

and possibly as many as 25. In these circumstances we agree with the Intervenor that it would be premature to order an election at this time. The present number of employees does not constitute a substantial and representative segment of the total future work force.⁶

[The Board dismissed the petition.]

⁶ *Cramet, Inc.*, 112 NLRB 975.

Small Tube Products, Inc. and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, and its Local 981, AFL-CIO. Case No. 6-CA-2111. December 1, 1961

DECISION AND ORDER

On August 25, 1961, Trial Examiner Arthur E. Reyman 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 in its entirety, as set forth in the Intermediate Report attached hereto. Thereafter the General Counsel and the Charging Party filed exceptions to the Intermediate Report and supporting briefs, and the Respondent filed a brief in support of the Intermediate Report.

The Board¹ 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 this case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations except as modified herein.

The General Counsel alleged that the Respondent violated Section 8(a) (1) and (5) of the Act by the following acts: (1) bypassing International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, and its Local 981, AFL-CIO (hereafter referred to as the Union), the exclusive bargaining representative, by bargaining directly and individually with its employees and conducting an employee poll on August 31, 1960; and (2) withdrawing recognition from the Union on October 28, 1960. The Trial Examiner recommended dismissal of both allegations. As the record clearly indicates that the Union acquiesced in the Respondent's conduct in meeting with small groups of its employees and intimidated and directly participated in the August 31, 1960, poll, we agree with the Trial Examiner's dismissal of the first allegation. However, with respect to point (2), we disagree with the Trial Examiner's recommendation.

¹ Pursuant to Section 3(b) of the Act the Board has delegated its powers in connection with this case to a three-member panel [Members Rodgers, Fanning, and Brown].

The facts, as found by the Trial Examiner, disclose that the Respondent and the Union were engaged in negotiations for a renewal of their existing contract. After five bargaining sessions, lasting over a period of 1 month, the Union was unwilling to agree to the Respondent's offer to abolish the present incentive payment system and its proposal to institute a profit-sharing plan together with a 10-cent per hour increase. After the last meeting, held on October 13, 1960, the Respondent's president, Oliphant, addressed an assembly of its employees and informed them of its futile attempts to reach an agreement with the Union. Oliphant then told the employees that as soon as the present contract shall terminate he intended immediately to institute the Respondent's last offer. The Trial Examiner found that an impasse had been reached at this final negotiation session held on October 13, 1960.

The contract expired on October 16, 1960, and the next day all 53 of the Respondent's employees went on strike and picketed the Respondent's premises. The Respondent started hiring replacements on October 25 and by October 28 it had hired 14 new employees. Of these, eight immediately commenced working, five had voluntarily quit on or before October 27, and one was not to start work until October 31, 1960. On October 28, 1960, the Respondent wrote a letter to the Union in which it stated that it no longer believed that the Union represented a majority of its employees and that it was thereby withdrawing recognition from it.²

The Respondent contends that its action in withdrawing recognition from the Union on October 28, 1960, was based on a good-faith doubt of the Union's continued majority status. In support of this contention, the Respondent relies on the following factors:

1. Respondent received reports from its supervisors that approximately 20 striking employees desired to return to work.

2. Respondent's president had personal conversations with "some" strikers who informed him that they were no longer in sympathy with the Union.

3. In an employee poll conducted on August 31, 1960, the Respondent's proposal to abolish the incentive pay system was rejected by the employees by a narrow margin. The Respondent contends that subsequently some of those who allegedly voted against the plan indicated that they would have accepted it if a profit-sharing plan had been included.

4. That in the unit of approximately 62 employees only 28 had voted in the 1958 election when the Union was certified.

Contrary to the Respondent's contentions, we find no merit in any of the first three defenses urged in justification of its alleged good-

² On October 31, 1960, the Respondent filed a petition for an election (Case No. 6-RM-197). This petition was subsequently dismissed by the Regional Director on January 23, 1961, due to the pendency of the instant 8(a)(1) and (5) matter.

faith doubt. Neither a mere desire of an unascertained number of strikers to return to work, nor an expression by some strikers of a belated willingness to accept the Respondent's proposal indicate that they have withdrawn from the Union. Indeed, it is difficult to attach any significance to a professed lack of sympathy with a union when the striker continues to support the strike by engaging in picketing. Moreover, as noted above, the Respondent had replaced only 8 of the 53 employees who went on strike. Similarly, we find that the Respondent's fourth alleged basis for withdrawing recognition from the Union is also without merit. This defense was raised for the first time by the Respondent in its brief to the Board and, as it was not litigated at the hearing, constitutes nothing more than a self-serving assertion lacking probative record support. However, were we to direct ourselves to this contention, we note that both the 1958 and 1959 contracts contained valid union-security clauses; that in view thereof, and in the absence of contrary evidence, it is fair to assume that, with the possible exception of three probationary employees, all of the employees who went on strike on October 16, 1960, were subject to the union-security requirements and were, therefore, members of the Union; and that, accordingly, the fact that only 28 employees in the present unit of 62 voted in the original representation proceeding is of little or no consequence.

Accordingly, as we have found that the Respondent was not possessed of a good-faith doubt as to the Union's majority status on October 28, 1960, when the Respondent withdrew and withheld recognition from the Union, we further find that by such conduct the Respondent violated Section 8(a) (1) and (5) of the Act.

ORDER

Upon the basis of the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Small Tube Products, Inc., Allegheny Township, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, and its Local 981, AFL-CIO, as the exclusive bargaining representative of all employees of the Respondent in the following appropriate unit: All production and maintenance employees of the Company at its Altoona plant, including sectionmen, but excluding office and professional employees, factory clerks, timekeepers, guards, and all other supervisors as defined in the Act.³

³ The above unit is that agreed to by the parties in their successive contracts in 1958 and 1959.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to join or assist the Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which the Board finds will effectuate the purposes of the Act:

(a) Upon request, bargain collectively with International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, and its Local 981, AFL-CIO, as the exclusive representative of all employees in the appropriate unit.

(b) Post at its plant in Allegheny Township, Pennsylvania, copies of the notice attached hereto marked "Appendix."⁴ Copies of said notice, to be furnished by the Regional Director for the Sixth Region, shall, after being duly signed by an authorized representative of the Respondent, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Sixth Region, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

⁴In the event that this Order is enforced by a decree of the United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, and its Local 981, AFL-CIO, as the exclusive representative of our employees in a unit appropriate for the purposes of collective bargaining, with respect to rates of

pay, wages, hours of employment, or other terms or conditions of employment. The appropriate unit is:

All production and maintenance employees of our Company at our Altoona plant, including sectionmen, but excluding office and professional employees, factory clerks, timekeepers, guards, and all other supervisors as defined in the Act.

WE WILL NOT interfere with, restrain, or coerce our employees in any like or related manner in the exercise of the right to self-organization, to form labor organizations, to join or assist the Union or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a) (3) of the Act, as amended by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL bargain collectively with the above-named Union, upon request, as the exclusive representative of all our employees in the appropriate unit, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

SMALL TUBE PRODUCTS, INC.,
Employer.

Dated----- By-----
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This is a proceeding under Section 10(b) of the National Labor Relations Act, as amended (61 Stat. 131, 29 U.S.C. 151, *et seq.*; 73 Stat. 519), herein called the Act.

After a charge filed by International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, herein called the International Union, and its Local 981, herein called Local 981 or the Local, on November 7, 1960, and an amended charge filed by the Union and the Local on February 20, 1961, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Sixth Region, after the issuance of complaint on January 20, 1961, issued a further amended complaint on April 21, and notice of hearing, alleging that Small Tube Products, Inc., contravened the provisions of the Act by refusing to bargain in good faith with the representatives of its employees and thereby did engage in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

The Respondent Company filed timely answer to the complaint as amended, effectively denying the substantive allegations of the amended complaint in regard to the violations of the Act therein set forth.

This case came on to be heard before the duly designated Trial Examiner at Hollidaysburg, Pennsylvania, on May 15, 1961, and was closed on May 18. Full opportunity was afforded each party to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues. Each party was afforded full opportunity to make oral argument on the record, to file proposed findings of fact and conclusions, and to file briefs. Briefs filed on behalf of the General Counsel, the Charging Party, and the Respondent have been received and considered.

Upon the entire record in the case, from my observation of the witnesses, and upon full examination of the record, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF SMALL TUBE PRODUCTS, INC.

The Respondent, Small Tube Products, Inc., is now, and has been at all times material hereto, a Connecticut corporation with its place of business in Allegheny Township, in the county of Blair, Pennsylvania, near the city of Altoona, where it is and has been engaged in the business of manufacturing and selling brass and copper tubes. During the 12-month period immediately preceding November 7, 1960, which period is representative of all times material herein, the Respondent manufactured, sold, and shipped from its Allegheny Township plant, finished products valued in excess of \$50,000 to points outside the State of Pennsylvania.

The Respondent is now and has been at all times material hereto, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED HEREIN

International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, and its Local 981, are labor organizations within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The Issues

Counsel for the General Counsel has stated the issues to be as follows:

(1) Whether the Respondent bypassed the exclusive bargaining representative of its employees by bargaining directly and individually with its employees, on the elimination of incentive pay in violation of Section 8(a)(1) and (5) of the Act.

(2) Whether the Employer violated Section 8(a)(1) and (5) of the Act by withdrawing recognition of the Union as the employees' exclusive bargaining representative on October 28, 1960.

Contractual Relationship Between the Employer and the Union Prior to October 28, 1960

The International Union was certified as collective-bargaining agent for the employees in an appropriate bargaining unit (production and maintenance employees) on June 25, 1958; subsequently the employees within the unit were organized into Local 981; thereafter the Respondent and the International Union and Local entered into a collective-bargaining agreement which ran from September 15, 1958, to October 1, 1959. A second agreement was entered into between the parties which ran from October 2, 1959, to October 1, 1960, subsequently extended to run to October 16, by supplemental agreement between the parties. Prior to the extension of the 1959-October 1960 agreement, the parties had met for the purpose of negotiating a new agreement, such meetings having taken place on September 9, 19, 29, and 30 and October 13; after these sessions of negotiations, the employees went on strike on October 17, 1960. On October 28, 1960, the Respondent withdrew recognition of the Union as collective-bargaining agent for the employees within the unit.¹ On October 31, 1960, the Respondent Company filed a management petition for a certification of representative (Case No. 6-RM-197), later dismissed by the Regional Director on January 23, 1961, the dismissal being based on pendency at the time of the filing of the petition of the Section 8(a)(5) charge upon which the amended complaint herein is grounded.

The 1959-October 1, 1960, agreement contained a clause providing for incentive pay of approximately 47 cents per hour to be paid to employees on certain jobs or orders received by the Company in addition to their basic hourly rate.

¹ Federal and State mediators were called into the picture on October 26, 1960. Their efforts to settle the strike were unavailing.

Edward A. Oliphant, president of the Respondent Company, on August 30 and 31, 1960, called several small groups of employees together and informed them that the financial condition of the Company was poor due to foreign competition, among other reasons, and suggested that the incentive pay on foreign price orders be eliminated. After his remarks made to the employees on August 30 and 31, the employees on August 31 engaged in a vote conducted on company premises on the question of whether or not they would work on certain orders tagged as "foreign price" at their basic hourly rates of pay without incentive pay. The employees at that time voted (28 to 21) against the elimination of incentive pay. Under date of June 8, 1960, the Company by President Oliphant had posted a notice on the bulletin board at the plant as follows:

To Our Employees:

As I have called to your attention from time to time, we have had many problems in our new plant here in Altoona, such as low productivity, serious quality problems at times and, of course, the inroads of foreign imports. All of these things affect our having as successful an operation as we should have considering that we have one of the finest, most modern small tube plants in the country.

I am sure that all of you are just as interested as I am in making this plant a tremendous success, because only in that way can all of us reap the benefits of job security and increased pay. I am equally certain that all of us, working together, can accomplish this goal.

Many of you have, from time to time, expressed an interest in "How are we doing." In order to answer the many questions you may have, and to provide an opportunity to discuss with you how we may make this a more successful plant as well as a better place to work, I am going to hold a series of meetings with small groups, continuing until I have a chance to talk with all of you. These meetings will begin this week.

Thereafter, the Respondent, by its president, addressed a series of letters to its employees. These letters appeared under dates of September 2 and 16 and October 17, 1960. In substance each letter set forth the Company's position that economically it was in trouble, and urged the elimination of the incentive system with certain adjustments suggested in the way of increased hourly rates of pay. On October 13, 1960, President Oliphant spoke to the employees.²

² President Oliphant's speech follows:

"DEAR FELLOW EMPLOYEES: *Today and this weekend will be one of the most important periods in your life.* I know it is one of the most important periods this Company will ever face. As you all know, your Company has been faced for the past few months with the necessity of making an important decision. This decision is one which should have been made immediately. However, it can be delayed no longer.

"You all know that your Company has lost considerable money in the past year and, in fact since operating in Altoona. This has been due to a number of reasons, but currently your Company is losing money primarily because of the foreign competition, which we are facing in the copper tube industry. Since 1949, *foreign importation of copper tube has increased from one-third million pounds to one hundred million pounds in 1959.* The price for foreign copper tube delivered in this country after payment of import duties is just about the same as the cost to us of the materials and labor involved. Therefore, it is no wonder that we have been unable to get any substantial orders for our product at a price that would enable us to make a profit. This situation became sharply evident in the latter part of August.

"Now we have a choice of three alternatives to follow:

"1. To shut down the plant permanently and liquidate the business;

"2. To remove the plant to some other State where we can have a lower labor cost; or

"3. To reduce our labor costs here sufficiently to meet foreign competition and remain in Altoona.

"As to the first alternative—the liquidation of the business—that would result in the loss of all of our jobs and a severe loss in the investment made by our stockholders. The second alternative is one which we don't want to follow. We are here in Altoona and we want to stay here. We don't want to move to some other State. Furthermore, it is questionable whether we would be able to raise the money which would be necessary for such a move.

"That leaves only the third alternative—that is—to reduce our labor costs and remain in Altoona. This alternative is the only logical one to follow. It would mean that we should be able to have full employment and thus more than make up for any loss in hourly

After the inception of the strike, the Respondent carried on business through its supervisors and others, until October 24 when it began to employ new employees. Those employees, comprising most of those who participated in the strike, and none

earnings. What's more important—the amount of money you take home each week and each year or the amount of money you earn by the hour? We think that when the choice must be made there is only one answer. *The important thing is the amount of money we take home each week and over the year.*

"After coming to this decision, I had talks with all of our employees. I explained that I could get orders and keep our plant working full time by dropping our prices in order to meet the foreign competition. We can get business at even better than foreign prices because we would be able to give our customers better delivery schedules. We could make a profit at these lower prices provided that our labor and salary costs were reduced and provided that we got a lot of business. *I know we can get the business at the low prices.* I suggested to the employees the termination of the incentive plan and a reduction in all office and executive salaries of 20%. I offered to grant a profit sharing plan in substitution of the incentive plan and the reduction in salaries. I also suggested some moderate wage increase on base rates of pay. A vote was taken on my proposition and it was rejected by the Union employees by a very slight margin. *Almost half of the Union employees voted to accept my offer* and the office, clerical and executive employees, I am sure will accept the offer.

"Immediately thereafter, by reason of the union vote, it was necessary to shut down the plant for lack of orders. You were notified of this by my letter of September 2. However, upon thinking this matter over, I decided to go out and get business at the lower prices because I was certain that upon mature reflection, you would see the justice of the Company's position. I also wanted to find out if I was right in thinking I could get such business. You know the result, we got orders at the low prices for many thousands of pounds and immediately recalled our labor force. We have worked steadily up until now to get out these orders.

"I have met a number of times with the Union Committee. The most recent meeting having been today. I have made the following *final* proposition to the Union Committee:

"1. The existing incentive plan will be eliminated and terminated effective next Monday, October 17, 1960

"2. The Company will institute effective immediately a profit sharing plan subject to the approval of the Internal Revenue Department, United States Treasury, providing substantially as follows:

"(A) The basic minimum financial needs of the Company—the sum of \$126,000 before taxes—will be received first by the Company and will not be subject to profit sharing

"(B) After the Company has made the before mentioned \$126,000 all profit beyond this point will go to the employees of the Company in the form of a bonus until the amount reached would equal a 25% wage and salary increase or a total of \$126,000, whichever figure is smaller.

"(C) Any profit thereafter will be divided between the Company and the employees as follows: the Company would retain 80% of the profits before taxes and the employees as a group would receive 20% of the profits before taxes.

"(D) The money received by the employees as bonus or profit sharing would be proportionate to their earnings as related to the total earnings of the employees.

"(E) To be eligible for profit sharing, an employee must be on the payroll on December 31 of each year and must have at least one year's seniority

"3 The Company will enter into a two year contract with the Union and will grant a wage increase of 10¢ per hour to be added to the base hourly rates effective October 17, 1960 and an additional 5¢ per hour would be added to base rates effective October 1, 1961, with the contract terminating October 1, 1962.

"When the Union Committee on September 30 suggested the extension of the present contract to October 15, we were stopped from going ahead with our plans to secure more business by meeting the foreign competitive price since the more production we turned out at the foreign price, the more we lost because our wage costs had not as yet been reduced. We have business lined up ahead of us, but very little, and unless we take steps immediately to get business, we will have to make substantial lay offs.

"*The decision can be delayed no longer.* Therefore, I have instructed our sales force to take steps immediately to get business at the competitive prices. *Effective Monday, October 17, the incentive plan is to be discontinued and employees will be paid base rates of pay. Effective Monday, October 17, these base rates will be increased by 10¢ per hour*

of the employees who worked for the Respondent prior to October 17, crossed the picket line to return to work. On October 28, the day the Respondent withdrew recognition from the Union and filed its petition for the resolution of the representation question, six new employees were at work and subsequently others were hired.

Under date of January 17, 1961, Ralph J. DiNicola, president of Local No. 981, and Paul G. Clouser, International representative, addressed a joint letter to the Company reading as follows:

GENTLEMEN: The members of Local Union No. 981, UAW (AFL-CIO) have this day voted to terminate the presently existing work stoppage at your plant at Spring Meadows, Allegheny Township, and unconditionally return to work effective at once.

Individual strikers, by letter dated the same day, addressed a letter to the Company in which they said:

GENTLEMEN: In conformity with action taken by our Local Union No. 981 UAW (AFL-CIO), I hereby notify you of my willingness to return to work at once and unconditionally. I will report to the company office at 8:00 o'clock A.M. tomorrow morning for assignment to work.

Forty-four such letters were sent to the Company by employees who went out on strike. Three employees, strikers, returned to work in early December 1960.

During the course of the negotiations in September 1960, the Respondent by its president suggested to the Union, the International, that it send in one of its financial experts to examine its books and see for itself the true financial position of the Company. Oliphant testified:

Q. (By Mr. LEITER.) Would explain to the Examiner how this [foreign competition] affected your business?

A. Well, in 1949, I think that is the earliest record available to me of foreign imports of copper and brass tubing. There was something less than a quarter of a million pounds imported annually, and that had grown in 1959 to nearly 100 million pounds. We had lost over the years—we lost whole industries which we might serve several of the different companies in that industry. We had lost whole markets and we had to get out of those markets into other markets. This not only affected my company but it affected all my competitors. I think that all of the effects from it, as far as the financial aspect of it is concerned, in 1960, it was incredible to us, a loss of \$35,000. It would not have

and you will receive this general increase immediately. I am instructing our lawyer to immediately prepare a profit sharing plan to be effective on the identical basis set forth herein which was offered to the Union. This profit sharing plan is one which grants greater participation to employees than any I have heard of. It is the most generous plan to employees that I know of. I am sure that all of you realize this.

"It is my understanding that the Union has called a meeting of employees to vote on acceptance or rejection of this plan on Saturday. *I hope that all of our employees will attend this meeting and vote. Your future and the future of this Company is at stake.* I hope that you will accordingly accept this offer.

"However, if by any chance this offer is rejected, then, as I said before, the changes will go into effect on October 17. *If any employee goes on strike, we will do everything within our power to operate this business and to replace permanently employees who are on strike. Under the law, any person who is replaced loses permanently his right to employment with this Company.* Naturally, any persons who go on strike will not be able to receive any unemployment compensations.

"*I sincerely hope that we will not have a strike. I sincerely hope that it will not be necessary to replace any of our employees. I sincerely hope that you will cooperate with the Company and I know that your cooperation will pay future dividends to you and to the Company.* However, I have no choice but to continue operations of this plant on a basis which will enable it to live. If, by any chance, a strike is called and if we are unable to operate the plant then I assure you that steps will be taken without delay to either liquidate the Company and terminate its existence, or steps will be taken leading to its removal from Altoona. The decision is yours. Will you destroy this Company and your jobs? Or will you accept our offer and share in whatever profits can be made while, at the same time guaranteeing yourself full employment? Please make your decision carefully and wisely "

been so serious for the Company, it was moved to Altoona in 1958, and we lost nearly a quarter of a million dollars the first year of operation. Some of that loss was in the moving of the Company which was relatively small. We got things straightened out in 1959. We did not make what we might call a good profit, but at least we made a small profit, \$12,000. That will give you an idea of how serious it is. You would have to know how large the Company is. What happened is a net loss of \$380,000, before we moved down. A net worth of perhaps \$160,000 or \$175,000.

Neither the International Union nor the Local availed themselves of this opportunity. Their answer was that they would not relinquish the incentive plan as applied to all orders, as against relinquishing incentive with an increase in basic pay on foreign orders, but the incentive should remain in effect on domestic orders.

The Respondent, on September 19, 1960, during the course of negotiations made the following written proposals to the Union.

1. There will be no wage cut but instead a wage increase as outlined below.
2. The elimination of the existing incentive system and instead substituting a profit-sharing plan as follows:

The basic minimum financial needs of the Company (\$63,000 per year after taxes—\$126,000 before taxes) will not be subject to profit sharing. All profit beyond this point will go to the employees of the Company up until the point is reached that would equal a 25% wage and salary increase or a total of \$126,000 whichever figure is smaller. Further profit, beyond this second point, would be divided between the Company and the employees as follows: the Company would retain 80% which would amount to 36% after taxes, and all employees would divide the other 20%. The basis of division in all cases would be proportionate to their earnings. The above profit-sharing plan is subject to approval by the Internal Revenue.

3. There would be a two (2) year contract with a wage increase of 5¢ per hour to be added to base rates effective October 3, 1960, and an additional 5¢ per hour to be added to base rates effective October 1, 1961. To be eligible for profit sharing an employee must be still on the payroll by December 31 of each year and must have at least one (1) year's seniority.

The Union refused this offer—an impasse, clearly shown on the record, ensued and the strike occurred with subsequent result as noted above.

President Oliphant testified:

We had borrowed, originally, \$200,000 from the small business administration in 1958, and we had to increase that loan to \$300,000 and we felt our account, to weather any further financial losses, was coming to the point where the Company would go bankrupt.

President Oliphant went on to relate that at a special meeting of the board of directors in May 1960, he reported to his board of directors concerning the financial position of the Company, and then made two specific recommendations. He recommended the sale of the Company to a larger competitor or, in the alternative, to drastically cut costs and specifically go out for customers that had been lost or for new customers and incidentally bring the Company's prices down to meet foreign import competition. Oliphant carried on discussions, under instructions from his board, looking forward to the sale of the Company but ran into certain obstacles which would prevent the immediate sale of the Company.

Again quoting President Oliphant on direct examination:

A. Yes, we were faced in late August, due to lack of orders, with substantially closing down the plant. The discussion was reached to do that sometime around, perhaps, August 25, that we had enough business to last out the following week and that we would have to close down the plant almost entirely at least for the present time.

Q. (By Mr. LEITER.) Was that a decision that you made at least with your supervisors?

A. Yes, we called in the people, how many man hours were involved in total back hours, and we made a statement of how long this remaining business

would last, and we talked to the sales department, who were frantically trying to get orders, that we had no alternative.

On the afternoon of August 30, 1960, Oliphant called in Ralph DiNicola and Gregg, one of the committeemen, and he and Plant Superintendent Evans informed DiNicola, the president of the Local, and Gregg that Oliphant had been successful in receiving a commitment from a former major customer for some 30,000 pounds of tubing. During Oliphant's conversation with DiNicola and Gregg, with Evans present, he informed them of the opportunity to fill this prospective order which would supply work for the plant without the necessity for shutdown and informed them that the order would have to be close to German import prices of tubes. In his words, again quoting from his testimony:

A. I specifically said this after getting through the discussion and outlining the problems of the shutdown and the reason for it. I have a suggestion to make, I can go out and get orders, and I named this particular order that I could get on the telephone within 5 minutes, which was true, and many other customers, and put you men back to work if you would be willing to work without incentive on those orders that we have to take on such prices. Well, there was very little discussion. Most of the talking was done by me. I got very little response, and before they left—what closed the conversation with those two men—I said to them I know that you will have grave difficulty in selling this to your membership, and I suggest that I call in small groups of employees and lay it out to them just as I laid it out to you and they agreed and that is what I did.

The August 31, 1960, Vote

There is sharp conflict in testimony between Oliphant and Evans for the Company on the one hand and DiNicola and Gregg on the other, as to who arranged the vote taken on the parking lot of the Company on the afternoon of August 31. There is testimony concerning instructions given by management representatives with respect to the making of a ballot box and the setting up of the box and the manner in which the vote was conducted. I do not believe that it makes a great deal of difference whether DiNicola and Gregg, apparently quite careless in their observance of their duties on behalf of the union members, or Oliphant or Evans were responsible for the vote. The fact of the matter is that the vote was taken and the result was adverse to the Company's suggestion that incentive be abandoned on foreign orders. As I understand the issues involved herein, the Section 8(a)(1) charge is derivative only from the Section 8(a)(5) charge that the Company refused to bargain in good faith. I do not find within the pleadings here or within the testimony any issue involving company domination, surveillance, or any matter having to do other than with the issues as stated by the General Counsel, set forth above. The issues herein as shaped by the pleadings and the testimony and proof offered at hearing show to me at least that the alleged inability of the Company to obtain orders without meeting the foreign competition collided headon with the refusal of the Union to permit the cessation of payment by the Company of incentive pay in addition to basic hourly rates, together with the refusal of the Union to accept what I consider a bona fide offer of the Company, made in writing, committing itself to increase wages in the future without the incentive plan. I can find no proof within the record, other than by innuendo, that the Company attempted unilaterally to control the payment of wages. I think a true impasse was reached at the end of the bargaining sessions in September 1960, and that the strike conducted by the Union was an economic strike and that the record clearly shows the Union lost that strike. I credit the testimony of Oliphant and Evans against that of DiNicola and Gregg.³

³ The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

SEC 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain

Good-Faith Bargaining

I do not believe that the question raised by implication here with respect to union majority during the times of bargaining and the times of the subsequent strike enter into the issues in this case. I do not believe, from the record as a whole, that the Respondent here can be said to have strictly challenged the union majority during the crucial times. The Union was a certified bargaining representative of employees in an appropriate unit and the Employer here did not question the union majority during the course of bargaining negotiations.

On the question of good-faith bargaining, it is well settled that an employer does not satisfy the good-faith bargaining requirements of the Act by holding meetings with representatives of a union representing its employees, by listening to contract demands made by the union representative and by making counter offers, unless the employer at the same time manifests a good-faith intent to come to an agreement with the union.⁴ It appears to me that the position of the Union here, in the light of economic facts as disclosed to it by the Respondent, together with the offer of the Respondent to submit its books for examination to the Union, shows good faith in bargaining and that for the Respondent to have gone further than it did in making its written offer with alternatives to the Union would have required the Respondent to engage in completely futile acts. Cf. *Precrete, Inc.*, 132 NLRB 986. I find that the Respondent did not, in violation of Section 8(a)(5) and (1) of the Act, unlawfully terminate the agreement between it and the certified bargaining representative of the employees within the above-described unit nor refuse to bargain with the representative as the collective-bargaining representative in violation of Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Small Tube Products Inc., is now, and has been at all times material hereto, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, and its Local 981, AFL-CIO, are labor organizations within the definition of Section 2(5) of the Act.

3. The Respondent has not engaged in nor is it engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act, as alleged in the further amended complaint.

4. The further amended complaint should be dismissed in its entirety.

[Recommendations omitted from publication.]

from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . .

⁴ See *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395, 402; *N.L.R.B. v. Reed & Prince Manufacturing Company*, 205 F. 2d 131 (C.A. 1), cert. denied 346 U.S. 887. Good-faith intent normally "can only be inferred from circumstantial evidence." *Reed & Prince* at pp. 139-140 "The problem is essentially to determine from the record the intention or the state of mind of Respondents in the matter of their negotiation with the union." *N.L.R.B. v. National Shoes, Inc., and National Syracuse Corporation*, 208 F. 2d 688, 691 (C.A. 2). See also *N.L.R.B. v. Stanislaus Implement and Hardware Company, Limited*, 226 F. 2d 377, 381 (C.A. 9).