

It is further recommended that the complaint with respect to Mid-States be dismissed in all other respects.

B. The Respondent, Local 738, International Chemical Workers Union, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Threatening employees with physical violence and discharge because they engage in antiunion activity.

(b) Causing or attempting to cause Mid-States Metal Products, Inc., to discharge, refuse to reinstate, or otherwise discriminate against any of its employees in violation of Section 8(a)(3) of the Act.

(c) In any other manner restraining and coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Notify Willard Ray Dobbins and Mid-States Metal Products, Inc., in writing, that it withdraws its objections to Dobbins' employment and requests his reinstatement. Notify Willard Ray Dobbins if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training Act, as amended, after discharge from the Armed Forces.

(b) Jointly and severally with Respondent Mid-States make Willard Ray Dobbins whole for all losses he may have suffered by reason of the discrimination against him, in the manner set forth in the section of the Decision entitled "The Remedy."

(c) Post at its offices, copies of the attached notice marked "Appendix B."<sup>71</sup> [Board's Appendix B substituted for Trial Examiner's Appendix B.] Copies of said notice, to be furnished by the Regional Director for Region 26, shall, after being duly signed by the Respondent Union's representative, be posted immediately upon receipt thereof, and be maintained by the Respondent Union for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union to insure that said notices are not altered, defaced, or covered by other material.

(d) Post at the same places and under the same conditions as set forth in (c) above, as soon as they are forwarded by the Regional Director, copies of the Respondent Mid-States Metal Products, Inc.'s notice marked "Appendix A."

(e) Forward signed copies of Appendix B to the Regional Director for posting by Respondent Mid-States Metal Products, Inc., at its Greenville, Mississippi, plant.

(f) Notify the Regional Director for Region 26, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply therewith.<sup>72</sup>

<sup>71</sup> See footnote 69, *supra*.

<sup>72</sup> See footnote 70, *supra*.

**M & M Oldsmobile, Inc. and Local 259, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO.** *Case No. 29-CA-82. January 17, 1966*

### DECISION AND ORDER

On September 9, 1965, Trial Examiner David S. Davidson issued his Decision in the above-entitled proceeding, finding that 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 Trial Examiner's Decision. Thereafter, Respondent, General Counsel, and the Charging Party filed exceptions to the Trial Examiner's Decision together with supporting briefs.

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

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in this case including the Trial Examiner's Decision, the exceptions, and briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as modified herein.

The facts as found by the Trial Examiner are supported by the credited evidence and are not seriously in dispute. Briefly, in a consent election held on June 12, 1964, a majority of the 28 shop employees in the service and parts department of Respondent's automobile agency designated the Union as their bargaining representative. The Union was certified on June 22 of that year and began negotiations with the Employer immediately thereafter. On August 10, 1964, following several meetings, the parties arrived at an agreement under which the Employer accepted the terms of a contract between the Union and the Automobile Dealers Association with certain specified modifications. The terms of the agreement were then drafted by Harry Silverman, who attended the final meeting as a mediator from the New York State Mediation Board. Copies of the handwritten draft, which covered one side of a sheet of paper, were circulated around the bargaining table and signed by the representatives of the Union and the Employer. After the signing, Meyers, president of the Union, requested that an additional clause regarding ratification be added because of the requirements of the Union's constitution. Respondent ultimately agreed, and the following was added on the back of the agreement and initialed on behalf of all the parties:

It is understood that this agreement is subject to ratification by the employees of M & M.

The Union thereafter held two meetings for the purpose of securing ratification. The first proved inconclusive and the Union called a second meeting on August 17, which was attended by 17 employees. The contract was discussed at length, as were the pros and cons of a strike as the alternative. The employees expressed individual views on the desirability of a strike, five favoring such action and the rest opposing it. Meyers then asked if any employees were opposed to the contract and, when only seven men raised their hands, declared that, under the circumstances, the contract was ratified. The record does not indicate that any employee at that time voiced dissatisfaction with the result of the meeting or the way in which it was conducted.

After the meeting the Union sent a telegram to the Employer advising that the contract had been ratified and was in effect.

Later that evening, Martin, Respondent's president, received a telephone call from two of the employees who told him that a ratification meeting had been held and that 11 of the 17 employees present had voted against ratification, rather than 7 as claimed by the Union. Martin told the two employees to put this in writing and see him the next day. Martin received the Union's telegram the following morning. He was also presented with a letter signed by 11 employees stating that there had been a fraudulent vote count at the previous night's meeting and asking the company not to sign the contract. Respondent thereupon notified the Union that it did not believe that the contract was ratified. Following an exchange of correspondence in which the parties repeated their positions, the Union notified the arbitrator named in the draft contract and requested that a hearing be set. Respondent refused to go to arbitration contending that there was no contract under which it was bound to do so.

Although we agree with the Trial Examiner's conclusion that the Respondent's refusal to effectuate the contract violated Section 8(a) (5), we do not base this result on his discussion covering employer enforcement of nonmandatory clauses or his rationale that Respondent's demand for additional proof of ratification amounted to the imposition of a new nonmandatory condition to putting the agreement into effect. Contrary to the Trial Examiner, we believe that our decision in *North Country Motors, Ltd.*<sup>1</sup> is dispositive of the issue on the facts of this case, and that, accordingly, Respondent's challenge of the Union's assurance of ratification was improper. Although in that case, unlike this one, the Union had not agreed to condition the contract on the receipt of ratification, the Board there stated<sup>2</sup> that the same result would have obtained even if ratification had been a condition precedent to a binding contract. In both cases, however, the requirement of ratification could only have been one which the Union itself assumed, and a vote was had which satisfied the Union's internal requirements. As we observed therein, a bargaining agent need not assume the obligation of obtaining ratification of any contract it may negotiate on behalf of its members, but, if it does so, it is for the union, not the employer, to construe and apply its internal regulations relating to what would be sufficient to amount to ratification.<sup>3</sup>

If, as claimed by Respondent, an employer were free to challenge the union's assertion that ratification had taken place, it would be difficult, if not impossible, for the parties to a collective-bargaining

<sup>1</sup> 146 NLRB 671.

<sup>2</sup> *Supra*, 673-674

<sup>3</sup> Respondent seeks to question the sufficiency of the ratification procedures that took place and does not assert that no vote of any sort had ever occurred.

agreement to arrive at a final settlement without the fear of being forced into protracted litigation regarding the union's compliance with its own procedures, clearly a collateral issue.<sup>4</sup> The encouragement of such industrial instability could not have been within the intendment of the Act. Nor does the employees' claim to the Respondent require a different result, particularly in the absence of a challenge to the result at the union meeting. To hold otherwise would be to allow a dissident employee or group of employees, or anyone who changed his opinion after the vote, to frustrate the expressed will of the majority. We therefore hold that where, as here, the parties have agreed that their contract shall be made contingent upon ratification by the employees, a vote is held showing majority approval which is not challenged at the time, and the union certifies to the employer that such ratification has been achieved, the employer may not avoid its contract by challenging the validity of the internal union procedures by which it was ratified.<sup>5</sup>

Accordingly, we find, as did the Trial Examiner, that Respondent has refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit and thereby violated Section 8(a)(5) and (1) of the Act.

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

<sup>4</sup> We find that the Trial Examiner erroneously relied on *Merck & Co., Inc.*, 102 NLRB 1612, as support for the proposition that the employer is entitled to more than notice of ratification. That decision involved a representation case where, as noted by the Trial Examiner, the issue was not whether the contract came into effect and the parties were bound thereby, but whether, under those circumstances, the contract, even if effective, was sufficient to bar the conduct of an election.

<sup>5</sup> In the event union members believe that their rights have been violated by the Union's use of irregular or unlawful internal procedures, other recourse is available to provide a remedy.

## TRIAL EXAMINER'S DECISION

### STATEMENT OF THE CASE

Upon a charge filed October 8, 1964, by Local 259, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO, referred to herein as the Union, the General Counsel issued a complaint against Respondent, M & M Oldsmobile, Inc. The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act. Respondent's answer denies the commission of any unfair labor practices.

This proceeding, with all parties represented, was heard before Trial Examiner David S. Davidson in Brooklyn, New York, from May 12 to 19, 1965. At the close of the hearing, oral argument was heard from counsel for the General Counsel, and the parties were given leave to file briefs. Briefs were received from the General Counsel and Respondent.

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

### FINDINGS AND CONCLUSIONS

#### I. THE BUSINESS OF THE RESPONDENT

Respondent, a New York corporation, is engaged in the retail sale, distribution, and service of new and used automobiles and parts at Jamaica, Queens, in the city and State of New York. In the course and conduct of its business Respondent annually purchases goods and materials valued in excess of \$50,000 which are transported and delivered to its place of business in interstate commerce directly from points out-

side the State of New York. In the course of its operations, Respondent annually sells and distributes automobiles, parts, and accessories, the gross value of which is in excess of \$500,000. Respondent concedes, and I find, that Respondent is engaged in commerce within the meaning of the Act and that assertion of jurisdiction is warranted.

## II. THE LABOR ORGANIZATION INVOLVED

Local 259, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act

## III THE ALLEGED UNFAIR LABOR PRACTICES

### A. *The facts*

#### 1. The issue and background facts

The question presented in this case is whether Respondent violated Section 8(a) (5) when it refused to put in effect the terms and conditions of employment provided by an agreement containing a ratification clause following receipt of notice of ratification from the Union under the circumstances hereinafter described.

On May 26, 1964,<sup>1</sup> after having received signed authorization cards from 22 of the 28 employees in the unit, the Union filed a representation petition seeking certification as the representative of the shop employees in Respondent's service and parts departments at its automobile agency. An agreement for a consent election was entered into between the parties on June 5, and on June 12 the election was held. The Union received 17 votes, and 11 voted against representation. As a result, on June 22 the Union was certified as the exclusive collective-bargaining representative of the following unit:

**INCLUDED:** All shop employees in Employer's service and parts departments at 138-22 101st Avenue, 138-19 101st Avenue, and 139-11 Queens Boulevard, Jamaica, New York.

**EXCLUDED:** New- and used-car salesmen, office clerical employees, watchmen, guards, and supervisors as defined in the Act.

Immediately thereafter the first negotiating meeting between Respondent and the Union was held. Respondent was represented by William B. Sherman, its general counsel and public accountant, Milton Martin, its president, and Patrick J. Marandino, its vice president, secretary, and treasurer. Also in attendance as an observer for Respondent was Joseph R. Parauda, an attorney. The Union was represented by Ralph Diamond, its vice president, and Sidney Korman and Clyde Stover, two employees from Respondent's shop. At the conclusion of the meeting Respondent retained Parauda for purposes of collective bargaining, and Sherman withdrew from the negotiations. Thereafter, Hyman Isaacs, a management consultant who represents numerous employers including the Automobile Dealers Industrial Relations Association of New York, Inc., herein referred to as the Association, became the spokesman for the Company in its negotiations with the Union.<sup>2</sup> After several meetings an apparent impasse was reached, and in early August the New York State Board of Mediation entered the negotiations. Union President Sam Meyers also entered the negotiations at this stage. After one or two meetings at the mediation Board's offices, it appeared that the major issue in dispute between the parties was the cost of the package which the Union was then seeking. At the next to the last meeting between the parties, on or about August 7, the representatives of Respondent and the Union agreed that each side would check its computations and that if Respondent found that the Union's cost estimate was correct, the dispute would be resolved at the next meeting.<sup>3</sup> The Union contended that the cost of its proposal was approximately \$30,000. Martin, Marandino, and Respondent's Office Manager Saraco contended that the cost was more than twice as much. The disagreement appears to have

<sup>1</sup> All dates referred to herein are in 1964 unless otherwise indicated.

<sup>2</sup> It does not appear that Parauda participated in any of the negotiations after Isaacs came on the scene. There is a dispute between the parties as to Isaacs' capacity in the negotiations. As it was conceded that Isaacs acted as an agent of Respondent with authority to negotiate for it and to enter into the agreement out of which this dispute arises, I find it unnecessary to decide whether Respondent retained Isaacs independently as a consultant or whether Respondent became a member of the Automobile Dealers Industrial Relations Association of New York and was represented by Isaacs in his capacity as consultant to the Association.

<sup>3</sup> During the course of this meeting Union President Meyers threatened that if no agreement was signed by the end of the meeting, the Union would promptly strike.

stemmed from a difference over the method used to compute the cost. Isaacs agreed with the Union's computation, and so informed Martin, Marandino, and Saraco.

It is undisputed that to the point all negotiations were in good faith and that collective bargaining as contemplated by the Act had occurred.

The final negotiating meeting was held on August 10 at the offices of the State mediation board. Isaacs spoke for the Company. Martin and Marandino attended the meeting and brought with them Sherman, who had not attended any negotiating meetings since the first meeting with the Union following certification.<sup>4</sup> Meyers, Diamond, and Korman were present for the Union, and Harry Silverman served as the mediator. After some discussion Respondent agreed to the Union's proposal. As its terms were reviewed, Silverman incorporated them into a handwritten stipulation, making one or more carbon copies. The stipulation provided that Respondent accepted the terms and conditions of the June 26, 1964, contract between the Association and the Union with specified modifications and exceptions.<sup>5</sup> When Silverman finished listing the exceptions and modifications to the Association's agreement, copies of the stipulation were handed to Isaacs and Meyers to review. At that point the entire stipulation appeared on one side of one piece of lined paper. A sharp dispute exists as to what happened thereafter.

No witness' recollection as to all the details of the meeting appeared to be perfect. Some lapses and omissions were doubtless inevitable in view of the passage of time between the event and the hearing and the likelihood that no one was aware at the time of the significance that the final minutes of the meeting would later assume. However, upon my evaluation of the testimony of the witnesses as a whole, including my observation of the witnesses and their demeanor, I have credited the testimony of Silverman, Meyers, Diamond, and Isaacs as to the August 10 meeting. Silverman was particularly impressive as a witness and had not substantial interest in the outcome of this proceeding.<sup>6</sup> Although his memory was not complete as to all details, it was apparent that Silverman had clear recollection of the August 10 meeting which grew stronger as he testified. I find, in accordance with Silverman's testimony,<sup>7</sup> that after he completed writing the stipulation, he separated the copies and distributed them around so that the various persons in the hearing room could read what he had written. Thereafter, representatives of the parties signed the agreement in his presence. A few minutes later Meyers stated that the subject of ratification had been omitted and that he wanted a ratification provision inserted in the agreement to satisfy the Union's internal requirements provided by its constitution and bylaws.<sup>8</sup> Isaacs said

<sup>4</sup> Sherman joined Martin and Marandino at Respondent's showroom, and they drove together to the mediation board officers, where they met with Isaacs and held a short caucus before meeting with the mediator and the union negotiators.

<sup>5</sup> At some point during the meeting Isaacs stated that the stipulation would serve as a memorandum of agreement until a formal contract could be prepared setting forth all the terms and conditions of employment and wage rates applicable to Respondent which the parties would then be required to sign.

<sup>6</sup> At the time of the hearing Silverman was no longer affiliated with the New York State mediation board but was serving as an arbitrator in private practice. He was the named arbitrator under the collective-bargaining agreement between the Union and the Automobile Dealers Industrial Relations Association of New York, Inc., which was in effect at the time of the August 10 meeting. Although it can be argued that Korman, whose interests were opposed to those of Respondent for whom he testified, was therefore even more reliable than Silverman, his testimony does not aid Respondent for the reasons set forth below.

<sup>7</sup> The testimony of Isaacs, Meyers, and Diamond was substantially the same as Silverman's although Isaacs' recollection was more vague than that of the other witnesses, and particularly poor as to dates. To the extent that there are minor variances between the testimony of Silverman, Isaacs, Meyers, and Diamond, I have credited Silverman, who generally impressed me as the most accurate in his testimony, unless elsewhere indicated to the contrary.

<sup>8</sup> While Silverman and Isaacs did not testify that Meyers referred to the Union's constitution and bylaws, both testified that there was discussion during which Meyers insisted on inclusion of the ratification clause. The statement "You have to do what you have to do" attributed by Silverman to Isaacs in response to Meyers' request, takes on meaning as a response to a statement that ratification was an internal requirement, and indeed, it is likely that in any discussion of Meyers' request he would have mentioned the constitution and bylaws, which, insofar as the record shows, were the only reason why the Union sought the ratification clause. In these circumstances, notwithstanding Meyers' failure to mention his reference to the constitution and bylaws in an affidavit given to the General Counsel, I credit his testimony, corroborated by Diamond, that he referred to the union constitution and bylaws when requesting the addition of the ratification clause.

he did not think it was necessary and asked Meyers "Why are you bothering. Leave it out. We don't need it. You have to do what you have to do." Meyers however continued to insist, and Silverman retrieved the copies of the stipulation. Silverman suggested inserting the words "subject to ratification" on the face of the stipulation at its beginning. Meyers objected, and Silverman then wrote on the back of the stipulation in his own words, "It is understood that this agreement is subject to ratification by the employees of M & M"<sup>9</sup> The added clause was then initialed by Isaacs and Meyers, and the meeting ended shortly thereafter.

Respondent offered the testimony of Sherman, Martin, Marandino, and Union Shop Steward Korman to support a different version of the circumstances of the addition of the ratification clause. I have not credited the testimony offered for this purpose. Korman was so hazy and confused in his recollection that his testimony cannot be relied upon for any purpose. His initial testimony that the ratification clause was added to the agreement at Isaacs' request before the stipulation was signed, was completely undermined by his immediate recantation and claim of lack of recollection of the time of its signing<sup>10</sup>

While Sherman, Marandino, and Martin were more positive in their testimony that Respondent requested the addition of the ratification clause to the stipulation before it was signed, other factors persuade me that their testimony also is not to be preferred to that of Silverman and the other witnesses presented by the General Counsel. Sherman, and to a lesser extent Martin and Marandino as well, impressed me as lacking in candor in describing the August 10 meeting and the events leading up to it. Sherman disclaimed knowledge of the state of the negotiations and of Isaacs' role in the negotiations until he arrived at the Mediation Board offices on August 10. He also testified that he did not participate in any discussion of costs at the August 10 meeting.<sup>11</sup> In the light of Sherman's role as Respondent's general counsel and accountant, who visited Respondent's showroom approximately five times a month, and my impression of him formed while observing him as he testified, I find it doubtful that Sherman was as ill informed as to the state of negotiations as he claimed to be. The doubt is confirmed by Martin's and Marandino's testimony. Both testified that Sherman was not kept informed or consulted with respect to the negotiations between June 23 and August 10, and could not recall whether he participated in any discussions of the cost of the Union's proposal on August 10. But, both also testified that Sherman was told prior to the Mediation Board meeting that agreement had practically been reached and that the disagreement over the cost of the Union's proposal was discussed in Sherman's presence both at Respondent's showroom and in Respondent's car as all three drove together to the Mediation Board before the August 10 meeting.<sup>12</sup> Their testimony cannot be reconciled with Sherman's disclaimers. Marandino in his testimony also played down the discussion of costs indicating, contrary to Martin, that Respondent had agreed with the Union's figure. Martin testified that he never agreed with it, even after he accepted the Union's proposal. Both Sherman and Marandino testified as if the only issue of importance which they discussed in the caucus was Respondent's need for a ratification clause. Indeed, Sherman initially testified that when the negotiating meeting started, Respondent immediately accepted the Union's proposal, and Isaacs started to dictate the terms of the stipulation. Yet Martin testified that the issue of costs was one of the big issues in the caucus, and that in a last effort to reduce costs he asked Isaacs to try to get the Union to agree to extend the contract term from 3 to 5 years so as to postpone the dates for the increases called for during its term.

<sup>9</sup> Although the witnesses were not in complete agreement as to who made the suggestion and objection, all witnesses, except Korman who was not asked, recalled that a suggestion was made that the insertion be made on the face of the agreement, objection was made that there was no room, and Silverman then stated that he would put the clause on the reverse side of the stipulation.

<sup>10</sup> I am not satisfied that his recollection was or could have been refreshed by reference to a telephone conversation between him and Respondent's counsel earlier on the day that he testified, particularly in view of his statement that what "threw" him and caused him to change his testimony was that the clause was on the back of the page which was shown to him at the time he testified.

<sup>11</sup> According to Sherman, "I couldn't have. I didn't know what they were."

<sup>12</sup> Marandino testified that he told Sherman that Respondent had decided to accept Isaacs' figure. Even if the term "Isaacs' figure" was not specifically used by Marandino, I find it inconceivable that any discussion of the negotiations and the dispute over costs would not have revealed to Sherman that Isaacs was involved in the negotiations if he did not already know that fact.

Under these circumstances, I find that Silverman and Isaacs are to be credited in their testimony that Sherman actively took part in the discussion of costs at the August 10 negotiating meeting, and that Sherman, Marandino, and Martin, to varying degrees did not frankly testify with respect to the August 10 negotiations and preceding events<sup>13</sup>

All three testified that Respondent sought the ratification clause because they had heard that the men in the shop were dissatisfied with the Union's contract proposal. Their explanations are not convincing. According to Sherman, he advised Marandino not to sign the contract without a ratification clause because, "If you sign this, it's an agreement and you are going to have difficulty with the men. They may go out on strike"

It would seem elementary that a strike was more to be feared if the contract were made subject to ratification and ratification failed, than if no ratification clause were inserted in the agreement and the employees were dissatisfied with it,<sup>14</sup> and I am not persuaded that Sherman believed otherwise.

Martin and Marandino expressed a different concern as motivating their desire for incorporation of the ratification clause. They testified that they wanted the agreement subject to ratification because they feared that valued employees would quit because of dissatisfaction with the agreement. But if the contract were ratified by a narrow margin the dissatisfaction of the dissenters would hardly be quelled and the causes of their dissatisfaction would remain.<sup>15</sup> If Respondent were truly concerned that employee dissatisfaction would lead to resignations, the solution would appear to have required either additional concessions by Respondent or an attempt to persuade the Union to rearrange benefits to meet the areas of employee objection. Respondent's efforts at the final meeting, to extend the term of the agreement from 3 to 5 years and postpone effective dates of benefits it provided, could only have aggravated employee dissatisfaction, and suggests that costs and not employee dissatisfaction were foremost in the minds of Respondent's negotiators. Although employee dissatisfaction may well have been discussed among Respondent's negotiators, I find, as Isaacs testified, that it was a topic of concern and discussion from the very outset of the negotiations, not in relation to any request by Respondent for ratification of the agreement, but in connection with Respondent's concern that an agreement providing for a mechanics' pay scale at a level which Respondent insisted upon might be rejected by the employees and the Union.

Finally, the rejection of Respondent's version of the addition of the ratification clause to the stipulation is confirmed by the physical composition of the document itself. The stipulation was handwritten by Silverman on legal-size lined paper. The date and caption "Stipulation" appear in the wide space at the top of the page. The introductory paragraph, "It is Stipulated and agreed between Loc 259, UAW, AFL-CIO and Automobile Dealers Industrial Relations Assn. and in behalf of its Member, M & M Oldsmobile Inc. that" begins on the top printed line of the page. The terms of the stipulations which follow thereafter fill every line through the fourth line from the bottom. Thus, at the point when Silverman finished writing the stipulation before it was signed and before the ratification clause was added, there were three blank lines at the bottom of the page. If the clause were added before it was signed, as Respondent claims, there would have been sufficient room on the front of the document to add the clause at the bottom, although there then would not have been sufficient room for

<sup>13</sup> In addition to the conflicts already mentioned in their testimony, Sherman differed with Martin and Marandino with respect to the nature of an exchange which triggered an altercation between Sherman and Meyers. Sherman testified that the incident was caused by Meyers' use of abusive language, but denied that the abusive language followed a charge by Sherman that Diamond had threatened that if there was a strike anyone who wanted to work would have to go through him. Martin and Marandino both testified that Sherman made such a charge, and as Martin put it, "Things like this you don't forget." Sherman's denial impresses me as an attempt to minimize his role in the negotiations.

<sup>14</sup> In fact, the Association agreement, which the stipulation adopted, contained a no-strike clause, but it is not clear whether Sherman was aware of it. The fact was certainly easily ascertainable if not known to him.

<sup>15</sup> Sherman, Marandino, and Martin differed in their testimony as to what the source of dissatisfaction was. Sherman, consistent with his disclaimer of knowledge of the negotiations, testified that he knew only that the employees were unhappy with the proposal but not why. Marandino testified that the mechanics were unhappy because of the proposal with respect to their pay. Martin testified that the dissatisfaction was more widespread and concerned three issues, including the mechanics' pay. Saraco corroborated Martin and testified that he had so reported to Marandino.

the signatures as well on the front. Even if it is not implausible that Silverman would have commented that there was no room on the front of the stipulation when three blank lines remained, if the document was not yet signed when the ratification clause was added, one would expect that the parties would have signed the stipulation at its end following the ratification clause, and there would have been no occasion to initial the added clause.

In sum, I have rejected Respondent's version of the circumstances of the addition of the ratification clause and find, as set forth above, that after the stipulation was signed by the parties, the ratification clause was added at Meyers' request.

### 3. The Union's ratification meetings

On August 13 Diamond called a meeting of Respondent's employees to be held after work at a bar across the street from the Respondent's showroom for the purpose of discussing the agreement. Between 20 and 22 employees attended the meeting. After lengthy discussion, Diamond asked the employees to vote. According to Diamond, seven voted "that they were not happy" about the contract, five voted "that they were happy about it," and the remainder of the group did not vote. Diamond told the group that the vote was not decisive and that he would have to call another meeting.<sup>16</sup>

Thereafter, the Union called another meeting for Monday, August 17, at 6 p.m. at its headquarters at 377 Broadway in New York. Written notices were distributed to the M & M employees which set forth as the agenda:

#### "Discussion on Contract Settlement Ratification of Contract Settlement"

Approximately 17 employees attended the August 17 meeting. In addition, Meyers, Diamond, Union Financial Secretary Frank LoCascio, and Union Attorney Richard Weinmann were present.<sup>17</sup> Meyers chaired the meeting. He described the agreement to the employees and explained it item by item. He then called for open discussion, and extended discussion followed. A considerable portion of the discussion was devoted to the pros and cons of a strike, because, as Meyers explained, assuming there was no ratification, the other alternative was a strike. Toward the end of the discussion, Meyers asked each employee individually to express his feelings about striking. Only five or six employees stated that they wanted to strike. The remainder indicated that they did not. Meyers then asked whether any employees were opposed to acceptance of the contract. Seven hands were raised. Meyers counted the hands and said that under the circumstances the contract was ratified. Meyers advised the employees that the purpose of the meeting was consummated and that it stood adjourned. The meeting lasted approximately 2 or 3 hours and was adjourned at around 9:30 or 10 p.m. Following the adjournment, none of the employees indicated to the officers of the Union any dissatisfaction with the outcome of the meeting or the manner in which it was conducted.

Upon the conclusion of the meeting, Meyers asked LoCascio and Weinmann to send a telegram to Respondent informing Respondent that the agreement was ratified.

<sup>16</sup> The findings as to the August 13 meeting are based on the testimony of Diamond which was contradicted in only one respect. According to Diamond, Marandino was present for some time while the meeting was in progress, and his presence interfered with the discussion. Marandino testified that he was in the bar only briefly before the meeting started and immediately left. I find it unnecessary to resolve this conflict.

<sup>17</sup> The findings as to this meeting are based on the testimony of Meyers, Diamond, and LoCascio. Diamond was most familiar with Respondent's employees and impressed me as trying diligently to recall the events as they happened and to confine his testimony to what he recalled. To the extent that there are discrepancies between the versions of Meyers, Diamond, and LoCascio, I have relied upon Diamond's version. None of the employees who attended the meeting were called as witnesses. The only evidence offered in conflict with the testimony of Diamond, Meyers, and LoCascio as to the vote at the union meeting was testimony by Martin, described below, as to a telephone conversation between him and two employees on the night of August 17 and a letter, described in detail below, purportedly signed by 11 employees, stating that the vote at the meeting was against ratification and was miscounted. Both the conversation and the letter are evidence of what Respondent's officers had before them at the time Respondent rejected the Union's ratification notice. However, particularly in the absence of testimony by any witness who was present at the meeting to contradict Meyers, Diamond, and LoCascio, I reject the letter and Martin's testimony with respect to his conversation as evidence of the truth of the facts reported to Respondent therein.

A telegram was sent to Respondent over Meyers' signature shortly thereafter which read:

This is to advise you that the contract between us has been ratified and is now in effect.<sup>18</sup>

#### 4. Respondent's rejection of the Union's notice of ratification

Late in the evening of August 17, sometime after 10:30 p.m., Respondent's President Martin received a telephone call at his home during the course of which he spoke with two employees, Sonny Tucker and John LaPeruta. Tucker and LaPeruta told Martin that there had been a union meeting and that 11 employees had voted against ratification out of 17 present. They said they did not know what to do. Martin replied that he did not know what to tell them they could do. He suggested that they put the facts in writing, give the statement to him, and that he would take it up with his attorneys.<sup>19</sup>

The next morning between 9:30 and 10 a.m. Tucker came into Respondent's office and handed a letter to Joseph Saraco, Respondent's office manager. Tucker told Saraco that it was for Martin and Marandino, neither of whom had yet arrived. Saraco also received the Union's telegram during the morning.

The letter handed Saraco by Tucker was dated 8-18-64 and bore the following handprinted message:

Dear Bosses:

On the Night of Aug. 17, 1964, there were a meeting held in New York City at the Union Hall on Broadway. The meeting was to have a vote on the agreement of the union contract that were offered to the men on Aug. 13, which was voted out by 98% of the men. On Aug. 17, we had another vote which 17 men were present. The President of the Union gave a quick count at the end of the meeting which he didn't give a correct count. Eleven of the men were there voted against it, but the President only counted six so then he said that the contract was voted in. We the members that were there felt that we was taken over by the count. So we ask the Bosses *Please don't sign that Contract.*

At the bottom and on the reverse appears a total of 11 signatures.

When Martin arrived at the showroom, Saraco handed him both the "Dear Bosses" letter and the telegram. Saraco told him he had received the letter from Tucker. Martin read them and did nothing further at that time. Marandino arrived somewhat later, and Martin showed both documents to him. Marandino asked where the letter came from, and Martin told him. Marandino then asked what they were going to do. Martin replied that they would have to discuss it with their lawyers to find out. Not long thereafter, Sherman arrived at the showroom. Martin and Marandino showed Sherman the "Dear Bosses" letter and the telegram. Sherman advised them that as far as he was concerned there was no contract and suggested that they contact Isaacs. Martin telephoned Isaacs who said he would come to the shop and did. Martin and Marandino showed him the two documents.

Isaacs took the position that when the Union gave notice that the agreement was ratified, it was not his job to look behind the Union's operations, and that as far as he was concerned the Association had a contract. He advised Martin and Marandino that if they were not going to honor the agreement, they had better get a good lawyer. Isaacs also testified that it became obvious during this meeting he could no longer represent Respondent, because of their differences in views.<sup>20</sup>

After Isaacs left, Martin called Attorney Parauda and read the telegram and the "Dear Bosses" letter to him. Parauda expressed the view that there was no contract at that time. He told Martin to mail the documents to him and that he would handle the matter.

<sup>18</sup> Respondent contends that the telegram was not sent until the early morning hours of the following day because the following appears on its top line "305A EDT Aug 18 64 SYA 100" In the absence of any evidence as to the significance of these symbols or the workings of Western Union, I regard them as insufficient to cast doubt on the uncontradicted testimony as to the sending of the telegram or on the credibility of the witnesses who testified as to the meeting generally.

<sup>19</sup> Only Martin testified as to this conversation. I have credited Martin's testimony as describing the conversation but, as indicated, do not accept it as evidence of the truth of what was reported to Martin by Tucker and LaPeruta.

<sup>20</sup> Martin and Marandino testified that Isaacs expressed the opinion that there was no contract. I credit Isaacs' testimony as to what he told them at this time.

On August 20, Parauda sent Meyers the following letter:

This will acknowledge receipt of your telegram dated August 18, 1964, by M & M Oldsmobile, Inc

In addition, the company has received a letter, dated August 18, 1964 signed by 11 of its employees, setting forth the events which took place at a meeting of M & M employees at the Union's hall on the evening of August 17, 1964.

Your telegram states that the contract has been ratified while the letter signed by 11 employees states that the contract was rejected by an 11-6 vote.

Since there is a serious doubt whether the contract has in fact been ratified, the company must take the position that the contract has not been ratified.

As you know, the stipulation entered into on August 10, 1964, by the Union, the Association and M & M Oldsmobile specifically states in writing "... this agreement is subject to ratification by the employees of M & M." Until such time as this provision in the stipulation is fully complied with it is the position of the company that it does not have a contract with your union.

On August 21, Meyers replied to Parauda by letter as follows:

Receipt of your astonishing letter dated August 20th, 1964, is acknowledged.

Please be advised that I was present at the meeting at which the contract was ratified. As you of all people well know, the employer is in no position to take issue with the Union's information to it that the contract is ratified and cannot interest itself in the Union's internal affairs. No letter from any employee has any validity in the face of a certification by the National Labor Relations Board that our Union shall represent the employees for the purposes of collective bargaining. As you know, our Union was certified for the employees herein on June 22nd, 1964, after a Board election.

Since there is no doubt whatsoever that the contract has been signed and ratified, we shall expect your client to observe it fully. Upon the first breach of said contract by the employer, we shall take the necessary steps to implement the contract.

Parauda replied by letter of September 2, 1964:

This will acknowledge receipt of your letter dated August 21, 1964.

As was stated in our previous letter, there is a provision in the stipulation between the Company and the Union that the contract will be ratified by the employees of M & M Oldsmobile, Inc. A majority of the employees who were present at the last ratification meeting have voluntarily indicated to us in writing that a majority of the employees present at that meeting refused to ratify the contract. Since you have indicated in writing that the contract must be ratified by a majority of the employees, we must insist that you comply with what you have previously agreed to in writing.

On September 4, 1964, the Union's attorney, Richard Weinmann, wrote Harry Silverman, the arbitrator under the Association's contract, to notify him that an unresolved dispute existed under the Association agreement between Respondent and the Union with respect to payment of proper wages and to request that he set a date, time, and place for arbitration. A copy was sent to Respondent.

On September 14, Parauda replied for Respondent reiterating the position taken in his previous letters and stating Respondent's refusal to arbitrate.<sup>21</sup>

Since August 10, there have been no meetings between Respondent and the Union. The Union has at all times taken the position that the August 10 agreement is a binding agreement and it has not sought any further negotiations or meetings. It has not taken any legal action to compel arbitration pursuant to its September 4 and 11 requests. The changes in terms and conditions of employment which the August 10 stipulation provided have never been placed in effect.

### B. Concluding findings

The General Counsel contends, contrary to Respondent, that the ratification clause did not give rise to a condition precedent to the effectiveness of the terms and conditions of the agreement, but at most was a promise by the Union independent of Respondent's obligation to perform under the contract. I do not agree. Even

<sup>21</sup> A second request for arbitration of a dispute over the discharge of an employee was submitted by Weinmann by letter to Silverman dated September 11. Respondent also refused to arbitrate that dispute.

though added after the body of the agreement had been signed, the ratification clause was not a separate agreement but a mutually agreed upon modification to the agreement reached moments before.<sup>22</sup> If the ratification clause was a mere promise, and not a condition, then the terms and conditions of employment provided in the agreement should have gone into effect immediately on August 10, independent of the Union's fulfillment of its promise. They did not. The wording of the telegram sent by the Union following its August 17 meeting indicates affirmatively that the Union understood and interpreted the agreement as requiring ratification before its terms and conditions would be placed in effect. The General Counsel contends that the Union desired the ratification clause only so that it could satisfy its constitutional obligations and not for the purpose of conditioning the effectiveness of the agreement on ratification. But if that were so, Isaacs correctly told Meyers it was unnecessary to make the agreement subject to ratification. Even though Meyers had the Union's constitution and bylaws in mind, their implementation would require, as is the normal case, that if the employees failed to ratify the agreement, it would not take effect and the Union would seek to negotiate further.<sup>23</sup> When Meyers insisted and Respondent agreed to add the ratification clause, the Union also sought to preserve the right to continue negotiations if ratification failed. The agreement by its terms became "subject to ratification by the employees of M & M," and whatever was meant by the quoted phrase had to occur before the terms and conditions of employment provided by the Agreement became effective. *Merck and Co., Inc.*, 102 NLRB 1612; *Westinghouse Electric Corporation*, *supra*.<sup>24</sup>

The question remains, however, as to what was intended by the parties as sufficient to satisfy the condition thus imposed and to actuate the terms and conditions of employment provided by the agreement. The General Counsel urges that the ratification clause is in effect an option clause, which gives the Union the right to put the terms and conditions of the agreement into effect upon mere notice to the Employer that the contract has been ratified, whatever the basis for the notice. Under this view, Respondent would have no right to resist effectuation of the agreement upon such notice. But if this is what the Union sought to obtain it is not what it asked for or secured. Meyers sought the ratification clause for the purpose of complying with the Union's internal requirements. He reserved no right to insist that the contract be implemented even if the Union failed to achieve ratification.<sup>25</sup> I find nothing in the negotiations to suggest that because Respondent did not seek the ratification clause it gained no contractual right to require performance of the condition before putting the terms and conditions of the agreement in effect. Nor has there been any demonstration that ratification clauses in collective bargaining agreements are commonly understood to give employers no right to insist that their terms be complied with.<sup>26</sup>

On the other hand, from the circumstances surrounding the addition of the ratification clause to the agreement and the events subsequent to the negotiations, it is clear that Respondent, as well as the Union, understood ratification to be a matter for the Union to attend to. As I have found, the ratification clause was inserted at the request of the Union for its purposes. There is no evidence that the parties ever discussed what was necessary to satisfy the ratification clause prior to execution of the contract. Thereafter the Union undertook to obtain ratification, and Respondent did

<sup>22</sup> Corbin on Contracts, p. 769, § 522 (West Publishing Co., 1950).

<sup>23</sup> See *Pocono Apparel Mfg. Co.*, 73 NLRB 844, 845; *Truscon Steel Company, Screen Division*, 62 NLRB 1108. These consequences of a failure to ratify lead to the conclusion that an agreement containing a ratification clause does not stabilize a bargaining relationship until ratification has occurred. See *Westinghouse Electric Corporation, Small Motor Division*, 111 NLRB 497, 499; *General Electric Company, Distribution Transformer Department*, 110 NLRB 992.

<sup>24</sup> In this respect this case differs from *North Country Motors, Ltd.*, 146 NLRB 671, for in that case on different facts, the Board concluded that the Union had not undertaken to ratify the Agreement as a condition precedent to the effectiveness of an agreement.

<sup>25</sup> Nor did it reserve the right to require further negotiation if the Union decided not to abide by a narrow margin in favor of ratification.

<sup>26</sup> The Board's Decision in *Merck & Co.*, *supra*, to the contrary establishes that the Board rejects the view that a condition precedent requiring ratification may be satisfied simply by notice that the contract has been ratified. While there the issue was not whether the employer and the contracting union were bound to put the terms of the contract in effect, the Board's Decision necessarily reflected its view that an employer has the right to require more than mere notice of ratification and that in fact the condition of ratification had not been satisfied in that case.

nothing but wait for the Union to act.<sup>27</sup> Even when Respondent rejected the Union's notice of ratification, Respondent insisted that "you [the Union] comply with what you have previously agreed to in writing." Thus, both parties understood that ratification was a union matter and would be attended to by the Union. In these circumstances, "the requirement for ratification could only have been one which the Union itself assumed." *North Country Motors, Ltd., supra*, 674.

I conclude that the action taken at the union meeting on August 18 was sufficient to satisfy the requirement of ratification assumed by the Union. I have found, as Meyers, Diamond, and LoCascio testified, that the contract was subjected to lengthy discussion with the employees during which Meyers posed as the only realistic alternatives, acceptance of the contract or a strike. When individual polling of the employees disclosed that there was only minority sentiment for a strike, and a show of hands disclosed that only 7 of the 17 present opposed acceptance of the contract, he declared the agreement ratified. Even if the provisions of the Union's constitution and bylaws were not satisfied to the letter by this procedure,<sup>28</sup> "[i]t was . . . for the Union, not for the Respondent, to construe the meaning of the Union's internal regulations relating to ratification."<sup>29</sup>

Whether this vote satisfied the Union's internal requirements "was a matter for the Union to decide, and not for Respondent to challenge once assured by the Union that the latter's ratification requirements had been met."<sup>30</sup> Moreover, Respondent has not challenged Meyers' interpretation of the Union's internal requirements but has challenged the accuracy of the report of ratification. I have found on the record before me that the challenge was not well founded. Therefore, I conclude that the action taken at the union meeting on August 17 was sufficient to satisfy the requirement of ratification assumed by the Union.

The next and final question for decision is whether Respondent's refusal to put the terms and conditions of the agreement in effect under these circumstances violated Section 8(a)(5).

In *N.L.R.B. v. Darlington Veneer Company, Inc.*, 236 F. 2d 85, 87 (C.A. 4), the employer insisted, among other things, as a condition of agreement, upon the inclu-

<sup>27</sup> When asked what he understood had to be done to satisfy the ratification clause, Sherman indicated that he was not concerned with it and gave it no thought. Marandino testified that his understanding was that the contract would be taken to the men for a vote by the shop steward and never gave a thought to whether Respondent would have to do anything with respect to ratification.

<sup>28</sup> The constitution of the Union's parent International provides in article 19, section 3: No Local Union Officer, International Officer, or International Representative shall have the authority to negotiate the terms of a contract or any supplement thereof with any employer without first obtaining the approval of the Local Union. After negotiations have been concluded with the employer, the proposed contract or supplement shall be submitted to the vote of the Local Union membership or Manufacturing Unit membership in the case of an Amalgamated Local Union at a meeting called especially for such purpose; should the proposed contract or supplement be approved by a majority vote of the Local Union or unit members present at the meeting, it shall be referred to the Regional Director for his recommendation to the International Executive Board for its approval or rejection. In case the regional Board Member recommends approval, the contract becomes operative until the final action is taken by the International Executive Board.

The Bylaws of the Local Union provide in article X:

(b) After negotiations have been concluded with the employer, the proposed contract shall be submitted to the vote of the employees of the employer at a special meeting called for such purpose on due notice.

(c) After approval by a majority vote of those present and voting at the meeting, the contract shall be referred to the Regional Director by the Local Union.

Sherman, Marandino, and Martin testified that they had never seen the International constitution or the Local bylaws and were not aware of their contents.

<sup>29</sup> *North Country Motors, Ltd., supra*. Pursuant to article VI of the Union's bylaws, between membership and executive board meetings, its president exercises general administrative authority and is the highest authority of the Local Union. Although the agreement in *North Country Motors* is distinguishable from the agreement here, the Board there stated alternative grounds for its holding. The quoted portion is in support of the Board's conclusion that the agreement was ratified even assuming that ratification was a condition precedent to the agreement in that case.

<sup>30</sup> *Ibid.*

sion in any agreement reached of a clause requiring ratification by a majority of its employees voting by secret ballot. The Court affirmed the Board in its conclusion that by its insistence on the ratification clause, "the company was attempting to bargain, not with respect to wages, hours or conditions of employment, but with respect to the authority of the duly certified representative of the employees to represent them, a matter fixed by statute." In *N.L.R.B. v. Wooster Divisions of Borg-Warner Corporation*, 356 U.S. 342, 349, the Supreme Court held that even where good faith may be presumed, "good faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining."

But, as recognized in both *Borg-Warner* and *Darlington*, if agreed to by a union, proposals embodying nonmandatory subjects are both lawful and enforceable.<sup>31</sup>

The ratification clause in this case incorporated a nonmandatory subject of bargaining in the agreement with the Union's consent. However, Respondent's position went beyond enforcement of the clause. Rather Respondent's position was tantamount to insistence upon the inclusion of a ratification provision in an agreement without the Union's consent. For once the Union had ratified the agreement as provided in the clause, nothing further remained to be done to enforce the ratification clause. When Respondent insisted that the Union take some additional action to satisfy Respondent that ratification had occurred, whatever Respondent's intent, Respondent went beyond the agreement to intrude upon the Union's internal affairs beyond the point to which the Union had agreed. Although Respondent insisted upon the additional action after agreement had nominally been reached and after the parties had left the bargaining table, the imposition of the new condition to the effectiveness of the agreement, no less than in *Darlington* and *Borg-Warner*, *supra*, made a matter concerning relations between employees and their union a condition to agreement and was a refusal to accord full recognition to the Union as exclusive representative of Respondent's employees.<sup>32</sup>

I conclude that under *Darlington* and *Borg-Warner*, although an employer may insist upon compliance with a contractual provision requiring ratification as a condition to its becoming effective, he acts at his peril if in so doing, he insists that the union do more than it has agreed to as a condition to putting the agreement into effect.<sup>33</sup>

Respondent contends that this case involves nothing more than a good faith dispute over contract interpretation, that the Union failed to seek negotiations with respect to that dispute, and that the Union's recourse in any event was before the courts and not before the Board.<sup>34</sup>

However, the same facts may give rise to both a breach of contract and an unfair labor practice, and I have concluded that the facts in this case establish that an unfair labor practice has occurred.<sup>35</sup> In these circumstances, the Union was not required to seek to negotiate before seeking to obtain a remedy for the unfair labor practice. Moreover, I am not persuaded that the instant case present a situation of

<sup>31</sup> See *Brotherhood of Painters, Decorators and Paperhangers of America, Glaziers, Local Union #1385, AFL-CIO (Associated Building Contractors of Evansville, Inc.)*, 143 NLRB 678; *N.L.R.B. v. Winchester Electronics, Inc. and Pyne Molding, Inc.*, 295 F. 2d 288 (C.A. 2).

<sup>32</sup> Cf. *Local 19, International Brotherhood of Longshoremen, AFL-CIO (Chicago Stevedoring Co., Inc.)*, 125 NLRB 61, *enfd.* 286 F. 2d 661 (C.A. 7).

<sup>33</sup> *Ferguson-Steere Motor Company*, 111 NLRB 1076, is not apposite. In that case an employer erroneously but in good faith took the position that an agreement had automatically renewed subject to its terms. The Board found no refusal to bargain. But the employer's insistence that the agreement had renewed did not invade the realm of employee-union relations, and the employer in fact bargained subject to a determination of the merits of its legal position.

<sup>34</sup> Respondent also contends that a judicial proceeding to enforce the arbitration provisions of the agreement in which the question here presented would have been resolved was in fact commenced when the Union served its notice of arbitration on the New York State Board of Mediation. It appears that the notice of arbitration commences what is known in New York as a "special proceeding," but that realistically there is no pending judicial proceeding until a party has gone to court. *Nathamel M. Munkoff v. Budget Dress Corporation*, 180 F. Supp. 818. After Respondent objected to the Union's notice of arbitration, nothing further was done to compel arbitration of any dispute or the enforcement of the agreement.

<sup>35</sup> See, e.g., *George E. Light Boat Storage, Inc.*, 153 NLRB 1209. The jurisdiction of the Board and the courts in such cases is concurrent. *Doyle Smith v. Evening News Association*, 371 U.S. 195, 197.

the kind in which the Board would choose to stay its hand and defer to judicial proceedings.<sup>36</sup> More than a matter of interpretation of a collective-bargaining agreement is involved. Until this dispute is resolved, there can be no stability achieved in the relationship between Respondent and the Union as representative of its employees, and the fruits of collective bargaining, which the Act promotes, will be denied the employees. The Board is not being called upon to police the agreement between the parties, but to make certain that the statutory objective of collective bargaining is achieved. The dispute cannot be resolved through any internal procedure, for Respondent in denying arbitration has required the Union to go to the courts to establish the existence of any internal dispute procedure. Although the Board defers to judicial proceedings in appropriate cases, here there is none in progress.

Accordingly, I find that Respondent, by refusing on and after August 18, 1964, to put into effect the terms and conditions of employment previously agreed upon between the parties on August 10, 1964, without further action by the Union to satisfy Respondent that the agreement was ratified, refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, and thereby violated Section 8(a)(5) and (1) of the Act.<sup>37</sup>

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

#### V. THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to post an appropriate notice.

As I have found that Respondent unlawfully refused to place in effect the terms and conditions of employment called for by the August 10, 1964, agreement, I shall also recommend that Respondent be ordered, upon request, to comply retroactively to August 18, 1964, with the terms of said agreement, including but not limited to the provisions relating to wages and the economic benefits, and to make whole its employees for any losses suffered by reason of Respondent's refusal to give effect to the agreement, with interest as prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716.<sup>38</sup> If no such request is made by the Union, it will be recommended that Respondent be ordered to bargain collectively, upon request, with the Union as the exclusive representative of the employees in the appropriate unit, and, if an understanding is reached, to embody such understanding in a signed agreement.

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

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. All shop employees in Respondent's service and parts departments at 138-22 101st Avenue, 138-19 101st Avenue, and 139-11 Queens Boulevard, Jamaica, New York, excluding all new and used car salesmen, office clerical employees, watchmen, guards and supervisors as defined in the Act, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

<sup>36</sup> Compare *United Telephone Company of the West and United Utilities, Incorporated*, 112 NLRB 779; *Morton Salt Company*, 119 NLRB 1402, *National Dairy Products Corporation, Detroit Creamery Division*, 126 NLRB 434; *The Flintkote Co.*, 149 NLRB 1561.

<sup>37</sup> In view of this conclusion, I find it unnecessary to consider two alternative theories suggested in support of the complaint: (1) that the obligation to give effect to the contract is a corollary to the obligation to execute any agreement reached, and (2) that when Respondent failed after ratification to place in effect terms and conditions of employment provided by the agreement, it modified or terminated the agreement in violation of Section 8(d).

<sup>38</sup> Cf. *Ogle Protection Service, Inc., et al.*, 149 NLRB 545; *Huttig Sash and Door Company*, 151 NLRB 470; *Quiel Bros. Electric Sign Service Co., Inc.*, 153 NLRB 326. See also *Gene Hyde, d/b/a Hyde's Super Market*, 145 NLRB 1252, enfd 339 F. 2d 568 (C.A. 9).

4. At all times since June 22, 1964, the Union has been, and now is, the exclusive representative of the employees in the said unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing, on and after August 18, 1964, to place in effect the terms and conditions of employment previously agreed upon between Respondent and the Union on August 10, 1964, unless the Union took action to ratify the agreement beyond the action it had agreed to take, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the foregoing conduct, Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

### RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby recommend that Respondent, M & M Oldsmobile, Inc., Jamaica, Queens, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, with the Union as the exclusive representative of its employees in the appropriate unit described in paragraph 3 of the section of this Decision entitled "Conclusions of Law," above.

(b) In any like or related manner interfere with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Local 259, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in any other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which I find necessary to effectuate the policies of the Act:

(a) Upon the request of the Union, give effect retroactively to the terms of the August 10, 1964, agreement between the Respondent and the Union, and make whole its employees for any losses suffered by reason of Respondent's refusal to give effect to the agreement on August 18, 1964, and thereafter, in the manner set forth in the section of this Decision entitled "The Remedy," but if no such request is made by the Union, bargain, upon request, with the Union as the exclusive bargaining representative of the employees in the previously described appropriate unit, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its sales and service establishment in Jamaica, Queens, New York, copies of the attached notice marked "Appendix."<sup>39</sup> Copies of said notice, to be furnished by the Regional Director for Region 29, shall, after being duly signed by an authorized representative of Respondent, be posted by Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 29, in writing, within 20 days from the receipt of this Decision, and what steps it has taken to comply herewith.<sup>40</sup>

<sup>39</sup> In the event that this Recommended Order be adopted by the Board, the words, "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "a Decision and Order."

<sup>40</sup> In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

## APPENDIX

## NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner 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, if requested by Local 259, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO, give effect to the terms of the agreement reached with that Union on August 10, 1964, said contract to be effective retroactive to August 18, 1964, and we will make whole our employees for any losses suffered by reason of our refusal to give effect to the contract.

WE WILL, if no request is made to place the August 10, 1964, contract in effect, bargain collectively, upon request, with the Union as the exclusive representative of the unit described herein with respect to rates of pay, wages, hours of work, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All shop employees in our service and parts departments at 138-22 101st Avenue, 138-19 101st Avenue, and 139-11 Queens Boulevard, Jamaica, New York, excluding new and used car salesmen, office clerical employees, watchmen, guards and supervisors as defined in the Act.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights to self-organization, to form labor organizations, to join or assist Local 259, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

M & M OLDSMOBILE, INC.,  
Employer.

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

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

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 16 Court Street, Brooklyn, New York, Telephone No. 596-5386.

**Engineers & Fabricators, Inc. and United Steelworkers of America, AFL-CIO.** *Cases Nos. 23-CA-1948 and 23-RC-2336. January 17, 1966*

## DECISION AND ORDER

On September 8, 1965, Trial Examiner Owsley Vose issued his Decision in the above-entitled proceedings, finding that Respondent had engaged in and was engaging in certain unfair labor practices; recommending in effect that the objections be sustained and the representation petition in Case No. 23-RC-2336 be dismissed; and further recommending that Respondent cease and desist from the unfair labor practices found, and take certain affirmative action, as set forth in the