Wilson Athletic Goods Mfg. Co., Inc. *and* United Textile Workers of America, AFL–CIO, and Its Local No. 233. Case 26–CA–2631

February 2, 1968

DECISION AND ORDER

BY MEMBERS BROWN, JENKINS, AND ZAGORIA

On May 29, 1967, Trial Examiner Eugene F. Frey issued his Decision in the above-entitled proceeding, finding that Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending dismissal of the complaint, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed 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.

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 finds merit in the exceptions of the General Counsel. Accordingly, the Board adopts the findings of the Trial Examiner only to the extent consistent herewith.

The essential facts in this case are not in dispute, and have been adequately set forth in the Trial Examiner's Decision. We shall restate the facts only to the extent required by our disposition of the case.

The Regional Director certified the Union in 1960 as the collective-bargaining representative of Respondent's production and maintenance employees. Their current collective-bargaining agreement has effective dates from October 9, 1965, to October 9, 1967.

In 1965 and 1966, Respondent began eliminating hourly paid work for most of its operations, by establishing standard piece rates for various jobs based on timestudies. In changing over from production of 1965 to 1966 models of golf bags, Respondent established, on June 11, 1966, new piece rates which determined wages for employees sewing zippers in golf bag pockets. Employees on this operation were advised of the new total rates as soon as they went into effect. When some of them saw their total pay decreasing under the new rate, they filed a formal grievance.[1] This grievance was processed through the first four steps without satisfactory resolution. On October 24, 1966, the Union notified Respondent that it wished to proceed to arbitration, the fifth and final step. About a month later, the Union advised Respondent that it did not wish to proceed to arbitration without first being permitted to make its own timestudies of the new piece rates. Respondent denied this request on the grounds that the Union would not have been able to derive any meaningful information for processing the grievance, since it was simply a matter of contract interpretation as to whether or not Respondent was precluded from setting up any rates which did not provide for maintenance of earnings.

The Trial Examiner found that the timestudies requested by the Union were neither necessary nor relevant to the basic issue concerning the propriety of the piece rates set by Respondent as a result of its own studies or to a determination by the Union of the advisability of proceeding to arbitration; that such timestudies would not have assisted the Union in deciding whether the piece rates were proper; and, that the Union would not have derived any meaningful information from its own timestudies since it had not first requested Respondent's time-study data.

We do not agree. We find, contrary to the Trial Examiner, that the information which the Union sought to obtain by means of a timestudy was not only relevant but also necessary to enable the Union to make an intelligent decision whether to proceed to arbitration. It is well settled that Section 8(a)(5) of the Act imposes an obligation upon an employer to furnish, upon request, all information relevant to the bargaining representative's intelligent performance of its functions.[2] This obligation extends to information which the union may require in order "to police and administer existing agreements."[3] The timestudies requested by the Union herein were in the nature of requests for such information. It is clear that the information requested was both relevant and necessary to enable the Union to fulfill its function as the bargaining representative, and that it was within Respondent's power to make such information available to the Union. We are of the opinion that compliance with the good-faith bargaining prescribed by the Act required Respondent to cooperate with the Union by making plant facilities available to the Union for the conduct by the latter of its own timestudies, unless the Union's request was improper for some other reason or imposed an unreasonable burden on Respondent.[4]

We do not agree with the Trial Examiner that the Union would not have gained any meaningful information from its own timestudies without first reviewing Respondent's timestudy. Although Respondent's timestudy engineer testified that the

[1] Grievance No. 44, filed June 22, 1966, relative to the complaint of employees Christine Stroud, Gladys Poole, and Caroline Somerville

[2] *N.L.R.B.* v. *Yawman & Erbe Manufacturing Co.*, 187 F.2d 947 (C.A. 2); *The Timken Roller Bearing Co.* v. *N.L.R.B.*, 325 F.2d 746 (C.A. 6).

[3] *J. I. Case Company* v *N.L.R.B.*, 253 F.2d 149 (C.A. 7); *The Timken Roller Bearing Co., supra.*

[4] See *Otis Elevator Company*, 102 NLRB 770, enforcement denied in relevant part 208 F.2d 176 (C.A. 2).

effect of his presence on an employee being checked was the only unlisted factor out of a total of about 12 factors listed in his timestudy, it still does not appear that his timestudy would have been intelligible to the Union without its having further knowledge of the other variables underlying the information appearing on the face of the timestudy. In these circumstances, we conclude that it would be unreasonable to require that the Union first request and review Respondent's timestudy data before it is entitled to receive permission to conduct its own timestudy.

Accordingly, we find that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to permit the Union to perform timestudies of the new piece rates.[5]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Wilson Athletic Goods Mfg. Co., Inc., Springfield, Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Textile Workers of America, AFL–CIO, and its Local No. 233, by refusing to permit the Union to perform independent timestudies, through its own experts, on jobs involved in grievances arising under the parties' collective-bargaining agreement.

(b) In any like or related manner interfering with the efforts of the Union to bargain collectively with it in behalf of the employees covered by the provisions of the collective-bargaining agreement.

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

(a) Post at its plant in Springfield, Tennessee, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly signed by the Respondent's authorized representative, shall 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 employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 26, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

[5] *The Fafnir Bearing Company*, 146 NLRB 1582.

[6] 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 "a Decision and Order" the words "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 you that:

WE WILL NOT refuse to bargain collectively with United Textile Workers of America, AFL–CIO, and its Local No. 233, by refusing to permit the Union to perform independent timestudies through its own experts on jobs involved in grievances arising under our collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with the efforts of the Union to bargain collectively on behalf of the employees covered by our collective-bargaining agreement.

WILSON ATHLETIC GOODS MFG. CO., INC.
(Employer)

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.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 746 Federal Office Building, 167 North Main Street, Memphis, Tennessee 38103, Telephone 534–3161.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

EUGENE F. FREY, Trial Examiner: The sole issue in this case is whether Respondent, Wilson Athletic Goods Mfg. Co., Inc., violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. Sec. 151, *et seq.* (herein called the Act), by refusing to comply with the request of the above Union as the statutory bargaining agent of Respondent's employees in its Springfield, Tennessee, plant, for permission to make its own timestudies of a certain operation in said plant for purpose of processing a grievance relating to standard piece rates assigned by Respondent to said job and filed by the Union under terms of a collective-bargaining contract between the Union and Respondent. The issue arises on a complaint issued by General Counsel of the Board, through the Board's Regional Director for Region 26, on January 31, 1967,[1] and answer of Respondent admitting jurisdiction and its refusal to permit the timestudy, but denying the commission of any unfair labor practices.

[1] The complaint issued after Board investigation of a charge filed herein by the Union on December 15, 1966.

A hearing was held on the issue before me at Springfield, Tennessee, on March 28, 1967, with all parties participating through counsel or other representative. At close of the testimony, a motion of Respondent to dismiss the complaint on the merits was taken under consideration, and is now disposed of by the findings and conclusions in this Decision. All parties waived oral argument at close of the hearing, but General Counsel and Respondent have filed written briefs, which I have carefully considered in reaching this Decision.

On consideration of the entire record in this case, and my observation of witnesses on the stand, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER AND THE LABOR ORGANIZATION

Respondent is an Illinois corporation, operating a place of business and plant in Springfield, Tennessee, where it makes golf bags. In the past 12 months prior to issuance of the complaint, Respondent had both direct inflow and outflow of material and products between said plant and points outside the State of a value in each instance in excess of $50,000. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The above Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A formal election was conducted by the Board at the plant on February 18, 1960, at which a majority of employees in an appropriate unit voted for the Union. The Regional Director aforesaid on February 29, 1960, certified the Union as the exclusive bargaining agent of the employees in such unit which consisted of all production and maintenance employees in said plant, excluding office clerical employees, watchmen, guards, and supervisors as defined in the Act. Respondent admits, and I find, that said unit is still the appropriate unit within the meaning of Section 9(b) of the Act, and that at all times since its certification the Union has been and now is the exclusive agent of all employees in said unit for bargaining purposes within the meaning of Section 9(a) of the Act. Respondent and the Union are presently parties to a collective-bargaining agreement covering employees in said unit which is effective until October 9, 1967.

In 1965 and 1966 Respondent began eliminating hourly paid work for most of its operations, by establishing standard piece rates for various jobs based on the timestudies.[2] In changing over from production of 1965 to 1966 models of golf bags, Respondent on June 11, 1966, established new piece rates which determined wages for employees sewing zippers in golf bag pockets. Employees on this operation were advised of the new rates as soon as they went into effect. When some of them saw their total pay decreasing under the new rates, three of them, Christine Stroud, Gladys Poole, and Caroline Somerville, complained to their foreman, Bobby Moulder, that the rates were wrong; Stroud was particularly angry about her lower pay, warning that she was "only going to run 80%," or work the equivalent of only 8 hours, long enough to make her basic piecework rate, without striving for any bonus. Moulder tried to pacify the three, saying he would check the rates with the timestudy engineer, Beecher Hendrix. He and Hendrix observed the three girls closely for several days, after which Moulder told them the rates appeared proper. The three discussed it with Hendrix, who took the same position. They then took their complaint to Jasper Smith, the official who had set up the new rates; he gave them the same answer, and told them to file a formal grievance if they were not satisfied.

On June 22 these workers filed a formal grievance with Moulder through the Union under the contract grievance procedures, claiming that their take-home pay under the new rates was less than before, and that this amounted to discrimination in violation of contract clause No. 2. Moulder referred it to plant superintendent, Robert E. Martin, as the second step in the formal grievance procedure. On June 28, Martin advised the Union that he could not settle it, and sent it to a company-union conference as the third step. At this conference on July 11 the union representatives presented the same complaint to Plant Manager Jack Joyce,[3] arguing that the new rates were wrong and should be reviewed, because the workers had less take-home pay than before. The Company answer was that the rates were proper, but these workers were not doing as much work as they should, that they were taking too many breaks from their work and not paying attention to their machines, hence were not putting out enough production to make their rates plus a bonus; Smith produced efficiency charts of all workers for the past year to show lower efficiency for the three complainants, to support this claim. No agreement was reached, so the dispute went to the fourth step, a September 6 conference between union agents, including International Union Vice President Calvin Ray, and Ray Rist, the company industrial relations manager. The Union made the same complaint and argument. Respondent replied that it would make another survey of the grievants' work for two weeks, and would let the Union know the result toward the end of September. When the same representatives met again on October 6, the company agents reported that it considered the rates proper, and when the Union repeated its contrary view, the company men repeated their claim that the decrease in take-home pay was due only to a drop in efficiency of the grievants, showing charts of their time worked, average hourly earnings, total earnings, and production for the period of observation, which depicted fluctuations in their production and earnings, and arguing that the variations were due to the lack of consistent effort by the workers. The parties reached no agreement.

On October 24, 1966, the Union sent Respondent a letter advising that, since the parties failed to reach agreement on the grievance, the Union intended to submit it to arbitration. This is the fifth and final step in the contract grievance procedure. By letter of October 28, Respondent replied that it would have its counsel talk with Everett F. Dean, a regional vice president of the Union, to agree on an arbitrator and time and place of arbitration. Shortly thereafter, Rist talked with Dean on the

[2] The piece rate established a minimum amount of pay for performing a fixed number of operations per hour, and the worker could earn more than the minimum by performing more than the standard number of operations

[3] Joyce was assisted by Martin, Smith, and Moulder, while the Union was represented by President W. C. Hooper and the plant grievance committee.

telephone about the grievance; the details of the discussion are not in the record, except that they did not discuss arbitration or the mechanics thereof suggested in Respondent's October 28 letter.

By letter of November 22, 1966, the Union advised Respondent that it did not desire to proceed to arbitration on the grievance "until it has had the opportunity to make its own time study on this rate," asking Respondent to suggest dates for the study and suggesting that Respondent might have its own industrial engineer present. By letter of November 30, Respondent denied the request on the grounds that the grievance did not challenge the fairness of the rate for the job, or indicate what the rate should be, but only raised the issue whether the company violated the "management" clause (section 2) of the contract by setting a rate that did not provide for maintenance of earnings, and hence the timestudy requested by the Union would not produce evidence relevant on the issue whether Respondent was precluded by the contract from setting up *any* rate, however well supported by timestudy data, which did not provide for maintenance of earnings, so that only dispute was a question of contract interpretation.

Contentions of the Parties and Concluding Findings

General Counsel contends that the dispute between the parties from the outset has been over the fairness or propriety of the rate for the grievants' operations, and that where the propriety of a piece rate is in issue during the processing of a grievance, the Union is entitled to make its own timestudy because it is necessary and relevant to its administration of the grievance machinery in the contract (in this instance, to determine whether it should take the grievance to arbitration), and that the information it needs about the fairness of the rate cannot be obtained from any other source but by a timestudy of the operations, hence under existing precedents the Union is entitled to make such a study, and a refusal thereof by the employer violates Section 8(a)(5) of the Act, under the decision in *Fafnir Bearing Company,* 146 NLRB 1582, affd. 362 F.2d 716 (C.A. 2). Since the situation here does not involve the usual issue of wage rates or fringe benefits in course of collective bargaining, where the labor organization is presumptively entitled to certain financial information from the employer, the Union here must show a specific need for the timestudy, particularly where the contract says nothing about the method of establishment of piece rates and makes no provision for their joint review by employer and union. *White Furniture Company,* 161 NLRB 444, 447; *General Electric Company,* 160 NLRB 1308, 1312, 1313.

If certain facts and circumstances disclosed by the record are considered alone, there would appear *prima facie* to be merit to the claim of General Counsel. The record shows, and Respondent admits, that at least from the July 11 meeting onward, the parties were in complete disagreement on whether the standard piece rate in question was fair and equitable; although the formal grievance in terms charged a violation of the "management" clause of the contract[4] through the alleged failure of Respondent to maintain the take-home pay of the three grievants, the record does not indicate any discussion of the obligation *vel non* of the employer to maintain take-home pay, as argued in its last letter, but only that the discussion narrowed the issue mainly to the fairness of the new rate under which these workers were paid. The Company recognized this when it took steps at each of the first four steps of the grievance procedure to check the rate, even going so far as to make essentially new studies of the operations of the grievants during the fourth step. Second, Union Agent Ray testified that timestudies of the operations by his engineers were needed to enable the Union to determine whether the new rate was fair and equitable, by a comparison of that study with the company timestudies, which would show whether the rates indicated by each varied materially. This present testimony at first glance appears to present a rational and cogent explanation of the need and sensible purpose of an independent timestudy, and if the Union had taken steps to procure the company timestudies first, preparatory to making the suggested comparison, the case would appear to fall squarely within the facts and ruling of the *Fafnir Bearing* case, *supra.*

However, the entire sequence of events, and necessary inferences therefrom, lead me to the conclusion that the independent timestudy requested by the Union in November was neither necessary nor relevant to the basic issue or to a determination by the Union about the advisability of arbitration, as it now claims, and that the Union never considered such study important or necessary for the handling of this grievance. First of all, it appears that the Union never made a demand for its own timestudies until after it had resorted formally to arbitration, the fifth and final step in the grievance procedure. While Hooper and Ray testified that they asked for it at the fourth-step meetings, and Hooper indicates vaguely that he had mentioned it at an earlier meeting, I do not credit their testimony as against the direct and credible denials by Rist, Joyce, and Martin, the employer agents at the conferences, of any such request by the Union, because Hooper's partisan testimony on this indicates that the alleged request was put only in the form of a rather casual question,[5] without any explanation or justification stated therefore; and Ray, the elder union official who was purportedly an expert in handling grievance procedures, was very vague about whether he made a specific request for a timestudy, his testimony indicating that he feels he did, solely on the assumption that he "probably" did it as a matter of routine, from his long experience with grievances. In addition, the Union formally resorted to the fifth step, arbitration, without specific reference to timestudies in any way. Hence, I must conclude from the Union's own conduct that it did not consider a timestudy by its own engineer either relevant or necessary to its handling of the grievance until November 22, long after

[4] Sec. 2 of the contract provides:

The management of the plant and the direction of the working forces, including, but not limited to the determination of the number of employees to be employed or retained, the right to hire, discipline, suspend, discharge, assign or transfer to jobs within the plant, and to release employees because of lack of work or other proper or legitimate reasons, is vested solely and exclusively in the Company; provided that this section will not be used for the purpose of discrimination against any employee or to avoid any of the provisions of this agreement. In addition, products to be handled, produced, or manufactured, the schedule of production, the methods, processes and means of production, handling and distribution, and the location of the plant, are solely and exclusively vested in the Company.

[5] Hooper says the union committee asked at one fourth-step meeting "if we cannot agree on this, why can't we bring in a time-study man?" to which Respondent replied that it would not permit it as a matter of company policy.

it indicated it would go to arbitration, the final step, and it gave no reason at the time of the November request for its change of position, nor offered any explanation why it wanted a timestudy preliminary to arbitration.

Furthermore, the record indicates that an independent timestudy would not in fact have assisted the Union, either in deciding whether the piece rate in question was proper or not, or whether it was justified in proceeding to arbitration, as its officials now testify. While Hooper and Ray testified that they needed the study to decide "who was right" about the rate, Hooper also said it would help to decide whether the grievants were or were not working hard enough to maintain their take-home pay. However, neither General Counsel nor the Union produced any proof or argument to show how an independent timestudy of the grrievants' operations, standing alone, would determine whether the Company's piece rate, or the timestudies on which it was based, were wrong, or how it would determine whether the grievants' actual performance was substandard and the real cause of their lower compensation. To the contrary, Ray admitted he needed his own study for comparison with the company studies to determine whether the company basis for the new rate was proper; he admitted that if the comparison were to show a variance of only 3 to 5 percent between the rate established by the Respondent and that indicated by the proposed union study, he would probably accept the company rate and drop the grievance. In addition, the uncontradicted testimony of Hendrix, the company engineer who ran the studies for the new rate, shows that, while an independent study by a union engineer would come up with a purported normal rate of production, it would not aid in determining whether the questioned rate was improper without his knowing beforehand, not only the questioned rate, but the basis on which it was established, i.e., the company timestudies, including all the factors considered in reaching the rate;[6] without knowledge of these factors, the union engineer could not determine whether his own study was based on the same or different factors, and thus whether his and the company studies had a common foundation as a basis of fair comparison. Hence, since it is clear from testimony of both company and union witnesses that the Union never asked for an examination of the company timestudies basing the new rates, and that it does not now seek such data, although it has always been available,[7] I am constrained to find that the union timestudy, standing alone, would not have assisted the Union in determining whether the rate was fair, whether the grievance had merit in that respect, or whether the fault lay with the workers themselves.[8] In this respect, the first element found essential in the *Fafnir Bearing* case, *supra*, as well as the facts which were found present and necessary to support a finding of violation of the Act there, are missing here,[9] and on that basis alone the refusal of Respondent to comply with the Union's request falls short of a violation of the Act.

Moreover, other circumstances strongly support an inference that the Union's November request arose, not from a bona fide desire to compare studies and determine whether to proceed to arbitration, but from other motives. While the fairness of the company standard piece rate was always in question, the record shows that this became an issue only after the grievants and the Union raised it as the alleged reason for the reduction in their take-home pay; there was no claim that the rate was intrinsically wrong or onerous. However, there is strong evidence that the reduced pay arose from the workers' own deficiencies, for at their first complaint, one of them indicated she would not try to maintain top performance so as to earn a bonus under the piece rate system; whether she was speaking for the three is not clear from her testimony, but after checking their work, Respondent at the third-step conference of July 11 contended that the three were earning less because they did not keep up their performance, and produced work charts to support that claim. It stated the same reason, with more specific proof of the lack of production of the three grievants, at the fourth-step conferences. Neither the workers or the Union at any step presented any facts or specific arguments, so far as the record disclosed, to refute that claim, other than to fall back on the complaint that the rate itself was at fault. The record shows that Respondent at each step of the grievance procedure made efforts to review the questioned rate and during the fourth step even reviewed the grievants' work continuously, thus making in effect a new timestudy on their operations,[10] and it is apparent that these studies were the basis for the charts of their production produced during that step. Having thus heard Respondent's basic claim that the fault lay with the workers themselves, and having seen the supporting proof, the fact that the Union then elected at first to go to arbitration, without first asking for its own timestudy of the operation, or a chance to observe the grievants at work, warrants the inference that it took the final step *pro forma*, realizing that it had no real answer to the claim of substandard performance, nor basis for questioning the piece rate by an independent timestudy or otherwise. Hence, the sudden change of tactic by its higher officials in November, in withdrawing the arbitration request and asking for its own timestudy, raises a suspicion as to its real motive. The Union offers no proof on this, except the present testimonial arguments of Hooper and Ray which may well be afterthoughts presented to fashion a case within the *Fafnir Bearing* ruling, but an indication of the presence of an ulterior motive can be found in the uncontradicted testimony of Rist that, in discussions on another rate dispute with top union officials in March 1966, the Union requested a timestudy

[6] Such factors include, among others, the time of day when the study is made, the working conditions (including the effect of the mere presence of the engineer observing the workers), allowances for difficulty and type of operation, type and weight of material handled, amount of handling of material involved, amount of interruption of work for machine adjustment or maintenance and procurement of raw material, and plant practices on time off for "breaks" and personal matters.

[7] Respondent admits that under *N L R.B* v *Truitt Mfg Co*, 351 U S. 149, it would have been obligated to show its timestudies to the Union on request, to support the questioned rate, and Hooper admitted that this information would probably have been given to him if he asked for it.

[8] I note also that, even after Respondent raised the claim that the workers' substandard performance was the cause of their lower take-home pay, the Union never asked for a chance to observe their work alone, either with or without company observers present.

[9] In the *Fafnir* case, the court based its decision largely on the circumstance that the union there had been furnished the company timestudy, but had requested a chance to make its own only after the union engineer had examined the company study and found at least one factor of adjustment used therein which he questioned and could not assess properly without making his own study. There is no such testimony from the Union here.

[10] Hendrix testified without contradiction that he had made 23 separate studies on Stroud's operation alone.

which Respondent refused as a matter of company policy, to which Union Agent Dean replied "you might as well agree to a time-study man from the Union, because we are going to get it one way or the other."[11]

In all the circumstances, I must conclude that a fatal weakness appears in the case of General Counsel, in that the Union put the "cart before the horse" by asking for its own timestudy under circumstances which would not demonstrably have aided it in processing the grievance further, and that it asked for the study for some reason other than a bona fide desire to resolve this grievance. In light of this conduct, I cannot conclude that Respondent's refusal of the timestudy was an unlawful refusal to bargain, particularly where there is no proof of other employer conduct indicating any union animus or a desire to evade its obligations under the contract or the Act. In this connection, I accept Respondent's present admission that it would furnish its own timestudies to the Union, upon request, as the employer did in the *Fafnir Bearing* case; and in line with Ray's own admissions, orderly procedure under the contract and the law would dictate this action as the only sensible and proper precedent to any request by the Union for an independent timestudy.[12]

On all the facts and circumstances pro and con, I am constrained to conclude that General Counsel has not sustained the ultimate burden of proving on the facts and the law that Respondent unlawfully refused to bargain with the Union by refusing to allow it to make its own timestudy in the plant.[13] I therefore grant Respondent's motion to dismiss on the merits, and will recommend that the complaint be dismissed in its entirety.

On the basis of the foregoing findings of fact and the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and the above Union is a labor organization within the meaning of Section 2(5) of the Act.
2. The record does not establish that Respondent has unlawfully refused to bargain with the Union as the statutory agent of its employees in the unit found above, as alleged in the complaint.

RECOMMENDED ORDER

On the basis of the foregoing findings of fact and conclusions of law, and the entire record in the case, I recommend that the complaint be dismissed in its entirety.

[11] Dean was present throughout the hearing, but did not testify for General Counsel.

[12] I also note, as another indication of Respondent's good faith in the matter, that, although the grievance procedure expressly excluded disputes about wages and rates of pay from the fifth step of arbitration, Respondent did not raise this technicality when the Union announced its desire to go to arbitration, but apparently waived the point in favor of submission of the grievance to arbitration on the merits.

[13] I have considered other and corollary arguments of General Counsel and find them without merit.