plant removal or any other reprisal; promise them benefits; or grant them wage increases or other improved conditions of work, to discourage their membership, support or activities in Local 29, Retail, Wholesale and Department Store Union, AFL–CIO, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Local 29, Retail, Wholesale and Department Store Union, AFL–CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in any other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

Dated_____ By_____
(Representative) (Title)

EUGENE YOKELL AND BERNARD YOKELL, COPARTNERS, D/B/A CRESCENT ART LINEN CO., AND BETSY ROSS NEEDLEWORK, INC.,

Employer.

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, Fifth Floor, Squibb Building, 745 Fifth Avenue, New York, New York, Telephone No. 751–5500.

C & S Industries, Inc. *and* United Electrical, Radio and Machine Workers of America, (UE), Local 1114. *Cases Nos. 13–CA–6784 and 13–CA–6863. April 28, 1966*

DECISION AND ORDER

On July 20, 1965, Trial Examiner John P. von Rohr issued his Decision 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 Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief. The General Counsel filed an answering brief to Respondent's exceptions.

The National Labor Relations Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following additions and modifications.

As described more fully in the Trial Examiner's Decision, the Union has been the certified bargaining representative of the Respondent's employees since April 1, 1963, and its current collective-bargaining agreement with the Respondent is effective from July 22,

1963, to May 31, 1966. This agreement sets forth an hourly wage rate for each job classification. It is silent with respect to any form of incentive wage system.

At the request of the Respondent, the parties met on May 8, 1964, at which time the Respondent raised the possibility of instituting a wage incentive system and offered to discuss with the Union the institution of such a system. The Union took the position that the Respondent had ample opportunity to present its plan at the recently completed negotiations and since it had not done so, the matter was closed and the contract was binding upon both parties. The Respondent then informed the Union it was "going to go ahead and time study the various jobs."

On September 21, the Respondent, without further notice or consultation with the Union, instituted a wage incentive system. That same day, the Respondent held a meeting attended by the union shop steward and five employees to announce the institution of the system.[1] Immediately thereafter, the Union filed grievances[2] alleging that the Respondent, by instituting the wage incentive system without prior consent of the Union, had violated article 29 of the contract which provides, *inter alia*, that "there shall be no change in the method of payment of any employee covered by this agreement without prior negotiations and written consent of the Union." The Respondent in its replies to the grievances took the position that there was nothing in the contract that prohibited the institution of an incentive system and that it was willing to negotiate the merits of the system with the Union.

Pursuant to the grievance machinery established by the contract, the parties held meetings on October 8 and 16. The Union adhered to the position it had taken at the May 8 meeting while the Respondent again contended that there was nothing in the contract which prevented it from instituting this system. On November 9, the Union filed its initial charges in this case.

During January and February 1965, the Respondent took disciplinary action against some of its employees for failing to meet production requirements established by the incentive wage system. This disciplinary action consisted of 1- to 3-day suspensions and the imposition of disciplinary points pursuant to the point system as set forth in Respondent's company policy and employee manual. The Union challenged this disciplinary action by filing a series of grievances

[1] There is no record evidence that describes the system itself or in what manner it operates.

[2] The contract between the Respondent and the Union defines a grievance as "any differences or disputes that may arise between the Union and the Company under the provisions of Article I, Section I. . . ." The contract also provides that the arbitrator "shall only rule upon the interpretation and application of this Agreement."

charging that the Respondent's conduct was "based upon an improper unilateral wage system that was established by the Company" The Union also filed charges with the Board, later amended, to this effect

The Trial Examiner, relying on *N L R B* v *Benne Katz*,[3] *d/b/a Williamsbury Steel Products Co*, in which the Supreme Court held that an employer violates its statutory duty to bargain collectively by changing the wages and working conditions of its employees without first notifying and bargaining with their representative concerning the contemplated action or change, found that Respondent's institution of wage incentive system, in the circumstances of this case, constituted a unilateral change in the wages and working conditions of its employees in violation of Section 8(a)(5) The Trial Examiner also concluded that the Union was not obligated to pursue the contractual grievance-arbitration procedure instead of filing charges, reasoning that since there was no provision in the contract which dealt with an incentive wage system, this subject fell outside the "interpretation and application" of the contract and was therefore not subject to arbitration

1 The Respondent initially contends that even assuming it was required to bargain with the Union over the institution of the wage incentive system, the institution thereof did not amount to "unilateral' action, violative of Section 8(a)(5), because, on May 8, 1964, prior to the institution of the wage incentive system, the Respondent notified and offered to bargain with the Union regarding the proposed system and the Union at that time declined to bargain We find no merit in this contention In the first place, the record establishes that at the meeting on May 8, the Respondent merely offered to discuss with the Union the possibility of its instituting some type of an incentive system at some unspecified time in the future No subsequent discussions on this subject took place until approximately 4 months later, after the Respondent actually instituted the wage incentive system herein We reject the view that an employer satisfies its statutory bargaining obligation by simply notifying the representatives of its employees that it contemplates modifying working conditions at some indefinite time in the future Such notification cannot serve to create for the employer a continuing option to affect a unilateral change in working conditions whenever it chooses

In any event, assuming that Respondent made a sufficient offer to bargain regarding the wage incentive system, we reject the premise of Respondent's argument that one party to an existing contract may during its term unilaterally institute a change in contract terms after it has offered to bargain regarding the change and the other party has refused to discuss the matter

[3] 369 U S 736 see also *Servette Inc* 133 NLRB 132

It is true, of course, that where during timely negotiations for a new agreement an employer has offered to bargain with a union concerning a proposed change in contract conditions and the union has refused to bargain, the employer does not violate his statutory obligation if following the effective period of the expiring contract he unilaterally institutes the change. The situation is different, however, where, as here, an employer seeks to modify during the life of an existing contract terms and conditions of employment embodied in the contract and made effective for its term. In the latter situation, a bargain having already been struck for the contract period and reduced to writing, neither party is required under the statute to bargain anew about the matters the contract has settled for its duration, and the employer is no longer free to modify the contract over the objection of the Union.

The statutory intent to stablize during a contract term agreed-upon conditions of employment is apparent from the provisions of Section 8(d) of the Act, which defines the obligation to bargain. That section not only imposes an obligation on each party to a contract to refrain from modifying the contract without complying with the notice and waiting period requirements therein set forth, but also expressly provides that the "duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract of a fixed term, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." In line with that provision, the Board has consistently held that a party does not violate its bargaining obligation when it refuses to discuss changes proposed by the other party in the terms of an existing contract.[4] The Board has also held that an employer acts in derogation of his bargaining obligation under Section 8(d), and hence violates Section 8(a)(5), when he unilaterally modifies contractual terms or conditions of employment during the effective period of a contract—and this even though he has previously offered to bargain with the union about the change and the union has refused.[5]

The Respondent's argument in substance is that Section 8(d) simply relieves a union of any legal obligation to bargain upon request over changes in an existing agreement, but imposes no duty on an employer to refrain from acting unilaterally once the union rejects the employer's offer to bargain. We cannot in reason accept

[4] *Tide-Water Associated Oil Company*, 85 NLRB 1096; *Jacobs Manufacturing Company, The*, 94 NLRB 1214; enfd 196 F. 2d 680 (C A. 2); see also *The Press Company, Incorporated*, 121 NLRB 976.

[5] See, *John W. Bolton & Sons, Inc.*, 91 NLRB 989, involving a factual situation virtually identical to the one in the instant case. And see also, *Kinard Trucking Company, Inc.*, 152 NLRB 449.

this construction of the statute. To adopt the Respondent's view would not only be contrary to the clear language of the section read as a whole, and at variance with existing Board precedent; it would also produce an incongruous result. Such a reading of the statute would as a practical matter leave a union with no choice but to bargain about contract changes whenever requested by an employer to do so. Its operative effect therefore would be to render virtually meaningless with respect to a union the express declaration in 8(d), quoted above, that neither party to a contract is required to "discuss or agree" to any modification of conract terms to be effective prior to the reopening time of a contract. Indeed, under the view, except for the speculative possibility that the union could succeed during negotiations in persuading the employer to give up its plan to modify the contract, the union would be offered no statutory protection in maintaining previously negotiated contract conditions for the agreed-upon term once the employer seeks to change them. This is to be contrasted with the unquestioned protection provided an employer under Section 8(d) against union strikes aimed at obtaining contract modifications during the effective period of a contract.[6] We are unwilling to construe the statute in a manner that would thus render nugatory the above-quoted language of Section 8(d), provide for a one-sided application, and curtail the effectiveness of collective-bargaining agreements as a stabilizing factor in labor-management relations.

While it is true that a breach of contract is not *ipso facto* an unfair labor practice,[7] it does not follow from this that where given conduct is of a kind otherwise condemned by the Act, it must be ruled out as an unfair labor practice simply because it happens also to be a breach of contract. Of course, the breadth of Section 8(d) is not such as to make any default in a contract obligation an unfair labor practice, for that section, to the extent relevant here, is in terms confined to the "modification" or "termination" of a contract. But there can be litle doubt that where an employer unilaterally effects a change which has a continuing impact on a basic term or condition of employment, wages for example, more is involved than just a simple default in a contractual obligation. Such a change manifestly constitutes a "modification" within the meaning of Section 8(d). And if not made in compliance with the requirements of that section, it violates a statutory duty the redress of which becomes a matter of concern to the Board.

[6] See, e g., *Milk, Ice Cream Drivers, Local No. 783 (Cream Top Creamery, Inc.)*, 147 NLRB 264.

[7] *Wilson & Co. Inc.*, 89 NLRB 310; *American Vitrified Products Company*, 127 NLRB 701.

In the instant case, we think it quite clear, and we find, that Respondent's unilateral superimposition of an incentive wage plan upon the contractually established wage structure operated as a "modification" of contract terms, within the meaning of Section 8(d). Although the contract makes no specific mention of wage incentives, such incentives are inseparably bound up with and are thus plainly an aspect of the payment of wages, a subject expressly covered by the contract.[8] Any doubt of this is removed by the presence in the contract of article 29, which expressly prohibits any change in the method of payment without the written consent of the parties. We therefore conclude, for reasons above set forth, and without regard to whether or not Respondent made a sufficient prior offer to bargain, that Respondent's unilateral installation of its wage incentive system was in derogation of its statutory obligation under Section 8(d), and was therefore violative of Section 8(a)(5).

2. The Respondent also contends that the dispute herein turns on a question of contract interpretation which can best be resolved through the grievance-arbitration procedure of the contract, and therefore than an arbitrator and not the Board should first determine the question. The Trial Examiner rejected this contention, concluding that since there was no provision in the existing contract which dealt with a wage incentive system, the dispute herein did not involve "the interpretation and application" of the agreement and was therefore not subject to arbitration. Although we did not rely on this reasoning of the Trial Examiner, we agree with his conclusion that the Board should not defer to arbitration—and this for the following reasons:

Section 10(a) of the Act, which confers on the Board power to prevent unfair labor practices provides that "[t]his power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . ." The Board is not precluded from resolving an unfair labor practice issue calling for appropriate remedial relief under the Act, simply because as an incident thereto it may be necessary to construe the scope of a contract which an arbitrator may also be empowered to construe.[9] Although it lies in the discretion of the Board to defer to arbitration, we do not regard the controversy before us as one calling for our exercise of such discretion. Here we do not have an issue which, although cast in unfair labor practice terms, is essentially one involv-

[8] *John H. Bolton & Sons, Inc., supra; The Ingalls Shipbuilding Corporation,* 143 NLRB 712.

[9] *Smith Cabinet Manufacturing Company,* 147 NLRB 1506; *Cloverleaf Division of Adams Dairy Co.,* 147 NLRB 1410. Member Brown relies on his concurring opinion in *Cloverleaf Division of Adams Dairy Co., id.* at p. 1420, and his separate opinion in *LeRoy Machine Co., Inc.,* 147 NLRB 1431, 1434.

ing a contract dispute, making it reasonably probable that arbitration will put the statutory infringement finally at rest in a manner sufficient to effectuate the policies of the Act. Nor does resolution of the unfair labor practice issue here involved primarily turn on an interpretation of specific contractual provisions of ambiguous meaning, within the special competence of an arbitrator to determine. Nor has either party placed this dispute before an arbitrator or secured an award passing upon any of the issues here raised. In urging deferral to arbitration, the Respondent contends only that the incentive plan was not specifically prohibited by the contract and that its installation was economically justified. But, for reasons earlier indicated, the absence of a specific incentive plan prohibition cannot and does not affect our judgment that Respondent's unilateral action was violative of the Act. And we agree with the Trial Examiner that Respondent's claim of economic necessity affords no justification for its unlawful conduct. Consequently, and as no other compelling reason appears for our doing so, we shall not defer to arbitration.

In view of the foregoing and the entire record in the case, we find that the Respondent violated Section 8(a)(5) by instituting, without the consent of the Union, a wage incentive system during the term of the existing collective-bargaining agreement.

3. Since, in order to remedy the 8(a)(5) violations found herein, we have ordered the Respondent to restore the working conditions which it had unilaterally changed and to make whole the employees who have been disciplined, we agree with the Trial Examiner that it is unnecessary to decide whether the Respondent's disciplinary actions against employees in implementation of the wage incentive system also violated Section 8(a)(3).

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist therefrom and take certain affirmative action which we find necessary to effectuate the policies of the Act.

The Trial Examiner recommended that the Respondent be ordered to cease and desist from refusing to bargain with the Union, and from making unilateral changes in wages without first consulting with the Union. However, since we have concluded that even if the Respondent had offered to bargain with the Union, it nonetheless would have been foreclosed from modifying contract terms over the Union's objection, we believe that the Trial Examiner's Recommended Order does not fully remedy the unfair labor practices found herein.

We shall therefore modify the Recommended Order and order the Respondent, upon request, to rescind the wage incentive program and to cease and desist from instituting changes in the wages, hours, and other terms and conditions of employment of its employees during the effective term of the collective-bargaining agreement covering said employees without first reaching agreement with the Union concerning such changes

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and orders that the Respondent, C & S Industries, Inc, Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order as so modified

1 Delete paragraph 1(b) and substitute the following therefor

"(b) Making unilateral changes in wages, rates of pay, or other terms and conditions of employment of its employees in the above-described appropriate unit during the term of the contract without first reaching agreement with the above-named Union concerning such changes"

2 Delete paragraph 2(a) and substitue the following therefor

"(a) Upon request of the above-named Union, rescind any plan which Respondent may have unilaterally instituted"

3 Delete paragraph 2(b) and substitute the following therefor

"(b) Make whole the employees listed in the first paragraph of the attached notice marked "Appendix B," together with 6 percent per annum thereon, for any loss of pay they may have suffered as a result of their layoff for failing to meet the production requirements established as a part of the unilaterally instituted incentive wage rate system"

4 Amend the first 2 lines of paragraph 2(e) as follows

"(e) Post at its plant in Chicago, Illinois, copies of the attached notices marked 'Appendix A' and 'Appendix B'[16] "

5 Delete the second paragraph of Appendix A and substitute the following therefor

> WE WILL NOT unilaterally institute changes in wages, hours, or other terms and conditions of employment of the employees in the bargaining unit described below, during the term of any collective-bargaining agreement covering said employees, without first consulting with and bargaining with the Union concerning such changes and reaching agreement on any modification of the terms of the contract

6. Delete the third paragraph of Appendix A and substitute the following therefor:

> WE WILL, upon request, revoke the incentive wage rate system for our employees which we unilaterally instituted on or about September 21, 1964.

7. Delete paragraph 5 of Appendix A and substitute the following therefor:

> WE WILL make whole the employees listed in the first paragraph of Appendix B, together with 6 percent interest per annum thereon, for any loss of pay they may have suffered by reason of their being laid off because of their failure to meet production requirements under the incentive wage rate system.

8. Amend the Employer's name, as it appears on Appendix A to read "C & S Industries, Inc."

MEMBER ZAGORIA took no part in the consideration of the above Decision and Order.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

Upon charges filed on November 9, 1964, and January 25, 1965, in Cases Nos. 13–CA–6784 and 13–CA–6863, respectively, the General Counsel for the National Labor Relations Board, for the Regional Director for Region 13, Chicago, Illinois, issued a consolidated complaint on February 15, 1965, against C & S Industries, Inc., herein called the Respondent or the Company, alleging that it had engaged in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. The Respondent's answer denies the allegations of unlawful conduct as alleged in the complaint.

Pursuant to notice, a hearing was held in Chicago, Illinois, on March 9, 1965, before Trial Examiner John P. von Rohr. All parties were represented by counsel and were afforded opportunity to adduce evidence, to examine and cross-examine witnesses, and to file briefs. A brief was filed by the Respondent it has been carefully considered.

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

FINDINGS OF FACT AND CONCLUSIONS

I. THE BUSINESS OF THE RESPONDENT

The Respondent is a Delaware corporation with its principal plant and place of business located at Chicago, Illinois, where it is engaged in the business of manufacturing, selling, and distributing automotive muffler systems and related products. During the calendar year ending in 1963, the Respondent manufactured, sold, and distributed from its plant in Chicago, Illinois, products valued in excess of $50,000 to points directly outside the State of Illinois. During the last year, Respondent sold products manufactured by it in Chicago, Illinois, valued in excess of $50,000 to various enterprises which themselves annually sell products valued in excess of $50,000 to points outside the State in which they are located.

The Respondent concedes, and I find, that it is and has been engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

United Electrical, Radio, and Machine Workers of America, (UE), Local 1114, herein referred to as the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III THE UNFAIR LABOR PRACTICES

A *The facts*

The principal allegation in the complaint herein charges the Respondent with having violated Section 8(a)(5) of the Act by unilaterally instituting an incentive wage rate system for its employees during the life of a collective bargaining agreement Unless otherwise noted, the facts set forth below are not in dispute

On April 1, 1963, the Board certified the Charging Union as the collective bargaining representative for a unit comprised of all Respondent's production and maintenance employees Following a series of collective-bargaining negotiations, the parties entered into a contract effective from July 22, 1963, to May 31, 1966

The event which gives rise to the dispute in this proceeding occurred on September 21, 1964, at which time the Respondent instituted an incentive wage rate system It is undisputed that this action was taken unilaterally, the Union having been given neither advance notice nor the opportunity to bargain over the matter [1] Insofar as the contract was concerned, it may be noted that it only provided for an hourly wage system, it did not provide for *any* form of incentive wage rate system On September 23, 1964,[2] the Union filed a grievance which charged as follows

> The Company is in violation of Sec 9 of Article 29 of the current collective bargaining agreement by starting an incentive system without prior consent of the Union The Union requests that the violation be stopped [3]

The Respondent immediately responded in writing, stating that Nothing in Contract Art 29 Sec 9 that pertains to above grievance "

On September 24, the Union filed a second grievance, this identical to the first except that it charged Respondent with having violated section 1 and 2 of article 29 of the contract, these sections having reference to the wage rates as set forth in the agreement The Respondent's reply in this instance was that Section 1 & 2, Article 29 [does] not say that the Company cannot introduce an Incentive System '

On October 20, the Respondent submitted a letter to the Union in further reply to the grievances theretofore filed which stated as follows

> The company's position is that nothing in the contract prohibits the installation of an incentive system The company has been willing to negotiate this matter with the union and has consistently asked the union to discuss the merits of the program and point out any short comings they feel might be in the plan The company, of course, agrees that any rates established under the plan will be subject to the grievance procedure The company is ready and willing to further negotiate this plan with the union at any time
>
> The company has retained a professional Industrial Engineering Firm to time study the shop and to set what we believe are fair and just rates The company will not insist on employee's earning incentive, but all employees are expected to maintain an efficient productive level New employees will be given the necessary training to bring them up to the standard productivity level within a normal period of time

While the Union never made any formal withdrawal of the above grievances, it is significant to note here that the Union filed a charge in the instant case [4] on November 9, 1964, alleging, *inter alia,* that the Respondent's unilateral institution of the wage incentive system constituted a violation of Section 8(a)(5) of the Act

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[1] The announcement of the wage incentive program was made to the union shop steward and five other employees who were called together by Respondent's president on the day the program was put into effect

I note further that during a meeting between union and company representatives held on May 8, 1964, the Company advised the Union that it was contemplating the institution of a wage incentive system in order to increase production and productivity However according to the credited and uncontradicted testimony of Leonard Wojewodzki a union official who was present at this meeting, the Union responded that it regarded the current contract as binding that it was opposed to any such incentive system at this time and that any question of a wage incentive program should be deferred until the commencement of negotiations for the next contract

[2] Unless otherwise indicated the dates which follow refer to the year 1964

[3] Article 29, section 9 provides ' there shall be no change in the method of payment of any employee without prior negotiations and written consent of the Union

[4] Case No 13–CA–6784

On December 29, the Respondent again wrote the Union concerning the above grievances, this time stating its position as follows:

> With regard to the grievances dated 9–23–64 and 9–24–64, the company submitted a third step answer to the Union on October 20, 1964. Inasmuch as the Union has not accepted this answer and in the interest of resolving this grievance, the company is requesting that the grievance be referred to an impartial arbitrator in accordance with Article 15 of our Labor Agreement.
>
> Please call me [a company official] so that we may select the arbitrator.

During the months of January and February 1965, the Respondent took disciplinary action against various employees for the reason that they failed to meet the production requirements as established by the incentive wage rate system as put into effect on September 21, 1964. Such disciplinary action consisted either of a 1- to 3-day layoff or the imposition of disciplinary points under Respondent's point system as set forth in its company policy and employee manual.[5] The Union responded to the Respondent's action in this regard by filing a series of grievances charging that the Respondent's disciplinary action as aforesaid "was based upon an improper unilateral wage rate system that was established by the Company." The Respondent replied to these grievances, in essence, by stating that the parties select arbitrators and that the matter be taken to arbitration.

B. *Additional facts; conclusions*

The Respondents' defense to the allegation that it violated Section 8(a)(5) of the Act by its unilateral institution of the incentive wage system is that the Board should not assert jurisdiction because the Union was under "a duty" to follow the grievance procedure in the contract. While the parties have cited many cases, I believe that Respondent's contention as aforesaid is squarely controlled by the Board's decision, as affirmed by the court, in *The Timken Roller Bearing Company*.[6] In the latter case the Employer refused the Union's request for certain wage data, asserting as a ground for its refusal that the Union's claimed right for such data must be through the grievance procedure provided by the contract, which terminated with arbitration. In rejecting this contention, the Board noted that the arbitrator's jurisdiction, as set forth in the contract, was limited in fact to disputes involving "the interpretation and application of the agreement." Accordingly, it was held, *inter alia*, that the dispute in question was not subject to the grievance procedure and arbitration provided in the bargaining agreement.

The identical situation prevails in the instant case. Thus step 3 of the grievance procedure in the instant agreement provides as follows: [7]

> It is expressly understood that the arbitrator shall have no power to subtract from, add to, or modify, the terms of this Agreement, and *shall only rule upon the interpretation and application of this Agreement.* [Emphasis supplied.]

As previously noted, the contract provides that the employees are to be paid at an hourly rate, such rates being specifically set forth therein for the various employee job classifications. There being no provision whatsoever in the contract which deals with an incentive wage rate system, it is clear, and I find, that any dispute involving this subject falls outside the "interpretation and application" of the contract and therefore is not subject to the grievance and arbitration procedure as provided in the collective-bargaining agreement. Accordingly I find that Respondent's contention as aforesaid is without merit.[8]

The merits of this case, in my opinion, must be decided in favor of the General Counsel under fundamental rules of labor law. Thus, the "duty to bargain collectively" is defined by Section 8(d) of the Act as the duty to "meet . . . and confer in good faith with respect to wages, hours and other terms and conditions of employment." It is too well established to require further discussion that an employer's action in changing the wage rates or other working conditions of its employees without notice to, or consultation with, the labor organization which they have chosen to represent them is in derrogation of its duty to bargain and is violative of Section 8(a)(5) of the

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[5] Under this system an employee is subject to discharge upon the receipt of 5 points against his record in any 6-month period.

[6] 138 NLRB 15; enfd. 325 F. 2d 746 (C.A. 6), cert. denied 376 U.S. 971.

[7] Article XV, section 1, step 3.

[8] See also *Smith Cabinet Manufacturing Company, Inc*, 147 NLRB 1506; *Cloverleaf Division of Adams Dairy Co.*, 147 NLRB 1410; *The Ingalls Shipbuilding Corporation*, 143 NLRB 712.

Act.[9] It is no defense, as the Respondent additionally urges, that the unilateral action taken was based on alleged economic necessity.[10] Accordingly, I find that the Respondent here committed an unfair labor practice within the meaning of Section 8(a)(5) of the Act, and derivatively Section 8(a)(1) thereof, by its unilateral institution of the incentive wage rate system. Respondent's letter of October 30 stating that "the Company is ready and willing to further negotiate this plan with the Union at any time" did not cure its unlawful action, for by this time the establishment of the incentive program was fait accompli. Moreover, I can but regard the statement as self-serving, for thereafter the Respondent continued to insist that the Union take the matter to arbitration. If the Respondent indeed wished to bargain in good faith, at the very least it should have rescinded its institution of the incentive program, returned to the status quo of the contract, and thereafter have taken appropriate steps to comply with Section 8(d) of the Act.[11]

C. *The allegation that Respondent unlawfully disciplined its employees*

The complaint alleges that the Respondent violated Section 8(a)(1), (3), and (5) of the Act by laying off and reprimanding certain of its employees "because of their failure to meet production requirements, established as part of the unilaterally instituted incentive wage rate system."[12] The Respondent admits the action in kind but denies the commission of any unfair labor practices with respect thereto.

I do not deem it necessary to decide whether Respondent violated Section 8(a)(3) of the Act by the foregoing conduct,[13] for the question here is primarily one of remedy. Having found that Respondent violated Section 8(a)(5) and (1) of the Act by its unilateral action with respect to the institution of the incentive wage rate system, I shall under the section herein entitled "The Remedy," follow established Board policy and recommend the restoration of working conditions which have been unilaterally changed,[14] this including appropriate redress to the employees who have suffered a loss as a result of the Respondent's unfair labor practices.[15]

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent cease and desist therefrom and take certain affirma-

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[9] *Beacon Piece Dyeing and Finishing Co., Inc.*, 121 NLRB 953; *N.L.R.B.* v. *Benne Katz, et al, d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736; *N.L.R.B.* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217; *N.L.R.B.* v. *Morris Harris, et al., d/b/a Union Manufacturing Company*, 200 F. 2d 656.

[10] *N.L.R.B.* v. *Morris Harris, supra.*

[11] There is no question of waiver in this case. In this connection, it may be noted that there is some dispute in the testimony concerning the positions taken by the parties during the 1963 contract negotiations relative to a bonus system which Respondent had in effect prior to the commencement of these negotiations. However, I need not resolve this conflict or set forth such testimony, for I regard it as irrelevant to the issue herein. I regard it so because this earlier bonus system was entirely different from the wage rate incentive system which gives rise to the instant dispute.

[12] The names of the employees and the dates of their layoffs (the layoffs were from 1 to 3 days) are specified in the attached Appendix B. Said appendix also reflects the names of the employees who were disciplined and the dates such action was taken.

[13] I.e., whether Respondent's disciplining of employees for failure to meet production requirements under its unilaterally established incentive plan constituted "encouragement or discouragement of membership in a labor organization" within the meaning of the Act.

[14] *Staub Cleaners, Inc.*, 148 NLRB 278; *George E. Light Boat Storage, Inc.*, 153 NLRB 1209; *Continental Bus System, Inc., d/b/a Continental Rocky Mountain Lines, Inc.*, 138 NLRB 894; *Dickten & Masch Mfg. Company*, 129 NLRB 112; *Cascade Employers Association, Inc.*, 126 NLRB 1014.

[15] There is no contention by the Respondent that the employees who were disciplined engaged in type of unprotected activity.

tive action designed to effectuate the purposes of the Act, including the posting of the notices attached to this Decision as Appendixes A and B.

Having found that the Respondent refused to bargain by unilaterally establishing an incentive wage rate system, I shall recommend that the Respondent restore the wage rates in effect prior to such unilateral action. I shall further recommend that Respondent make whole the employees listed in the attached Appendix B, who were laid off because of their failure to meet production requirements under the unilaterally established incentive wage rate system by payment to them of a sum equal to that which they would have earned in the absence of any such layoffs. Further that Respondent shall rescind and revoke any disciplinary points issued to the employees named on Appendix B who were disciplined under Respondent's point system.

Because of the character and scope of the unfair labor practices found to have been engaged in by Respondent, I shall recommend that Respondent cease and desist from in any other manner interfering with, restraining, and coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act.

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

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. United Electrical, Radio and Machine Workers of America, (UE), Local 1114, is a labor organization within the meaning of Section 2(5) of the Act.
3. All production and maintenance employees, excluding all office clerical employees, outside truckdrivers, professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. At all times since March 23, 1963, the Union has been, and still is, the exclusive representative of all the employees within said appropriate unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment, within the meaning of Section 9(a) of the Act.
5. By unilaterally instituting an incentive wage rate system, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.
6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
7. The Respondent has not engaged in unfair labor practices insofar as the complaint alleges violations of the Act not specifically found herein.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, I recommend pursuant to Section 10(c) of the Act, that Respondent C & S Industries, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the above-named labor organization as the exclusive representative of its employees in the following appropriate unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

All production and maintenance employees, excluding all office clerical employees, outside truckdrivers, professional employees, guards, and supervisors as defined in the Act.

(b) Making unilateral changes in wages, rates of pay, or other terms and conditions of employment of its employees in the above-described appropriate unit without first consulting and bargaining with the Union, in a manner violative of the Act.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist the above-named or any other labor organization, to bargain collectively through representatives of their choosing, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by the provisos 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 request, meet and bargain collectively with the above named labor organization as the exclusive representative of the employees in the above-described

appropriate unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed written agreement

(b) Make whole the employees listed uder the first paragraph of the attached notice marked "Appendix B," for any loss of pay they may have suffered as a result of their layoffs for failing to meet the production requirements established as a part of the unilaterally instituted incentive wage rate system

(c) Revoke and rescind any disciplinary points issued to the employees listed in the second pargaraph of the attached notice marked Appendix B which were issued to them because of their failure to meet production requirements established as part of the unilaterally instituted incentive wage rate system

(d) Preserve and, upon reasonable request, make available to the Board or its agents, for examination and copying, all payroll records, and other records necessary to analyze the amounts of backpay due the employees listed in Appendix B

(e) Post at its plant in Chicago, Illinois, copies of the attached notice marked 'Appendix A" [16] Copies of said notice, to be furnished by the Regional Director for Region 13, shall, after being duly signed by an authorized representative of the Respondent, be posted by it immediately upon receipt thereof, and be maintained by it by 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 said Respondent to ensure that said notices are not altered, defaced, or covered by any other material

(f) Notify the said Regional Director, in writing, within 20 days from the receipt of this Decision, what steps the Respondent has taken to comply herewith [17]

I further recommend that the complaint be dismissed insofar as it alleges violations of the Act not specifically found herein

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[16] 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 is 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 "

[17] In the event that this Recommended Order is 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 A

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 NOT refuse to bargain collectively with United Electrical, Radio and Machine Workers of America, (UE), Local 1114, as the exclusive representative of the employees in the bargaining unit described below

WE WILL, upon request, bargain with the above named Union as the exclusive representative of all the employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such an understanding in a signed agreement

WE WILL revoke the incentive wage rate system for our employees which we unilaterally instituted on or about September 21, 1964

WE WILL NOT unilaterally change the rates of pay of the employees in the bargaining unit described below The bargaining unit is

> All production and maintenance employees, excluding all office clerical employees, outside truckdrivers, professional employees guards, and supervisors as defined in the Act

WE WILL make whole the employees listed in the first paragraph of the attached Appendix B, for any loss of pay they suffered by reason of their being laid off because of their failure to meet production requirements under the incentive wage rate system

WE WILL rescind and revoke any disciplinary points issued to the employees listed in the second paragraph of Appendix B because of their failure to meet production requirements under the incentive wage rate system

All our employees are free to become, remain, or to refrain from becoming or remaining members of any labor organization, except to the extent that such right may be affected by the provisos in Section 8(a)(3) of the Act.

C & C INDUSTRIES, 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, 881 U.S. Courthouse and Federal Office Building, 219 South Dearborn Street, Chicago, Illinois, Telephone No. 828–7572.

APPENDIX B

Names and dates of employees laid off

(1)

Names of Employees	*Dates of Layoff*	*Names of Employees*	*Dates of Layoff*
N. Flores	Jan. 11	F. Holmes	Jan. 18
R. Campbell	Jan. 11	E. Miranda	Jan. 18
L. Nykoden	Jan. 11	A. Stanevich	Jan. 18
E. Miranda	Jan. 11	R. Pumphrey	Jan. 25
A. Stanevich	Jan. 11	L. Nykoden	Feb. 10
R. Rivera	Feb. 1	R. Pumphrey	Feb. 10
J. Johnson	Feb. 1		

Names and dates of employees reprimanded

(2)

Names of Employees	*Date of Reprimand*	*Names of Employees*	*Date of Reprimand*
F. Holmes	Jan. 4	R. Rivera	Jan. 4
F. Rodriguez	Jan. 4	J. Habinka	Jan. 4
N. Flores	Jan. 4	J. Johnson	Jan. 4
P. Bakei	Jan. 4	E. Kerley	Jan. 4
A. Stanevich	Jan. 4	C. Davis	Jan. 7
E. Miranda	Jan. 4	R. Pumphrey	Jan. 8
R. Campbell	Jan. 4	R. Montanel	Jan. 8
S. Garcia	Jan. 4	L. Garcia	Jan. 11
L. Nykoden	Jan. 4		

NOTE.—All dates 1965.

Corrie Corporation of Charleston *and* Chauffeurs, Teamsters and Helpers Local No. 175, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. *Case No. 9–CA–3559. April 28, 1966*

DECISION AND ORDER

On January 7, 1966, Trial Examiner Rosanna A. Blake issued her 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