

1962, was still in progress at the time of the hearing. The Petitioner contended that the Employer would lose its rights to such challenges if it did not litigate the questions of employee status at the hearing. We reject this contention. Under the doctrine in the *Pipe Machinery* case,¹⁴ the Board considers eligibility issues in cases of this type by way of challenges.

[Text of Direction of Election omitted from publication.]

¹⁴ *The Pipe Machinery Company*, 76 NLRB 247. See also *The Hertner Electric Company*, 115 NLRB 820; *Bright Foods, Inc.*, 126 NLRB 553

Cabinet Manufacturing Corporation and Chauffeurs, Teamsters and Helpers Local Union 215, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. *Case No. 25-CA-1515. January 10, 1963*

DECISION AND ORDER

On September 17, 1962, Trial Examiner Robert E. Mullin issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Intermediate Report. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief. The General Counsel filed a brief in support of the Intermediate Report.

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

The Board has reviewed the rulings¹ made by the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following modifications:

We agree with the Trial Examiner that the Respondent violated Section 8(a) (5) and (1) of the Act.² In so doing, we rely only on the

¹ In finding that the Respondent has violated the Act as set forth below, we do not find it necessary to consider or in any way to rely upon the Board's decision in *Borden Cabinet Corporation*, 131 NLRB 890.

² The Trial Examiner concluded that "since July 24, 1961," which was the date of the Union's certification, the Respondent violated the Act by refusing to bargain with the employees' designated bargaining representative. As the Respondent engaged in a course of conduct, the totality of which failed to comply with the statutory requirement of good-faith bargaining, we find that the violation of Section 8(a) (5) and (1) commenced on September 1, 1961, the date on which the Respondent met for the first bargaining session. See *California Girl, Inc.*, 129 NLRB 209.

whole course of bargaining by the Respondent, as set forth in the Intermediate Report, the totality of which makes it manifest to us that the Respondent has failed to comply with the statutory requirement of good-faith bargaining.

ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Cabinet Manufacturing Corporation, Evansville, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively in good faith with Chauffeurs, Teamsters and Helpers Local Union 215, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of its employees in the appropriate unit described below:

All production and maintenance employees at our plant in Evansville, Indiana, exclusive of office clericals, plant clericals, foremen, guards, professional employees, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

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

(a) Upon request, bargain collectively with Chauffeurs, Teamsters and Helpers Local Union 215, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in the appropriate unit, with respect to rates of pay, wages, hours of employment, or other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its plant in Evansville, Indiana, copies of the attached notice marked "Appendix."³ Copies of said notice, to be furnished by the Regional Director for the Twenty-fifth Region, shall, after being duly signed by a representative of the Respondent, be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places

³ In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

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

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that :

WE WILL bargain collectively, upon request, with Chauffeurs, Teamsters and Helpers Local Union 215, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of all the employees in the bargaining unit described below, with respect to rates of pay, wages, hours of employment, or other conditions of employment, and, if an agreement is reached, embody it in a signed contract. The bargaining unit is :

All production and maintenance employees at our plant in Evansville, Indiana, exclusive of office clericals plant clericals, foremen, guards, professional employees, and supervisors as defined in the Act.

WE WILL NOT, by refusing to bargain in good faith, or in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist the above-named Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

CABINET MANUFACTURING CORPORATION,
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.

Employees may communicate directly with the Board's Regional Office, 614 ISTA Center, 150 West Market Street, Indianapolis, Indiana, Telephone No. Melrose 3-8921, if they have any question concerning this notice or compliance with its provisions.

INTERMEDIATE REPORT

STATEMENT OF THE CASE

This proceeding, brought under Section 10(b) of the Labor Management Relations Act of 1947, as amended, 61 Stat. 136, 73 Stat. 519 29 U.S.C., Sec. 151, *et seq.*, herein called the Act, was heard in Evansville, Indiana, on May 28 and 29, 1962, pursuant to due notice to all parties. The complaint, issued by the General Counsel of the National Labor Relations Board, and based on charges duly filed and served, alleged that the Respondent, in violation of Section 8(a)(5) and (1) of the Act, refused to recognize and bargain with the Union in good faith. In its answer, duly filed, the Respondent conceded that it is engaged in commerce within the meaning of the Act, but it denied the commission of any unfair labor practices. At the hearing all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce relevant evidence and to argue orally. Oral argument was waived. A motion to dismiss the complaint, made by the Respondent at the close of the hearing, was taken under advisement. It is disposed of as appears hereinafter in this report. On July 23, 1962, both the General Counsel and the Respondent submitted able briefs which have been fully considered.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, an Indiana corporation, with its main office, plant, and place of business in Evansville, Indiana, is engaged in the manufacture, sale, and distribution of cabinets and furniture parts. During the 12 months preceding the hearing, a representative period, the Respondent manufactured, sold, and shipped from its Evansville plant products valued in excess of 50,000 to points outside the State of Indiana. On the foregoing facts, the Respondent concedes, and I find, that Cabinet Manufacturing Corporation is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Chauffeurs, Teamsters and Helpers Local Union 215, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Teamsters or Union, is a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A *Introduction and sequence of events*

The Respondent concedes, and I find, that all production and maintenance employees at its Evansville plant, exclusive of office clericals, plant clericals, foremen, all guards, professional employees, and supervisors as defined in the Act constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

On July 14, 1961, in a secret ballot election conducted under the supervision of the Regional Director for the Twenty-fifth Region of the Board, a majority of the employees in the above-described unit designated and selected the Union as their representative for the purpose of collective bargaining with the Respondent. On July 24, 1961, the Regional Director certified the Union as the exclusive bargaining agent for the employees in the foregoing unit. Thereafter, the Union requested a bargaining conference and the parties met for the first time on September 1, 1961. Many other meetings were held in the following months, the last being on May 18, 1962. These will be discussed hereinafter. It is undisputed that by virtue of Section 9(a) of the Act, the Union has been at all times since its certification, the exclusive bargaining agent for the employees in the above-described unit.

B. *The facts*

At the first bargaining conference, held on September 1, 1961, the Union was represented by Glenn Wilkinson, an assistant business agent, Al Crawley, an organizer for the Upholsters Union, and two employees of the Respondent, Sarah Goodwin¹ and Lester Walters. The Company was represented by Arthur C. Nord-

¹ Goodwin married at sometime prior to the hearing and in the transcript is sometimes referred to as Sarah Stevens (her married name) or Sarah Goodwin Stevens.

hoff, its counsel, Gil Seager, its plant manager, and A. C. Sermersheim, an officer of the corporation. At this meeting the Union presented a proposed agenda for ensuing meetings and Nordhoff promised to have a company proposal ready for the next meeting which was then set for September 12. Sometime after the close of this meeting Nordhoff asked that the conference set for the latter date be postponed. This was done, and on about September 20 the Union received, by mail, a proposed contract from the attorney for the Company.

The next meeting was held on October 26. At this time John Mofield, an assistant business agent for the Teamsters, appeared along with Wilkinson, Goodwin, and Walters for the Union, and the Company was represented by Nordhoff, Sermersheim, and Maurice R. Kuper, the latter being vice president of the Respondent.² After some discussion of the Company's proposal the meeting adjourned.

On November 6, the parties met again. This time the Union presented a proposed contract which was complete as to all provisions except wages. After the parties had read the proposed agreement, item by item, the meeting adjourned.

Throughout the period in question the Respondent had in effect an incentive pay system. Effective on November 13, 1961, and after some discussion with the Union, the Respondent established the following rates for its employees: for the first year of employment—\$1.15 per hour; for the second year—\$1.20 per hour; at the beginning of the third year—\$1.25 per hour; and after 3½ years—\$1.30 per hour. The foregoing were base rates. The incentive earnings of an employee, if any, were added to them.³ The extent of the discussion as to the Respondent's proposed changes in these rates is not clear from the record. However, at the hearing the General Counsel did not allege, nor did the witnesses for the Union contend, that the Respondent unilaterally announced the foregoing wage rate revision.

On November 28, the parties met again for a short conference.⁴ According to Mofield, at this time the parties agreed with the Union's proposal on hours of work and right of entry and the Company further agreed that the employees would not have to work split shifts.

On December 12, the parties met and again discussed the Union's proposed contract. Mofield testified that article 8 on "Arbitration" was revised slightly and agreed upon, that a provision on discharges was agreed to and that agreement was reached on article 10, "Maintenance of Standards," with the exception of one subparagraph.⁵

On December 15, in a telephone conversation between Wilkinson and Nordhoff, the latter agreed that the Respondent would meet for another bargaining conference on January 4. On the latter date, the union committee arrived at the appointed time and place but the company representative did not. Nordhoff acknowledged that he had promised the Union that the employer group would meet on that date, but that his secretary had failed to keep a record of it on his appointments calendar. He further testified, however, that he assumed he had notified the other members of the committee about the date of the meeting. Kuper, on the other hand, testified that he never heard of the scheduled meeting until the afternoon of January 4. In any event, no company representatives appeared at the time and place originally set for this meeting. After an exchange of telephone calls another meeting was scheduled for January 9, 1962.

On the last-mentioned date the parties met for another conference. According to Mofield, during the discussion on this occasion, the Company agreed to a contractual provision on funeral leave for the employees and to another providing seven paid holidays. Thereafter the parties engaged in a discussion of wage rates and the company incentive pay plan. The Union sought a base rate guarantee 25 percent above the existing rate. Kuper expressed the Company's opposition to this proposal on the ground that if the base rate was raised the employees would have no incentive to increase production. Sarah Goodwin then asked him whether the rates would be reduced if an employee made over \$2 an hour on the incentive plan. Kuper took umbrage at this question and asserted that he did not care to be called a rate cutter. According to Mofield, at this point, he explained to Kuper

² The Respondent points out in its brief that in the record this official is incorrectly referred to as "Amos Maurice Kuper," whereas, in fact, his name is Maurice R. Kuper. The record is hereby corrected to conform with the latter designation.

³ Before this schedule went into effect, during the period from January 1 to November 13, 1961, employees in their first year of employment had a base rate of \$1.15 an hour, in their second year \$1.20, and in their third year and thereafter, \$1.25 an hour.

⁴ Unless otherwise indicated, at this and subsequent conferences, the parties were represented by the same individuals as enumerated above with respect to the meeting on October 26.

⁵ This was subparagraph 9(d).

that since Cabinet Manufacturing Corporation had been operating the plant⁶ there had been no rate cutting, but that the employees felt that this had been done at the plant during an earlier period. At the hearing Kuper testified that Goodwin further stated that when she had actually earned over \$2 she had not reported it on her wage tickets. He further testified that Walters then said, "That ain't all. I'm going around telling everybody no matter what the Company says or does if you make over \$2 an hour they'll cut your rates." At the hearing Goodwin denied that she had ever falsified her wage tickets or that she had ever stated that she had done so. She was a credible witness and I credit her version of this meeting. Walters denied that he ever told any of the employees to slow down on the production line. Mofield and Goodwin testified that they heard no union committee member assert that he had told employees to slow down on the production line. Walters testified to the same effect. He did not, however, deny having made the precise statement which Kuper attributed to him. Walters was a verbose, opinionated witness whose manner and attitude did not enhance his credibility. Although some of Kuper's testimony was likewise unpersuasive, in this instance it is my conclusion that as to the statement which Kuper attributed to Walters, the former is the more credible. It was undisputed that the conference closed on a note of harmony even though the foregoing discussion had been somewhat bitter. The next meeting was scheduled for January 17.

On January 16 Kuper sent the Union what he captioned an "Open Letter to Teamster Union Local 215." He stated therein, in relevant part:

In our negotiations for a union contract at Cabinet Manufacturing Corporation we have proceeded cautiously primarily because it is our first attempt to reach an agreement with a Union and our inexperience requires considerable deliberation.

While negotiations seemed to move along satisfactorily, our confidence in the procedure was completely shattered last week when the plant representatives for the Union, before both Union and Company officials, disclosed that they had deliberately falsified incentive tickets and openly encouraged other employees to do likewise or restrict their production below a certain point.

* * * * *

That these two people on the negotiating team, by their own admission, would return to the plant to sabotage the existing incentive plan and deliberately attempt to mask the success of the company's program for their own advantage is obviously negotiating in bad faith, a violation of Company policy, ethically wrong and dishonest.

This demonstration of bad faith in negotiations forces the Company to pursue the following courses of action:

1. File a charge of unfair labor practice with the NLRB.
2. Suspend negotiations with the Union until it can demonstrate its ability to negotiate in good faith.
3. Suspend the two people involved for two weeks while investigating grounds for permanent discharge.
4. Recommend to the Union that the two people be removed from the negotiating committee.

On January 17, the parties met as scheduled. In addition to the respective members of the bargaining groups, Edward Windes, a conciliator for the Federal Mediation and Conciliation Service, was in attendance. At the request of the conciliator both parties gave a brief résumé of what had occurred at the earlier bargaining sessions. Thereafter, Mofield initiated a discussion of the "Open Letter" which the Union had received from the Company. According to Mofield, he told the Employer's representatives that he was sorry about any misunderstanding that might have arisen from anything said at the earlier meeting and that at this point he felt that the parties should immediately resume negotiations to secure a contract. Thereupon, the company representatives announced that they wanted a letter from the Union stating that the Union did not condone employee slowdowns on the production line, the falsification of wage tickets, or any variance of these practices. Mofield told Kuper that such a letter would have to come from the head of the Union, but that in the meantime he could give his personal assurances that his organization did not condone or uphold such wrongdoing as they company representatives attributed to the employees. According to Mofield, at this point the committee for the Company told him

⁶ Respondent had taken over the plant in 1960 from a predecessor corporation

that if they received a letter from the Union of the foregoing type, they then would decide "whether or not to hold another meeting and when."⁷

In a lengthy letter dated January 18, 1962, C. K. Arden, president of Local 215, endeavored to answer the Company's letter of January 16. This letter read, in relevant part, as follows:

This is in response to your "Open Letter to Teamsters Union Local 215" It appears that you have taken some minor and casual remark made by an employee during a negotiation meeting completely out of context and distorted it far out of proportion. I suggest to you that during the course of collective bargaining it has been the experience of thousands of people on both sides of the table that many remarks are made, either in anger or in jest, as part of general course of talk which may have little or very limited effect upon, or reference to, serious matters at hand. You seem to have taken some such remark and given it undue weight and the action you have indicated bodes ill for our future relationship should you continue to follow such a course.

* * * * *

As to your second item, I assure you that the Union is in good faith in its attempts to bargain with you, and will continue to bargain in good faith as long as you permit us to do so. Again, I remind you that bargaining cannot continue while you make arrogant demands and rupture the relationship.

As to your third item, I caution you against taking any disciplinary action against the two employees you have in mind as we would consider that an unfair labor practice and I assure you that the National Labor Relations Board has found strong cause to condemn employers for taking action against members of negotiating committees—It being the theory of the Board that this in itself is an unfair labor practice, but not only against the employee involved, but against the union as well.

With respect to your fourth item, again we appreciate your recommendation that these two people be removed from the negotiating committee and we would do so if we thought their actions to be a serious violation. However, we remind you that it is also an unfair labor practice for an employer to attempt to dictate to a union who its bargaining representatives shall be.

* * * * *

In a letter dated February 2, 1962, Kuper replied to Arden. The relevant portions of this letter appear below:

Your opening paragraph reads as follows: "It appears that you have taken some minor and casual remarks made by an employee during a negotiating meeting completely out of context and distorted it far out of proportion."

Since this seems to be the same theme of your letter we had better go over the chain of events again. The two union officials, our legal counsel, and myself were in attendance when the two people on the committee, possibly inadvertently, made it clearly understood that they had held back incentive earnings and had encouraged other employees to do likewise. Their admissions was detailed and left nothing to the imagination and we could never dismiss such a serious matter as being of minor consequence and casual in nature.

* * * * *

While it is possible that the union did not know of the activities of these people, it was certainly their responsibility to do so. In your letter you are now aligning yourself with these people, apparently condoning their deplorable activities and/or telling the company that we should dismiss the entire happening as minor or casual.

* * * * *

In that your own officials witnessed the disclosure of these employees and yet you support their position makes all of our previous negotiations seem a travesty, and makes subsequent negotiations impractical on the basis of their being no common ground for mutual trust. We wish you to re-examine the happenings and to reconsider the action outlined in our previous letter so that you can help us clear the air for a new approach to our quest for harmonious relations between employer and employee.

⁷ Kuper testified at some length as to the events at this meeting but never denied the testimony of Mofield that at this meeting the union representatives were informed that the company decision as to another meeting would be withheld pending receipt of such a letter. I credit Mofield's testimony as set out above.

Subsequent to the meeting of January 17, both the Company and the Union filed unfair labor practice charges against the other. On March 16, at a conference arranged by Conciliator Windes, the parties met again. Kuper, Nordhoff, and Thomas Habig, the latter an official of the Respondent, appeared for the Company. The Union was represented by Mofield and Wilkinson. At the outset of the meeting the Union submitted a wage proposal. Before there was any discussion of this, however, the company representatives stated that the letter which Arden sent was unsatisfactory and that a more complete apology from the Union was needed. Mofield pointed out that a provision in the Union's proposed contract gave the Company the right to fire an employee for dishonesty and that such a clause should be adequate for the purpose. According to Wilkinson, when the union representatives endeavored to discuss the wage proposal, Kuper stated, "We're ahead of ourselves we got to get this other thing lined up before we go any further" Wilkinson testified that he then stated that since the Union was willing to incorporate in the contract a provision that would forbid the falsification of wage tickets, slowdowns, or dishonesty, the Company should be satisfied with that and not wait for a letter to that effect. According to Wilkinson, at this point, Habig expressed his objection to such a clause in the contract on the ground that its presence in the agreement would make all such issues subject to arbitration and that he would not agree to that. At this point the conciliator suggested that each group meet with him separately and they did so. Thereafter, when the joint session was resumed, the union representatives asked if the Company was refusing to meet further until it received a letter from the Union. According to Mofield, Kuper, and Nordhoff both stated that "they weren't refusing to meet . . . but . . . it would help if they could get such a letter from the Union." This testimony was in substantial accord with that of Kuper. The latter testified, "I made it a point of telling both Mr. Mofield and Mr. Wilkinson that we did not require a letter. However, I stated we would like to receive a letter." Kuper conceded that earlier the Union had offered to put a clause in the contract to allay any fear that the Union would sabotage the Company's incentive plan. Kuper could not recall having heard any company negotiator object to such a clause on the ground that it would be subject to arbitration. Habig, to whom such an objection was attributed by Wilkinson, did not appear as a witness. I find that the exchange between Habig and Wilkinson occurred substantially as the latter testified. At the close of the conference Mofield and Wilkinson asked that the company representatives agree with them upon a further meeting date, but no agreement could be reached and the conference adjourned with no date having been set for another bargaining session.

On April 2, Conciliator Windes brought the parties together for another meeting. At this conference the negotiations covered both a proposed contract which the Company had originally submitted in January and also the Company's wage offer which it submitted at this time. In the latter the Company proposed a base rate schedule as follows:

Men		Women	
Start -----	\$1.15	Start -----	\$1.15
After 1 year -----	1.20	After 2 years -----	1.20
After 2 years -----	1.25	After 3 years -----	1.25
After 3½ years -----	1.30		

The foregoing wage proposal as to the men was identical with the scale which had been in effect at the plant since the preceding November for both men and women. The wage rate proposed for women was actually less than that in effect at the time. Wilkinson immediately pointed out this discrepancy to Kuper. The latter promised to check into the matter but did not withdraw the offer as it appeared in the proposal. Thereafter the parties considered the Company's proposed contract. According to Mofield, at this conference the company representatives withdrew various previous commitments made as to clauses that had been discussed at earlier meetings. Mofield testified that at prior conferences the Company had agreed on a clause that would prevent split shifts, on a clause as to Saturday and Sunday pay, on funeral leave, and on arbitration. According to Mofield, at the meeting on April 2, notwithstanding their earlier agreement on the foregoing provisions, the company representatives wanted either to reconsider these items or to hold them for further negotiation. Mofield testified that at one point when Habig expressed his disagreement on the holiday pay clause, the latter was reminded that Sermersheim, his predecessor on the bargaining committee, had agreed to the provision. According to Mofield, Windes then stated that the parties could not "get together on a contract with the Company reneging on certain things." Thereupon Kuper stated that the Company

could withdraw any agreed items and Habig commented that he could not be "stuck" with any commitments made by Sermersheim, his predecessor on the committee.⁸

The Union's original contract proposal of November 6, 1961, was referred to by several of the witnesses as a "patch work" proposal. It consisted of 22 pages, some of them handwritten and the others consisting of paragraphs from other contracts which had been pasted together. After the meeting of April 2, 1962, Mofield had this original document retyped and sometime during the following week he sent several of the typed copies to Kuper and Nordhoff. The latter testified that at the earlier meeting Mofield had promised to send the Company a new proposal which would incorporate the agreed-upon language as to all provisions which the parties had discussed during their negotiations. Nordhoff and Kuper both testified that they were surprised to learn, upon a study of the document which Mofield sent them in April, that it was no more than a retyped copy of the proposal which the Union had submitted months before. Mofield testified that he sent the copies to the company negotiators merely to provide them with a more legible copy than the original and that he had not intended the document as a complete counterproposal. I am convinced, however, that Mofield had given Kuper and Nordhoff reason to believe that the new document would incorporate the substance of their tentative agreements arrived at during the conference of the preceding months.

On April 24, the parties met again.⁹ According to Mofield, there was a discussion of holiday pay, stewards, and maintenance of standards. Mofield testified that whereas the Company earlier had agreed to the provision on holiday pay, at this meeting it retracted this agreement. Also, according to Mofield, originally the Company had agreed to permit the Union to have three stewards at the plant, but at this meeting its representatives wanted to limit the Union to a single steward. Mofield further testified that whereas the maintenance of standards clause had been agreed upon at the meeting on December 12, on April 24, the company negotiators disagreed with the provision. Finally, the meeting adjourned when the Company promised to redraft its proposals and present them at a later meeting.

The next bargaining conference was held on May 8. At this session the company representatives presented their last counterproposal. This contained, among its other provisions, a wage scale that was identical with the base rate established by the Company on November 13, 1961. After being in session only a short while, at the suggestion of Conciliator Windes, the meeting adjourned to permit the union committee to study the terms of the document. On May 18, the parties met at a short meeting and for the last time. No other bargaining sessions were held prior to the hearing on the present charges.

C. The background evidence

The General Counsel offered evidence, over the objection of the Respondent, as to a number of incidents at the plant which occurred during the election period in the summer of 1961. These antedated the filing of the charges by more than 6 months. Although Section 10(b) of the Act bars such evidence as the basis for independent findings of unfair labor practices, the Board has held that they are relevant background evidence as to subsequent unfair labor practice charges. *N.L.R.B. v Reed & Prince Manufacturing Company*, 205 F. 2d 131, 139-140 (C.A. 1), cert. denied 346 U.S. 887; *Florida All-Bound Box Company*, 138 NLRB 150, footnote 1; *Harold Goldsmith and Ada J. Goldsmith, d/b/a Superior Maintenance Company*, 133 NLRB 746, footnote 3; *Lundy Manufacturing Corporation*, 136 NLRB 1230.

The testimony offered by the General Counsel concerned the activities of the foremen at the Respondent's plant, immediately before and after the election which was held on July 14, 1961. Goodwin testified that a few days before that date, Everett Moss, foreman of the finishing room, questioned her as to her union sympathies. According to Goodwin, after she told the foreman that she planned to vote for the Teamsters, he told her "The Company is going to move out. They don't intend to let the Union come in." Goodwin testified that Moss further stated that the plant would be moved to Jasper, Indiana, and that he had been promised a job at that new site. Clyda Zirkelbach, another employee, was present during this conversation and corroborated Goodwin.

⁸ The comment which Mofield attributed to Habig was denied. I find that this portion of the conversation at the meeting transpired substantially as Mofield testified.

⁹ Another meeting that was scheduled for April 12 was not held because of a disastrous fire at the plant of the Borden Cabinet Corporation. Borden and Cabinet are both wholly owned subsidiaries of the Jasper Corporation.

James Ray Beshears, another employee, testified that on or about July 13, Moss told him that the Company would move to Jasper if the Union won the election. According to Beshears, when he suggested that even in this event the Company would have to take the employees with it, Moss told him that the plant could be moved without transferring any employees. Beshears testified that Moss concluded the conversation by telling him, "If the Union [got] in, everybody is going to have to walk a chalk line. There's going to be a lot of new faces . . ." Moss denied that he had made any of the comments which the foregoing employees attributed to him. Goodwin has been found a credible witness earlier herein. In this instance she was corroborated by Zirkelbach, who also appeared frank and honest. Beshears was no longer in the employ of the Respondent at the time of the hearing. His testimony was credible and consistent with that of the two above-mentioned witnesses. Under these circumstances it is my conclusion and I find that the testimony of the employees related the more accurate version of the conversations in question.

There was evidence that Gene Speicher,¹⁰ foreman over the trimmers, finish patchers, and packers, made statements similar to those attributed to Moss. Thus, Beshears testified that 2 or 3 days before the election, Speicher told him and one other employee who was present that if the Union won, the plant would be moved to Jasper. Speicher denied this testimony, but I find that Beshears in this instance was the more credible.¹¹

There was also testimony by Lester Walters that in a conversation with Charles Hall about 2 days before the election the latter stated that if the Union won the plant would move. Walters described Hall as foreman over the finish rubbers. Hall was one of four leadmen at the plant who voted, without challenge, at the election. In the representation decision issued on June 28, 1961, his status, as well as that of the other leadmen, was specifically considered by the Board. On the basis of the record developed in that proceeding the Board concluded that Hall and the other leadmen were employees within the meaning of the Act. *Cabinet Manufacturing Corporation*, Case No. 25-RC-1999 (not published in NLRB volumes). Such a finding in a representation proceeding is not dispositive of a question of supervisory status in a subsequent unfair labor practice case. Cf. *N.L.R.B. v. Southern Airways Company*, 290 F. 2d 519, 522-523 (C.A. 5); *N.L.R.B. v. Montgomery Ward & Co.*, 242 F. 2d 497, 501-502 (C.A. 2); *N.L.R.B. v. Griggs Equipment, Inc.*, 307 F. 2d 275 (C.A. 5); *Leonard Niederriter Company, Inc.*, 130 NLRB 113, footnote 2. On the other hand, here, the Board decision, representing an analysis of the facts as to Hall's status during the very period that is now in question, may have "persuasive relevance" (*N.L.R.B. v. Southern Airways Company, ibid.*, at p. 523) unless new evidence not previously considered by the Board is brought forward. There is nothing in the present record in the latter category. Accordingly, it is my conclusion and I find that the General Counsel, in this connection, has failed to establish that Hall was a supervisor within the meaning of the Act at any time during the election period. Consequently, his comments to a fellow employee have no relevance or materiality to any issue in this case.

As further background evidence in the present proceeding the General Counsel moved that the Trial Examiner take official notice of the Board decision in *Borden Cabinet Corporation*, 131 NLRB 890.¹² In that case the Board found, on May 31, 1961 that Borden had violated Section 8(a)(1) and (3) of the Act during the course of an unsuccessful organizational campaign conducted by the United Brotherhood of Carpenters. As noted earlier, Borden and Cabinet are both wholly owned subsidiaries of the Jasper Corporation. Kuper testified that he is a vice president in both of the subsidiaries as well as the parent corporation and, further, that he is in charge of the labor relations at both Borden and Cabinet. Under these circumstances the findings of the Board as to the unfair labor practices committed at Borden have some relevance as background to the present proceeding.

¹⁰ In the transcript this name is spelled S-p-i-k-e-r. In its brief the Respondent asserts that the foreman's name should be spelled S-p-e-i-c-h-e-r. I shall treat this passage in the brief as a motion to correct the transcript in this regard and hereby rule that the record shall reflect this correction.

¹¹ Lester Walters also testified that in a conversation with this same foreman during this period Speicher asked him for his opinion of the election and when Walters stated that he was for the Union, the foreman declared that the Company did not need the Teamsters telling it how to run the plant. Even if this conversation occurred as Walters testified, and as found earlier herein, the recollection of this witness did not impress me as being very reliable, the discussion would still come within the protection of Section 8(c) of the Act.

¹² The record reflects no ruling on this motion. It is hereby granted.

D. Concluding findings

The General Counsel contends that (1) from about January 17, 1962, until about April 2, 1962, the Respondent refused to meet with the Union; (2) during this same period the Respondent illegally conditioned bargaining with the Union on its renunciation of unauthorized conduct by its members; (3) since January 17, 1962, the Respondent has refused to bargain with the designated representatives of the Union, and (4) the Respondent pursued a course of bargaining from the outset of the protracted negotiations with no intention of entering into any final or binding collective-bargaining agreement. All of these allegations are denied by the Respondent.

In its letter to the Teamsters dated January 16, 1962, the Respondent stated that the performance of Goodwin and Walters "force[d] it to . . . Suspend negotiations with the Union until it can demonstrate its ability to negotiate in good faith . . . [and] . . . recommended to the Union that the two people be removed from the negotiating committee . . ." At the meeting with Mofield and Wilkinson on January 17, the company representatives reiterated the position set forth in the above letter, requested a written apology from the Union for the conduct of Goodwin and Walters, and further objected to the continued presence of the latter on the bargaining committee. On January 18, 1962, the Union wrote Kuper in answer to the Company's charges and endeavored to reassure him that there was no basis for his allegations. On February 2, in his written response, Kuper renewed the charges of bad faith against the Union and concluded with the statement,

In that your own officials witnessed the disclosures of these employees and yet you support their position makes all of our previous negotiations seem a travesty, and *makes subsequent negotiations impractical* on the basis of there being no common ground for mutual trust [Emphasis supplied.]

Thereafter, the Respondent did not meet with the Union until March 16, at which time the company representatives renewed their request for a letter of apology from the Union, notwithstanding the Union's offer to incorporate a clause in the contract that would insure its support of the incentive plan. Although Nordhoff stated at that time that the Respondent's committee was not refusing to negotiate until the letter was received, the meeting adjourned with Mofield and Wilkinson having been unable to secure any commitment as to a future meeting date from the company representatives.

The Respondent was, of course, free to file unfair labor practice charges against the Union at any time. It was further free to discipline Goodwin and Walters insofar as they may have violated any of the plant rules in connection with work tickets or the incentive plan. Notwithstanding its dissatisfaction with these individuals, however justifiable it may have been, the Respondent was not free at any time to suspend negotiations with the Union or to insist that either of these employees be removed from the negotiating committee. Nevertheless, in the letter of January 16 the Company announced that it would suspend negotiations with the Union and ask that Goodwin and Walters be removed from the bargaining committee. This was followed by the letter of February 2 in which it reiterated its belief that further negotiations were impractical. Thereafter the Company did not meet with the Union until March 16 at which time it renewed its demand for a letter of apology and would not agree upon a date for another meeting until April 2. On these facts it is my conclusion, and I find, that the Respondent violated Section 8(a)(5) and (1) by suspending negotiations with the Union on and after January 17, 1962, and by endeavoring to dictate the composition of the Union's negotiating committee. *N.L.R.B. v. Deena Artware, Inc.*, 198 F. 2d 645, 648, 650-651 (C.A. 6), cert. denied 345 U.S. 906; *N.L.R.B. v. Marion G. Denton and Valedia W. Denton, d/b/a Marden Mfg. Co.*, 217 F. 2d 567, 570 (C.A. 5), cert. denied 348 U.S. 981; *N.L.R.B. v. Roscoe Skipper, Inc.*, 213 F. 2d 793, 794 (C.A. 5); *Prudential Insurance Company of America v. N.L.R.B.*, 278 F. 2d 181, 182 (C.A. 3); *Deeco, Inc.*, 127 NLRB 666-667.

It is also my conclusion, on the foregoing facts, that throughout the period from January 17 until sometime after March 16 the Respondent conditioned further meetings with the Union upon the willingness of the latter to produce a letter of apology in which it would denounce the alleged sabotage of the incentive plan by Goodwin and Walters. On March 16, however, when the Union volunteered to incorporate a clause in the contract that would insure its support of the incentive pay plan, the Respondent's officials insisted that this was not enough and renewed their request for the aforesaid letter. Such a letter as the Respondent sought here is comparable to an employer demand that a union register under a State statute so as to be amenable to suit in the State courts, or that it post an indemnity bond.

It is well settled that the latter are outside the area of compulsory bargaining and that an employer cannot legally make its agreement depend upon compliance with such conditions. *N.L.R.B. v. Dalton Telephone Company*, 187 F. 2d 811, 812 (C.A. 5), cert. denied 342 U.S. 824; *F. McKenzie Davison, W. J. Hardy, Sr. and W. J. Hardy, Jr., d/b/a Arlington Asphalt Company*, 136 NLRB 742. Cf. *N.L.R.B. v. Wooster Division of Borg-Warner Corporation*, 356 U.S. 342, 343-350. In the present case the demand for a letter of apology, over and above the inclusion of a contract clause such as the Union was willing to sign, was not a mandatory subject for bargaining, and the failure of the Union to write the Company a letter that conformed with its demand did not accord the Respondent a valid ground for suspending negotiations. Accordingly, it was a violation of Section 8(a)(5) and (1) for the Respondent to discontinue its meetings with the Union while awaiting a favorable response to its demand for such a communication.

Finally, the General Counsel contends that the Respondent's entire course of action negates the claim that it ever intended to arrive at a binding collective-bargaining agreement. To the findings in that connection we will now turn.

As set out above, Mofield testified that: On November 28, 1961, the parties agreed on a "right of entry" clause, an "hours of employment" clause, and that there would be no split shifts; on December 12, the Respondent agreed upon provisions as to arbitration, "maintenance of standards" and discharges; and on January 9 agreement was reached on a clause on funeral leave and holidays. Mofield's testimony is corroborated by the terms of the Respondent's proposed contract which it supplied the Union on January 9, 1962.¹³ At the hearing Kuper testified that this document incorporated the discussions and understanding of the parties up to that time,¹⁴ but that it was incomplete in not having a proposed wage scale. After the Respondent resumed negotiations with the Union on April 2 and 24, however, it expressed disagreement with the clauses in this proposal on split shifts, hours of employment, funeral leave, arbitration, holidays, and maintenance of standards, as well as other provisions on which there had been earlier agreement. Mofield testified, without contradiction, that at these meetings Conciliator Windes stated that the parties would not be able to agree upon a contract "with the Company renegeing on certain things . . ." Kuper conceded that on one occasion at this time "Mr. Windes chastised me rather severely for wanting to hold the item [one of the clauses in question]." At another juncture during this period, Habig stated that he could not be "stuck" with any agreements made by Sermersheim, his predecessor on the Respondent's negotiating team. It is, of course, manifest that no requirement in the Act compels an employer to grant a wage increase to establish its good faith in bargaining. On the other hand, here, the Respondent's negotiators put off the submission of a wage proposal until April and prior to that time delayed final agreement on many matters on the ground that they were "cost" items. Yet, when the Company finally submitted a wage offer on April 2, it was a proposal that would not increase its costs at all, for the offer merely provided that male employees continue to receive the same rates that had been in effect for 5 months and that the scale for female employees actually be decreased.

The test of good faith in collective bargaining is whether a party to negotiations conducted himself during the entire negotiations so as to promote rather than to defeat an agreement. *N.L.R.B. v. Reed & Prince Manufacturing Company*, 205 F. 2d 131 (C.A. 1), cert. denied 346 U.S. 887. It is my conclusion that the Respondent has met that test here. In the light of the above facts as to the Company's retraction on April 2, 1962, and thereafter, of its earlier concessions as to various contract clauses and its proposal of a wage scale for women that was even less than that already in effect, coupled with the conduct of the Respondent from January through March 1962, which has already been found a violation of Section 8(a)(5), and considered along with the background evidence as to the Respondent's opposition to union organization generally, it is my conclusion that the Company's entire course of action throughout the bargaining sessions was lacking in a good faith desire to arrive at a final agreement in its negotiations with the Union. By such conduct the Respondent further violated Section 8(a)(5) and (1). I so find.

¹³ This proposed agreement appears in the record as General Counsel's Exhibit No. 6.

¹⁴ Thus, Kuper stated:

The way I remember how this particular proposal was brought up, there had been a number of discussions concerning our initial proposal and a whole series of discussions concerning the Union's proposal. The Company agreed then to type up a list of items that had been discussed in the terminology that the Company felt would represent what had been discussed . . . the thing was incomplete in that a lot of the cost items were not included, particularly wages.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent has engaged in unfair labor practices by refusing to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, I will recommend that the Respondent, upon request, bargain collectively with the Union.

Upon the basis of the above findings of fact, and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. The Employer is engaged in commerce and the Union is a labor organization within the meaning of the Act.
2. All production and maintenance employees at the Respondent's plant in Evansville, Indiana, exclusive of office clericals, plant clericals, foremen, guards, professional employees, and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.
3. At all times since July 24, 1961, the Union has been the exclusive representative for the purposes of collective bargaining within the meaning of Section 9(a) of the Act of all the employees in the aforesaid appropriate unit.
4. By refusing to bargain in good faith with the Union, by refusing to meet and bargain with the Union from January 17, 1962, until after March 16, 1962, by illegally conditioning bargaining with the Union on its renunciation of unauthorized conduct of its members, and by refusing to bargain in good faith with the designated representatives of the Union since July 24, 1961, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.
5. By said acts the Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, thereby engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
6. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]

R.C. Can Company and United Steelworkers of America, AFL-CIO. *Case No. 16-CA-1610. January 11, 1963*

DECISION AND ORDER

On August 15, 1962, Trial Examiner James T. Barker issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Intermediate Report. Thereafter, the Respondent filed exceptions to the Intermediate Report.

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