all the provisions of the plan, but that "bargaining" does not necessarily connote "agreeing" with the Union on its demands.

Conclusions

The gist of the complaint here is that on June 30, 1941, while the Union was the recognized exclusive bargaining representative of the employees, Respondent

unilaterally and without conference with the Union, put into effect an incentive pay plan which affected the wages and working conditions of the employees, and by so doing *ipso facto* refused to bargain with the Union and engaged in an unfair labor practice within the meaning of Section 8 (5) of the Act. The subsequent maintenance of such incentive pay plan is cited as a continuance of such unfair labor practice. Respondent freely admits that on the date stated, it unilaterally inaugurated the incentive pay plan but denies that by so doing, and by subsequently maintaining it, any unfair labor practice has been engaged in, under all the circumstances. The facts are not in great dispute.

On June 12, 1941, Respondent and the Union entered into their fifth consecutive annual contract, effective as of April 1, 1941, which contract contained the following clauses pertaining to wages:

> Section 3 Wages. (a) Minimum wages shall be those set forth on the list attached hereto and made part of this Agreement.
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> (b) No monthly, weekly, or hourly wage now being paid above the minimum scale established hereby shall be reduced for any cause during the life of this agreement for the same or equivalent work. . . .
>
> (c) The employees shall be paid weekly.

On June 30, 1941, when the incentive pay plan was put into operation, all negotiations pertaining to the relations of the Respondent and the Union had been concluded and embodied in the written contract above referred to. Wage scales had been set covering piece work and hourly rates. There were no negotiations of any kind pending between Respondent and the Union and there is nothing in any part of the record to indicate that at any time Respondent has ever evidenced any antipathy toward the Union or any reluctance to bargain with it on matters which were appropriate matters for collective bargaining. In inaugurating the plan, Respondent in no way disturbed the then going wage rates. It continued the hourly and piece work rates then in effect but, by means of the incentive pay plan provided a medium whereby employees might increase their weekly pay through the medium of increased production.[7] The record fails to suggest that the unilateral action of the Respondent in inaugurating the plan was designed to belittle the Union or diminish its influence, but rather it is undisputed that the establishment of such an incentive pay plan was a part of the over-all policy of Respondent, which it had inaugurated or was inaugurating in a very substantial number of its plants through the United States.

A refusal by an employer to bargain collectively with the designated representative of a majority of his employees is defined as an unfair labor practice under Section 8 (5) of the Act, because it is one of the practices which, in the opinion of Congress, as expressed in the passage of the National Labor Relations Act, tends to interfere with, restrain, and coerce the employees in the exercise of the rights guaranteed them in Section 7 of that Act. With this as a premise which is inescapable, the action of Respondent here complained of must be measured by the answer to the question as to whether it tended, *per se*, to interfere with, restrain, or coerce, the employees in the exercise of the rights guaranteed them in Section 7 of the Act. I am unable to see where it does any of these things. In all the cases where the Board has considered the effect of unilateral pay

[7] It was conceded that throughout its relations with the Union since 1937 Respondent has made numerous upward adjustments of rates and wages, applicable to individuals or groups, without consulting with the Union and that the Union has never raised a question as to the propriety of such action nor evidenced any interest in discussing them other than to provide in its annual contracts that wages being paid above the prescribed minima may not be reduced without the approval of the Union.

increases and has found them to be, *per se*, violations of Section 8 (5), the employer has been in some kind of a controversy with the Union, and it has been found that such unilateral action was designed to undermine the Union in some regard and to deprive it of the bargaining representation conferred by the Act. In each of those cases, also, the Union promptly acted to invoke the protection of the Act against such conduct. *V. O. Milling Company*, 43 N. L. R B 348; *Henry McCleary Timber Company*, 37 N. L. R. B. 725, *The Barrett Company*, 41 N. L. R B. 1327, enf'd 120 F. (2d) 583 (C. C. A. 7); *George P. Pilling & Son Company*, 16 N. L. R. B. 650, enf'd 119 F. (2d) 32 (C. C. A. 3). On the other hand, in those decisions, the Board indicates that it is not the unilateral concession that is an unfair labor practice, but the granting of the concession while bargaining is in progress on the same subject, thus deteriorating the value of the Union's efforts in the eyes of the employees. Where the situation has been free of such circumstances, the Board has found such a unilateral concession to be legitimate, as something put into effect by the employer pursuant to normal business policy. *Sam M. Jackson, et al.*, 34 N. L. R. B 194; *Montgomery Ward & Co., Incorporated*, 39 N. L. R. B. 229.

It is accordingly found that the establishment of the plan by the unilateral action of Respondent in June 1941, and the subsequent maintenance and application of the plan, all without protest from or objection by the Union and as a part of normal over-all business policy did not constitute a refusal to bargain with the Union.

Following the establishment of the plan, the Union remained silent and accepted its application without question for 2 years. In 1943, the Union made its first approach to Respondent concerning the plan This had to do with its administration in the warehouse. A bargaining conference was held with union officials and the matter adjusted to the satisfaction of all. The contracts for 1942 and 1943 were both negotiated by the Union in those respective years without mentioning the plan or bringing it into the bargaining negotiations. The second time the plan was brought to the surface by the Union was in the negotiations for the 1944 contract. No one has accused Respondent of not bargaining with the Union concerning the plan at those conferences An impasse was reached on the Union's demand for the elimination of the plan and other items. The War Labor Board disposed of this demand by rejecting it. The next occasion when the Union broached the subject of the plan was in the negotiations for the 1945 contract. Its position had not changed from the negotiations for the previous year. Only its approach was different. Again there was an impasse, but no failure on the part of Respondent to bargain.

In its brief, the Union dwells on the failure of Respondent to physically supply the Union with a copy of all the data, statistics, schedules and other matter from which the plan is formulated, and charges Respondent with refusing to agree to physically attach such a copy to the 1945 contract when and if it is finally negotiated There is no merit in either of these contentions. The record is silent on the latter point. On the former, the refusal was based on the impracticability of the request, since the material requested is made up into a massive volume of typewritten matter and cannot, in reason, be copied for such a purpose. It is admitted by the Union, that in response to this request, Respondent advised the union committee that the whole record pertaining to the plan is available in its office for inspection by the Union at any time, and that the Union has never made an effort to inspect it The same is true of Respondent's repeated invitations to the Union to designate someone to receive instruction, with pay, concerning the structure and operation of the plan, which the Union has ignored.

After accepting the benefits of the plan for almost three years without protest or objection, the Union decided in 1944, that it wanted the plan eliminated. It attempted to accomplish this through the medium of collective bargaining but was unsuccessful. An impasse resulted and an appeal was made to the War Labor Board to compel Respondent to yield to the Union's demand. This, too, was unsuccessful. Now the Union seeks to accomplish its desire by attacking the initiation of the plan. The attack comes too late. The Union accepted the plan in the first instance and took its benefits for almost three years It should have voiced its objection when the plan was introduced Having accepted it, there was nothing for Respondent to bargain about until the Union brought it up for bargaining, and when the Union did raise any questions concerning the plan, Respondent did, in fact, fulfill all the requirements of good faith bargaining. It is therefore found that, at no stage has Respondent refused to meet with the Union and bargain on any feature having to do with the plan or any other matter pertaining to proper subjects of collective bargaining, or has in any other regard engaged in unfair labor practices within the meaning of the Act.

Upon the foregoing findings of fact and upon the entire record of the case, the undersigned makes the following·

Conclusions of Law

1 Canning Workers Union Local No 20707, A. F of L, is a labor organization within the meaning of Section 2 (5) of the Act.

2. Respondent is engaged in commerce within the meaning of the Act.

3. Respondent has engaged in no unfair labor practices within the meaning of the Act.

RECOMMENDATIONS

Upon the foregoing findings of fact and conclusions of law and upon the entire record herein, the undersigned recommends.—

1. That the complaint herein be dismissed.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, as amended, effective July 12, 1944, any party or counsel for the Board may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations file with the Board, Rochambeau Building, Washington 25, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and/or brief, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the parties and shall file a copy with the Regional Director. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of the order transferring the case to the Board.

R N Denham,
Trial Examiner

Dated June 20, 1945.