Chas. S. Wood & Co. *and* Teamsters Local Union No. 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. *Case No. 22–CA–731. November 2, 1961*

DECISION AND ORDER

On June 1, 1961, Trial Examiner Arnold Ordman issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

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

The Board 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 entire record in this case,[1] including the Intermediate Report, the exceptions, and the brief, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Upon 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 the Respondent, Chas. S. Wood & Co., West Orange, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively in good faith with Teamsters Local Union No. 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of all truckdrivers and warehousemen employed by Respondent at its premises in West Orange, New Jersey, but excluding supervisors and all other employees, with respect to

[1] The Respondent's request for oral argument is denied as the record, exceptions, and the brief, adequately present the positions of the parties.

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rates of pay, wages, hours of employment, or other conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to organize and bargain collectively, or to refrain from such activity.

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

(a) Upon request, bargain collectively in good faith with Teamsters Local Union No. 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of all the employees in the appropriate unit described above with respect to rates of pay, wages, hours of employment, or other conditions of employment.

(b) Post at its place of business in West Orange, New Jersey, copies of the notice attached hereto marked "Appendix."[2] Copies of said notice, to be furnished by the Regional Director for the Twenty-second Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its 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 Twenty-second Region, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

[2] In the event that this Order is enforced by a decree of a 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 bargain collectively in good faith, upon request, with Teamsters Local Union No. 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of all the employees in the bargaining unit described below, with respect to rates of pay, wages, hours of employment, or other conditions of employment. The bargaining unit is:
>
> All truckdrivers and warehousemen employed at our West

Orange, New Jersey, premises, but excluding supervisors and all other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights to organize and bargain collectively, or to refrain from such activity.

CHAS. S. WOOD & CO.,
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

STATEMENT OF THE CASE

This proceeding, with all parties represented, was heard before the duly designated Trial Examiner in Newark, New Jersey, late in October and early in November 1960, on complaint of the General Counsel and answer of Respondent, Chas. S. Wood & Co. The issue litigated was whether Respondent has refused and is refusing to bargain collectively with the Charging Party, Local 408, more fully named in the caption, and whether Respondent has thereby violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended.

At the close of General Counsel's case, Respondent moved for dismissal of the proceeding. The Trial Examiner denied the motion. At the end of the hearing Respondent again moved for dismissal. Ruling on the latter motion was reserved and is presently denied consistent with the findings and conclusions set forth hereunder. Opportunity for oral argument was afforded the parties and thereafter General Counsel and Respondent submitted written briefs which have been duly considered.

Upon the entire record, and upon my observation of the witnesses, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Respondent is a New Jersey corporation with its principal office and place of business in West Orange, New Jersey. At that location and at various construction sites Respondent is engaged in the purchase, sale, and installation of thermal insulation and related products. During the year preceding the issuance of the complaint herein, Respondent in the course of its operations made interstate purchases of goods and materials valued in excess of $250,000. During the same period Respondent made interstate sales and performed services outside the State of New Jersey from which it derived revenue totaling more than $500,000. Respondent in its answer to the complaint admits these facts and admits also that it is engaged in commerce within the meaning of the Act. I so find.

II. THE LABOR ORGANIZATION INVOLVED

Local 408 is a labor organization within the meaning of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The issues defined*

The parties are in agreement and I find that at all times here relevant, Local 408 has been and is the collective-bargaining representative of Respondent's truckdrivers and warehousemen and that these employees, exclusive of all other employees of Respondent and exclusive of supervisors, constitute an appropriate bargaining unit for purposes of collective bargaining. During the period here under consideration, the employees comprising this unit were four in number: Edward Wakeling and

Herman Heller, truckdrivers; John Komar, warehouseman; and Paul Caputo, part-time combination truckdriver and warehouseman.

With specific reference to the unfair labor practices here alleged, the complaint sets forth that since on or about August 18, 1960, Respondent has refused to bargain ing good faith with Local 408 concerning the terms and conditions of employment of the employees in the above-described unit; that since on or about August 18, 1960, Respondent has bargained in bad faith and with no intention of entering into any final and binding agreement covering these employees; that on or about August 18, 1960, and thereafter, Respondent sought to bargain individually with these employees notwithstanding that Local 408 was their designated collective-bargaining representative; and, finally, that on or about August 18 and thereafter Respondent "reneged and continues to renege" on contract terms offered to Local 408 after Local 408 had accepted those terms.

In its answer to the complaint Respondent entered a general denial to these allegations. In the course of the hearing, Respondent amplified its position in this regard. In essence, Respondent's position is that it bargained in good faith; that the failure to bargain in good faith is more properly ascribed to Local 408;[1] that Local 408 during the course of the bargaining negotiations for a new agreement demanded inclusion of provisions which were unlawful; and that during the course of the bargaining negotiations, Local 408 engaged in strike and picketing activities which were unfair labor practices under Section 8(b)(4) of the Act.[2]

B. *Background*

In order properly to appraise the events on or about August 18, 1960, and thereafter, which constitute the gravamen of the complaint herein, brief reference must be made to antecedent events. Local 408 has had successive collective-bargaining agreements with Respondent covering its truckdrivers and warehousemen. The most recent of these agreements was executed on May 2, 1958, and expired by its own terms on April 30, 1960. Local 408 also had agreements, *inter alia,* with four other companies engaged in the same general line of endeavor as Respondent. The agreements with these four companies, H. W. Porter & Company, Inc., Woolsulate Corp., Jacobsen & Company,[3] and Robert A. Keasbey Company, likewise expired on April 30, 1960. On January 15, 1960, Teamsters Local 408 mailed to these four companies and to Respondent a notice of intention to terminate the existing collective-bargaining agreements and to negotiate new agreements.[4]

Bargaining negotiations between Local 408 and the five companies above-named began in due course. Anthony Cusano, president and business agent of Local 408, was the principal negotiator for the Union, Vincent J. Apruzzese, attorney, represented the five companies.[5] Cusano, during the period ending July 19, 1960, submitted three different proposed collective-bargaining agreements and Apruzzese

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[1] It appears that Respondent filed unfair labor practice charges in that regard against Local 408 which the Regional Director after investigation dismissed

[2] These latter activities were the subject matter of an unfair labor practice proceeding heard by the Trial Examiner on October 24 and 31, 1960, in which Local 408 was the Respondent and Chas. S. Wood & Co the Charging Party (Case No 22–CC–97) (132 NLRB 117). On February 6, 1961, the Trial Examiner issued an Intermediate Report finding that Local 408 had engaged in certain conduct violative of Section 8(b)(4)(i) and (ii)(B) of the Act and recommended a remedy therefor. Inasmuch as the same parties were involved in that proceeding as in the instant proceeding, the Trial Examiner deemed it appropriate in order not to unduly prolong the instant proceeding, to consider the evidence in the earlier proceeding, so far as relevant here, as part of the instant record. The findings made herein, therefore, reflect in part the proceedings in Case No. 22–CC–97.

[3] Also identified occasionally as Jacobson & Company.

[4] Notice of this action was given at the same time by Local 408 to the United States Conciliation and Mediation Service and to the New Jersey State Board of Mediation. The notices to these governmental agencies included a statement of intention by Local 408 to declare a strike unless a new contract was signed by May 1, 1960.

[5] There is a great deal of conflicting evidence in the record as to whether Apruzzese was negotiating for the five companies collectively or whether he was representing Respondent and the other firms on an individual basis. The controversy, in view of the issues as framed by the pleadings, is of minimal significance The evidence is clear that for the first few months of bargaining and until the strike, which began on July 19, 1960, negotiations were conducted by Local 408 with the five companies on a group basis. On the other hand, it is equally clear that the parties contemplated that any agreements reached would be incorporated in separate contracts with each of the five companies.

submitted a draft of a collective-bargaining agreement as a counterproposal. The parties were unable to reach an accord, however, and on the evening of July 18, 1960, the employees of the five companies, who were members of Local 408, voted to strike. The strike began on the morning of July 19, 1960.

Shortly after the strike began, Local 408 retained Anderw F. Zazzali, an attorney, to assist it in its collective-bargaining negotiations with the five companies. Sections 5 and 14 of Local 408's proposed contract dealing generally with duties of employees and with the amount of work covered by the contract or free to be assigned by the Respondent had been a major source of disagreement between Local 408 and the five companies. Apruzzese insisted that certain of these provisions were unlawful; Local 408 questioned Apruzzese's judgment in this regard but indicated that it did not desire any unlawful provision in an agreement and would drop its demand for any provision that was unlawful. By August 1, 1960, however, the issue in this regard was apparently resolved. The parties by stipulation entered into an acceptable compromise as to these matters and a few related matters, and the compromise was incorporated into a proposed contract. On August 1, 1960, Apruzzese wrote to Cusano confirming that that contract, which had been "initialled and signed" by Cusano and Apruzzese, would become binding upon ratification by the employees. The letter made reference by name to the four companies heretofore named but not to Respondent. The ratification by the employees was duly obtained and in due course Local 408 and the four companies other than Respondent executed separate contracts.

C. *Bargaining negotiations between Local 408 and Respondent in August and September 1960*

From August 1, 1960, on, the negotiations relevant here related only to dealings between Local 408 and Respondent. The testimony and the exhibits relating to these negotiations, like the testimony and the exhibits relating to the prior negotiations, were voluminous, and much of the evidence is in conflict. Moreover, inconsistencies appear in the testimony of the several major witnesses even when the testimony of each witness is considered separately. However, I believe this is due in most instances to faulty recollection of a complex series of events and documents rather than to any deliberate effort to falsify. Moreover, much of the conflict and inconsistency has reference only to inconsequential matters and the principal skein of events material here is for the most part clear.[6]

According to Cusano, he first learned on August 1, 1960, that Respondent was not satisfied with the terms of the contract which the other four companies had agreed to execute.[7] Sections 5 and 14 of the proposed contract continued to be the principal stumbling block to an agreement between Local 408 and Respondent. Respondent was apparently unwilling to accept the compromise in that regard which its attorney, Apruzzese, had reached with Local 408 respecting the other four companies. In any event, on August 11, 1960, Apruzzese as a result of prior discussions submitted a letter to Zazzali setting forth proposed modifications to Sections 5 and 14. The letter, in addition to setting forth suggested modifications, provided that as to one disputed matter (Respondent's possible discontinuance of trucking operations), Local 408 and Respondent sign a separate letter stating that the issue involved "be subject to future negotiation between the parties upon the request of either party."[8] The question was whether Local 408 would agree to the proposals in the August 11 letter.

The evidence in the record is quite clear, and I find, that as of August 11, the parties clearly understood that if Local 408 agreed to the proposals in Apruzzese's letter, any remaining differences between the parties could be readily resolved and an agreement between Local 408 and the Respondent could be quickly consummated.

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[6] Accordingly, except where material and discussed herein, I have not attempted to resolve conflicts or inconsistencies The briefs of the parties deal extensively with these matters and my failure to treat them in detail is not to be taken as an indication that they have not been carefully considered as bearing on my evaluation of the evidence relating to the issues here presented for resolution.

[7] Apruzzese insisted that Respondent's position had been clear at all times I believe there may have been an honest misunderstanding here. In any event since the complaint predicates no unfair labor practice allegation on this ground and since the parties continued to bargain thereafter, I deem it unnecessary to resolve this conflict.

[8] The clause, which was quoted in the letter but was not to be included in the collective-bargaining agreement, read as follows:

> If the Employer shall discontinue pick up or delivery of materials with his trucks, he shall arrange for his employees to be hired by the Employer that will undertake this function.

On August 18, 1960, 1 week after the August 11 letter was submitted to Local 408, Local 408 notified Apruzzese that subject to the approval of the employees Local 408 agreed to the August 11 proposals. The approval of the employees was obtained forthwith and by 1 p.m. that day Apruzzese was duly notified thereof. Apruzzese, however, manifested a change of attitude. Apruzzese accused Local 408 of unduly delaying in agreeing to the proposals in his August 11 letter and stated that Respondent was not of the same mind to settle outstanding differences on August 18, as it has been on August 11. Apruzzese complained that in the intervening week Local 408 had increased its secondary activity, had stepped up its agitation on the picket line and on August 15 had filed an unfair labor practice charge against Respondent.[9]

During his conversations with Zazzali on August 18, Apruzzese suggested that Mr. Wood, Respondent's president, meet that evening with the four employees represented by Local 408 in an attempt to resolve outstanding differences between the parties. Zazzali was unable to contact Cusano to get the latter's consent to such a meeting, but finally consented provided that the meeting be limited to an effort to reestablish good will and to discuss management prerogatives, matters which, according to Zazzali, Apruzzese said Wood was interested in.[10]

The meeting between Wood and the employees was held that evening, August 18, at Wood's home. Present were Mr. and Mrs. Wood and the four employees, Heller, Wakeling, Komar, and Caputo.

Heller, Wakeling, Komar, and Mr. and Mrs. Wood testified as to what transpired at this meeting. At the outset of the meeting Mr. Wood told the employees they were there to negotiate a collective-bargaining agreement. Heller, Wakeling, and Komar each testified that they did not understand this to be the purpose of the meeting but, rather, understood that they were present merely to reestablish good relationships. Nevertheless, upon further urging by Mr. Wood, the employees agreed to discuss the proposed contract although it had been their understanding that basic agreement had already been reached in that regard. After discussing earlier sections of the proposed contract, the parties reached section 22 of the proposed contract. That section provided that the union president "shall affix his signature to all collective bargaining agreements made and entered into on behalf of any and all members of this Local Union." Heller, Wakeling, and Komar each testified that Wood wanted section 22 omitted from the proposed agreement, that the employees were to sign without the Union, and that Wood was bargaining "with you four men and no one else." Wood denied that he had taken the foregoing positions. In any event it is clear that the meeting reached a stalemate at this point. The men refused to agree to the omission of section 22, or to sign an agreement without the Union. A recess was then called in the meeting and a number of telephone calls ensued in which Zazzali and Apruzzese were consulted. Zazzali informed the employees and Mrs. Wood that the former had no authority to consummate an agreement and that that was not the purpose of the meeting. The meeting disbanded. According to the testimony of the employees, Mr. Wood told them as they were leaving that he would be available until 10 the following morning if they wanted to sign a contract with him, without the Union. Wood denied that he had made any such suggestion, but admitted in his testimony that upon reaching section 22 of the contract he had suggested that they initial or sign the agreement.

I credit the testimony of Heller, Wakeling, and Komar as to the events which transpired at this meeting. Their testimony as to these events was straightforward,

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[9] The instant proceeding arises out of the August 15 unfair labor practice charge.

[10] Apruzzese, in effect, concedes that this was Zazzali's position, but insists that he told Zazzali that a meeting limited to these items would be meaningless and that Mr. Wood would not meet with the employees unless he could discuss the contract and attempt to resolve all outstanding differences According to Apruzzese, Zazzali finally agreed that the employees could meet with Mr. Wood for that purpose. I find it difficult to believe that Zazzali, who was reluctant to let the employees meet with Wood at all without first obtaining Cusano's consent, would have agreed to give such carte blanche authority to the employees in utter disregard of established collective-bargaining practices Moreover, the subsequent course of events, discussed in the text, tends to reinforce my conviction that Zazzali neither agreed to give, nor gave, the employees authority to resolve all outstanding differences and arrive at a contract. I find that, while the terms "good will" and "management prerogatives" could have been more specifically defined, Zazzali did not intend to convey, nor did Apruzzese understand him to convey, that all matters in the proposed contract, most of which presented no issue and had been agreed upon, were open to negotiation between Wood and the employees. I credit Zazzali's testimony in this regard.

convincing, and consistent with the overall pattern of events. Respondent argues that there were inconsistencies in the testimony of Heller and Wakeling which destroyed their credibility. This claim on the part of the Respondent was based in large part on the fact that each testified he had been working for Respondent for 6 years whereas in previous sworn statements they had fixed that period as being 8 years. I do not regard this error as a basis for rejecting their testimony as to events at the meeting of August 18 to which, it should be noted, Komar also testified. On the other hand, the testimony of Mr. and Mrs. Wood does not wholly support Respondent's position. As already indicated, Wood acknowledged that he had asked the employees to sign or initial the agreement when the discussion reached the crucial section 22 provision. The employees refused to do so. It seems apparent that they were being asked to do something more than indicate a provisional acquiescence subject to adoption by the Union. Both Mr. Wood's testimony and Apruzzese's discussions with Zazzali prior to the meeting revealed that Mr. Wood wanted to actually consummate an agreement that evening and wanted to consummate it with the employees. Indeed, Wood had told the employees a month earlier while the latter were on the picket line in front of Respondent's plant that they should get another union to represent them because he would not bargain with Local 408.[11]

Accordingly, I find that the employees were authorized to attend the meeting of August 18 at Wood's home merely to discuss management prerogatives and good relationships, that they understood this to be the limit of their authority but that they reluctantly acquiesced to Wood's insistence that they go over the entire contract notwithstanding their impression that basic agreement had already been reached in that regard. I believe and find further that their refusal to initial or sign the agreement or to approve the elimination of section 22 was further demonstration of their understanding that they had no authority to consummate an agreement without Local 408.[12] Finally, I find that Mr. Wood sought to utilize the meeting of August 18 to consummate an agreement with the employees individually in derogation of their right to be represented by their bargaining agent.

As already noted, I find that Wood told the employees at the termination of the August 18 meeting that he would be available until 10 the following morning if they wanted to sign a contract. Wood testified that he had included Cusano in this offer. Significantly, however, this offer was apparently not mentioned to Cusano or Zazzali, nor was mention of this made in Wood's pretrial affidavit which recited only that "if in the morning the men were able to clarify their authority to settle the remaining differences and to sign, Wood would be available all day to wrap up the matter so that the men might return to work."

The next negotiating session was held early in September 1960 between Cusano and Apruzzese. Apruzzese told Cusano that Mr. Wood was in Europe and that he, Apruzzese, had full authority to consummate an agreement with Local 408. On this basis Apruzzese proposed several further contract changes. However, when the Union agreed to these changes, Apruzzese said he would have to contact Mr. Wood in Europe to obtain the latter's approval. Cusano vigorously but ineffectually protested that he had been dealing with Apruzzese on the strength of the assurance that Apruzzese had full authority to consummate an agreement. However, Apruzzese persisted and in due course informed Cusano that he had communicated with Wood in Europe and that Wood was not satisfied but wanted still more changes. Further bargaining ensued concerning various provisions, in most of which the Union acceded to Apruzzese's demands. Finally, Apruzzese asked that the Union agree to delete section 23 of the proposed contract which dealt with retroactive pay and indicated that section 23 was the sole stumbling block to an agreement. On this understanding the Union agreed to the deletion and Apruzzese then said, "Now, we have a contract." Cusano then suggested that the strikers return to work but Apruzzese said that was up to Mr. Wood. A few days later Apruzzese told Cusano that Wood was still not satisfied and that the welfare fund provisions of the proposed contract were not acceptable to him. Cusano stated that the Union was opposed to deleting the welfare fund

[11] I credit the testimony of Komar, Heller, and Wakeling in this regard.

[12] Respondent makes much of statements by Cusano that Local 408 wanted express acquiescence or even written signatures by the employees to any agreement reached with Respondent It is apparent that Cusano felt he was making unusual concessions to Respondent in his endeavor to reach an agreement and was interested in protecting himself against possible criticism by the employees in this respect On the other hand, Cusano's statements could not fairly be construed as indicating that Local 408 was willing to abdicate its bargaining position altogether or that the employees wanted it to do so. It was apparent in this connection from the employees' position at the meeting of August 18, that they wanted Local 408 to continue as their bargaining representative.

provisions but asked whether such deletion would dispose of the matter. Apruzzese did not reply. There were no further negotiations between the parties.[13]

D. *Concluding findings*

As stated at the outset it is undisputed that Local 408 was at all times here relevant the duly designated bargaining representative of the four individuals comprising the appropriate bargaining unit herein and that it was incumbent upon Respondent to bargain collectively in good faith with that labor organization. The totality of the evidence suggests, subject to the affirmative defenses hereinafter discussed, that Respondent did not fulfill that obligation. More specifically, it appears, as alleged in the complaint that since on or about August 18, 1960, the pattern of Respondent's negotiations revealed that it had no intention of reaching a final and binding agreement. Even prior to that date Respondent had been unwilling to enter into the same basic agreement with Local 408 which its counsel had consummated on behalf of the four other companies even though negotiations theretofore had been conducted in common for all five companies. But conceding that Respondent was not obliged to enter into that agreement merely because four other companies had done so, its later conduct demonstrates that it had no intention of entering into any agreement at all. Respondent asserted at the outset that the principal stumbling blocks to an agreement were the provisions of sections 5 and 14. Respondent was apparently unwilling to accept the compromise which its own counsel, Apruzzese, had negotiated as a basis for agreement with the other four companies. After considerable discussion a new compromise in that regard was framed and Apruzzese embodied it in his letter of August 11. On August 18, Local 408 accepted this latest compromise but Respondent complained that the events of the intervening week had altered the situation and that the agreement could not be consummated. That same evening, as I have found, Respondent sought, through the device of a meeting between the four employees and Mr. and Mrs. Wood at the Wood home, to execute an agreement with the four employees themselves in disregard of the status of the Union as their bargaining representative. When this effort failed, bargaining negotiations came to a virtual standstill until the beginning of September. At that time negotiations began again and Apruzzese asserted, perhaps in all candor, that he had been given full authority to bargain in Respondent's behalf because Mr. Wood was in Europe. On this basis Local 408 repeatedly made concessions, each time on the understanding that the particular concessions would lead to a consummated agreement. In each instance, however, Local 408 learned to its chagrin that Wood required additional concessions. On the occasion of Respondent's last demand, the deletion of the welfare clause, even its own counsel was unwilling to assure Local 408 that the granting of the demand would result in a collective-bargaining agreement.

In this state of the record citation of authority to establish that Respondent defaulted in its obligation to bargain in good faith would appear to be superfluous.[14] Respondent, however, asserts a number of affirmative defenses.

First, Respondent asserts that the provisions of sections 5 and 14 were "hot cargo clauses" in violation of Section 8(e) of the Act and that by demanding the inclusion of such provisions, Local 408 was engaging in unlawful conduct exonerating Respondent from its duty to bargain. The contention is devoid of merit. Assuming, *arguendo*, that the provisions in question fell within the orbit of Section 8(e) of the Act, a proposition by no means certain, it is apparent that from the very outset Local 408 indicated its willingness to abandon any unlawful demand. At the beginning of August it agreed to the formulation which Respondent's counsel utilized as a basis for agreement with the other four companies where that issue was likewise in controversy. And when Respondent's counsel embodied a new compromise as to the disputed provisions in the letter of August 11, Local 408 likewise agreed to that. Under these circumstances Respondent can hardly justify its refusal to bargain on this ground. Certainly after August 18, when Local 408 agreed to the August 11 proposal, Respondent had no basis for its continued refusal to bargain thereafter on such ground.

Like considerations invalidate Respondent's second defense, namely, that Local 408's unlawful conduct arising out of its picketing and related activities demon-

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[13] The foregoing findings as to the September negotiations are based largely on the testimony of Cusano which, in this regard, was clear and convincing and which I credit.

[14] But see *Hillsboro Cotton Mills*, 80 NLRB 1107; *L G Everist, Inc*, 103 NLRB 308; *Bonham Cotton Mills, Inc*, 121 NLRB 1235; *Herman Sausage Co, Inc*, 122 NLRB 168, affd 275 F. 2d 229 (C.A. 5), rehearing denied 277 F. 2d 793; *Graham County Electric Cooperative, Inc*, 96 NLRB 684, 685; *N.L.R.B* v. *Reed & Prince Manufacturing Company*, 205 F. 2d 131 (C.A. 1), enfg 96 NLRB 850, cert. denied 346 U.S. 887.

strated Local 408's lack of good faith and exonerated Respondent from its bargaining obligation. The Trial Examiner has already made reference to his prior Intermediate Report where he dealt with the subject matter of this defense. In that Intermediate Report, the Trial Examiner found that Local 408 by picketing and related conduct at a public service site where Respondent was engaged in installation work violated Section 8(b)(4)(i) and (ii)(B) of the Act. The Trial Examiner found further that Local 408 engaged in like violations at a Reichhold Construction site. It is significant, however, that the conduct found to be unlawful at the public service site spanned only a period of several hours on August 8, 1960, and the conduct at Reichhold started on July 20 and ended on July 22, 1960, a period of only 3 days. Finally, the Trial Examiner found that the picketing and related activities at Respondent's own premises at West Orange was not violative of the cited sections of the Act. In this frame of reference, therefore, the issue presented is whether Local 408's unlawful conduct at Reichhold during the period from July 20 to 22 and its unlawful conduct at public service for several hours on August 8, exonerated Respondent from its bargaining obligation.

The Board has, to be sure, held that the duty to recognize and bargain with a union which is the employee representative is suspended during such time as the Union is engaged in conduct incompatible with fair dealing.[15] But this holding does not extend to the proposition that such conduct completely relieves the Employer of his duty to bargain thereafter or that the Employer in turn may in turn with impunity engage in unlawful conduct. *Kohler Co.*, 128 NLRB 1062. And the fact that the Union continued to resort to economic pressure, albeit not by unlawful means, likewise does not grant the Employer such a license. See *N.L.R.B.* v. *Insurance Agents' International Union, AFL–CIO* (*Prudential Ins. Co.*), 361 U.S. 477.

In the instant case the complaint predicates its refusal to bargain allegations on Respondent's conduct on August 18 and thereafter. At that time Local 408's unlawful secondary picketing had already come to a halt. Moreover, Respondent apparently did not consider that conduct as a bar to further collective bargaining. Indeed, as of August 11, Respondent acknowledges that it was close to consummating an agreement and to that end purportedly made the offer contained in its letter of August 11. However, when Local 408 accepted that offer on August 18, Respondent inexplicably demurred on the ground that in the intervening week the situation had changed because of increased secondary activity by Local 408. However, it is undisputed that there was no secondary picketing during that week, that the only picketing taking place was that at Respondent's own place of business at West Orange. Moreover, Apruzzese admitted that except for one call on April 11, which was not completed, he made no effort to contact Cusano or Zazzali during that week. This circumstance is hardly compatible with Respondent's asserted concern about the increased tempo of secondary activity. Rather it seems to be further indication that Respondent on August 18, as well as early in September, had a fixed intention not to consummate an agreement with Local 408 and was utilizing the tactic of making further and further demands upon Local 408 to preclude arrival at an agreement.[16]

The foregoing is also dispositive for the most part of Respondent's generalized defense that it cannot be found guilty of a refusal to bargain in good faith because Local 408 was itself not bargaining in good faith. In support of this latter contention Respondent urges, in addition to the considerations already discussed, that it had made offers which Local 408 had not accepted, that Local 408 had on occasion been dilatory in responding to Respondent's proposals, and that Local 408's conduct was not exemplary in other respects. On the basis of all the evidence, much of which has been summarized herein, I find this generalized defense to be without merit.

In sum, I find that a preponderance of the evidence on the record considered as a whole sustains the allegations of the complaint that Respondent since on or about August 18, 1960, has refused and is refusing to bargain in good faith with Local 408 in violation of Section 8(a)(5) of the Act, and is thereby interfering with,

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[15] See *Phelps-Dodge Copper Products Corporation*, 101 NLRB 360; *Marathon Electric Mfg Corp*, 106 NLRB 1171, enfd. 223 F 2d 338 (C A D C), cert. denied 350 U S 981. But cf *N L R B* v. *Insurance Agents' International Union, AFL–CIO* (*Prudential Ins Co*), 361 U S 477.

[16] Local 408 did file an unfair labor practice charge against Respondent on August 15, the charge upon which the instant proceeding is predicated. While Respondent was undoubtedly displeased at this development, it is settled that the filing of an unfair labor practice charge does not exonerate an employer from his statutory obligation to bargain *N L R B* v. *E A Taormina, A F Taormina, et al, d/b/a Taormina Company*, 207 F 2d 251, 254 (C A. 5), and cases there cited

restraining, and coercing its employees in the exercise of their rights under Section 7 in violation of Section 8(a)(1) of the Act.

IV. THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of the Act, I shall recommend that it cease and desist therefrom and from like or related interference with the rights of its employees to organize and bargain collectively. I shall also recommend appropriate affirmative relief adopted to the situation which calls for redress.

Upon the foregoing findings, and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Chas. S. Wood & Co. is an employer engaged in commerce within the meaning of the Act.
2. Local 408 is a labor organization within the meaning of the Act.
3. All truckdrivers and warehousemen employed at Respondent's West Orange premises, exclusive of all other employees and all supervisors, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.
4. At all times relevant herein Local 408 has been the exclusive bargaining representative of all the employees in the above-described unit within the meaning of Section 9(a) of the Act.
5. By failing and refusing to bargain collectively in good faith with Local 408 as the exclusive bargaining representative of the employees in the appropriate unit, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.
6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]

Midland Manufacturing Company, Division of Pacific Industries, Inc. *and* International Union of Electrical, Radio, and Machine Workers, AFL-CIO. *Case No. 17-CA-1778. November 3, 1961*

DECISION AND ORDER

On August 24, 1961, Trial Examiner George J. Bott issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and is engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a brief in support thereof.

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

The Board 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,[1] the brief, and the entire record in this case,

[1] The Respondent's request for oral argument is hereby denied, as the record, including the exceptions and brief, adequately reflect the issues and the positions of the parties.