APPENDIX B

NOTICE TO ALL MEMBERS OF INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 428, AFL–CIO, AND TO ALL EMPLOYEES OF SCHURR & FINLAY, INC.

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 you that:

WE WILL NOT announce a policy of refusing to dispatch members of International Brotherhood of Electrical Workers, Local No. 769, AFL–CIO, or of any other labor organization, to Schurr & Finlay, Inc., or to any other employer engaged in commerce for which we have constituted ourselves as the sole source of referral.

WE WILL NOT tell employees or prospective employees of Schurr & Finlay, Inc., that they must become our members as a condition of employment or continued employment.

WE WILL jointly and severally with Schurr & Finlay, Inc., make whole any employee who on or since October 16, 1963, has paid to us initiation fees, dues, or assessments because of any requirement to obtain membership in our organization as a condition of employment or continued employment with Schurr & Finlay, Inc., with interest at the rate of 6 percent per annum.

WE WILL NOT give effect to our contract of October 17, 1963, with Schurr & Finlay, Inc., and we will not hold ourselves out as the exclusive source of referral to employment with Schurr & Finlay, Inc.

WE WILL NOT in any other manner restrain or coerce employees in the exercise of rights guaranteed in Section 7 of the Act.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 428, AFL–CIO,
Labor Organization.

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 Resident Office, Federal Building, 230 North First Street, Phoenix, Arizona, Telephone No. 261-3717, if they have any questions concerning this notice or compliance with its provisions.

Shell Oil Company *and* Independent Oil and Chemical Workers Union of Louisiana. *Case No. 15–CA–2143. October 29, 1964*

DECISION AND ORDER

On June 28, 1963, Trial Examiner Frederick U. Reel issued his Intermediate Report 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 Intermediate Report. He further found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended dismissal as to them. Thereafter, the Respondent and the General Counsel filed exceptions to the Intermediate Report, and supporting briefs.[1]

[1] The Respondent has requested oral argument. This request is hereby denied because the record, exceptions, and briefs adequately present the issues and positions of the parties.

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 [Chairman McCulloch and Members Fanning and Brown].

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, including the Intermediate Report, the exceptions, and briefs, and adopts the Trial Examiner's findings, conclusions, and recommendations only to the extent consistent herewith.

Shell Oil Company, the Respondent herein, is engaged in the manufacture of petroleum products at its Norco, Louisiana, plant. Since 1945, the Union, the Charging Party herein, has represented Respondent's hourly paid employees at the Norco refinery. The hourly paid employees fall into two categories, those in production operations and those engaged in maintenance and light construction work.

Before the present controversy arose, the parties were operating under a contract which was scheduled to expire on September 30, 1961. That contract, like those preceding it since 1952, contained a single provision pertaining to subcontracting, designated as article XIV, providing that in the event the Respondent subcontracts "work within the refinery which could be performed by employees covered by this agreement, the Company will . . . [require] the contractor to pay not less than the rates of pay provided in this agreement for the same character of work." In July 1961, the Union, in anticipation of expiration of this contract, notified the Respondent of its desire to open negotiations on certain subjects, including restrictions upon Respondent's right to subcontract. The record shows that for some time prior to 1961 the Respondent had been awarding contracts to private contractors for the performance of miscellaneous construction and maintenance work which could be performed by its own employees. The work, however, was awarded without notification to the Union, and it is not disputed that until the Respondent's right to subcontract work became a matter of dispute during the 1961 negotiations, the Union voiced no objection to this established method of subcontracting. The complaint in the instant case is limited to individual contracts let by Respondent after March 29, 1962.

In the course of negotiations beginning in September 1961, the parties had some 47 bargaining sessions, with the contracting out of work being one of the chief matters discussed. Throughout the discussions, Respondent consistently maintained that under article XIV it had the right to subcontract without notice or other bargaining with the Union, and that this right was restricted only by the "prevailing wage" clause in that provision. The Union initially sought to secure a complete prohibition on subcontracting and, as more fully

set forth in the Intermediate Report, subsequently sought to attach other conditions on the exercise of that right.[2] The Respondent, however, made clear that it would undertake no obligation which would expressly or impliedly limit its right to contract out unit work. The agreement scheduled to expire in 1961 was extended from month to month until March 29, 1962, when terminated pursuant to appropriate notice by the Union. The parties nevertheless continued operating under many of the contract's terms while recognizing that dues checkoff and contractual grievance procedures were no longer in effect. The exact provisions of the contract which the parties recognized as continuing were apparently the subject of some uncertainty and discussion. It appears, however, that article XIV was not involved in those discussions, and that the Respondent continued to comply with its terms during the hiatus between formal termination of the old contract in March 1962, and the execution of a new agreement the following February. The Union struck on August 18, 1962. The strike ended on February 17, 1963, when the parties executed a new collective-bargaining agreement. The new agreement retained article XIV without material modification and did not include new restrictions on Respondent's subcontracting practices.

The Trial Examiner found, and we agree, that Respondent did not violate the Act with respect to a group of subcontracts involving specialized work of a kind beyond capacities of the in-plant maintenance employees. We also agree with his further finding that Respondent was not under a duty to bargain over contracts let and completed in the course of the strike; this temporary subcontracting necessitated by the strike did not transcend the reasonable measures an employer may take in order to maintain operations in such circumstances.[3]

However, the Trial Examiner further found that certain other subcontracts awarded to private subcontractors without notification or consultation with the Union during the hiatus between March 29, 1962, and termination of the strike were let in violation of the Act, as he also found with respect to the contract let after execution of the new agreement. Each involved unit work. Two of the subcontracts were awarded after termination of the agreement on March 29, 1962, but before commencement of the strike. Another contract awarded to Delta Field Erection Co. for miscellaneous construction work was let during the strike but had not been completed when the

[2] In addition to the contract modifications sought by the Union at the refinery, it urged deletion of article XIV in contemporaneous negotiations at Shell's chemical plant located in Norco. This demand at the chemical plant is equally relevant to an assessment of the bargaining positions of the parties at the refinery in view of the clear understanding that any agreement reached on the subcontracting issue at either facility would be binding at the other

[3] *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, and cf. *Hawaii Meat Company, Limited*, 139 NLRB 966, enforcement denied 321 F. 2d 397 (C.A. 9).

strike ended; and a fourth contract was awarded after the strike's termination and the execution of the new bargaining agreement in February 1963.

In concluding that these subcontracts were awarded without satisfying Respondent's statutory bargaining obligation, the Trial Examiner reasoned that the statute as much prohibited the unilateral action taken by the Respondent in subcontracting occasional maintenance work, which otherwise might have been performed by employees in the bargaining unit, as it prohibited permanent subcontracting on a unilateral basis. In rejecting Respondent's contentions, he found that neither article XIV nor the Respondent's practice of letting contracts without prior notice or bargaining sufficed to relieve Respondent of its statutory obligation to bargain before subcontracting unit work. In the Trial Examiner's opinion, article XIV was no more than a prescription of wage rates for contracts which the Respondent might let, but was unrelated to the Respondent's obligation, applicable to each subcontract it proposed to let, to give the Union prior notice and an opportunity to bargain over the amount or kind of work to be subcontracted. As to the Respondent's contention that the Union's acquiescence in the Respondent's established practice of subcontracting without notice to or bargaining with the Union relieved it of the obligation to bargain on this matter, the Trial Examiner held that the Union's failure to exercise its statutory right in the past was not a forfeiture of its right to bargain during the period here in controversy, particularly since the Union had made clear, throughout the negotiations for the current agreement, that it was not continuing to acquiesce in the Respondent's practice. On these considerations the Trial Examiner found that the Respondent violated Section 8(a)(5) because it subcontracted unit work without notice to or bargaining with the Union. We do not agree.

Unlike the Trial Examiner, we do not view article XIV as merely a limitation on subcontractors' wage rates, having no bearing upon the Union's statutory bargaining rights. Since 1952, article XIV has been the key provision regulating the interests of Employer and Union in the area of subcontracting. In our opinion, its terms are reasonably to be construed as embodying an implicit, yet clear, understanding that, at least with respect to the Company's continuous practice of contracting out occasional maintenance work, Respondent had the right to act unilaterally without prior notice or consultation, so long as it complied with the conditions of the protective wage requirement of that article. That such, indeed, was the understanding and agreement of the parties is confirmed by their contemporaneous interpretation of article XIV as manifested by the Union's indifference to Respondent's unilateral maintenance subcontracting in the many years between article XIV's first inclusion in the 1952 collec-

tive-bargaining agreement and the 1961-1963 negotiations, almost a decade later, when prior consultation with management on decisions to subcontract individual maintenance jobs was first pressed by the Union. In the circumstances, we are persuaded that article XIV evidenced a contractual intent that, except for the limitation on subcontractors' wage rates, Respondent was free to award occasional maintenance subcontracts without obligation to provide advance notice or an opportunity to bargain.

It being clear that Section 8(a)(5) is not to be applied to disturb an agreement reached freely and in good faith, our construction of article XIV would be dispositive were it not for the fact that three of the four subcontracts now in issue were awarded when the parties were not operating under formal collective-bargaining agreement. In this connection, the General Counsel argues that termination of the preceding agreement in March 1962 revived any bargaining rights the Union may have surrendered under article XIV. Consistent with this contention, the Trial Examiner expressed the view that, absent a formal extension agreement, binding duties and obligations are not imposed on the parties during a hiatus between contracts, and finding no such agreement here, he concluded that no justification existed for Respondent's unilateral subcontracting in this period. We, again, disagree.

In our opinion, the rights and duties of parties to collective bargaining, during a hiatus between contracts, may be derived from sources other than a formal extension agreement. Thus, it is well settled that notwithstanding the termination of a labor contract, the parties, pending its renewal or renegotiation, have the right and obligation to maintain existing conditions of employment. Unilateral changes therein violate the statutory duty to bargain in good faith. We are persuaded and find that Respondent's frequently invoked practice of contracting out occasional maintenance work on a unilateral basis, while predicated upon observance and implementation of article XIV, had also become an established employment practice and, as such, a term and condition of employment.

This practice, however, like any other term or condition of employment, was not immune to change. We thus agree with the Trial Examiner that the Union had a right, during the period when the parties were without a contract and negotiating for a new one, to propose a change in or elimination of the Company's practice and to request bargaining thereon; and that it was not precluded by any claim of waiver from doing so. But the Union's demand to bargain for a modification or elimination of the Respondent's established practice did not suspend the Respondent's right to maintain its established practice, any more than a demand by the Union to modify the existing wage structure would suspend Respondent's obligation to

maintain such wage structure during negotiations.[4] Here the Respondent honored the Union's request to bargain over subcontracting, and there is no proof that it did not bargain in good faith. Moreover, it does not appear that the subcontracting during this hiatus period materially varied in kind or degree from what had been customary in the past. In these circumstances, we cannot say that the Respondent's action in subcontracting, according to its established practice, certain unit work without prior notice to or bargaining with the Union during the period when no bargaining agreement was in effect was in derogation of a statutory duty to bargain on terms and conditions of employment.[5]

As indicated, the Trial Examiner also found that Respondent's duty to bargain over the subcontracting of maintenance work extended to subcontracts let after the termination of the strike and the execution of a new contract on February 17, 1963.

It is true, of course, as we indicated earlier, that whatever construction had been placed on article XIV under past contracts, it did not preclude the Union during the course of the 1961–1963 contract negotiations from insisting on a different interpretation or seeking to amend, or as appeared, to eliminate the clause entirely. But it is unquestionably clear that the Respondent entered bargaining negotiations with the firm conviction that article XIV, as it had existed in earlier contracts, and as is herein found, implicitly acknowledged its right to subcontract occasional maintenance work without any obligation of prior consultation with the Union, and subject only to the

[4] For decisions upholding an employer's right to take action respecting terms and conditions of employment during negotiations where consistent with established practice, see *McCulloch Corporation*, 132 NLRB 201, 213–214; *H. E. Fletcher Co.*, 131 NLRB 474, 484–485.

[5] As heretofore noted, the Trial Examiner followed the *Mackay Radio* doctrine and properly absolved Respondent from any violation of the Act with respect to all but one of the temporary subcontracts let during the period of the strike, *supra*. The exception involved a miscellaneous construction work subcontract which was awarded during the strike but was allowed to continue after the strike ended. Although covered by our discussion and conclusion set forth in the text immediately above, there are additional reasons for not adopting his finding as to this subcontract.

Obviously, an employer who intends to maintain operations by subcontracting projects of temporary duration has no precise basis for determining the length of the strike, and thus normally is in no position to ascertain whether work to be contracted out will be completed before or after cessation of strike action. If such a contract is of reasonable duration and dictated by exigencies of the strike, there is no justification for finding unilateral action, otherwise privileged as an incident of the right to maintain operations during a strike, to be unlawful simply because the strike has ended before performance of the subcontract has been completed To avoid imposition of the statute, an employer would be required to bargain over all temporary contracts awarded during a strike or risk violating the Act should such a contract extend beyond the strike. We shall not impose such alternatives upon an employer.

Thus, and apart from considerations set forth in the text above, we disagree with the Trial Examiner and find that this subcontract, like those limited in duration to the strike period, was in the circumstances of this case properly awarded as an incident of Respondent's right to continue operations during a strike, and, for this reason also, was not in violation of Section 8(a)(5) of the Act.

payment of the prescribed wage rates. It is equally clear that the Respondent throughout the numerous bargaining sessions maintained this position, even though the Union challenged and declined to accept it. And the evidence shows that the Respondent refused to agree to any proposal that did not leave its right to subcontract completely unrestricted; indeed, as the Trial Examiner found, it insisted on full freedom to contract out work to a point where it conditioned the Union's obtaining of "*any contract*" on the Union's agreeing to the Respondent's exercise of this prerogative. Thus, it is manifest that the Respondent was willing to accept a costly strike, and did in fact do so, rather than retreat from its position. In the circumstances, we are persuaded that the reappearance of article XIV, without material change, in the new contract must reasonably be viewed as a capitulation by the Union to the Respondent's bargaining position and as a reaffirmance of the contractual understanding implicit in article XIV, namely, that it gave Respondent the right to continue occasional maintenance subcontracting without prior consultation with the Union.

For the above reasons, and as we are satisfied that the unilateral subcontracting in issue here both accorded with the Respondent's established practice and was consistent with the understanding of the parties manifested in article XIV, we hold that Respondent did not violate Section 8(a)(5) of the Act by failing to notify and consult with the Union before contracting out the various maintenance projects covered by the allegations in the complaint herein.

Our holding in the present case involves no conflict with our decision in *Town & Country Manufacturing Company, Inc.*,[6] relied upon by the Trial Examiner in finding the violations. There, the employer frustrated all bargaining by unilaterally subcontracting his trucking operation under conditions that deprived the union of an opportunity to attempt to negotiate a mutually acceptable alternative. In the instant case, the subcontracting did not occur in a context of surprise, or under conditions precluding the Union from invoking collective bargaining with regard to changes in existing practices which, as stated above, had become an established condition of employment. In fact, the parties did engage in good-faith bargaining concerning the issue arising from what was in effect a union demand for a change in such practice. Respondent's action in the course of negotiations merely represented an application of established subcontracting practices which, as we have held, it was entitled to maintain during negotiations of a new contract. However, we wish to make it clear that our present holding is limited to the particular circumstances of this case and that we do not pass upon

[6] 136 NLRB 1022, enfd. 316 F. 2d 846 (C.A. 5).

whether or not Respondent may, in the future, lawfully expand its subcontracting practice without prior notice and consultation with the Union.

Accordingly, and as we adopt the Trial Examiner's findings that Respondent did not violate the Act in any other respect,[7] we shall dismiss the complaint in its entirety.

[The Board dismissed the complaint.]

[7] As there is no independent evidence of bad faith on Respondent's part, we agree with the Trial Examiner that Respondent did not violate Section 8(a)(5) by conditioning execution of a new bargaining agreement upon the Union's waiving whatever right of consultation it had respecting subcontracting. See *American National Insurance Co.*, 343 U.S. 395; *Peerless Distributing Company*, 144 NLRB 1510.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This case, heard in New Orleans, Louisiana, on April 15 through 18 and 29, 1963, before Trial Examiner Frederick U. Reel pursuant to a charge filed August 14 and a complaint issued December 7, 1962, presents issues arising out of Respondent's practice of contracting out occasional maintenance work without bargaining with the Charging Party, which is the statutory bargaining representative of Respondent's hourly paid employees, including those engaged in maintenance work.

Upon consideration of the entire record, including my observation of the witnesses, and after due consideration of the briefs filed by the Company and by General Counsel, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT AND THE LABOR ORGANIZATION INVOLVED

Shell Oil Company, herein called the Respondent, is a Delaware corporation engaged in purchasing, refining, and marketing oil at various locations, including a plant at Norco, Louisiana, from which it annually ships in excess of $50,000 worth of products to points outside the State. Respondent admits that it is engaged in activities affecting commerce within the meaning of Section 2(6) and (7) of the Act, and I so find. Independent Oil and Chemical Workers Union of Louisiana, herein called the Union, is the exclusive bargaining representative of the hourly paid employees at the Norco refinery.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background—practices prior to the expiration of the 1960-61 contract*

The Company's hourly paid Norco employees fall, roughly, into two groups, those engaged directly in production operations and those engaged in maintenance and minor construction work. This case is concerned with the latter group known as the engineering field department. Prior to a strike which lasted from August 1962 to February 1963, the Company had 643 hourly employees in the bargaining unit, of whom 337 were in engineering field. Since the strike, the complement has shrunk to 408, of whom 179 are in engineering field. The engineering field employees embrace all the usual types of construction workers (e.g., welders, boilermakers, electricians, painters, common laborers, etc.), some of whom are highly skilled.

For some years prior to 1961, when the controversy which led to these proceedings first arose, the Company had on occasion let contracts to private contractors to perform miscellaneous construction and maintenance work. In deciding whether such work should be done by contract or by its own employees, the Company was guided by such factors as whether it possessed the necessary equipment, materials, "know-how," and available manpower to do the job itself. The Company had not notified the Union before letting such contracts. The Union, prior to 1961, had voiced no objection to the Company's practices in this regard, and it

appears that prior to 1961, no members of the engineering field department had ever been in layoff status at the time such contracts were let. By the summer of 1962, however, approximately 60 men in that department had been laid off.

During 1960 and 1961, the Union and the Company operated under a collective-bargaining agreement which by its terms expired September 30, 1961, but was automatically continued from month to month in the absence of a notice of termination. This contract, like prior contracts between the parties, contained a clause (article XIV) providing that in the event the Company had construction work performed by a contractor, the latter as a condition of his contract would have to pay his employees not less than the rates of pay for work of the same character set forth in the contract between the Company and the Union. In July 1961, however, when the Union in anticipation of the expiration of the existing contract, gave notice of the subjects on which it wished to negotiate, it indicated a desire to restrict the right of the Company to contract work. From that day to this, the parties have been sharply divided over this issue.

B. *Negotiations for the new contract, the notice of termination, the strike, and the new contract*

Between the opening of negotiations for a new contract in September 1961, and the ultimate execution of a new agreement in February 1963, the parties met in some 47 bargaining conferences. The matter of contracting out work was one of the chief matters discussed throughout the bargaining. The Company steadfastly maintained that it must have the right to let such contracts at any time it saw fit. The Union at first requested a covenant against contracting out work, then modified its position to limit such contracts to occasions when no company employees qualified to do the work were laid off, and finally retreated to an offer that the Company be free to let contracts when in its judgment such action was necessary, but be guided in exercising this judgment by such considerations as the availability of qualified men, materials, and equipment. To each of these requests (as well as to a request that the matter be arbitrated) the Company responded with an insistence that its right to let contracts be unrestricted, except by the "prevailing wage" clause of article XIV. On one occasion the Company proposed a clause which set forth the Company's willingness to advise the Union of decisions which the Company reached with respect to contracting work, and which also stated that this advice would ordinarily be given in advance of the beginning of the work. The Company's offer concluded, "However, we cannot see our way clear to undertake any obligation which would expressly or impliedly limit our right to contract work." The Union rejected the proposal because it found the last sentence objectionable.

While negotiations were in progress, the Union late in February 1962 gave the Company notice of the Union's desire to terminate the existing contract which under its terms had been extended on a month-to-month basis. After March 29, 1962 (30 days after the Union's notice), the former contract was no longer binding. The parties continued to operate under many of its terms, however, although recognizing that the dues checkoff and grievance procedures were no longer applicable. The testimony is in some conflict as to whether the Company and the Union had any understanding as to the continuance in effect of the other provisions of the prior contract (including *inter alia,* article XIV). According to union witnesses, company representatives on some occasions would say that they regarded the terms of the contract as still in effect, but on other occasions would emphasize the absence of any contract. None of these discussions concerned article XIV, however. The Company continued to comply with the terms of that article during the hiatus between the formal termination of the old contract in March 1962 and the execution of a new agreement the following February.

In mid-April 1962, the Board handed down its decision in *Town & Country Manufacturing Company, Inc., et al.,* 136 NLRB 1022, enfd. 316 F. 2d 846 (C.A. 5), holding that an employer violated the Act if he unilaterally subcontracted part of the work of a bargaining unit. The Union pressed this decision upon the Company in support of the Union's position in the bargaining negotiations, but the Company's view was that article XIV gave it the right to let contracts unilaterally, i.e., that the provision constituted a waiver of the Union's right to bargain over each subcontract.

On August 18, 1962, the Union called a strike which lasted until the signing of a new contract the following February. During the strike, as well as before and after the strike, the Company continued to let construction and maintenance con-

tracts without notice to, or bargaining with, the Union. At bargaining sessions during the strike, the Company continued to reject union demands for restrictions on contract work, and repeated its contention that article XIV gave the Company the right, subject to the terms of that provision as to wage rates, to let contracts without notice to, or bargaining with, the Union.

During the strike, the Company operated the refinery with "staff" personnel, assisted to some degree by outside contractors. When the strike ended, the Company did not reinstate all the strikers, but instead relegated a substantial number to layoff status. Prior to the strike the Company had 337 men in its engineering field department. After the strike it employed only 170. The cutback resulted from company experience during the strike that it could operate efficiently with a smaller complement in that department by having operating personnel engage in some maintenance work in the course of their operations and by not observing strict jurisdictional lines in assigning work to particular crafts. According to company witnesses, the letting of contracts did not cause the layoff of any men except for those (two or less) who were affected by the letting of the garbage collection contract, discussed *infra*. The General Counsel and the Union took the view that but for the letting of contracts (which had not been the subject of negotiations with the Union prior to their being let), the Company would have reinstated all the strikers, or in other words would have recalled the men now in layoff status. For a further analysis of these contentions, and to consider the Company's related contention that the contracts it let without notice to the Union did not involve the work of employees in the bargaining unit, it is necessary to consider in some detail the contracts here complained of.

C. *The various contracts let by the Company*

The complaint, as amended at the hearing, alleges that the letting of contracts on and after March 29, 1962, without notice to or bargaining with the Union, violated the Act. I find no concession that the letting of such contracts prior to that period was *not* unlawful, particularly as General Counsel expressly repudiated any such concession. At the hearing both sides presented testimony concerning the particular contracts which were let during the period in issue. Briefly summarized, they were as follows:

1. Contract of May 30, 1962, to clean boiler tubes and drums with acid. Gayden Derickson, the Company's chief engineer, who had primary responsibility for the letting of maintenance and construction contracts, testified that this contract was let to a firm which had special equipment and materials to clean boilers chemically, and that attempts to clean the boiler manually by regular plant forces had proved unsuccessful and unduly time consuming. As Derickson put it, "The impact on the downtime is perhaps the most significant thing, and that is done in a matter of a day chemically and many days mechanically."

2. Contract of April 13, 1962, to repair and replace ceramic tile on swimming pool. According to Derickson, this contract was let to the concern which had previously installed the tile, and the Company's regular employees were not qualified to set decorative tile. [1]

3. Contract of May 8, 1962, for the salvage of plants, soil treatment, and addition of new plants. The work was done by a nursery and flower shop, and (according to Derickson) the work was of a specialized character beyond the capacities of the Company's regular gardener who is "principally a grass cutter and hedge trimmer."

4. Contract of August 7, 1962, to repair the sound system in the theater. According to Derickson, the Company's own electricians were not qualified to work on the "rather complex sound system that is an integral part of a movie sound reproduction equipment . . . quite different from the normal PA system work."

5. Contract of August 2, 1962, to sandblast and spray materials on a storage tank to stop leaks (the Matcote contract). This was part of a $250,000 project, all the other work of which was done by company forces. According to Derickson, this part of the project was contracted out because in the past when plant forces had done this kind of work the result was unsatisfactory. The contractor utilized spe-

[1] This testimony appears at page 355, lines 15 to 18. An error in the transcript at that point makes it appear that Derickson's answer was part of the question. I hereby correct the transcript at line 15 to end the sentence with the word "pool" and to insert at that point: "Would you explain the circumstances surrounding this contract?—A. This was a contract to repair the swimming pool."

cial equipment and materials, and also gave the Company a "guarantee," which would not have been forth-coming had the Company merely purchased the materials, rented the equipment, and had its employees do the work.

6. Contract of July 27, 1962, to apply acoustic ceiling in the main office building. This contract was let to the concern which both sold and installed the material. The job involved a "false ceiling" suspended on T-bars, and was considerably more difficult to install than the type of acoustical tile which is attached directly to the ceiling.

7. Contract of September 5, 1962, for the disposal of garbage and trash. Prior to the strike which commenced August 18, 1962, company employees had handled the removal of garbage and trash. During the strike the Company engaged a contractor to do the work. The Company continued this contractual arrangement after the strike, and during the latter stages of the strike discussed its intention to do so with the Union.

8. Contract of October 18, 1962, to install 2300 volt power supply. This contract was let during the strike, and was part of a project, in part necessitated by the strike, to install booster pumps on the pipeline to facilitate distribution of the products, as the normal means of shipment had been impaired by the strike.

9. Contract of October 11, 1962, for the purchase and installation of four radar eye units, a special radar equipment with which the Company had had no prior experience.

10. Contracts of August 27, 1962, and January 8, 1963, to haul hydrogen trailers, a service required and utilized only during the strike.

11. Contract of October 26, 1962, for miscellaneous construction work. This contract, let during the strike, was still in effect at the time of the hearing, well after the strike ended. The only specific task performed under the contract after the strike was the installation and construction of a new facility, known as the saturate fractionation job, using craftsmen similar to those on the Company's payroll.

12. Contract of March 1, 1963, to clean chemically the primary column of a distilling unit. This contract was similar in character to that described under number 1, above.

13. Contract of March 6, 1963, to supply and erect an aluminum awning.

14. Contracts of March 11 and 18 and April 1, 1963, as part of a major construction project known as the "energy recovery system." The entire project when completed will cost approximately $2½ million and involves the erection of various large units.

15. Contract March 29, 1963, for termite treatment of village houses and sheds.

Finally, Derickson testified that in determining whether to let contracts or do the work with plant forces, he "would consult with" various management officials, but that he "would under no consideration consult with the labor organizations that were representing the employees *who might do the work if it was kept within the plant.*" [Emphasis supplied.]

D. *Conflicting contentions and concluding findings*

The foregoing discussion of the negotiations between the parties and of the contracts let to outside contractors furnishes the framework in which to consider the contentions of the parties. Further details as to the facts set forth above will be developed in the course of considering these contentions.

General Counsel sees the case as essentially a simple violation of the rule against changing working conditions by unilateral action—contracting out work of the bargaining unit without any prior discussion with the bargaining representative. Respondent contends that that general rule is inapplicable to this situation, whatever its applicability may be where an employer permanently subcontracts an entire operation. Alternatively, Respondent argues that the Union waived its right to bargain over these matters. As a further alternative, Respondent argues that none of the contracts in question involved work normally done by the bargaining unit, except for those let during the strike when Respondent was free to obtain strike replacements. General Counsel in turn contends that the contract clause referring to contracting out work sets wage rates for contractors but does not represent a waiver of the Union's right to bargain over the letting of particular contracts. General Counsel further urges that the Company by insisting in bargaining negotiations that the Union surrender its right to bargain over the letting of contracts violated Section 8(a)(5). Finally, General Counsel contends that even if the provision as to contractors' wage rates constituted a waiver of the

Union's right to bargain, this would not legitimize actions taken during the period between contracts—as to which the Company replies that the contractual terms continued to be operative during the hiatus between contracts. [2]

1. The duty to bargain

On the fundamental issue raised by the parties—whether the statute inhibits unilateral action in letting contracts for maintenance work which might otherwise be performed by members of the bargaining unit—I have little doubt that the General Counsel's position correctly states the law. That is to say, the line of cases exemplified by *Town & Country Manufacturing Company, Inc., supra,* is as applicable to the contracting of specific jobs involved here as it is to contracting out an entire operation or department. The differences are of degree, and not of kind; the Union has the same legitimate interest in protecting the work of the employees from slow erosion that it has in protecting the work against sudden and total disappearance.

2. The "waiver"

A far closer and more troublesome issue is presented by the Company's contention that the Union waived its right to bargain over the letting of particular contracts. The Company finds such a waiver in article XIV of its contracts with the Union which provides in pertinent part: "Whenever a contractor or subcontractor performs work within the plant which could be performed by employees covered by this agreement the Company will include a provision in the applicable contract requiring the contractor and subcontractor to pay not less than the rates of pay provided in this Agreement for the same character of work. . . ." According to the Company, the Union won this concession with respect to the Company's freedom to contract, and thereby left the Company free in all other respects to let contracts without regard to the Union. General Counsel and the Union, on the other hand, view the provision as nothing more than a wage rate requirement, designed to inhibit the Company's desire to contract out work, but not otherwise bearing on the rights of the parties in the event the Company, notwithstanding the wage limitations imposed, desired to let such contracts.

I find merit in the Union's and General Counsel's position. The present contractual provision does not limit the amount of contracting the Company may do, but only prescribes wage rates for such contracts as it lets. The Union's concern in obtaining such a restriction is, of course, to prevent undercutting of its wage scale, and hence to prevent job eliminations caused by such undercutting. But the Union's concern is not limited to that cause of job erosion. Having inhibited the Company's opportunities for getting work done cheaper by cheaper labor, the Union still retains an interest in keeping contracts to a minimum. To this end, for example, the Union sought clauses limiting the Company to letting contracts only for work customarily contracted out, or to occasions when no company employees were laid off. The failure of the Union to achieve such clauses leaves open the extent to which the Company can contract out work. Under the Company's view of the law, if the Union once it had achieved the wage restriction in Article XIV, still wanted to preserve the right to bargain over the letting of individual contracts, it was incumbent on the Union to obtain a contractual provision expressly preserving this right. I find the law to be otherwise: the Union's statutory bargaining right is preserved in the absence of a clear and unmistakable waiver thereof. See e.g., *N.L.R.B.* v. *The Item Company,* 220 F. 2d 956, 958–959 (C.A. 5), cert. denied 350 U.S. 905. Moreover, under the Company's reading of article XIV, it would have been free to contract out all the work of the engineering field de-

[2] The Company also urges that the basid issue is one of contract interpretation which should be left to arbitration. But Section 10(a) of the Act expressly provides for Board jurisdiction in these matters notwithstanding arbitration agreements If the national policy is to be reversed to express a preference for arbitration over administrative adjudication, it is for Congress to do so.

In any event, it ill behooves Respondent to urge that the dispute is one for arbitration under the current contract When the Union sued to compel arbitration of a related issue at the Shell Chemical plant, under a contract which, like the current contract between Shell Oil Company and the Union, provided that a controversy "may be settled by arbitration," the Shell Oil Company (which was the named defendant) resisted that action on the theory, *inter alia,* that the bargaining agreement "clearly makes enforcement of that agreement by arbitration permissive and not mandatory" (General Counsel's Exhibit No. 23). See also General Counsel's Exhibit No. 20

partment without bargaining with the Union. It would require far plainer language than I find in article XIV to establish that the Union surrendered its right to bargain over what could amount to abolition of all the jobs in the department.

In further support of its theory of waiver, the Company points to the Union's acquiescence in the Company's practice of letting contracts without prior notice to, or bargaining with, the Union. But the failure to exercise a statutory right does not extinguish it insofar as subsequent violations are concerned, and the Union's lack of concern in earlier years is readily explained by the fact that on those occasions no members of the bargaining unit were in layoff status or threatened therewith. The waiver by acquiescence theory, moreover, is palpably untenable during the period here in controversy, for the Union throughout the negotiations for the current contract made clear that it was not acquiescing in the Company's practice. Unless, therefore, the "waiver" is to be found in article XIV, it is nonexistent; past acquiescence in the practices does not put it in article XIV, for such acquiescence could as easily have occurred in the absence of that provision.

During the course of the bargaining, the position of the parties was consistent with the position urged here. The Company, viewing article XIV as giving it the right to contract without bargaining, construed all union proposals restricting this freedom as proposed amendments to article XIV, and insisted that no such amendments be made. The Union, on the other hand, put forth its proposals for restricting contract work without reference to article XIV which it viewed solely as a limitation of wage rates, in contracts which might be let [3] For example, Company's Exhibit No. 42 represents union proposals made at the bargaining session of November 25, 1962. The first two paragraphs of that exhibit deal with a restriction of the amount of contract work, and the third paragraph deals with wage rates on contracted work. Although the Company (consistent with its position) viewed the entire matter as proposed amendments of article XIV, the record shows that the Union (consistent with its position) presented the first two paragraphs in writing and then presented the rate proposal orally and at a different point in the negotiations on that date and not as part of the restriction on amount and type of work to be contracted.

It should also be noted that the Union's position in the bargaining went to the opposite extreme from the Company's; that is, the Union sought contractual restrictions on the amount or kind of work to be contracted rather than mere recognition of its statutory right to bargain over the letting of such contracts. Although the Union was unsuccessful in these attempts to restrict contracting, it by no means follows that the Union in agreeing to continue article XIV (with a minor amendment deleting area wage rates as a permissible standard) agreed to or is bound by the Company's construction thereof. On the contrary, it seems more reasonable to conclude that the Union, unable to win the concessions it wanted, decided to rest on its rights under the law as construed in *Town & Country Manufacturing Company, Inc., supra,* a decision which it had called to the Company's attention. This is particularly true as the charge and complaint in the instant proceeding both predate the current contract Cf. *N L.R.B.* v. *Yawman & Erbe Manufacturing Co.,* 187 F. 2d 947, 949 (C.A. 2); *McQuay-Norris Manufacturing Company* v. *N.L.R.B.,* 116 F. 2d 748, 751 (C.A. 7).[4]

Throughout the bargaining, the Company insisted on full freedom to contract out work, a position which General Counsel at the hearing claimed to be in violation of the Act in that it conditions the Union's obtaining of *any* contract on the surrender of a statutory right to bargain on other matters. Although I find considerable logical force in the suggestion that an employer who says he will not sign a contract unless the Union waives one of the bargaining rights given it

[3] I do not credit the contrary testimony of J. D. Walker, the company personnel manager, who impressed me as an evasive and unreliable witness. Indeed, I credit only so much of Walker's testimony as is specifically corroborated by other, more credible witnesses

[4] Having found no waiver, I need not reach either the contention that during the period between contracts the Company's unilateral action cannot be excused by article XIV, or the answering contention that the prior contract continued to be observed during the interim period. Should the Board reverse my finding as to waiver, those contentions must be dealt with. In my view, the parties did not reach any such agreement during the interim period as would justify a finding that the Company was free to act unilaterally in the letting of contracts at that time; the Company observed the requirements of article XIV but was not legally bound to do so. However, in my view it would not effectuate the policies of the Act to issue a remedial order based on violations which occurred only because of the hiatus between contracts.

by Congress has to that extent refused to bargain, I believe that this position was rejected by the majority of the Supreme Court in *N.L.R.B.* v. *American National Insurance Co.*, 343, U.S. 395, 407–409, 411–413. Unless and until the Board succeeds in overturning that decision, an employer is free to insist on a management prerogative clause which, whatever else it may embrace, clearly may include a right to contract out occasional maintenance work without prior notice to, or negotiation with, the Union.

3. The contracts as to which bargaining was required

Having found an unwaived duty to bargain in general, we turn next to the particular contracts to determine which, if any, the Company let in default of its bargaining obligation. The duty to bargain extends only to those matters which affect the members of the bargaining unit; thus, for example, I find no default in the failure to bargain over the termite contract as termite extermination was not a matter within the competence of members of the bargaining unit. I reach a similar result with respect to the landscaping and theater sound contracts. The swimming pool contract likewise involved skills not possessed by the regular employees. Installation contracts such as those for the acoustical ceiling, the awning, and the radar units also fall outside the area of those which must be discussed with the Union before being let, for the purchase of the material contemplates that the seller will install it. Finally, heavy original construction work is apparently outside the area of work performed by the bargaining unit, and need not be discussed with the Union before being let.

With respect to contracts let during the strike, I find no violation with respect to those covering work completed during the strike. During the strike, the Company was free to carry on its business by hiring replacements itself or by arranging with contractors to have the latter's employees perform the work of the strikers. The contract for garbage disposal survived the strike, and to that extent was within the area as to which unilateral action was improper. But the record shows that during the strike the Company advised the Union that the Company intended to continue the garbage disposal contract after the strike, told the Union the Company's reasons for this determination, and heard the Union on its objections thereto. In find no basis for a holding that the Company did not bargain in good faith over the continuation of the garbage contract, and hence find no violation of the Act with respect to that matter.

The contracts for cleaning the boilers and the distilling units and for repairing the tank leaks stand on a different footing. I have little doubt that the Company had sound economic reasons for contracting this work out, but this consideration is irrelevant where the work involved is inherently a normal part of the work of the bargaining unit. Unilateral action may well be economically justifiable, but this does not excuse the duty to bargain over the matter. Thus, for example, the unilateral wage increases in *N.L.R.B.* v. *Benne Katz, etc., d/b/a Williamsburg Steel Products Co*, 369 U.S. 736, or the unilateral subcontracting in *Town & Country, supra,* may have been reasonable moves from the economic standpoint, and the employers would have been free to take them *after bargaining in good faith.* See *N.L.R.B.* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 224-225; *N.L.R.B.* v. *Bradley Washfountain Co,*, 192 F. 2d 144, 150-151 (C.A. 7). So in this case, the letting of the Matcote contract for example, may well have been reasonable, but as the repair work was of a nature similar to that previously done by employees in the unit, their bargaining representative should have been heard before the work was taken away. Any other result would permit erosion of the unit without any opportunity being afforded the employees' representative to be heard in their behalf. Cf *Town & Country, supra; International Union, U.A.W., Local 391* v. *Webster Electric Co.*, 299 F. 2d 185, 197 (C.A. 7). (It is for this reason, also that I reject the line of arbitration cases cited by the Company. The arbitrators frequently decide only that the letting of the contract was reasonable or economically justified, whereas the issue here is the right of the Union to be consulted before that decision is reached because of some other (and, to the Union, preferable) result might also be reasonable and economically justified.)

The line here drawn between bargainable and nonbargainable contracts is admittedly narrow. Whether a new contract, yet unlet, is more like that for the theater sound system (involving electrical work beyond the capacities of the Company's electricians) or more like that for repairing the tanks (involving a new process, superior to that which the Company's employees are capable of using) is a matter as to which reasonable men may differ. For example, the contract described in item 11, section C, above, for miscellaneous construction seems to have included

some matters which were outside the normal work of the unit (heavy construction) and some work similar to that normally done by the men in the unit. Even the concept of work normally done by the unit is inexact, for on some occasions the Company with a surplus of available men will have them perform work it would normally prefer to contract out, and in converse situations, where its men are busy and its need is urgent, the Company may prefer to contract work it would ordinarily do itself. Sheer capacity to perform the work is also not the sole test; the Company's employees may possess the technical skills for the major construction jobs, but the Union freely conceded that such jobs were outside their purview. The Company and the Union under their existing contract must draw a similarly narrow line in administering article XIV which applies to work "which could be performed by employees covered by this Agreement. . . ." And the italicized portion of Derickson's testimony quoted in section C, above, shows company recognition of at least some of the work as within the capacity of plant forces.

The fact that the standards are necessarily inexact does not absolve the Company of its legal duty. Nor can the Company justly complain that it is placed under a Damoclean sword, for it can easily avoid the peril by resolving any doubts in favor of notifying and bargaining with the Union. In this connection, I view as altogether specious the Company's arguments that it would be enmeshed in endless negotiations. In the case of the tank repair, for example, the Company need only advise the Union of the need to have the job done and the Company's reasons for letting the contract (superior process, equipment, and materials unavailable to the Company, unsatisfactory past experience with own repairs, desire for a guaranty from the contractor), and invite the Union's comments. If, after listening to the Union in good faith, the Company proceeds to let the contract, it will have complied with its bargaining obligations.[5] While it may be true that technically the employer must bargain to "impasse," that stage may be reached very quickly where all that is involved is whether the employer shall let a particular contract. See the final paragraph of the court's decision enforcing the *Town & Country* case, *supra*. The "reasonable bargaining" there referred to may, in contracts of this nature, require no more than a statement of the Company's intentions and its reasons therefor, to which the Union may well accede or to which it may make reasoned and persuasive reply. Applicable here is the admonition of the court in *Pacific Coast Association of Pulp and Paper Manufacturers* v. *N.L.R.B.*, 304 F. 2d 760, 766 (C.A. 9): "We venture to suggest that the [Respondents] get into the water before they make an irrevocable decision that it is too cold. They may find, and not entirely to their own surprise, that it is tolerable, or even quite pleasant." [6]

CONCLUSION OF LAW

By failing to bargain with the Union before letting contracts giving to outside contractors and their employees maintenance work of a nature which could have been assigned to members of the bargaining unit, the Company engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

THE REMEDY

I shall, of course, recommend the normal cease-and-desist order, and affirmative bargaining order, and the posting of a notice, all drafted with an eye to the particular violation here found. General Counsel also seeks an order directing the reemployment of men on layoff status since the strike, on the theory that contracting out of work resulted in their not being recalled. I decline to recommend this relief.

It is true, of course, that the Company's engineering field force declined substantially from 337 before the strike to 170 after it. Various factors such as retirements, quits, and transfer of a job category out of the unit account for some of the 167 employees no longer in the unit. A number, not clearly set forth in the record but presumably determinable in compliance proceedings should such be ordered, remain in layoff status. The record also discloses, however, that, as a

[5] If the action is not taken in good faith, but in a desire to defeat the Union or penalize the employees for their adherence to it, the action is unlawful even if the employer has a general right (by waiver from the Union) to subcontract.

[6] The Company suggests that occasionally emergencies require the immediate obtaining of outside contractors. Such unusual situations are provided for in the proposed remedial order.

result of strike experience and concessions in the new contract,[7] the Company is able to function with far less employees than prior to the strike. Moreover, although I have found a violation in the failure to negotiate with the Union before letting certain contracts (notably those of May 30, August 2, and October 26, 1962, and March 1, 1963), there is no reason to believe that any men are now out of work because those contracts were let. Finally, although some men might have been recalled if those contracts had not been let, the Company's reasons for contracting out that work are such as to render highly unlikely the possibility that good-faith bargaining with the Union would have resulted in any change in the Company's determination to let those contracts. Under all the circumstances, therefore, I do not believe it would be equitable or would effectuate the policies of the Act to issue a reinstatement or backpay order.[8]

[Recommended Order omitted from publication.]

[7] Permitting a relaxation of craft lines and permitting operating personnel to do routine maintenance in the course of their operations.

[8] In view of this disposition of the matter, I do not reach the Company's contention that the strikers under Section 8(d) forfeited their employment status by the Union's failure to notify the Federal and State mediation services before striking. General Counsel's view on this issue is that timely notice of the dispute was given by the Employer. General Counsel argues that the requirements of Section 8(d) are therefore met as the statutory purpose of notifying the services is to afford them a chance to settle the dispute, and no good purpose is served by dual notification. I would find merit in this argument if I were otherwise disposed to recommend relief for the strikers. As to the suggestion that the Union's alleged failure to comply with Section 8(d) resulted in its violating Section 8(b)(3), the short answer is that any such violation particularly as it would be limited to the period of the strike, would not be material in determining whether the Company's prestrike and poststrike conduct violated Section 8(a)(5).

The parties litigated the issue whether the strike was an unfair labor practice strike. I find that one of the principal causes of the strike was the contracting of work without prior negotiation with the Union. Cf. *Simmons, Inc.* v. *N.L.R.B.*, 315 F. 2d 143, 146 (C.A. 1), and cases there cited. But this finding, which leads to the conclusion that the strike was an unfair labor practice strike, leads to no remedial order under the circumstances of this case, for at most it would require "preferential hiring" which is meaningless to employees already listed as merely in layoff status.

Shell Chemical Company, a Division of Shell Oil Company *and* Independent Oil and Chemical Workers Union of Louisiana.

Case No. 15–CA–2129. October 29, 1964

DECISION AND ORDER

On June 28, 1963, Trial Examiner Frederick U. Reel 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. He further found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended dismissal as to them. Thereafter, the Respondent and the General Counsel filed exceptions to the Intermediate Report and supporting briefs.[1]

[1] The Respondent has requested oral argument. This request is hereby denied because the record, exceptions, and briefs adequately present the issues and the positions of the parties.