

and executive personnel, guards, and supervisors, as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of the Act.

4. Sindicato Obreros Unidos Del Sur De Puerto Rico has been since February 13, 1963, and at all times since has been the exclusive representatives of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of the Act.

5. By Respondent's decision in May 1965 unilaterally deciding to cease its seasonal sugarcane grinding operation, to lay off its grinding employees, and to make arrangements to divert sugarcane from its mill to other mills for grinding, by implementation of its aforesaid decision by ceasing its sugarcane grinding operations, by laying off its grinding employees, and diverting sugarcane from its mill to other mills for grinding, without having consulted with the Union or having engaged in collective bargaining about these matters, and by failure to negotiate in good faith as to grievances about these matters, the Respondent has engaged in, and is engaging 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.

[Recommended Order omitted from publication ]

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**Humble Oil & Refining Company and Local 866, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.** *Case 22-CA-2598. November 1, 1966*

DECISION AND ORDER

On July 15, 1966, Trial Examiner David London issued his Decision in the above-entitled proceeding, finding that Respondent had not engaged in and was not engaging in certain unfair labor practices as alleged in the complaint, and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision and a supporting brief, and Respondent filed a brief in support of the Trial Examiner's Decision.

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

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 Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

[The Board adopted the Trial Examiner's Recommended Order and dismissed the complaint.]

## TRIAL EXAMINER'S DECISION

## STATEMENT OF THE CASE

Upon a charge filed December 16, 1965, by Local 866, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 866), the General Counsel, acting through the Board's Regional Director for Region 22, on February 9, 1966, issued a complaint alleging that Humble Oil & Refining Company (Respondent or Company) had engaged in violations of Section 8(a)(1), (2), (3), and (5) of the National Labor Relations Act, as amended (the Act). By its answer, Respondent denied the commission of any unfair labor practice. Pursuant to due notice, the hearing in this proceeding was conducted before Trial Examiner David London at Newark, New Jersey, on April 25 through 27, 1966. On or about June 13, 1966, the General Counsel and Respondent filed briefs which have been carefully considered by me.

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

## FINDINGS OF FACT

## I. THE BUSINESS OF RESPONDENT

Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Delaware. At all times material herein, Respondent has maintained various other places of business, terminals, and facilities in the States of Texas and New Jersey, including a refinery in Linden, New Jersey, herein called the Bayway Refinery. It is now, and at all times material herein has been, engaged at said offices and places of business in the manufacture, sale, transportation, and distribution of petroleum and related products.

In the course and conduct of Respondent's business operations during the 12 months preceding the issuance of the complaint herein, Respondent caused to be refined, sold, distributed, and transported in interstate commerce, products having a value in excess of the Board's jurisdictional standards. Respondent admits, and I find, that at all times material herein, it was and is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

Local 866 is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

## III. THE UNFAIR LABOR PRACTICES

A. *The alleged violation of November 19, 1965*<sup>1</sup>

Respondent employs approximately 34,000 employees. Its Bayway, New Jersey, refinery, where all the events with which we are concerned occurred, employs approximately 1,800 employees of whom about 800 are union represented in two bargaining units.

Since November 1964 the Union has been, and presently is, the duly certified collective-bargaining representative of the production and maintenance employees at the Bayway Refinery, known and hereafter referred to as the "wage unit." In November 1964 Independent Petroleum Workers of New Jersey (the Independent) was certified as collective-bargaining representative of Bayway Refinery's clerical employees which union is known and hereafter referred to as "the salary unit." On December 30, 1964, Independent affiliated with Local 866, the Union herein, and Respondent has since that affiliation also recognized and negotiated

<sup>1</sup> During the hearing, an informal settlement agreement pertaining to specified allegations charging violations of Section 8(a)(1), (2), and (3) of the Act was executed by the parties, approved by the Regional Director, and the Trial Examiner herein, and the allegations involved were, accordingly, withdrawn. As a result, the only issues remaining herein are those concerned with alleged refusal to bargain violations of Section 8(a)(5) and (1) of the Act occurring on November 19, 1965, and January 17, 1966.

with the Union on behalf of the employees in the salary unit. Leonard B. Conte, president of Independent, has acted as business agent for both unions and as representative of the employees in the two units described above.

On January 22, 1965, Respondent entered into separate collective-bargaining agreements with Local 866 and the Independent expiring November 22, 1966, and containing a reopener clause "on the subject of a general wage adjustment" upon notice by either party, prior to January 22, 1966.

At the time of the execution of the aforementioned contracts, and for a number of years prior thereto, Respondent had in effect what is known as the Humble Benefit Plan, composed of six individual plans—annuity, disability annuity, disability (sickness or accident), noncontributory group insurance, and contributory group insurance—all of which are collectively described as the Humble Benefit Plan and are published as subparts of the one Humble Benefit Plan. This plan, which provides all employees benefits except hospitalization and medical insurance, is a uniform companywide plan covering substantially all of Respondent's approximately 34,000 employees. The plan, however, provides for exclusion of service station employees and any employees covered by collective-bargaining agreements under which the Company has agreed to make contributions to some other plan. This has occurred in the Company's Chicago marketing operations where it and a Teamsters' Local have agreed that the Company shall make contributions to the Teamsters' plan for employees represented by that Teamsters' Local rather than providing coverage under the Humble Benefit Plan. With this exception, every employee is covered and exactly the same benefits have been provided to all employees from the chief executive officer of the Company to the lowest paid employee. Differences in benefits accruing to covered employees result only because of differences in length of service, or in earnings. Exactly the same benefit formulas are applied to all employees, whether corporate officers or union represented.

The two collective-bargaining agreements Respondent executed with the Union and the Independent on January 22, 1965, as described above, contain identical sections providing that each "agreement does not affect the Humble Benefit program . . . or the administration thereof." However, the section contains the further provision that the foregoing "is not a waiver of such rights as the union has to bargain concerning this program."

On June 2, 1965,<sup>2</sup> Respondent informed the Union that it was contemplating a general increase in all wage units of Respondent throughout the country and asked whether, in consideration of an agreement with the Union on such increase, the Bayway Refinery employees would waive their right to the wage-reopener clause in the existing collective-bargaining contracts. On or about June 15, the Union advised Respondent that if agreement on such a wage increase could be reached, the Union would waive the January 22, 1966, wage-reopener clause. Respondent thereupon made an offer of an increase in wages of 4½-percent, with a minimum of 16 cents an hour, effective July 1, and the Union agreed to give consideration to the offer.<sup>3</sup> A similar offer was made to the salary unit on the following day.

The parties met again on July 2 at which time the Union informed Respondent that it "would want all of the wage increase reflected in the area of benefits," and that it would make a more detailed proposal on July 6. On that day, July 6, it proposed that instead of the wage increase, the equivalent amount thereof be applied to "full paid annuities, full paid group insurance, and an additional \$50 towards the cost of medical, surgical and hospitalization benefits." Respondent replied that its fringe benefits were then already more generous than that of its competitors and, because the entire petroleum industry was then contemplating an early wage increase, Respondent would be placed at a competitive wage disadvantage if it applied the 4½-percent increase to benefits instead of wages. A meeting held on July 12 produced no change of position by either party. On July 13, at a meeting of the employees of both the wage and salary units, the salary unit accepted Respondent's proposal and it was, apparently, put into effect. The wage unit, however, rejected the offer.

By October, other oil companies had made wage adjustments with its employees and Respondent deemed it "prudent" to renew its 4½-percent wage offer to the

<sup>2</sup> Unless otherwise indicated, all reference to dates herein are to the year 1965.

<sup>3</sup> The offer also included an additional proposal for "red circle" employees which proposal, however, has no relevance to the issues herein.

Union. It submitted the offer, to be effective, however, upon acceptance, as distinguished from the July 1 effective date contained in its earlier proposal. At a meeting on October 28, the Union submitted a counterproposal—half of the increase to be applied to wages, and half to Blue Cross and Blue Shield, “major medical.” Respondent replied by presenting a detailed statement seeking to establish the “unsoundness” of the Union’s counterproposal. The parties met again on November 3 but neither party changed its position, and they “mutually agreed that [they] would drop the whole matter.”

On November 19, at a meeting attended by duly designated representatives of both parties, J. J. Graham, Respondent’s employee relations manager at Bayway and its principal spokesman, informed the Union’s representatives that he had called the meeting “to inform [them] of some changes in [Respondent’s] Benefit Plan which will become effective December 31, 1965.”<sup>4</sup> A memorandum entitled “An Improved Retirement Income Program for Humble Employees,” detailing the changes in the benefit program, was distributed to the participants in the meeting. Among the changes was one whereby Respondent agreed it would itself bear the full cost of the annuity program, thereby relieving employees of the obligation to contribute thereto and thus increasing their take-home pay. In addition, Respondent agreed to double its contributions toward the thrift program and to revise and improve the annuity formula.

At this meeting, the changes were explained in detail and a lengthy discussion ensued during which many questions by the union representatives were answered. One of the Union’s stewards requested the loan of some of Respondent’s material for use in explaining the changes to employees and Respondent agreed to make it available. In response to an inquiry by the Company, the Union indicated that it would be desirable for the Company to schedule meetings among employee groups thereby making it unnecessary for the Union to do so.

Respondent publicized these changes in the following company publications: “Bayway Refiner,” dated November 26, 1965, distributed to all employees at Bayway; the “Humble News” for December 1965, distributed to all of Respondent’s employees throughout the country; and in “Esso Fleet News,” dated November 24, 1965. The “Bawway Refiner” stated: “On Friday, November 19, Humble announced a major improvement in the Humble Benefits Plans designed to provide more retirement income to employees throughout the Company who retire after December 31, 1965.” The “Humble News” headlined the article: “Revised Annuity and Thrift Provisions Will Boost Retirement Income, Raise Take Home Pay.”

Shortly after the November 19 meeting, Graham discussed the changes on at least two occasions by telephone with Conte who, though he had notice of the meeting, was unavoidably absent therefrom. Conte expressed concern regarding the application of the annuity formula to employees who had been on strike during the past year, and Graham assured him that arrangements had been made for the formula to be applied to those employees without any deductions from total company service for time absent during the strike. Other technical questions were referred by Graham to Mr. Sweeney, Benefit Plan administrator for the Bayway Refinery. Graham also discussed with Conte the desirability of the employee meetings to explain the changes in the Benefit Plan. Conte agreed that this was desirable and such meetings were thereafter held.

On November 23, the Union served notice on Respondent of its desire to negotiate the Wage Reopener as set forth in the contract of January 22, 1965, covering the employees in the wage unit. Bargaining with respect thereto took place thereafter and agreement on certain phases thereof was reached. With respect to the unresolved items, the parties were still negotiating during the week before the hearing herein.

It is the contention of the General Counsel that “Respondent violated Section 8(a)(1) and (5) [of the Act] in failing to bargain with Local 866 by unilaterally changing the Humble Benefit Program on November 19, 1965,” and that the changes in that plan were a “*fait accompli*” on that day. Respondent concedes that it was under “obligation to give notice to and an opportunity to bargain to the Union . . . before effectuating changes in benefits under the Plan.” It contends, however, that this notice and opportunity was given on November 19, 1965, and that the Union, once it had received such notice, was placed under an obligation

<sup>4</sup>The testimony is undisputed that prior to November 19 there was no proposal by Respondent concerning changes in the Humble Benefit Plan.

to make a clear and definite demand for bargaining with respect thereto, or at the very least to object to placing the changes in benefits into effect, if it desired to negotiate different changes in the plan. For the reasons that follow, I conclude that the General Counsel has not established by a preponderance of the evidence that Respondent on or about *November 19*,<sup>5</sup> unilaterally changed the Benefit Plan.

On or shortly before November 18, Graham called Conte and told him that Respondent anticipated making some changes in the Benefit Plan which he "wanted to review with the Union" on November 19. Conte was not certain whether he would be able to attend a meeting on that day and told Graham to go ahead with the meeting nevertheless, but to make certain that the Union's chief stewards attended the meeting.

At the meeting held on November 19, four of the Union's chief stewards, all being members of the bargaining committee, two from the wage and two from the salary unit, were in attendance. Graham opened the meeting by announcing "there were some *anticipated* Benefit Plan changes [he] wanted to review and discuss with them" and then turned the meeting over to an associate who circulated a memorandum describing changes in the plan and presented "a detailed review" thereof. During the discussions that followed, all of the union representatives asked questions about the changes to which Respondent apparently gave satisfactory answers.

Although Graham announced at the opening of the meeting that the changes would become effective December 31, 1965, there was no testimony or contention that any union representative asked, as was the case in Respondent's announcement of the proposed wage increase on June 2 and in other earlier negotiations between the parties, that the Union be given a further opportunity to study and then reply to the proposal.

Joseph Neunert was the *only* union representative of the four representatives who attended the November 19 meeting who was called upon by the General Counsel to testify concerning what transpired thereat. He testified that he did not "believe . . . any representative from the Union ask[ed] the Company not to put the changes into effect," or that there was "any request by the union representatives to have any further [negotiation] meetings concerning these changes." Instead, the union representatives asked only that Respondent conduct employee meetings so that all the employees would be fully appraised of, and understood, the increased benefits in the Benefit Plan described to the union committee that day. The entire conduct of the union committee on November 19 leads only to the conclusion that they acquiesced in Respondent's announcement of the increased benefits to become effective December 31.<sup>6</sup> The committee's conduct, and the conclusion I have drawn therefrom, is consistent with Conte's conduct concerning other benefits "announced" on May 1 and on which occasion, he testified, the Union made no demand to bargain with respect thereto because "we felt that they were *definite benefits*."

I find nothing in what transpired at the meeting on November 19, to establish that Respondent's announcement on that day announced or constituted a "fait accompli," or foreclosed bargaining with respect thereto as claimed by the General Counsel. Respondent was certainly under no obligation to expressly ask, in so many words, that the Union bargain with respect to the revised benefits. Instead, I conclude that upon being appraised on November 19 that Respondent intended to make the new benefits effective on December 31,<sup>7</sup> it was incumbent upon the Union to indicate, *in some manner*, its disapproval thereof or that it desired to negotiate and bargain with respect thereto. As previously found, the Union manifested no such disapproval or desire for further negotiation. Section 8(a)(5) of the Act does not require an employer to literally invite negotiation. Instead, the section makes it unlawful for an employer "to *refuse* to bargain

<sup>5</sup> In his brief, the General Counsel constantly stresses November 19 as the date of violation.

<sup>6</sup> See *Kinard Trucking Company, Inc.*, 152 NLRB 449, where the Board recognized "that it is possible, of course that, once notified of the employer's desire to alter an existing term or condition of employment, the representative might accede and not request bargaining." See also *Motoresearch Company and Kems Corporation*, 138 NLRB 1490, 1493, and *Shell Oil Company*, 149 NLRB 305, 307.

<sup>7</sup> Respondent's board of directors did not approve the revised Benefit Plan until December 29.

collectively with the representative of his employees." In context here, "refuse to bargain" implies a prior request to bargain<sup>8</sup> and, admittedly, there was no such request herein.

The General Counsel, though not directly so asserting, expresses "wonder [as to] what avail a bargaining request would have been," and implies that it would have been futile for the Union to do so because "not only did Respondent announce the changes to the meeting of stewards, [but it] published them" in its periodicals. I conclude that there is nothing in either incident to justify the inference suggested by the General Counsel.

The first factor, pertaining to the nature and effect of the "announcement" to the union committee on November 19, has already been considered and disposed of by me contrary to the implication suggested by the General Counsel. Nor am I persuaded that the publication of the announcement in Respondent's publications warrants or supports an inference that a request to bargain would have been a futile gesture, or that the publications presented or established the new benefits as a *fait accompli*. Of the two publications relied upon and referred to by the General Counsel in his brief, the first to appear was the "Bayway Refiner" which, however, was not published until November 26, a full week after the November 19 announcement to the union committee. The other publication is dated "December 1965." There is nothing more in either publication than what had been announced to the union committee on November 19. And, having heard no protest from the Union or request to bargain with respect thereto during the interim, Respondent merely utilized its long-established news media to publicize what it had valid reason to believe had been agreed to, or acquiesced in, by the Union.

Nor is it of avail to the General Counsel's theory of the case that, during the June 2–November 3 negotiations concerning the 4½-percent wage increase offered to the Union, Respondent refused to apply the equivalent amount thereof to benefits then covered by the Benefit Plan. While Respondent did not at that time look with favor upon the Union's proposal and rejected it, its reason for doing so was not, as the General Counsel suggests, a closed mind unwillingness to change or improve the fringe benefits for employees at Bayway because those benefits were covered by a companywide plan available to all of its employees throughout the United States.<sup>9</sup> Instead, I find, as has heretofore been noted, that Respondent rejected the Union's proposal during the wage negotiations in order to remain competitive in wages and salaries with the remainder of the petroleum industry which, during the summer of 1965, was contemplating a general wage increase. Accordingly, I find that the June 2–November 3 wage negotiations were entirely unrelated to the November 19 announcement pertaining to improved benefits under the Benefit Plan.

On the entire record, I find "that the mere announcement of the program on [November 19], did not violate Section 8(a)(5) or (1) of the Act [and] that Respondent did not refuse to bargain about the [Benefit Plan] at any time before it was made effective." *General Electric Company*, 127 NLRB 346; *Lawn-Boy Division, Outboard Marine Corp.*, 143 NLRB 535; 544; *Montgomery Ward and Co., Inc.*, 137 NLRB 418, 422; *Motorcoach Company*, *supra*; *Shell Oil Company*, *supra*.

#### The January 17, 1966, Announcement

The second and only other issue posed by the record and the General Counsel's brief is "whether Respondent violated Section 8(a)(1) and (5) of the Act in failing to bargain with Local 866 by unilaterally changing employees' contributions toward a Major Medical insurance plan on January 17, 1966."

Since about 1956, Respondent has provided a Major Medical Plan for some of its employees designed to provide coverage for unusually large medical expenses in excess of that provided by Blue Cross-Blue Shield coverage. By 1959, and as a result of negotiations with the Bayway wage and salary units, the employees in

<sup>8</sup> This is not to say, however, that a unilateral change in<sup>1</sup> terms or conditions of employment unequivocally announced and forthwith imposed is not violative of the Act.

<sup>9</sup> In fact, as previously noted, the plan itself provides for exclusion therefrom of employees covered by collective-bargaining agreement under which the Company has agreed to make contributions to some other plan. Thus, at Chicago, Respondent and another Teamster local have agreed that Respondent make contributions to a Teamsters' Benefit Plan rather than Respondent's Benefit Plan.

those units were brought under the Major Medical Plan. The represented employees at Bayway constitute approximately 800 of the 14,000 employees covered by that plan. The plan itself consists of the contract, together with its revisions and supplements, between the Company and the Travelers Insurance Company, the insurance carrier. There is no separate written plan similar to the Benefit Plan although literature describing the insurance contract is publicized for covered employees.

Prior to a revision of this Major Medical Plan in 1963, this plan provided for premiums at each location to go up or down for that location alone, depending upon the plan experience at that location. However, the benefits provided were and are identical for employees at all locations. A part of the 1963 revision was an arrangement under which premiums for employees at a particular location would no longer vary depending upon the experience at that particular location. Instead, in the future, premiums would vary only as the total experience of the group—14,000 covered employees—required higher or made possible lower premiums, in which case the percentage change in premiums for the group would be applied to the individual premiums at each location, either up, or down, as circumstances dictated. These 1963 revisions in the Major Medical Plan were discussed at that time with the Unions which were then bargaining representatives for the Bayway employees.<sup>10</sup>

This Major Medical Plan also includes a provision for retroactive premium adjustments each year provided there has been an overall favorable experience for the group. Such a favorable experience generates a return to the policyholder (the Company) of a portion of the premiums paid that year. The 1962 supplement provides for a special fund to be maintained by the carrier in which these premium dividends would be maintained, and the funds accumulated in this special account are sometimes referred to as surplus funds. Under the 1962 supplement, these surplus funds could not be used to absorb premium increases caused by unfavorable under the plan or could be used to reduce premiums where favorable experience made this possible.

When the premium year ended in 1964, to the surprise of the carrier, the experience for the group covered by this plan was different from that experience under other Major Medical plans; a favorable experience had occurred, requiring the carrier to return a portion of the premium into the special account provided for in the 1962 supplement. The carrier indicated at this time, however, that it could not expect a favorable experience for the next policy year since this would be inconsistent with the general trend in the country, and suggested that the surplus funds in this special account be retained to offset the anticipated unfavorable experience. However, at the end of the contract year in 1965, the Company's Major Medical Plan was still experiencing a favorable low ratio, contrary to the general trend in the country, and the carrier was again required to deposit excess premium payments into the special account. By this time, the special account had totaled almost \$500,000 and the carrier indicated to Respondent that there was no need to retain such a large amount of money in anticipation of future unfavorable experience. The carrier expressed the opinion that a premium suspension for 6 months be placed into effect in order to reduce the size of the special account to the level desired for future protection against premium increases.

At the time the 1963 revisions were made, one of the various revisions explained to the Unions at Bayway was a new schedule of premiums for the various localities covered by the plan. As previously indicated, any future changes in the premium schedule were to be made at the same percentage increase or decrease, as the case may be, but the 1963 premium schedule was established for each location on the experience at that particular location in prior years. This revision of premium schedules in 1963 made possible a reduction in premiums for Bayway employees (both represented and nonrepresented) from \$2 per month for family coverage to \$1.84 per month.

When the Unions were informed of this reduction, they objected, expressing a preference for using the 16 cents to purchase additional benefits. Negotiations followed during which it was determined that no significant benefits could be obtained for Bayway employees for the additional 16 cents. This determination was reached after joint discussions by the Company and the Unions with representatives of the insurance carrier. The Company and the Unions then agreed, pursuant to an arrangement made with the insurance carrier, that deduc-

<sup>10</sup> Conte was then president of the Union representing similar employees.

tions of \$2 a month would continue to be made for Bayway employees and that the additional 16 cents would be accumulated in a special Bayway account maintained by the insurance carrier.

This special Bayway account is different from the special account for the plan as a whole as discussed above and as provided for in the 1962 supplement to the Company's contract with the carrier. The Company and the Unions agreed that the 16 cents would be retained in this account, to be maintained by the carrier, until such time as the parties negotiated further upon some method of applying it to Bayway employees in connection with reduced premiums or additional benefits in the area of Major Medical Insurance. Thus, though the contract with the carrier provided for a \$2 premium for Bayway employees, only \$1.84 was being used to pay for benefits under the plan. The other 16 cents was held by the carrier in a *special Bayway account* as described above. The discussions with the insurance with the insurance carrier concerning suspension of premiums involved only the 6 months suspension to be used to reduce the surplus accumulated in the special account for the *entire plan* resulting from favorable experience during the 2 previous years, and there was no discussion with the carrier concerning disposition of the special Bayway account.

On Friday, January 14, 1966, Graham became ill, remained so for several days thereafter, and asked John Kennedy, division head of labor relations for Respondent at Bayway, to contact Conte and arrange for a meeting with the Union on January 17. Kennedy was unable to reach Conte until early during the morning of Monday, January 17, at which time he explained to him that Respondent "had some items which [it] wished to discuss with the Union" and was told by Conte to proceed with the meeting even though he, Conte, could not attend.

At the meeting held that day, attended by at least six members of the Union's bargaining committee, Kennedy and Sweeney explained that the insurance carrier had indicated that the surplus funds in the special account for the Major Medical Plan had reached a point, due to favorable experience of the plan as a whole, to make feasible a complete suspension for 6 months. It was explained that because of this situation and pursuant to the recommendations of the carrier, the Company had made arrangements with the carrier for such a suspension to begin on February 1, 1966. The Company also informed the union representatives that it wished to utilize the funds that had accumulated in the special Bayway account (in which the additional 16 cents per month for Bayway employees had been accumulated by the carrier) to provide an additional 3 months suspension of premiums, making a total of 9 months suspension for Bayway employees.

There was considerable discussion of this information and several questions were asked. One employee asked whether instead of suspending premiums, the money accumulated due to the favorable experience under the plan could not be used to provide additional benefits. He was told that the carrier had recommended premium suspension.<sup>11</sup> No further questions were asked and there was no indication of any desire of the Union to engage in any further discussions of the 6 months premium suspension.

However, with respect to the additional 3 months suspension, which the Company was proposing to finance through utilization of the special Bayway account, one union representative objected, observing that he thought this meant that the Company was unilaterally deciding to use the funds in this manner regardless of the Union's opinion. Kennedy replied that the Company recognized this as an area for negotiation between the Company and the Union, that the Company was merely "proposing" the 3-months' suspension, and that the Company was willing to have further meetings with the Union on this subject.

This 3-months' suspension, which would not in any event have taken place until the end of the 6 months beginning on February 1, 1966, has not occurred, no directions have been given to payroll to suspend premiums beyond the 6 months period, and the status of whether the special Bayway account should be used for an additional premium suspension is unresolved pending further negotiations with the Union.

On the entire record I am unable to find or conclude that Respondent on or about January 17, 1966, unilaterally changed the employees' contributions toward the Major Medical insurance plan as alleged in the complaint. Instead, I find

<sup>11</sup> The insurance contract provided that the money in the special account could be used *only* to pay premiums.

that its announcement on January 17 with respect to that plan was intended by Respondent, and was so understood by the Union's representatives, as a proposal for the future disposition of the accumulated surplus and that the Union acquiesced in that disposition of the fund. My conclusion is buttressed by the fact that though the proposal was not to become effective until the following February 1, the Union, which apparently meets constantly with company representatives pertaining to employer-employee relations and problems, made no alternative suggestion pertaining to the Major Medical plan or indicated any need or desire for further negotiation with respect thereto. A union aware, as this Union was, of its right to bargain collectively with respect to all changes and conditions and terms of employment of its members, should not be allowed to sit idly by following an employer's announcement of an anticipated change of such terms and conditions and then subsequently claim that the announcement, *per se*, constituted unilateral action and an unfair labor practice.<sup>12</sup>

#### CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Respondent has not engaged in the unfair labor practices alleged in the complaint.

#### RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, it is recommended that the complaint be dismissed in its entirety.

<sup>12</sup> In view of the findings entered immediately above, I find it unnecessary to consider Respondent's alternative defense that "the premium suspension was an administrative act taken under an existing plan."

**Walker Manufacturing Company and Local 85, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO.** *Case 30-CA-345. November 1, 1966*

#### DECISION AND ORDER

On July 20, 1966, Trial Examiner Paul E. Weil issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in only one of the unfair labor practices alleged in the complaint. He concluded this did not warrant the issuance of a remedial order, and, therefore, recommended that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision and a supporting brief, and the Respondent filed cross-exceptions and an answering brief.

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

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The