

do—that the rationale of *Western Electric* cogently and persuasively laid to rest any such argument.⁴⁸

In view of all the foregoing considerations, I would overrule the entire line of *General Electric* cases. Accordingly, I would hold the instant contract a bar to a present determination of representatives for at least a period of 2 years and I would therefore dismiss the petitions.⁴⁹

MEMBER MURDOCK, dissenting:

I fully subscribe to the analysis of the law and the conclusions reached in Member Peterson's dissent, which substantially reflects the views I have consistently separately expressed or joined in since the *Western Electric Co.* case.⁵⁰

⁴⁸ That the *General Electric* deviation from the preceding trend may not be a permanent one is indicated by subsequent decisions in which the Board has again emphasized stability in industrial relations. For example, the Board recently held that where a contract contains coterminous modification and termination clauses, a broad notice to modify is not to be construed as an intent to terminate and the contract is a bar, if provision is expressly made that in the event such notice is given, the contract will be automatically renewed for another full term. It is said that, under these circumstances, a proposal for modification of the contract and the action taken thereon do not un stabilize the existing contractual relationship to such an extent as to preclude the application of the usual contract-bar rule. *Mallinckrodt Chemical Works*, 114 NLRB 187; *Michigan Gear & Engineering Company*, 114 NLRB 208.

Another example which can be given is the increasing number of restrictions that the Board has been placing upon the application of its schism doctrine—which is an exception to the contract-bar rule. Thus, fewer contracts are being found not a bar because of alleged schisms. See *Saginaw Furniture Shops, Inc.*, 97 NLRB 1488; *Sylvania Electric Products Company*, 100 NLRB 357; *Pepsi-Cola Buffalo Bottling Corp.*, 107 NLRB 990; *A. O. Smith Corporation*, 107 NLRB 1415; *Weatherhead Company*, 108 NLRB 719.

Finally, reference can be made to a number of decisions in which the Board has held that, under certain circumstances, a contract not formally executed until after the filing of a representation petition is nevertheless a bar to an election. Here, again the Board has acted in favor of maintaining stability of bargaining relationships. See *Oswego Falls Corp.*, 110 NLRB 621; *Natona Mills, Inc.*, 112 NLRB 236; *Phelps Dodge Refining Corporation*, 112 NLRB 1209; *Mervin Wave Oil Company, Inc.*, 114 NLRB 157.

⁴⁹ In view of the fact that the contract has not been in effect for 2 years, it is unnecessary for me to pass upon whether sufficient evidence has been presented to prove that a substantial part of the industry concerned is covered by contracts of 5 years' duration. See *Duncan Foundry and Machine Works, Inc.*, 107 NLRB 298.

⁵⁰ 94 NLRB 54; see also my dissenting opinions, e. g., *General Electric Co.*, 108 NLRB 1290; *American Lawn Mower Co.*, 108 NLRB 1539; and *Griffith Rubber Mills*, 114 NLRB 712.

Riteway Motor Parts Corp.,¹ Petitioner and Garage, Parking & Service Station Employees Union, Local 596, AFL-CIO. Case No. 4-RM-179. January 31, 1956

DECISION AND DIRECTION OF ELECTIONS

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Eugene M. Levine, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

¹ The name of the Employer appears as corrected at the hearing.

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 organization involved claims to represent certain employees of the Employer.
3. The Employer, a retail and wholesale automobile parts dealer, seeks a determination of the bargaining representatives at its Philadelphia, Pennsylvania, sales establishment. The Union, in effect, denies that a question concerning representation exists.²

On April 26, 1955, the Union's secretary-treasurer requested the Employer to sign a collective-bargaining contract, including a union-shop provision, covering the Employer's employees, and accompanied his request by threat of picketing. Later in the day, the Employer telephoned the Union and suggested that the Union file a representation petition with the Board. The Union declined this proposal and asserted that the picket line would be imposed the following morning. On April 27, 1955, the Union began picketing, displaying signs reading "RITEWAY MOTOR PARTS CO., NOT UNION; WE ASK ALL EMPLOYEES TO JOIN LOCAL 596, IBTCWHA, AFL." Approximately 2 hours after the picketing started, the Union telephoned the Employer, stating that it could be seen that the Union was not bluffing, and asked if the Employer was ready to sign a contract. The Employer again refused to do so. On May 21, 1955, the Union notified the Employer, by letter, that it did not claim to represent a majority of the Employer's employees and that its current picketing was for organizational purposes only. Thereafter, on May 26, 1955, the Employer filed its petition herein. The Union withdrew its picket line about May 28, 1955. At the hearing, held June 8 and 17, 1955, the Union renewed its disclaimer of interest, and over the objection of the Employer³ offered testimony that it did not intend to reestablish its picket line. At a reopened hearing⁴ the Employer introduced evidence showing that the Union had, in fact, reestablished its picket line for 1 day, on August 9, displaying the same picket signs as before. The Employer also presented testimony that, in the course of a telephone conversation on the day that the picketing resumed, the Union asked the Employer how it liked the picket line at the premises; and in answer to the Employer's query as to how long the picketing would

² As the unfair labor practice charges filed by the Employer against the Union have been withdrawn, we need not consider the question raised by the Union as to the propriety of the Employer's waiver of charges for the purpose of this proceeding.

³ In view of our findings hereinafter, we need not rule upon the Employer's motion to strike the testimony of the Union's business agent as to the Union's intentions in connection with future picketing.

⁴ On August 23, 1955, the Employer filed a motion to reopen the record herein, alleging that the Union had resumed, and threatened to continue, intermittent picketing. On September 7, 1955, the Board granted the Employer's motion and ordered a reopened hearing.

continue, the Union asserted that the pickets might be withdrawn but would be reinstated.

The Union denies having made a further demand for recognition and, although it admits that the picket line was reestablished on August 9, it contends that the picketing was for organizational purposes only. The Employer asserts that the Union's reestablishment of the picket line and related conduct casts doubt on the meaning of the Union's disclaimer of interest.

A disclaimer of interest is valid only if clear and unequivocal, and only if the union disclaiming does not engage in any activity inconsistent with the disclaimer.⁵ Organizational activity, in and of itself, is not inconsistent with a disclaimer.⁶ However, the record in this case shows that the Union at the outset threatened a picket line if the Employer refused to sign a contract, and that the very next day it posted pickets at the Employer's premises, clearly implementing its original threat, and establishing the purpose of the picketing as an attempt to obtain a contract, despite the fact that the signs carried by the pickets may have been organizational in character.⁷ At the original hearing, the Union disclaimed interest. As picketing had ceased, and no other conduct of the Union up to that time was inconsistent with its disclaimer, the petition was then subject to dismissal. But before the Board took action, the Union again picketed the Employer, in the circumstances described above.

The sole question for resolution here, then, is whether the Union's picketing and other conduct *after* its disclaimer at the original hearing was inconsistent with that disclaimer. The fact that no further picketing occurred and that the Union again disclaimed at the second hearing is not alone controlling. Otherwise, a union could play fast and loose with the Board by disclaiming at a hearing, and thereafter resume picketing, *ad infinitum*. A union may well change its mind; despite previous conduct aimed at securing recognition, it may at the hearing decide to disclaim. But once having availed itself of this privilege, it may not thereafter engage in inconsistent conduct and then again disclaim.

As to the 1-day picketing after the hearing closed, we need not here decide that standing alone it constituted conduct inconsistent with the disclaimer. But the conduct of the Union's representatives clearly negated the ostensible organizational character of the picketing. The conversation with the Employer, the statement by the union representative to the Employer as to how it liked the picket line at its premises, and the threat to reinstate the pickets, could have had no

⁵ See *McAllister Transfer, Inc.*, 105 NLRB 751; *Kimel Shoe Company*, 97 NLRB 127.

⁶ *Hamilton's Ltd.*, 93 NLRB 1076, at 1078; *Smith's Hardware Company*, 93 NLRB 1009, at 1010.

⁷ We find it unnecessary to determine this question.

other purpose than to induce the Employer to action. We believe, in all the circumstances, that that action could only have been recognition of the Union and execution of a contract, the very objective for which the Union had threatened to, and did, picket the Employer before the hearing. Our dissenting colleague asserts that the facts do not *impel* the inference that the original purpose of the Union was unchanged. They certainly dispel any possibility that the picketing was only for organizational purposes. The inference that the picketing was for the original purpose is entirely reasonable; indeed, it is difficult to imagine what else the Union could have had in mind in speaking with the Employer as it did.

Accordingly, we find that the picketing was tantamount to a demand for recognition, and that in all the circumstances the Union's disclaimer has been vitiated.⁸

We find, therefore, that a 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.

4. The Employer contends that the only appropriate unit consists of its salesmen, truckdrivers, warehousemen, and maintenance employees, including the counter man, but excluding office and clerical employees. The Union asserts that there should be separate units of salesmen, warehousemen, and truckdrivers, but takes no position as to the Employer's other employees.

There are approximately 30 employees in the unit alleged as appropriate by the Employer which includes 11 warehousemen, 2 maintenance men, 4 inside salesmen and a counter man, 5 outside salesmen, and 6 truckdrivers.

The warehousemen, also referred to as "pickers," perform customary warehouse duties, storing incoming shipments, filling orders for products, and preparing them for shipment to customers. The 2 maintenance men devote about 30 percent of their time to cleanup work, but spend the remainder of their time performing the same duties as the warehousemen. In other words, they are essentially warehousemen. The inside salesmen and the counter man also perform some warehouse work. The inside salesmen take telephone orders from customers, and the counter man waits on customers calling at the counter. These employees are all hourly rated and share the same supervision.

The outside salesmen spend 80 percent of their time away from the Employer's premises, calling on customers and soliciting business. Unlike the other employees, they are on a salary and commission basis, and, except for the one-half day per week they spend inside the

⁸ See *Francis Plating Co.*, 109 NLRB 35; *Petrie's, An Operating Division of Red Robin Stores, Inc.*, 108 NLRB 1318; *Swee-T-Shirts, Inc.*, 111 NLRB 377, at 379; *Curtis Brothers Inc.*, 114 NLRB 116. There appears to be but one such employee.

store taking telephone orders, they appear to have no contact with any other employees.

We find, on these facts, that the interests of the inside salesmen are more closely allied to those of the warehousemen than to those of the outside salesmen. We shall, accordingly, group the inside salesmen with the warehousemen for unit purposes,⁹ and shall establish a separate unit for the outside salesmen.¹⁰

The six truckdrivers spend almost all their time away from the plant delivering products ordered by customers. Although they could appropriately be joined with the warehousemen,¹¹ as the Union seeks to represent them separately, we shall, in accordance with the Board's usual policy of permitting truckdrivers to be separately represented, establish the truckdrivers as a separate unit.

Accordingly, we find that the following employees of the Employer at its Philadelphia, Pennsylvania, establishment, constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act:

- (1) All warehouse employees, including maintenance men, inside salesmen, the price and location clerk, and the counter man, but excluding outside salesmen, truckdrivers, office clerical employees, guards, watchmen, and supervisors within the meaning of the Act.
- (2) All outside salesmen, excluding all other employees and supervisors within the meaning of the Act.
- (3) All truckdrivers, excluding all other employees and supervisors within the meaning of the Act.

[Text of Direction of Elections omitted from publication.]

MEMBER PETERSON, dissenting:

I cannot agree with the majority opinion in this case with respect to its resolution of the issue of the Union's disclaimer of interest. For, without expressly stating so, it represents a clear departure from well-established Board precedent.

According to the majority's factual findings—some of which are based upon controverted testimony—on April 26, 1955, the Union asked the Employer to sign a contract and accompanied its request with a threat of picketing. On April 27, 1955, when it began picketing, it inquired whether the Employer was ready to sign. However, on May 21, 1955, the Union notified the Employer, by letter, that it did not claim to represent a majority of the employees and that its current picketing was for organizational purposes. It was unnecessary for the Union to change its picket signs at that time, since they were clearly of the type used in organizational picketing. At the

⁹ *J. Segari & Co.*, 114 NLRB 1159.

¹⁰ See *Weaver-Beatty Motor Co.*, 112 NLRB 60.

¹¹ See *Ozburn-Abston and Co., Inc.*, 112 NLRB 941.

hearing on June 8 and 17, 1955, the Union renewed its disclaimer of interest. The only subsequent events were the reestablishment on August 9, 1955, for 1 day by the Union of its picket line which had been withdrawn on May 28, 1955; a telephone conversation on August 9, 1955, in which the Union asked the Employer how it liked the picketing and asserted that the picket line might be withdrawn, but would be reinstated; and, another disclaimer of interest by the Union at the reopened hearing on September 29, 1955.

It is axiomatic that a disclaimer of interest, if it is to be recognized, must be clear and unequivocal and the disclaiming union must not engage in any inconsistent activity. My colleagues apparently find such inconsistent conduct here because of the Union's initial threat to picket the Employer if it refused to sign a contract and because when the Union resumed picketing after the disclaimer it again clearly indicated by its conduct that its purpose had not really changed, that the Employer could remove the picket line by signing a contract. In referring to "the disclaimer," presumably my colleagues are adverting to the one made by the Union at the hearing on June 8 and 17, 1955. And, by their allusion to "its conduct," they can only mean the Union's reestablishment of the picket line on August 9, 1955, for 1 day, its inquiry as to how the Employer liked the picket line, and its assertion with regard to the possible future withdrawal and reinstatement of the line.

It by no means follows that the Union's inquiry and its reference to the maintenance or discontinuance of the picket line impels the inference that its original purpose of obtaining a contract was unchanged. My difficulty in this regard is considerably enhanced by the fact that the record shows that the Union never once in any manner mentioned a contract after April 29, 1955—the day on which it began picketing with signs which were patently organizational in character. I can only conclude that what my colleagues are really saying is that the Union's disclaimer is nullified solely because of its resumption of picketing. However, there are numerous Board decisions—none of which to my knowledge has been overruled—holding that the mere reestablishment of a picket line after a union has made a disclaimer of interest is insufficient to cast doubt upon the validity of the disclaimer and does not constitute a reassertion by the union of its representation claim where the union makes no claim for recognition or demand for a contract after it has filed its disclaimer.¹² This is precisely the situation here.

My colleagues admit that organizational activity is not inconsistent with a disclaimer. Yet, it appears to me that their determination in

¹² See for example, *General Paint Corp.*, 95 NLRB 539; *Smith's Hardware Company*, cited in footnote 6 of the majority opinion; *Hamilton's Ltd.*, cited in footnote 6 of the majority opinion; *Palace Knitware Co., Inc.*, 93 NLRB 872; *Hubach and Parkinson Motors*, 88 NLRB 1202; *De De Johnson*, 77 NLRB 730.

this case constitutes a serious impairment of the right of a union to engage in such conduct without being forced to an election. For, the effect of their action here is that once a union seeks a contract or recognition from an employer and commences picketing, upon its failure to receive either, its subsequent disclaimer of interest and withdrawal of its picket line will be equated to equivocal conduct if, for any reason and regardless of the intervening time interval, the picketing is resumed. Thus, it seems to me that to hold, as my colleagues do, that the Union's picketing for 1 day on August 9, 1955, was tantamount to a demand for recognition, despite its disclaimer on June 8 and 17, 1955, and the absence of any evidence that the picketing thereafter was anything but organizational in character, is to say that once the Union asked for a contract and began picketing the die was cast and it could no longer change or alter the nature or purpose of the picketing. I cannot subscribe to such a view which, in my opinion, places all its emphasis upon a union's conduct prior to its disclaimer and completely ignores the fact that because of changing times and circumstances a union's purpose in picketing thereafter may be altered accordingly.

However, there is another reason which I find equally persuasive for disagreeing with the position espoused here by my colleagues. Thus, they appear to disregard the fact that the Union resumed its picketing for only 1 day and that it had not been picketing for more than a month at the time of the reopened hearing when it again disclaimed interest. My research fails to disclose any Board decision in which a question concerning representation was found and an election directed where there was an unqualified disclaimer of interest and *no current picketing* or boycotting going on at the time of the hearing. As a matter of fact, in each of the cases cited by the majority as authority for their finding the plants of the employers involved were being picketed currently.¹³

Indeed, in the very recent *Franklin* case,¹⁴ where there was a disclaimer of interest and no picketing at the time of the hearing, this Board found that the union's conduct was not inconsistent with the disclaimer and dismissed the petition, even though the cessation of picketing was pursuant to a State court injunction. In my opinion, aside from the fact—which I do not consider particularly significant—that here the Union picketed for 1 day prior to its disclaimer of interest at the latest hearing, the only basis for distinguishing the instant case from *Franklin* is one which *a fortiori* requires the same result. Thus, if we are to look to conduct to ascertain purpose, then it seems to me that the fact that here the Union ceased picketing voluntarily affords a much more persuasive reason for finding no inconsistent activity than

¹³ See footnote 8, *supra*.

¹⁴ *Franklin Square Lumber Co.*, 114 NLRB 519.

in the *Franklin* case where the cessation of picketing was involuntarily caused.

In view of the foregoing, I would issue an order dismissing the petition in this case with the usual *caveat* that the Board will entertain a motion by the Employer requesting reinstatement of the petition, in the event that the Union, within 6 months from the date of the order, engages in conduct inconsistent with its disclaimer.

General Box Company and International Woodworkers of America, AFL-CIO, Petitioner. *Case No. 15-RC-1340. January 31, 1956*

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Pursuant to a stipulation for certification upon consent election, an election by secret ballot was conducted on November 15, 1955, under the direction and supervision of the Regional Director for the Fifteenth Region, among the employees in the unit described in the stipulation. At the conclusion of the election, a tally of ballots was furnished the parties. The tally shows that of 69 eligible voters, 61 cast valid ballots, of which 28 voted for and 33 against the participating labor organization. There were 5 challenged ballots.

The Petitioner filed objections to conduct affecting the election which objections were mailed to the Regional Director and were postmarked 10 p. m., November 21, 1955. The Regional Director received these objections on November 23, 1955. On December 1, 1955, the Regional Director issued his report on objections in which he found that as the parties were provided with a tally of ballots on November 15 the Petitioner's objections received at the Regional Office in New Orleans, Louisiana, on November 23, were not timely filed. Consequently, he recommended that the objections be overruled and the results of the election be certified. The Petitioner filed timely exceptions to the Regional Director's report.

The Petitioner contends that the date of filing objections should be the date when they are deposited in the mail. Furthermore, the Petitioner alleges that the objections were actually deposited in the mail 8 hours before the postmarked time and asserts that objections mailed that same day to the Employer in a rural area 150 miles away from Montgomery, Alabama, where they were posted, were delivered on November 22. The Petitioner contends that the Regional Director did not receive the objections before November 23 because of a delay in mail delivery caused by the postal service for which the Petitioner should not be held responsible.