American Welding & Industrial Sales, Inc. *and* Teamsters Automotive Workers Local 495, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 31–CA–4039 and 31–CA–4215

November 20, 1974

DECISION AND ORDER

BY MEMBERS JENKINS, KENNEDY, AND PENELLO

On June 30, 1974, Administrative Law Judge David G. Heilbrun issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting 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 authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect *Standard Dry Wall Products, Inc*, 91 NLRB 544 (1950), enfd 188 F 2d 362 (C A 3, 1951) We have carefully examined the record and find no basis for reversing his findings

[2] In the absence of any exception to the "Unauthorized distribution of literature" prohibition in sec 13 03–41 of the Respondent's proposal, the inclusion of which the record shows the Respondent insisted upon, Member Jenkins does not pass on whether or not the prohibition constitutes a violation of Sec 8(a)(5) and (1) of the Act

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge: This case was heard at Los Angeles, California, on April 9, 10, and 11, 1974, based on charges filed October 11, 1973, and January 23, 1974, the second of which was amended February 5, 1974, and February 12, 1974, and complaint issued November 30, 1973, which was amended February 12, 1974, with an order consolidating cases. The amended complaint alleges that American Welding & Industrial Sales, Inc., herein called Respondent, violated Section 8(a)(1), (3), and (5) of the Act by written communications threatening employees with loss of employment because of strike participation, by failure and refusal to reinstate various striking employees to their former positions of employment, and by manifesting a refusal to bargain collectively with Teamsters Automotive Workers Local 495, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, through dilatory tactics, bad-faith contract proposals, surface bargaining devoid of real intention to achieve agreement, and claiming inability to pay economic demands without furnishing supporting factual data on request.

Upon the entire record in this case, including my observation of the witnesses, and upon consideration of the brief filed by General Counsel, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT AND THE LABOR ORGANIZATION INVOLVED

Respondent, a corporation, engages in the wholesale distribution of welding and industrial supplies at North Hollywood and other southern California locations. It annually purchases goods valued in excess of $50,000 for use in such operations and receives these goods directly from suppliers located outside the State of California. I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts and Discussion*

On June 18, 1973,[1] the Union was certified as exclusive collective-bargaining representative for included employees at Respondent's four described locations. Opening of negotiations was promptly requested by Karl H. Ullman, union secretary-treasurer, following which he exchanged correspondence with Erwin Lerten, a practicing attorney authorized by Respondent to conduct collective-bargaining negotiations. In the course of this exchange Ullman submitted the Union's contract proposal and a first meeting was scheduled for July 25.

Joseph Henderson and Wallace Patton appeared for the Union at Lerten's office on July 25 and, after waiting approximately 15 minutes beyond a scheduled 10 a.m. starting time, conferred with Lerten and Richard Owen, Respondent's general manager.[2] The union proposal, a 15-page document of 26 articles, was a primary basis of discussion although the parties exchanged descriptions of

[1] All dates hereafter are in 1973, unless otherwise indicated

[2] Owen was also present as a participant for Respondent at all future bargaining sessions between the parties, each of which was similarly held in Lerten's office

their respective group health insurance plans. Lerten commented on the lack of a preamble tailored to the actual identity of the parties and departure from certified bargaining unit language in the recognition clause. This and related discussion consumed approximately 30 minutes, after which the meeting ended with Lerten stating he would prepare a counterproposal and the endeavor would take at least a week.[3]

By letter dated August 8, Lerten advised Ullman that a draft proposal was being reviewed by his client. This proposal, released in duplicate to Ullman by Lerten's letter dated August 15, was a 29-page draft of 34 sections. Lerten and Ullman arranged a meeting for August 31 at which Ullman appeared alone only to wait at least 15 minutes beyond the scheduled 2:30 p.m. starting time. Discussion commenced with Ullman stating his comparison of Respondent's proposals showed they contained no economic improvements and even eliminated benefits then in effect. Lerten stated that existing wages and benefits were high enough to obtain personnel for Respondent's semiskilled jobs but that "another look" might be taken at his economic offer should the freeze on price ceilings be lifted. In discussing the point further, Lerten added that Respondent[4] was not disposed to increase wages when its ceiling prices were frozen and did not feel it was necessary to do so.[5] This meeting of approximately 30 minutes' duration ended shortly thereafter. Ullman recalls remarking at the end that he guessed "[T]here is nothing else we can talk about, if that is the company's position," while Lerten recalls Ullman's final remark to cover a need for wage increases and intention to submit the existing counterproposal for membership consideration

Ullman returned to his office, informed colleague Thomas O'Leary[6] of Respondent's position, and requested the latter seek production of a financial statement via assistance from the Union's legal department. As a result, Lerten received a letter dated September 4 from Union Attorney Paul Crost requesting production of Respondent's "books and records" for the purpose of substantiating a "claim of inability to grant wage increases." Lerten replied to Crost by letter dated September 6 with a refusal to so produce, writing in negation that Respondent "has at no time made a claim that it is unable to grant wage increases."

Approximately a week before November 19, Ullman telephoned Lerten's office and arranged a third meeting for that date. Ullman and Patton appeared for the Union and, after waiting at least 10 minutes beyond the scheduled 10 a.m. starting time, began the session. The proposal and counterproposal of the parties were as yet unchanged from the form in which they were originally furnished in July and August, respectively. The Union had proposed a typical union-shop provision to cover present and future employees, checkoff rights, and detailed successorship language. Articles entitled "Retained Rights," "Maintenance of Standards," "Other Labor Disputes," and "Union Representative-Union Steward" read, respectively:

> It is mutually agreed that the Employer reserves the right to discharge any employee for sufficient and proper cause; provided, however, that no employee be discharged or discriminated against for upholding Union principles and taking part in normal Union activities. The Employer also agrees that prior to the discharging of any employee he will consult with the Union Representative first.
>
> The Employer agrees that all conditions of employment relating to wages, hours of work, and general working conditions shall be maintained at no less than the highest standards in effect at the time of the signing of this Agreement, and the conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement.
>
> * * * * *
>
> 1 The Union agrees that it will not require its members to recognize any labor dispute which has not been approved by the Joint Council of Teamsters locally or in the area in which the strike occurs.
> 2. The Employer will not require employees coming under the terms of this Agreement to handle in any manner goods, products or merchandise sold, manufactured or handled by persons, firms or corporations who are on the unfair list of the Joint Council of Teamsters in this area, and the Employer agrees that he will not require such employees to go through picket lines sanctioned by the Joint Council of Teamsters in this area, and will in no manner penalize any employee who acts in accordance with the rights set forth in this provision.
> 3. The Employer further agrees that the rights conferred herein are specifically consented to and that the exercising of such rights shall not be considered a breach of contract.
>
> * * * * *
>
> The Business Representative or qualified representative of the Union, and the Union Stewards so designated by the Union, shall be permitted to talk with the employees on Company property for the purpose of ascertaining whether or not this Agreement is being observed by the parties hereto, or to assist in adjusting grievances. This privilege shall be exercised so that no time is lost to the Employer.

[3] Lerten is credited over union witnesses as to this time estimate

[4] Tr p 415, l 7, is corrected by substituting "company" for "union"

[5] Ullman testified that Lerten made a claim of inability to pay by uttering, in the context of dialogue concerning Respondent's giant parent corporation, Gulf and Western, "[W]e aren't making any money at American Welding So we are not prepared to give any economic increases" Lerten denied Gulf and Western was even mentioned until the next meeting and Owen does not, contrary to the implication of General Counsel's brief, contradict Lerten on the point Ullman's quoted testimony varies from an unrefreshed version while his notes of the meeting and an original affidavit in the case allude only to Lerten assuming a "won't improve" posture as to wages Consistency in Ullman's testimony is found only in a supplemental affidavit executed November 1 Lerten's version is substantially more credible and I accept it as fact

[6] O'Leary is a special organizer and business agent for the Union whose truncated testimony begins at p 381 of the transcript The index of transcript volume III is corrected to show this witness' name

An article entitled "Warning Notices, Grievance and Arbitration Procedure" recited the Company's right to discharge "any employee for cause" with respect to which two warning notices shall have first been given with differences between the parties concerning such or "any provision" of the agreement to be submitted to final and binding decision by a board of arbitrators, the third impartial member of which shall act as chairman and be appointed through Federal Mediation and Conciliation Service auspices upon failure of the representatives of the parties to agree upon a direct selection. Eleven holidays were proposed with elaborative language on the subject, vacation entitlement based on continuous service was proposed with appropriate protective language, sick leave, leave of absence, funeral leave, and jury duty were the subject of separate articles, while seniority was treated extensively with seniority preference controlling as to promotions when occupational qualifications showed no "distinguishable difference." The subjects of posting of notices, job classifications and wage rates, temporary assignment, hours of work, overtime, guaranteed hours, job bidding, and safety and health provisions were treated, a cost of living formula plus four benefit plans each described separately in appendices were proposed and language concerning the term of agreement was structured, with effective dates and deadline for reopener notice to be determined.

Respondent had proposed a recognition clause that mirrored the certification,[7] a simple open shop, to forbid carrying on of "[U]nion business, collection of dues, solicitation of membership, or drives for membership . . . during working hours on the employer's premises at any time," to accommodate desired operational interchangeability by permitting temporary transfer of employees for a continuous period up to 1 week without wage rate change, a 3-month probationary period for new employees, a definition of seniority with listed reasons for its loss and additional protective language, the privilege of adopting "[A]ny company rules which are not in direct conflict with the provisions of this agreement," a minimum wage rate schedule reflecting those already in effect, overtime pay in excess of 40 hours a week, 6 paid holidays with limiting and qualifying language excluding pay or time off for holidays falling on a Saturday, the existing vacation formula with limiting and forfeiture language, continuation of Respondent's group health and life insurance with dependent coverage to be paid by employees, an elaborate provision forbidding strike, lockout, or "boycotts," recognition of the entitlement of nonbargaining unit personnel to perform bargaining unit work, a separability clause, a legalistic "waiver and notice" clause and language structured for the term of the agreement, and mechanics of reopener notice.[8]

Section 5 of Respondent's proposal was entitled "Rights of Management" and carried the following introductory language:

> Except as otherwise specifically provided in this agreement, the employer has the sole and exclusive right to exercise all the rights or functions of management, and the exercise of any such rights or functions shall not be subject to the grievance or arbitration provisions of this agreement.
>
> Without limiting the generally [sic] of the foregoing, as used herein, the term "Rights of Management" includes:

Following this listing of 25 specified rights appeared with language that would close the subject by deeming the enumeration of "[M]anagement prerogatives listed above" not exclude "other management prerogatives not specifically enumerated." The rights enumerated dealt typically with business policy, product distribution, and employee utilization.[9]

Section 13 of Respondent's proposal, entitled "Discipline and Discharge," provided, in essence, through introductory language that regular, full-time employees were not to be disciplined or discharged without just cause and, while Respondent would reserve sole discretion to impose a lesser penalty, an enumeration of reasons were each to be deemed just cause for immediate discharge. There followed 49 listed types of typical industrial misconduct by employees covering broad areas of neglect, dishonesty, insubordination, or personal dereliction. Number 5 read:

> Engaging in a strike, picketing, sabotage, or slowdown, or failure or refusal to cross a picket line at the premises of the employer, or at the premises of any of the employer's customers or suppliers in connection with their work.

Number 41 read:

> Unauthorized distribution of literature, written or printed matter on the employer's premises, or solicitation in any manner on the employer's premises during working hours.
>
> Working hours does not include before or after

[7] The Culver City location was inadvertently omitted A second inadvertence appears in Sec 16 02(a) of Respondent's proposal in which reference to "Paragraph 15 06" must, from context, mean 15 07 Noting that Art I, 2, of the Union's proposal contains the garbled phrase "[E]xecutes a contractor of transaction " and that its arbitration clause presumes to call on the Federal Mediation and Conciliation Service to select an arbitrator within 3 days although that agency reports a fiscal year 1973 capacity of 15 7 days average for such service and striving for further reduction from a current 6 5 days, (News and Background Information, 86 LRRM 58), I attach no significance to such minor errors in preparation of documents of this length and given the time element involved Comment is occasioned since General Counsel briefed the point

[8] Other subjects in Respondent's proposal which did not have a particular significance in the negotiations that followed were a nondiscrimination clause, language concerning temporary and part-time employees, the subjects of reduction in work force, recall procedure, employees' obligations, superannuated employees (later withdrawn by Respondent), lunch and break periods, sick leave, leave of absence, and existing retirement and savings plan, termination of employees for reasons of health or age, and a military service clause

[9] Two of those listed were "The determination of safety, health and property protection measures for the business" and "The placing of service, maintenance or distribution work with outside contractors or subcontractors " Within the overall rationale I apply to this case neither of these proposed managerial rights is deemed to evince lack of good-faith bargaining *Gulf Power Co*, 156 NLRB 622 (1966), and *Stuart Radiator Core Mfg Co*, 173 NLRB 125 (1968), both cited by General Counsel, are each distinguishable in this area

work, coffee breaks, or lunch periods, providing that the employee doing the soliciting or distribution and the employee being solicited or to whom the material is being distributed, both are not working during this period.

The section concluded by making discipline for any of the enumerated reasons grievable but limited arbitral review of such a matter only to "[T]he question as to whether the employee committed any of the prohibited acts."

Section 15 of Respondent's proposal was entitled, "Grievance Procedure." It defined a grievance as any claim that an "express provision" of the agreement had been violated and provided for initiation of grievances only by "[A]n aggrieved employee of the employer, or by a union officer, or the union shop steward. . . ." Grievances were to be filed within 3 working days of the "inception or occurrence thereof" and a further set of time limits governed higher level review. This proposal included the following subsections:

15.05. The parties agree to follow the foregoing grievance procedure in accordance with the steps, time limits and conditions set forth above. If, at any step of the grievance procedure, the Employer's representative fails to give his written answer within the time limit herein set forth, the Union may appeal the grievance to the next step at the expiration of the time limit. If the employee or the Union fails to follow the foregoing procedure in accordance with the time limits set forth herein, the grievance shall be settled on the basis of the Employer's last answer, and no further action can be taken.

15.06. At any stage of the grievance or arbitration proceedings, either party may request that any witness for the other party, including the employee filing the grievance, shall submit to a polygraph test. Refusal of any witness to take a polygraph test will make that witness' testimony inadmissable for the purpose of resolving the grievance or in the arbitration provided for in the next Section 16 (Arbitration). The polygraph test may be administered by any expert in the giving of such tests, selected by the party requesting the test, who is qualified by the Keeler Institute, Chicago, Illinois, and who is not in the employ of the Employer or the Union. The cost of such test shall be borne by the party requesting the test. The results of the polygraph test shall be final and binding upon all parties to the grievance. Further, if the grievance goes to arbitration in accordance with the provisions of the next Section 16 (Arbitration), the arbitrator shall be bound by the results of the polygraph test in making his decision.

15.07 Anything in this Agreement to the contrary notwithstanding, the following matters are not subject to the grievance or arbitration procedures of this Agreement:

(a) Any matter specifically covered by any provision of this Agreement where there is no dispute as to the facts; or

(b) Any matter reserved solely to the rights of management, or to the discretion of the Employer, by the terms of this Agreement; or

(c) Any matter which would require a change from the wages, hours, or conditions of employment set forth in this Agreement; or

(d) Any matter which is not regulated by this Agreement, or

(e) Any grievance which is not filed in accordance with the provisions of Paragraph 15.02 of this Section 15.

Section 16 of Respondent's proposal, entitled "Arbitration," sets forth procedures for direct appointment of arbitrators or, failing that, appointment from Federal Mediation and Conciliation Service panels. The proposal limited arbitral authority by negating any power to decide a matter not declared to be a grievance under Paragraph 15.07, to change wages, hours, or conditions of employment as set forth in the agreement, to add to, subtract from, or modify any of the terms of the agreement, to substitute an arbitrator's discretion for the employer's discretion in cases where the employer was given discretion by the agreement, and, further, to deal only with the grievance occasioning appointment and to not consider any hearsay evidence. Expenses of the impartial arbitrator were proposed to be paid by the party losing the arbitration.

Section 28 of Respondent's proposal, entitled "Employer Investigations," read in part:

28 01 In the event that the Employer has reason to believe that an act of sabotage has been committed or that there has been a theft or destruction of the Employer or another employee's property, or that there has been poor work performance, or that there has been a violation of any of the Employer's rules, the Employer may require an employee who is reasonably related to the act or acts in question to take a polygraph test in order to determine the responsibility for the act or acts in question. Any employee who refuses to take a polygraph test, when requested to do so by the Employer, shall be subject to immediate discharge without notice.

Section 31 of Respondent's proposal, entitled "Entire Agreement," read:

31 01. The Employer shall not be bound by any requirement which is not specifically stated in this Agreement. Specifically, but not exclusively, the Employer is not bound by any past practices of the Employer or understandings with any labor organizations, unless such past practices or understandings are specifically stated in this Agreement.

31.02. The Union agrees that this Agreement is intended to cover all matters affecting wages, hours, and other terms, and all conditions of employment and similar or related subjects, and that during the term of this Agreement neither the Employer nor the Union will be required to negotiate on any further matters affecting these or any other subjects not specifically set forth in this Agreement.

The meeting of November 19 began with Lerten elaborating on his disclaimer of inability to pay posture. The spokesman then exchanged economic feelers with discussion proceeding to center on the Union's demand for a 6.2-percent economic improvement and Respondent's offer of a 5.5-percent wage increase without change in fringe

benefits. The subject was left as discussion moved to various other areas of disagreement. On union security, Lerten offered a maintenance-of-membership clause with right of employee withdrawal during the first 10 days of the contract. Ullman tied this subject into the Union having equal opportunity with other sources as to the furnishing new employees but Lerten refused such concession on grounds Respondent was satisfied with its hiring sources and believed a change would only generate problems. Ullman requested relief from the restrictive language concerning visitation rights of union representatives but Lerten adhered to his contract proposal adding the matter could be handled on a case-by-case basis. Ullman voiced support for the Union's maintenance-of-standards proposal but Lerten refused to agree to such language countering with explanation that any particular benefits the Union desired should be raised and, if agreeable, "spelled out" in the contract. The subject of management rights was discussed with Lerten characterizing the Union's proposal as worthless in this regard, adding that he did not necessarily insist on management rights as set forth in his proposal but instead on the principle that management rights be expressly detailed in negotiated language. There was refinement in principle concerning full-time employees regularly working two jobs and employee transfers. Ullman sought to shorten the proposed 3-month probationary period but Lerten declined any change. The parties disagreed as to the extent of seniority usage concerning promotions, shift choice, overtime, and vacation scheduling with Lerten insisting that seniority apply only to job protection and not in areas which would limit operational flexibility. Discussion moved to language concerning discipline and discharge with Ullman favoring a simple "just cause" concept to apply in the area while Lerten desired specific reasons be set forth and denominated as requisite just cause. Some progress occurred when Lerten displayed language for a three-step progressive disciplinary approach.[10] Proceeding to the subject of overtime, Ullman stated an understanding that daily overtime was already in effect and, upon verifying this with Owen, Lerten agreed to such change. In the same area, Ullman proposed double time pay for Sunday work and in the belief that such rarely, if ever, occurred Lerten agreed to this. During the course of the meeting,[11] which concluded at 12:45 p.m., Ullman commented as to the possibility of a strike in the event employees rejected the overall contract offer.

Negotiations were dormant into early December at which time rumors reached Owen that a strike was imminent. By that time employees had, in fact, rejected Respondent's proposed contract at a union meeting. On December 1, Owen sent telegrams to employees which read:

> UNDERSTAND UNION CALLING STRIKE MONDAY. COMPANY WILL CONTINUE TO OPERATE. YOU HAVE LEGAL RIGHT TO CROSS [PICKET] LINE AND WORK. IF NECESSARY COMPANY WILL REPLACE STRIKERS. IF PERMANENTLY REPLACED, YOU MAY [LOSE] POSITION.

A strike did occur December 3 and Owen wrote the following letter to striking employees on that date:

> This letter is written to inform you that this company will continue to operate in spite of the work stoppage which began on this day. If it is necessary to replace striking employees in order to maintain our operations, we shall do so. Accordingly, we feel that it is only fair to inform you that in the event you are permanently replaced, you will lose your position with this company.

Respondent did, in fact, maintain operations with replacement employees hired during the period December 7–10.

On December 10, Ullman telephoned Lerten and a meeting was arranged for December 12. Ullman and James Fitzgerald appeared for the Union, waiting 15 minutes beyond the scheduled 2 p.m. starting time before discussion commenced. Ullman summarized a possible basis for agreement should the Company improve its economic offer to an overall 6.2 percent, agree to a modified union shop excluding any present employee not desiring to join, and improve administrative language regarding grievance procedure, work rules, disciplinary discharge, polygraph test, and qualifying fringe benefit language. Lerten and Owen caucused for approximately 20 minutes and upon returning Lerten stated Respondent would not offer to pay group insurance for employee dependents but would offer an additional one-half holiday on Christmas Eve, and an additional one-half holiday on New Year's Eve, providing such holidays fell on a Tuesday through Friday. This concession reflected a practice already in effect. Lerten continued by stating the Company would offer to equally share an arbitrator's cost and minor changes were made in some of the Respondent's enumerated reasons for discharge with an additional three of them deleted. Generally Lerten argued that express description of various types of just cause for disciplinary action should remain; otherwise it opened the area too wide for an arbitrator to apply his notions of reasonableness. In discussing disciplinary reasons, Lerten emphasized the Company's interest in expecting employees to carry out their duties, notwithstanding such picket lines as might confront them. Lerten adhered to Respondent's position that bargaining unit work by supervisors should continue to be permitted as was customary in Respondent's "small operation" and that, regarding union security, a slight modification was offered in that maintenance of membership was proposed with an employee's right of withdrawal during the 15 days at the end of a contract The period of time for the filing of a grievance was increased to 5 days, however Lerten adhered to language calling for grievance forfeiture in the event time limits were not observed, while not exposing Respondent to a

[10] The parties tentatively agreed that 18 of the enumerated 49 reasons would require two warnings before discharge Company practice had been that of discretionary use of a two-step warning plan

[11] Lerten is credited as to events occurring during this and successive bargaining meetings His meeting notes were more thorough and better organized than other participants and his chronological testimony of the negotiations generally more persuasive An exception to my general credibility resolution relates to whether a strike possibility was mentioned on November 19, as this subject appears prominently in Ullman's notes and is a convincingly likely utterance on his part

corresponding penalty. As at the prior meeting, discussion of the polygraph arose in terms of Subsection 15.06 with Ullman terming it illegal and Lerten insisting it was appropriate to the grievance procedure and in customary use at the Company.[12] The meeting ended at approximately 4 p.m.[13]

On December 18, Ullman telephoned Lerten urging the Company to modify its position on union shop in the interest of reaching agreement. Lerten agreed to reconsider with company officials and after doing so sent Ullman a letter dated December 21, restating Respondent's last position on the subject and concluding with the statement "[T]he Company feels it has gone as far as it can on the issue of the union security and will not change its position . . . at this time." Ullman replied by letter dated December 26 setting forth 15 areas as to which he was "[c]onfident an agreement could be consummated if the Company were willing to agree . . . " and concluding with the suggestion of a meeting at Lerten's earliest convenience to attempt resolution of remaining issues. Lerten learned of this letter in a contact to his office and caused his secretary to arrange a further meeting which was set for January 2, 1974.

Ullman and Patton appeared for the Union at this meeting, waiting at least 15 minutes beyond its scheduled 10 a.m. starting time. Lerten opened the meeting by protesting that the apparent number of outstanding issues had grown but that the best approach was to take each item set forth in Ullman's letter. This was done with equal hiring opportunity for the Union discussed first Lerten characterized this as a "hiring hall," saying that while no discrimination would be practiced against union members Respondent wished to continue doing its own hiring. Lerten reiterated Respondent's willingness to negotiate specific rights of management provided they did result in eventual listing. On visitation rights, Lerten adhered to Respondent's position that this should occur outside working hours. Similarly, he repeated opposition to a maintenance-of-standards clause stating that instead anything agreed upon relative to working conditions should be specified. Respondent's proposed reasons for discipline were discussed and Ullman withdrew objection to 14 of them subject to the three-step warning language.[14] Lerten declined to establish a time limit on use of past disciplinary record but did agree to strike language requiring an aggrieved employee to state specific contract sections allegedly violated.[15] The use of polygraph in grievance procedure and limitation on arbitral authority was also discussed without modification by Respondent. Lerten agreed for the first time to offer vacation entitlement to regular part-time employees but refused to agree that vacation scheduling would occur by seniority on grounds the operation was too small.[16] He refused to grant a work guarantee but did accept the first portion of the Union's safety and health proposal. Lerten would not agree to a job bidding procedure on grounds of Respondent's size and adhered to the offer of Respondent's existing benefit plan without dependent coverage. This meeting ended at approximately 2:30 p.m.

Subsequently, on February 6, 1974, Ullman communicated an unconditional offer to return to work on behalf of five striking employees. Employee Walter M. Greenleaf, III, had by then been recalled to work to fill a position vacated when Respondent terminated a replacement employee. Ishmael Guzman was also recalled to work while other striking employees either resigned or were continued on preferential reinstatement status for future vacancies.

This case concerns a course of bargaining with specific factors indicative, in General Counsel's view, of bad faith. As to overall mechanics and tempo of negotiations, I find an utter absence of dilatory conduct. An extensive counterproposal was produced with promptness, delay in commencing meetings was based on minor factors understandable in a business office context and although Respondent did not ordinarily initiate negotiations it continued them briskly on occasion of each request.

I have rejected evidence that the August 31 meeting saw a claim of inability to pay. It is true the *Stockton*[17] case found an inability to pay claim based on utterances that were interpreted to have that meaning. Here, a refusal to increase labor costs is based on classic bargaining disinclination rather than the notion of business poverty. See *Charles E. Honaker,* 147 NLRB 1184 (1964).

Essentially, the Union sought an industry pattern contract while Respondent desired to minimize the effects of unionization. The Union pressed for immediate achievement of institutional-type proposals tending to consolidate its position, make it more visible and establish a looseness of language permitting further gain by contract interpretation of bargaining intent or custom and practice.

Respondent's proposals invariably sought to eliminate ambiguity and clamp rigid, limiting language on many subjects covered. Its aim, sufficiently explained in negotiations, was to convert to the newly required collective basis of dealing with its employees only in a manner in which predictability was present and operational flexibility at a continued high level.

Respondent permissibly adhered to a modest form of union-security offer, remaining within doctrinal limits on the subject. Similarly its demand for management rights was sufficiently justified, both in the abstract as to language proposed and by explanations repeatedly given union negotiators on the subject. Cf. *Wheeling Pacific Company,* 151 NLRB 1192 (1965), and cases cited therein; *Schnell Tool & Die Corporation,* 144 NLRB 385 (1963).

As to disciplinary powers, Respondent sought to compartmentalize prohibited employee conduct. The effect of doing so narrows disciplinary disputes to the more particularized question of whether conduct falling within artful employment law meaning[18] has occurred, rather than us-

[12] Owen had testified that in regard to general polygraph matters the company policy was to request, but not require, the taking of such tests (Tr p 122, 123)

[13] Ullman characterized it in his testimony as being "very brief" to the point the Union "practically wasted our time "

[14] At Tr p. 446, Lerten testified that Ullman had no serious objection to, among others, number 5 As this was always in dispute, I deem the testimony an inadvertent error.

[15] Tr p 447, l 8, is corrected by substituting "15 02" for "17 02 "

[16] In the course of negotiations, Respondent also modified its vacation proposal to permit pro rata vacation pay for part-time employees reflecting current practice

[17] *Stockton District Kidney Bean Growers,* 165 NLRB 223 (1967)

[18] See "Contract Terms Interpreted," *Labor Arbitration Cumulative Digest*

Continued

ing the generalized notion of just cause.[19] Lerten expressly noted a purpose of this was to exclude arbitral consideration based on sympathy. As movement occurred on the subject and no startling prohibitions were proposed, this area rests merely as another in which agreement was not totally reached. Fragmented evidence of Respondent's past condonation of employee misconduct does not corrupt the proposal. I find that enumerated reason for discharge number five does not constitute a per se violation both intrinsically and, in part, since a meaningful no-lockout clause was proposed in contrast to the illusory one significant to decision in *Stuart Radiator, supra.*

The desire for strong management rights language, coupled with near abhorrence of the Union's proposed maintenance-of-standards clause and desire for a tightly worded arbitration clause, was the central rationale of Respondent's bargaining position. It maintained willingness to negotiate any subject and compromise any issue[20] seeking mainly to assure that terms of the contract would carry substantial certainty relative to labor costs and work force utilization. Ullman rightly claimed that the arbitration language Respondent proposed was harsh and seemingly unprecedented.[21] The fact remains that it contemplated a third-party dispute settlement mechanism in which, while sharply limiting arbitral powers, latitude still would exist for judgmental determination of evidence leading to crucial resolution of ultimate fact issues. In the last analysis, arbitration mutates the ability of parties having a collective-bargaining relationship to fix and administer their own contractual terms and Respondent exhibited nothing more than a keen desire to closely channel this process to the extent it was invoked.[22]

The failure to reach agreement was affected by the Union's indifferent approach to bargaining. At the conclusion of the second meeting on August 31, it had contributed little of meaningful substance as shown by Ullman's own testimony to his belief Respondent's claim of inability to pay left "nothing else we can talk about."[23] Contrarily there would have been much yet to talk about; the first topic suggested whether Respondent could document its financial position and beyond that all remaining noneconomic areas of disagreement as to which there were many.[24] Each party's proposal was its own bastion of words. The spirited advocacy of one party was the exasperation of the other. Respondent had no monopoly on cleverly meager phraseology for traditional contract areas.[25] In the touchstone area of union security Respondent made progressive concessions, slight though they were, which belay concluding an effect or intent of overall employer bargaining was to undermine the Union's achieved status or escape reaching worthwhile agreement. The most telling feature of the evidence is that subsequent to the November 19 meeting the Union presented Respondent's offer to bargaining unit members for their own acceptance or rejection. This action largely undercuts application of established doctrine that an employer's bargaining posture can involve such onerous terms as to insure opposition by any self-respecting labor organization.[26]

Other subjects of lesser significance have been attacked by General Counsel on grounds of inherent illegality. The proposed no-solicitation rule is only arguably ambiguous and when read in conjunction with enumerated reason for discharge number 41 the ambiguity is shed[27] leaving merely a proposal subject to modification. The general polygraph proposal respecting new employees[28] was reflective of Respondent's practice. To the extent California Labor Code 432.2 is raised, it is significant to consider an authoritative published interpretation of that statute.[29] Apart from the point of it being a mere proposal to the Union, Owen's

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and Index with Table of Cases (BNA), vol 51–60 (1974) for "moonlighting," p 429, and vol 21–30 (1960) for "horseplay," p. xv

[19] Often also termed sufficient cause, good cause, justifiable cause, reasonable cause, proper cause, or combinations thereof. This is a narrow illustration of the range of phrasing available to negotiations.

[20] Lerten's testimony, Tr p 485, which I credit

[21] Proposing that only the Union could forfeit a grievance has reasonable compatibility with the overall scheme of Respondent's Sec 15 when it is noted that Respondent as an employer has no entitlement to initiate a grievance. This privilege is often present with instances of union liability found in reported decisions. *Haddon Craftsmen, Inc*, 57 LA 895 (M Berkowitz), *PPG Industries, Inc*, 51 LA 500 (J Vadakin), *Teamsters* v *Consolidated Freightways,* 56 LRRM 3033 Since here only the Union (or an employee) could initiate a grievance it follows that reasonableness is not offended to seek forfeiture against the only potential "moving party" for such purposes As to mandatory polygraph testing applicable to any witness, it remains problematical whether that would have the mechanistic significance suggested at first reading While such results might bind parties and the arbitrator, the manner in which the latter would be "bound" could only be learned in an actual proceeding. Thus, a particular witness' version of events might show strong truthfulness or strong nontruthfulness but still not be persuasive as to accepted evidentiary fact of the events since greater weight could be accorded other testimony While such is conjectural it is true cautious application of polygraph techniques has arisen in reported arbitration cases *Bowman Transportation, Inc*, 61 LA 549, (C Laughlin), *American Maize-Products Co*, 56 LA 421, (J Larkin), *Koppers Company, Incorporation,* 68-1 ARB par 8084 See also *American Oil Company,* 189 NLRB 3 (1971) Sec 16 02(f) would exclude hearsay evidence although it is commonly permitted in labor arbitration See 29 CFR 1404 12 (Federal Mediation and Conciliation Service Arbitration Rules) and Rule 28, Voluntary Labor Arbitration Rules of the American Arbitration Association This point must rest with comment that parties may shape their arbitration creature as they see fit and I cannot treat this proposed language as indicative of bad faith See *Steelworkers* v *American Manufacturing Company,* 363 U S 564, 570 (concurring opinion)

[22] For a sophisticated discussion of the essence of labor arbitration and lurking nuances about which Respondent harbored legitimate concern see Edgar A Jones, Jr, "The Schizophrenic World of Labor Arbitration and Mr Q Vadis, Arbitrator," proceedings of Fourteenth Annual Institute on Labor Law, The Southwest Legal Foundation, at 251–302 (1968)

[23] Tr p 254

[24] In evaluating this case, I note the apparent expertise and depth of experience in collective-bargaining matters possessed by each chief spokesman Ullman is shown to be a principal negotiator for the Union while Lerten has had many years labor law practice

[25] The Union's proposed Art III verged on a "negative" management rights clause by stating, under the pluralistic heading of "Retained Rights," only the single, closely circumscribed right to discharge

[26] Cf *Abingdon Nursing Center,* 197 NLRB 781 (1972)

[27] See *Walton Manufacturing Company,* 126 NLRB 697 (1960)

[28] I find Respondent's proposed Sec 28 was never reached for discussion between the parties Lerten denies it was, I credit this denial A close reading of Ullman's testimony (Tr p 279) fails to show a contrary claim

[29] The following conclusions were reached upon a request for interpretation in 43 Ops Cal Atty Gen 25, issued January 14, 1964

> New Section 432 2, Labor Code, prohibits an employer from demanding or requiring a polygraph test as a condition of employment or continued employment, although it does not prohibit an employer from asking for or requesting such a test An evaluation of all the circumstances will determine whether the section has been violated

testimony was that Respondent only requested such tests and thereby functioned within the permissible area. Occasionally Respondent's tough bargaining posture overreached. While discussion between the parties never reached legalistic Subsection 26.05 of Respondent's proposal, this passage, presuming to substitute the authority of contract for judicial-type determinations, is axiomatically unenforceable. Whether read in connection with the separability clause or simply viewed as a bargaining proposal, I can in neither event deem the existence of this language as part of an intention on Respondent's part not to achieve agreement with the Union.

The strike of employees commencing December 3 was economic in nature as at that point Respondent was not in violation of the Act. It began at a time when only 2-1/2 *hours* of serious negotiating had occurred over a 4-month period. While subsequent bargaining sessions brought only slight change,[30] there was balanced adamancy on each side. The strike continued to early February 1974 for the same motivation as present at inception. It was not prolonged by subsequent bargaining action of Respondent or its failure to make concessions fully satisfactory to the union negotiators. *The Dow Chemical Company,* 186 NLRB 372 (1970); *Speciality Container Corporation,* 171 NLRB 24 (1968); *Webster Outdoor Advertising Company,* 170 NLRB 1395 (1968). During this period and beyond the rights of striking employees were recognized within applicable doctrine.

A final matter for consideration is the written communications issued by Respondent at the time the strike commenced. General Counsel focuses on the second of these because of the finality of language used. I do not consider Owen's letter of December 3 to embody a threat. It must be viewed in conjunction with the telegram close in point of time and accurately states the literal truth that the employee addressed "will" lose his position for at least the time being if permanently replaced. After a week of striking, employee Greenleaf inquired of his status and, although learning from a supervisor he had been permanently replaced, could not recall whether told he had not been "fired." This branch of the case differs substantially from *The Laidlaw Corporation*[31] in which the statement to employees was that they would "forever" lose the right to employment by commencing a strike. Considering this and other circumstances in *Laidlaw,* I find it distinguishable and otherwise conclude employees here were not subjected to a threat cognizable under Section 8(a)(1) of the Act. *The Dow Chemical Company, supra.*

As to each contested issue the preponderance of evidence does not support allegations of the complaint. My conclusion of law is that Respondent has not in any manner violated the National Labor Relations Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[32]

The complaint is dismissed in its entirety.

[30] Failure to harmonize Respondent's proposal with existing fringe benefits is not commendable, but in circumstances of this case fails to impress as a deliberately disruptive bargaining tactic

[31] 171 NLRB 1366 (1968)

[32] In the event no exceptions are filed as provided by Sec 102 46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec 102 48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes