

en Plumbing Company, S. C. Sachs Co., Inc., and Harold Grau, or any other person engaged in commerce, or in an industry affecting commerce, to engage in a strike, or a refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, materials, articles, or commodities, or to perform any services, nor will we threaten, coerce, and restrain the above-named Employers, or any other person, where an object thereof is to force or require Rosenbloom, or any other person, to cease doing business with Cupples Products Corporation.

GLAZIERS' LOCAL No. 513, AFFILIATED WITH BROTHERHOOD OF PAINTERS, DECORATORS AND PAPER-HANGERS OF AMERICA, AFL-CIO,

Labor Organization.

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

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

Employees may communicate directly with the Board Regional Office, 4459 Federal Building, 1520 Market Street, St. Louis 3, Missouri, Telephone No. Main 2-4158, if they have any question concerning this notice or compliance with its provisions.

Kennecott Copper Corporation (Chino Mines Division) and International Association of Machinists, AFL-CIO

Kennecott Copper Corporation (Chino Mines Division) and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 632, AFL-CIO.
Cases Nos. 28-CA-958 and 28-CA-961. October 13, 1964

DECISION AND ORDER

On January 6, 1964, Trial Examiner Martin S. Bennett issued his Decision in the above-entitled case, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed, as set forth in his attached Decision. Thereafter, the General Counsel and the Respondent filed exceptions to the Trial Examiner's Decision and supporting briefs.

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 Fanning, Brown, and Jenkins].

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 Decision and the entire record in this case, including the exceptions and briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner as modified below.¹

[The Board dismissed the complaint.]

¹ Our agreement with the Trial Examiner's ultimate conclusion is based on the particular circumstances of this case, including the fact that the Respondent's allegedly unlawful unilateral action resulted in no significant detriment to the employees in the appropriate unit, and the further fact that the Respondent agreed to and did bargain about its action as soon as the Union protested.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

This matter was heard before Trial Examiner Martin S. Bennett at Silver City, New Mexico, on October 1, 1963. The complaint¹ alleges that Respondent, Kennecott Copper Corporation (Chino Mines Division), had engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by unilaterally subcontracting, without prior notice, to Machinists and Boilermakers certain unit work customarily performed by employees in the units represented by those organizations. Briefs have been received from the General Counsel and Respondent.

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

FINDINGS OF FACT

I. JURISDICTIONAL FINDINGS

Kennecott Copper Corporation (Chino Mines Division) is a New York corporation which maintains a Chino Mines Division at Santa Rita and Hurley, New Mexico, where it is engaged in the mining and reduction of copper ores and related products. Said division ships products valued in excess of \$50,000 per annum directly to points outside the State of New Mexico. I find that the operations of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

International Association of Machinists, AFL-CIO, and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 632, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The issue*

At its Hurley milling operations, Respondent utilizes a piece of equipment known as a Garfield roll base. Four are in operation at all times and a fifth is held in re-

¹ Issued July 30, 1963, and based upon charges filed on May 22 and 27, 1963, respectively, by International Association of Machinists, AFL-CIO, and International Brotherhood of Boilermakers, Iron ship Builders, Blacksmiths, Forgers and Helpers, Local 632, AFL-CIO, herein called Machinists and Boilermakers.

serve. Approximately once a year it becomes necessary to rebuild a Garfield roll base and this repair work had previously been performed at the mill by employees in the two bargaining units represented by the charging unions. Specifically, in addition to their normal duties, members of the bargaining unit represented by Boilermakers did a portion of the work falling within their competence for the past 15 years and members of the unit represented by Machinists performed the portion falling within their skills for the past 3 years and, to a lesser extent for the past 11.

On May 13, 1963, without any notice to either labor organization, Respondent unilaterally subcontracted the rebuilding of a Garfield roll base to Darbyshire Steel Company, El Paso, Texas, and on that date a Darbyshire truck hauled the Garfield roll base to its El Paso plant where the work was to be performed. The General Counsel attacks this subcontract as constituting a refusal to bargain in good faith and relies upon the principles enunciated by the Board in *Town & Country Manufacturing Company, Inc., et al.*, 136 NLRB 1022 and *Fibreboard Paper Products Corporation*, 138 NLRB 550. This actually would involve an extension of the doctrine, because, unlike those cases, it is undisputed that no jobs were lost as the result of this business decision. All involved had previously worked a 5-day 40-hour workweek and continued to do so thereafter, although there is dispute as to the amount of overtime, if any, that would have been worked had Respondent done this work itself.

B. *Appropriate units and majority representation therein*

All boilermakers, boilermaker layout men, boilermaker helpers, boilermaker apprentices, welders, and car repairmen at the Hurley, New Mexico, boiler shop, including the Santa Rita car repairmen and the triple valve man, but excluding cleanup men, clerical employees, supervisors, assistant supervisors and the foreman, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

All machinists and helpers at the Santa Rita and Hurley, New Mexico, operations and all machinists, helpers, mechanics, burners, and apprentices employed at the Hurley smelter, excluding supervisors, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Boilermakers and Machinists at all times material herein have been and now are the respective representatives of the employees in the above-described appropriate units for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

C. *Alleged refusal to bargain*

The Boilermaker unit complement is 20 or 21 men. One to three men would normally be assigned to the overhaul project which takes from 500 to 600 man-hours to perform. The Machinists' unit personnel would customarily devote approximately 250 man hours to the task. The previous repair of a Garfield roll base lasted 13 months and was completed in 1962. This represents total elapsed time because the personnel involved worked on the overhaul only when not otherwise engaged in their normal assignments.

Respondent desired to have the 1963 project completed within 6 to 8 weeks and, at the most, within 5 months, although, as of October 1, Darbyshire had not completed the job. Had Respondent's personnel worked full time on the overhaul, the job would have taken approximately 90 days, this involving overtime work. It is Respondent's policy to avoid such overtime work.

It is manifest that this issue raised by the General Counsel relates to normal unit work and would fall within the scope of the cited cases upon which he relies. I find therefore that this is a subject of mandatory bargaining. On the other hand, Respondent has raised several defenses, and one of these, predicated upon the management-rights clause of the contract, is deemed to be dispositive of the present issue. The clause provides as follows:

Nothing in this agreement shall be construed to limit or impair the right of the company to exercise its own discretion in determining whom to employ, and nothing in this agreement shall be interpreted as interfering in any way with the company's right to alter, rearrange or change, extend, limit or curtail its operations of any part thereof, to decide upon the number of employees that may be assigned to work on any shift or the equipment to be employed in the per-

formance of such work, or to shut down completely, whatever may be the effect upon employment, when in its sole discretion it may deem it advisable to do all or any of said things.²

The most recent contract negotiations took place in 1956, 1959, 1961, and 1962. The record discloses that during this entire period the clause was not a sleeper and that the parties consciously realized its scope. Thus, in the 1956 and 1959 contract negotiations, the Unions attempted to place a ban against subcontracting in the contracts. This attempt was successfully resisted by Respondent. In the 1961 and 1962 negotiations, the Unions did not raise the topic and the General Counsel claims that anything short of a clear and unmistakable waiver by them of their right to be heard on the topic of subcontracting may not be recognized.

The record also demonstrates that in the very same 1956, 1959, and 1962 negotiations, the Unions attempted to modify the management-rights clause. It is likewise undisputed that Respondent successfully resisted this change and that the clause has been unchanged since 1956. I find, therefore, that the clauses were operative and consciously so on both sides.

An inspection of the clause readily demonstrates its breadth. It flatly gives Respondent the right to exercise its sole discretion, which "Nothing in this agreement" may "limit or impair." It further gives Respondent the right to alter, limit, or curtail its operations or any part thereof as well as to decide on the number of personnel to be used and the right to shut down completely "in its sole discretion." Obviously, this clause permits Respondent to go much further than they did in the instant case.

It would logically follow that the sending out of the repair job is sanctioned by this broad language. This is so even if the overhaul did affect personnel in the units, which it did not in any real sense because all personnel continued to work their regular 40-hour workweek.³ While it is admitted that the time factor was the primary reason for the subcontract, the cost factor in overtime pay because of personnel limitations was also a factor. Thus, the position of the General Counsel reduces itself to a claim that Respondent should have gone on an overtime basis at penalty pay to keep this extra work in the unit.

Be that as it may, I find that this broad management prerogatives clause reserves to Respondent the right to take precisely the action it took. Consequently, the labor organizations involved herein have thereby waived any rights they otherwise enjoyed to be heard on the issue of subcontracting. Indeed, the Supreme Court has recognized a savings clause of a more ambiguous nature as constituting a valid disclaimer of illegal strike objectives by a labor organization. *N.L.R.B. v. News Syndicate Company, Inc., et al.*, 365 U.S. 695. I shall, therefore, in view of the foregoing considerations, recommend that the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. The operations of Respondent, Kennecott Copper Corporation (Chino Mines Division) affect commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Association of Machinists, AFL-CIO, and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 632, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

RECOMMENDED ORDER

In view of the foregoing findings of fact and conclusions of law, it is recommended that the complaint be dismissed in its entirety.

² These organizations have for some years conducted joint negotiations and have signed similar agreements. This clause appears in both contracts, although in different locations, in an article entitled "Scope of Agreement."

³ There were no Boilermakers' unit personnel in layoff status and none were available for hire in May of 1963. Only one machinist, Twa, was then on layoff and he refused an offer of work from Respondent in June. This date was prior to the time when Machinists' unit personnel would have performed their portion of the overhaul, had Respondent done it in the plant.