

CONCLUSIONS OF LAW

1. Traders Oil Company of Houston, Respondent herein, is an Employer within the meaning of Section 2 (2) of the Act, and is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.
2. Local 4-227, Oil, Chemical and Atomic Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2 (5) of the Act.
3. Employee Committee is a labor organization within the meaning of Section 2 (5) of the Act.
4. All production and maintenance employees employed by the Respondent at its Humble, Texas, lease, exclusive of office clerical, guards, and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.
5. On or before April 28, 1956, and at all times thereafter, the Respondent refused, and continues to refuse to bargain collectively with Local 4-227, Oil, Chemical and Atomic Workers International Union, AFL-CIO, as the exclusive representative of all its employees in the bargaining unit described in the paragraph numbered 4, above, in contravention of Section 8 (a) (5) and (1) of the Act.
6. The agreement or contract made and executed between Employee Committee, consisting of certain employees of the Respondent and the Respondent on May 15, 1956, is not a bona fide collective-bargaining agreement, was entered into contrary to the purposes of the Act, and is a nullity under the Act.
7. The Respondent, by interrogating its employees interfered with their rights to concerted activity as guaranteed under Section 7 of the Act, in contravention of Section 8 (a) (1) of the Act.
8. These unfair labor practices are unfair labor practices within the meaning of Section 2 (6) and (7) of the Act.

[Recommendations omitted from publication.]

Insurance Agents' International Union, AFL-CIO and The Prudential Insurance Company of America. *Case No. 22-CB-4*
(formerly 2-CB-1726). *December 13, 1957*

DECISION AND ORDER

On December 7, 1956, Trial Examiner C. W. Whittemore issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint, and recommended that the complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Company and the General Counsel filed exceptions to the Intermediate Report and supporting briefs. The Respondent also filed a statement in support of the Intermediate Report and a brief.¹

The Board² 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 Intermediate Report, the exceptions and briefs, and the entire record in

¹ The requests of the Respondent and the Company for oral argument are hereby denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

² Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Leedom and Members Murdock and Jenkins].

this case, and finds merit in the exceptions to the Intermediate Report for the reasons discussed below. Accordingly, the Board adopts only those findings and conclusions of the Trial Examiner which are consistent with the findings and conclusions hereinafter made.

1. The Trial Examiner found that the Respondent did not refuse to bargain in good faith within the meaning of Section 8 (b) (3) of the Act by engaging in certain conduct, characterized by him as "slowdowns," during the course of contract negotiations. We do not agree.

The facts are not in dispute and may be summarized as follows: For a number of years, the Respondent has been in contractual relations with Prudential, the Charging Party, as the exclusive bargaining representative of Prudential's district agents in an appropriate unit described in the Intermediate Report. On January 16, 1956, about 2 months before the expiration date of their then current contract, the parties began negotiations for a new agreement. Apparently dissatisfied with the progress of negotiations, the Respondent on February 28 alerted local union officials that it contemplated taking "emergency" measures, if a satisfactory agreement was not reached by the time their current contract expired on March 19. No agreement having been reached as the contract expiration date approached, the Respondent accordingly adopted a "Work Without Contract" program which concededly, as the Trial Examiner found, was designed to force the Company to yield to its bargaining demands. This plan was put into effect through a series of directives issued during the course of negotiations to local union officials and member district agents, at least once a week until the following July when a new agreement was concluded.³ These directives required the district agents at various times, while negotiations were going on, to engage in specified harassing activities in the course of their employment and in utter disregard of their assigned duties and normal routines.

As fully set forth in the record, the district agents, pursuant to the directives, refused to write new business; reported late to their respective offices at 10 o'clock in the morning instead of 8:30, as they were required to do; engaged in "sit-in mornings" whereby the agents remained in the office until noon "doing what comes naturally" and refused to perform any work after 4:30 p. m., contrary to what they

³ This agreement was concluded on July 17, 1956, during a recess in the hearings herein. For this reason, among others, the Respondent moves to dismiss the complaint on the ground that the case has become moot. It is well established that the discontinuance of unfair labor practices does not render moot the charges based thereon. Moreover, we find that the order hereinafter directed is necessary as an assurance against the recurrence of the violations found in this case. Accordingly, we deny the Respondent's motion to dismiss. *International Longshoremen's Association, Independent, et al.*, (New York Shipping Association, Inc., et al.), 118 NLRB 1481; *Southern Saddlery Company*, 90 NLRB 1205, 1208; cf. *N. J. R. B. v. Mexia Textiles Mills, Inc.*, 339 U. S. 563, 567.

customarily did; picketed, demonstrated, and distributed leaflets in front of the home, district, and detached offices on specified days; distributed leaflets each day to policyholders and others on the agent's debit; secured policyholders' signatures on petitions directed to the Company on the Respondent's behalf; engaged in an "all-go-or-no-go" program whereby agents refused to attend special business conferences on the Company's invitation; presented signed policyholders' petitions to the Company at its home offices while simultaneously engaging in mass demonstrations; when, upon Respondent's direction, the agents resumed writing new business, they refused, contrary to company instructions, to make any report of such business to staff managers or to permit them to read the reports or to see any insurance applications which were deposited directly in the "chute"; and reported to and left the office in a group. In addition, during the period from May 21 to June 22, district agents refused to participate in the Company's "May Policyholders Month" campaign and instead participated in the Respondent's "May Policyholders Month" campaign. As a result, the agents would not accept any material for the Company's campaign, work extra hours, put forth special effort, work with a staff manager, perform duties after 4:30 p. m., show any interest, or take part in management meetings. It cannot be questioned that the foregoing activities were intended and could have no effect other than to disrupt and curtail the Company's business, and thereby to compel the Company to accede to the Respondent's contract demands.

In our opinion, the harassing tactics to which the Respondent resorted while purporting to negotiate its differences with the Company do not reflect the good-faith bargaining contemplated by the Act.⁴ Collective bargaining in good faith, as the Board and the courts have so often held, presupposes that both the employer and the union "enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement touching wages and hours and conditions of labor."⁵ It requires "cooperation in the give and take of personal conferences with a willingness to let ultimate decision follow a fair opportunity for the presentation of pertinent facts and arguments."⁶

In the present case, the Respondent's reliance upon harassing tactics during the course of negotiations for the avowed purpose of compelling the Company to capitulate to its terms is the antithesis of reasoned discussion it was duty-bound to follow. Indeed, it clearly re-

⁴ Section 8 (d) defines the duty to bargain as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."

⁵ *Globe Cotton Mills v. N. L. R. B.*, 103 F. 2d 91, 94 (C. A. 5).

⁶ *N. L. R. B. v. Jacobs Manufacturing Company*, 196 F. 2d 680, 683 (C. A. 2).

vealed an unwillingness to submit its demands to the consideration of the bargaining table where argument, persuasion, and the free interchange of views could take place.⁷ In such circumstances, the fact that the Respondent continued to confer with the Company and was desirous of concluding an agreement does not *alone* establish that it fulfilled its obligation to bargain in good faith, as the Respondent argues and the Trial Examiner believes. At most, it demonstrates that the Respondent was prepared to go through the motions of bargaining while relying upon a campaign of harassing tactics to disrupt the Company's business to achieve acceptance of its contractual demands. If an employer in the course of negotiations threatens to shut down his plant or to cut hours of work or to stop overtime, in order to force a union to accede to his proposals and abandon its own demands there can be no doubt, under established Board law as enforced by the courts, that the employer thereby is not engaging in the genuine good-faith bargaining required by the Act. Similarly, here, the Respondent's conduct does not evidence an open and fair mind to reach agreement on the basis of free exchange of ideas which is essential to good-faith bargaining. By the same token, it is unnecessary to show, as the Respondent urges, that this conduct actually affected the negotiations or the Company's business.⁸ It is sufficient that this conduct reflected an attitude not to engage in the free give-and-take of good-faith bargaining.⁹

Although admitting that its activities in question fall within the category of a "concerted slowdown," the Respondent, nevertheless, contends that this conduct is no different from a strike and is entitled to the same statutory protection. Therefore, it argues if no inference of bad faith could be drawn had it engaged in a strike contemporaneously with the negotiations, no such inference could be drawn from the conduct in which it had actually engaged. It is clear, however, as the Trial Examiner found, that, unlike a strike, "concerted slowdowns," and the Respondent's harassing activities in particular, are not protected by Section 7 or Section 13 of the Act.¹⁰ Consequently, whether or not an inference of bad faith is permissible where a union engages in a protected strike to enforce its demands, there is nothing unreasonable in drawing such an inference where, as here, the union's

⁷ Indeed, the Respondent bluntly informed its membership by one of its directives that "a satisfactory contract will be won in the field and not at the bargaining table."

⁸ However, we note that in one of the directives to the membership, the Respondent informed them that the "program of 'work without a contract' is now operating in high gear. It is having a decided effect upon management and its success has been the subject of discussions at the bargaining table."

⁹ Contrary to the Respondent's contention, we rely on the harassing tactics solely as evidence of the Respondent's bad-faith dealings with the Company and not as independently constituting unfair labor practices.

¹⁰ See, for example, *International Union, U. A. W. v. Wisconsin Employment Relations Board*, 336 U. S. 245; *Phelps Dodge Copper Products Corporation*, 101 NLRB 360, 367-368.

conduct is not sanctioned by the Act.¹¹ Harassing activities are plainly "irreconcilable with the Act's requirement of reasoned discussion in a background of balanced bargaining relations upon which good-faith bargaining must rest,"¹² and "impair[ed] the *process* of collective bargaining that Congress intended not only to encourage but to protect."¹³

Moreover, unlike the complete cessation of work and pay involved in a strike, the Respondent's resort to harassing tactics was designed to enable the employees unilaterally to dictate the terms of their employment and accept compensation from their employer without giving a regular return of work done,¹⁴ and thus to circumvent the orderly and peaceful procedures of collective bargaining. Such conduct, as the Supreme Court has recognized with respect to an employer's unilateral action, is "manifestly inconsistent with the principle of collective bargaining."¹⁵ To permit these unprotected activities to be used to undermine free collective bargaining would, in our opinion frustrate the very purpose of the Act to secure industrial peace through the process of collective bargaining.

In view of all the facts and circumstances in this case, and in accordance with the Board's decision in *Textile Workers Union of America, CIO, and Local 1172, et al. (Personal Products Corporation)*; (108 NLRB 743), we find that the Respondent, by engaging in harassing conduct during the course of the negotiations, failed to bargain in good faith and thereby violated Section 8 (b) (3) of the Act.¹⁶

2. In dismissing the complaint herein, the Trial Examiner was under the erroneous impression that he was not bound by the Board's decision in the *Textile Workers Union* case, *supra*, because the Court of Appeals for the District of Columbia refused to enforce the portion of the Board's order in that case relevant to the issues here involved. The Trial Examiner in support of his assumption that he was not "required to conform his findings, conclusions and recommendations to the principles enunciated in the Board's decision in *Personal Prod-*

¹¹ We respectfully disagree with the contrary opinion of the majority of the court in *Textile Workers Union of America, CIO, and Local 1172, et al. v. N. L. R. B. (Personal Products Corp.)*, 227 F. 2d 409 (C. A., D. C.) and agree with the dissent of Judge Danaher in that case.

¹² *Phelps Dodge Copper Products Corporation, supra*, at p. 368.

¹³ *Textile Workers Union of America, CIO, and Local 1172, et al. (Personal Products Corp.)*, 108 NLRB 743, 747.

¹⁴ Indeed, in one of the directives to the district agents, the Respondent pointed out "You know that the Company is unhappy because our membership are able to draw their salaries while continuing the program."

¹⁵ *N. L. R. B. v. Crompton-Highland Mills, Inc.*, 337 U. S. 217, 225, see also dissenting opinion in *Textile Workers Union of America, CIO, and Local 1172, et al. v. N. L. R. B. (Personal Products Corp.)*, *supra*, at p. 412.

¹⁶ See *International Union, United Mine Workers of America, et al. (Boone County Coal Corporation)*, 117 NLRB 1095. In view of our decision herein, we deny the Respondent's motion to dismiss the complaint.

ucts" erroneously relies upon the Board's decision in *Blue Flash Express Inc.* (109 NLRB 591, 593) where the Board specifically overruled previous principles established by the Board with which certain court decisions were in conflict. The Board in that case reevaluated its previous decisions on the principles involved therein and itself chose to establish a new policy citing in support of such policy, the decisions of the courts alluded to by the Trial Examiner. It has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise. But it is not for a Trial Examiner to speculate as to what course the Board should follow where a circuit court has expressed disagreement with its views. On the contrary, it remains the Trial Examiner's duty to apply established Board precedent which the Board or the Supreme Court has not reversed. Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved.¹⁷

THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent, set forth above, which have been found to constitute unfair labor practices occurring in connection with the operations of the Company, described in the Intermediate Report, 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.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist from this and like and related conduct, and to take certain affirmative action designed to effectuate the policies of the Act.

¹⁷ Member Murdock is in full agreement with the views just stated as to the obligation of Trial Examiners to follow Board precedent despite conflicting court precedent, it being the sole prerogative of the Board to decide when to reverse its own precedents and to adopt and apply contrary court decisions. He further notes that he has previously stated such a view in his dissent in *American Tool Works*, 116 NLRB 1681, 1686, where, however, he was alone in doing so. Neither in that case nor in other cases (e. g., *Crystal Palace Market*, 116 NLRB 856, 868; *Shepherd Machinery Company*, 119 NLRB 320; *Alloy Manufacturing Company*, 119 NLRB 307), where Trial Examiners successfully anticipated reversals of Board precedents by ignoring Board precedents, has the Board criticized the Trial Examiners' actions in not following and applying Board precedent. In Member Murdock's view the obligation of Trial Examiners to follow Board precedent is uniform and the Board should be no less critical of a Trial Examiner's refusal to follow Board precedent in cases where the Board affirms the result reached by a Trial Examiner who has disregarded Board precedent.

CONCLUSIONS OF LAW

1. The Prudential Insurance Company of America, a New Jersey corporation, is engaged in commerce within the meaning of the Act.
2. Insurance Agents' International Union, AFL-CIO, is a labor organization within the meaning of Section 2 (5) of the Act.
3. Insurance Agents' International Union, AFL-CIO, is, and at all times material herein has been, the exclusive representative of the Company's employees in an appropriate unit described in section III, A, of the Intermediate Report for the purpose of collective bargaining within the meaning of Section 9 (a) of the Act.
4. By refusing to bargain collectively in good faith with the Company, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (3) of the Act.
5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2 (6) and (7) of the Act.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Insurance Agents' International Union, AFL-CIO, its officers, representatives, agents, successors, and assigns shall:

1. Cease and desist from refusing to bargain collectively in good faith with The Prudential Insurance Company of America, as the exclusive representative of the Company's district agents in the appropriate unit described in the Intermediate Report, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, by authorizing, directing, supporting, inducing or encouraging the Company's employees to engage in slowdowns, harassing activities or other unprotected conduct, in the course of their employment and in disregard of their duties and customary routines, for the purpose of forcing the Company to accept its bargaining demands, or from engaging in any like or related conduct in derogation of its statutory duty to bargain, provided the Respondent remains the representative of the employees in the appropriate unit as prescribed in Section 9 of the Act.
2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:
 - (a) Post at its business offices and meeting halls, and at the business offices and meeting halls of its local unions which administer its contract with The Prudential Insurance Company of America, copies of

the notice attached hereto as an appendix.¹⁸ Copies of said notice, to be furnished by the Regional Director for the Twenty-second Region, shall, after being duly signed by an official representative of the Respondent, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Furnish to the Regional Director for the Twenty-second Region signed copies of the notice attached hereto and marked "Appendix," for posting, the Company willing, at the home office, district offices, and detached offices of The Prudential Insurance Company of America which are herein involved, in places where notices to employees are customarily posted. The notice shall be maintained there for a period of sixty (60) consecutive days thereafter. Copies of said notice, to be furnished by the Regional Director for the Twenty-second Region, shall, after being duly signed by an official representative of the Respondent as provided in paragraph 2 (a) of this Order, be forthwith returned to the Regional Director for such posting.

(c) Notify the Regional Director for the Twenty-second Region in writing, within ten (10) days from the date of this Order, as to what steps the Respondent has taken to comply herewith.

¹⁸In the event that this Order is enforced by a decree of a United States Court of Appeals, the notice shall be amended by substituting for the words "Pursuant to a Decision and Order," the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

APPENDIX

NOTICE TO MEMBERS AND ALL EMPLOYEES

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

WE WILL NOT refuse to bargain collectively in good faith with The Prudential Insurance Company of America, as the exclusive representative of the Company's district agents in the appropriate unit described in the Intermediate Report, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, by authorizing, directing, supporting, inducing or encouraging the Company's employees to engage in slowdowns, harassing activities or other unprotected conduct, in the course of their employment and in disregard of their duties and customary routines, for the purpose of forcing

the Company to accept its bargaining demands, and we will not engage in any like or related conduct in derogation of our statutory duty to bargain, provided we remain the representative of the employees in the appropriate unit, as prescribed in Section 9 of the Act.

INSURANCE AGENTS' INTERNATIONAL
UNION, AFL-CIO,

Labor Organization.

Dated----- By-----

(Representative)

(Title)

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

INTERMEDIATE REPORT

STATEMENT OF THE CASE

A charge having been duly filed and served, a complaint and notice of hearing thereon having been issued and served by the General Counsel of the National Labor Relations Board, and an answer having been filed by the above-named Respondent, a hearing involving allegations of unfair labor practices in violation of Section 8 (b) (3) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act, was held in New York, New York, on various dates between June 27 and September 11, 1956, before the duly designated Trial Examiner.

As to the unfair labor practices, in substance the complaint alleges and the answer denies (both having been amended, in minor respects, early in the hearing): that by directing its members to engage in certain concerted "slowdown" activities during a period when it was negotiating, as the legal bargaining representative of employees in an appropriate unit, with the Charging Employer for a new contract, the Respondent Union refused to bargain collectively within the meaning of Section 8 (b) (3) of the Act.

At the hearing all parties were represented, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, to file briefs, and proposed findings of fact and conclusions of law. Arguments at the conclusion of the hearing were waived. Briefs have been received from the Employer and the Union; both have been carefully considered.

After the close of the hearing, the Trial Examiner received a written stipulation, of eight pages, covering certain matters discussed on the record the final day of the hearing. It had then been agreed, by all counsel and the Trial Examiner, that if a stipulation could be reached, it would be forwarded and made a part of the record. It is hereby ordered that said stipulation be made a part of the record in this case as Respondent's Exhibit No. 1-UUU.

Also after the close of the hearing the Trial Examiner received from General Counsel a letter dated September 19, 1956, indicating upon its face that copies had been forwarded to other counsel in the case, requesting the renumbering of certain exhibits placed in evidence by counsel for the Respondent. This request was occasioned by the fact that when substitution, agreed upon in advance by counsel, was made for some 16 volumes of negotiating transcripts received in evidence, it turned out that because of difference in binding there are in fact 72 volumes. General Counsel's request for renumbering of Respondent's Exhibit No. 1, as explicitly set out in the aforesaid letter, is hereby granted. The letter referred to is also hereby made a part of the record, and is to be marked General Counsel's Exhibit No. 1-U.

Upon the entire record in the case, and from his observation of the one witness, the Trial Examiner makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The Prudential Insurance Company of America is a New Jersey corporation, having its principal office and place of business in Newark, New Jersey, with branch

offices and places of business in 46 States of the United States and in the District of Columbia. It is engaged in the business of selling and issuing life insurance, group-insurance, and annuity contracts.

During the year ending December 31, 1955, Prudential received as premiums on insurance contracts a sum of more than one billion dollars, and paid out on claims under such contracts a sum of more than one-half billion dollars.

Prudential, the Charging Employer, is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Insurance Agents' International Union, AFL-CIO, is a labor organization admitting to its membership employees of the Charging Employer.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and issues

This case stems from a charge filed by Prudential in April 1956, during the period of its bargaining for a new contract with the Respondent Union. Based upon the charge, General Counsel's complaint, issued in June (also during the negotiating period), alleges that while negotiating the Union directed Prudential's employees to engage in certain concerted activities, described generally as "slow-downs," and that by initiating and encouraging such conduct the Respondent "evinced its failure or refusal to bargain in good faith with Prudential," thus violating Section 8 (b) (3) of the Act.¹

In its answer, motions, objections, and brief the Respondent opposes—not the major facts alleged—but the legal conclusions and theory involved. In substance, it may be said that the Respondent denies that slowdowns during the course of negotiations, *per se*, establish bad-faith bargaining or a refusal to bargain.

Having noted the nature of the combat, the Trial Examiner turns to a brief description of the arena, the opponents, and the material events. As to all factual matters the evidence is not in dispute, but appears in the record as admissions, concessions, or stipulations.

All parties agree that the Respondent is now, and for some time has been, the exclusive bargaining representative, within the provisions of Section 9 (a) of the Act, of Prudential's district agents in an appropriate unit covering 34 States, the District of Columbia, and the cities of Toledo and Bryan, Ohio.²

Until about March 18, 1956, the parties had been operating under a 2-year contract which, by an appropriate exchange of letters and notices, was opened in January 1956, for negotiation of a new agreement. Negotiations began about January 16 and were concluded with the execution of a new contract on July 17,

¹ This section reads: "It shall be an unfair labor practice for a labor organization or its agents—to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of Section 9 (a)"; the term "bargain collectively" is thus defined in Section 8 (d): "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . ."

² The specific allegations of the complaint on this unit point, admitted by the answer, read as follows: "During the period from about January 16, 1956, to about April 23, 1956, all District Agents employed by Prudential in the States of Alabama, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington and West Virginia, the District of Columbia, and the cities of Toledo and Bryan, Ohio, exclusive of managers, staff managers, agencies service representatives, office supervisors, assistant office supervisors, clerks, and all supervisors as defined in Section 2 (11) of the Act constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act. During the period since about April 23, 1956, all District Agents employed by Prudential . . . [in all States and cities above-named plus the State of Maryland] exclusive of . . . [all excluded categories heretofore cited] constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act."

1956, during a recess in these proceedings—a recess specifically requested by the Respondent to permit the reaching of an agreement.

By the latter part of February the Respondent apparently became disturbed about the progress of negotiations and the approach of the contract's expiration date. On February 28 its president, George L. Russ, sent to the heads of all locals a long letter in which, while admitting "some progress" toward "a satisfactory contract," he expressed concern regarding "the attitude of the Company in view of their many proposed changes in the working conditions" and urged such union officials to prepare (1) for "any emergency action which will take place on March 20" and (2) to carry out "whatever directive is forth coming (*sic*) from the International Union."

On March 13 Russ directed all officials and members: (1) to take a "strike vote" at a special meeting on March 18; and (2) to carry out the following program for the week beginning March 19 unless by then a satisfactory agreement with Prudential had been reached:

(1) Write no further business until a satisfactory agreement has been reached.

(2) Take part in the demonstration in front of your district or detached office on March 21, 1956, between the hours of 12 and 1:00 p. m.

(3) You are to take part in the demonstration at the various home offices of the Prudential on Friday, March 23, 1956.

The same directive stated: "During this period the Union shall continue its negotiations with the Company and make every effort to reach a satisfactory agreement. . . . Your participation is necessary to the success of this effort."

For the next several weeks similar instructions were issued by the Respondent and its agents which, in addition to the above-noted action on the part of members, called for late reporting at the office, for "sit-ins"—during certain periods, remaining in the office instead of visiting prospective or actual policyholders, for soliciting signatures upon petitions from policyholders, and for refusal to attend business conferences called by Prudential.

Members of the Respondent Union throughout the areas of the country covered by its jurisdiction, and to a greater or lesser degree of participation, carried out the instructions and directives issued by the Respondent.

These concerted activities, brought about by the Respondent's responsible action, are the conduct which is the nub of this case. There is no dispute that these activities were engaged in, that the Respondent is accountable for them, and that they were designed to influence the progress of negotiations for a new contract.

B. *Is the question open?*

A point raised by counsel for Prudential in his brief to the Trial Examiner should be disposed of. Counsel strenuously urges that the Trial Examiner has no choice but to follow, in his findings, conclusions, and recommendations, the Board's determination of the same issues in its "Personal Products" Decision and Order. (*Textile Workers Union of America, et al. (Personal Products Corporation)*, 108 NLRB 743.)

The history of that case, in substance, is as follows: The Board's decision issued May 5, 1954; on October 27, 1955, the essential features of the Board's conclusions and order were reversed by the Court of Appeals for the District of Columbia Circuit, *Textile Workers Union of America, et al. (Personal Products Corp.) v. N. L. R. B.*, 227 F. 2d 409; the Board sought review by the Supreme Court; a writ of certiorari was granted April 2, 1956, 350 U. S. 1004; on October 15, 1956—after the close of the hearing in this case—the Supreme Court withdrew its grant of certiorari, without comment, 352 U. S. 864.

So far as the Trial Examiner is aware, both from research and from claims of counsel, the *Personal Products* case is the only one yet decided by the Board involving the question posed here.

In his well-prepared brief, counsel for Prudential contends that the Supreme Court withdrew its grant of certiorari "because the NLRB filed a supplemental memorandum indicating that in this particular case the question may have become moot." He adds, "the prior action of the Supreme Court indicates that certiorari would probably be granted in a proper case." By "prior action," it is assumed that counsel means the prior grant of certiorari, since withdrawn.

As to the supplemental memorandum of the Board, referred to by counsel, the Trial Examiner has that document before him. Its final sentence reads:

Accordingly, *in our view* the instant case has *not* become moot. [Emphasis supplied.]

It appears clear that in the Board's opinion the case was not moot, and that this opinion was voiced clearly to the Supreme Court.

Furthermore, the Trial Examiner hesitates to read meaning into the Supreme Court's withdrawal of its previous grant—a mere withdrawal without explanation, and such hesitancy is suggested by a comment made by Gerard D. Reilly, a former member of the Board, an authority on labor law, and one not unfamiliar with the drafting of the Taft-Hartley amendments to the Act:

Of course a denial of certiorari is not necessarily conclusive of the views of the Supreme Court. . . .³

The plain fact remains: at this moment the Trial Examiner, as an agent of the Board, is not in a position to cite as legal authority the Board's decision in *Personal Products*, since that decision has been reversed by the Circuit Court of Appeals.

Nor does the Trial Examiner believe that he is required, as counsel for Prudential urges in his brief, to conform his findings, conclusions, and recommendations to the principles enunciated in the Board's decision in *Personal Products*. In support of his contention, counsel cites a number of cases in which the Board has said, in effect, that it need not acquiesce in any court decision until such time as the question involved may have been passed upon by the Supreme Court.⁴ The Trial Examiner believes that counsel has overlooked the Board's majority decision in *Blue Flash Express, Inc.*, 109 NLRB 591, 593, where the Board specifically overruled principles previously adhered to and followed decisions of courts of appeals.

The Trial Examiner finds in the history of the administration of the Act no existence of a rigid Board policy never to reconsider its interpretation of the law until so required by the Supreme Court. Board policy, if such there is on this point, seems to be one of discretion and judgment under the circumstances.

In short, the Trial Examiner is persuaded by the factors above noted that the major question in *Personal Products* is still an open one. And as to the evidence and issues herein involved, which differ both in detail and degree from those apparent in *Personal Products*, the Trial Examiner believes that the Board will wish to have before it, in the event the case comes to it for review, his findings and conclusions reached by independent judgment and not by an effort of clairvoyance or intuitive anticipation.

C. "Unprotected" vs. "Unlawful"

Were the terms "unprotected" and "unlawful" of equal legal connotation, the Trial Examiner's task in this case would be measurably simplified. In many cases the Board has found slowdowns to be unprotected. In *Phelps Dodge Copper Products Corporation*, 101 NLRB 360, 368, the Board said, citing other cases: "It is well established that a slowdown is a form of concerted activity unprotected by the Act." In that case the Board also said that the employer, "under established Board and court precedents" would have had a right to discharge employees participating in the slowdown, and further found that the employer was under no legal obligation to bargain, during the period of the slowdown, with the labor organization responsible for the slowdown.

In no case coming to the Trial Examiner's attention, however—except in *Personal Products*, which has been reversed by the Court—has the Board held, in effect, that a slowdown, being unprotected activities, is *per se* violative of the Act. Thus, there exists no Board or court precedent permitting the Trial Examiner to conclude, forthwith, that because the Respondent caused its members to engage in the unprotected activities of a slowdown it therefore violated the Act.

While there can be no reasonable doubt that *unlawful* concerted activities (those specifically prohibited by the Act) are, *per se*, unprotected activities, the Trial Examiner discerns no mandate in reason requiring the reverse to be considered as true. The words are not synonymous.

There appears to be a real distinction between a determination that by certain conduct employees have lost protection otherwise accorded them by the Act and a conclusion that by causing such conduct a labor organization has violated the Act, absent some expressed or clearly implied prohibition in the Act itself. Indeed, leveling of the two propositions would seem to be cautioned against by the language of the Act:

³ *Clark Bros. Co., Inc.*, 70 NLRB 802, 811.

⁴ Counsel cites: *The Harvester War Depot, Inc.*, 63 NLRB 249, 251; *Westinghouse Electric Corporation*, 72 NLRB 60, 61; *Bethlehem Steel Company*, 89 NLRB 1476, 1477.

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

SEC. 501. When used in this Act—

* * * * *

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

And the U. S. Supreme Court, in *International Rice Milling Co., Inc. v. N. L. R. B.*, 341 U. S. 665, 673, voiced this warning:

By § 13, Congress has made it clear that . . . all . . . parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read only if such interference, impediment or diminution is "specifically provided for" in the Act.

In the same case the Supreme Court cited the following from its own previous opinion (*International Union, U. A. W. A., A. F. of L., Local 232 v. Wisconsin Employment Relations Board*, 336 U. S. 245, 253).

While the Federal Board is empowered to forbid a strike, when and because its purpose is one that the Federal Act made illegal, it has been given no power to forbid one because its method is illegal—even if the illegality were to consist of actual or threatened violence to persons or destruction of property.

Nor does General Counsel venture to urge that the slowdown during negotiations, being unprotected activities, was *per se* a refusal to bargain, violative of the Act, and subject to a Board cease and desist order and court decree. In his several statements of position during the hearing he voiced, as bridging the gap between the slowdown facts established and the refusal to bargain conclusion he sought, the following claims, among others:

- (1) the Union's expressed intent and purpose to bring pressure upon Prudential at the bargaining table;
- (2) by the slowdown creating "an atmosphere" which was not of a proper "give-and-take" nature, and was not "conducive to good faith bargaining";
- (3) failing to bargain in good faith; and therefore
- (4) refusing to bargain.

Since General Counsel assumed the burden of proving his case, the points raised by him will first be considered, together with relevant points stressed by counsel for Prudential in his brief.

D. Consideration of General Counsel's case

1. Pressure and atmosphere

There can be no doubt, in view of the multitude of facts and documents stipulated in evidence, that the Respondent at all times made it perfectly clear to Prudential that its program of a concerted slowdown, morally characterized by General Counsel as "harassing tactics," was designed, intended, and carried out for the purpose of bringing pressure upon Prudential at the bargaining table. It seems unnecessary to burden this report with supporting quotations from the scores of documents and thousands of pages of transcript of the negotiations. In his letter to local presidents, quoted heretofore, Russ made it known on February 28—shortly before expiration of the contract—that "emergency action" might be necessary if agreement was not reached on a satisfactory new contract. On March 23, after the slowdown had begun, a union negotiator said to Prudential's representatives at the negotiating meeting that day—in response to some apparent criticism from the employer of union members participating in the program:

Far from feeling that it demeans me, far from feeling that my policyholders don't understand what I'm doing, I consider it a mark of honor and a privilege to act as a union man; and let the record show that I say this day the one who has lost dignity has been the company, to allow this present wordage of this contract to go as long as it has so that the men at last have to take militant action to help us negotiate. (Page 3703, transcript of negotiations of March 23, 1956.)

The open, announced purpose of the Respondent's action was to bring pressure upon the employer at the bargaining table, and the plain object of the pressure was to obtain a contract satisfactory to it.

Was the object of the pressure illegal? Clearly not. The reaching of collective-bargaining agreements satisfactory to the parties is, and has been since 1935, a major goal of the Act.

Was the bringing of pressure upon the employer at the bargaining table by action of employees in the field illegal? General Counsel does not so claim. In effect he concedes that such pressure, if brought by a full strike, would be permissible and that action causing it would be fully protected by the Act.

The general proposition of bringing economic pressure upon an employer to gain economic advantages was passed upon many years ago by Chief Justice Taft, in *American Foundries v. Tri-City Council*, 257 U. S. 184, wherein he said:

Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital.

When the foregoing was quoted to him on the floor of the Senate on April 29, 1947, during debate upon certain amendments to the Act, of which he was coauthor, the late Senator Taft replied: ⁵

I fully subscribe to every word said there; and there is nothing in the bill which in any way operates against what is there stated.

The legal aspects of its object, of the pressure itself, and of the complete strike method of bringing pressure having been thus disposed of, the Trial Examiner turns to the apparent theory of General Counsel that half a strike is greater than the whole strike and, when indulged in during negotiations, must be presumed to exert such unique pressure upon the employer that the Board should find it illegal and subject to a cease and desist order.

First, it should be noted that neither General Counsel nor counsel for Prudential offered any evidence, oral or by document, objective or subjective, to indicate that the "harassing tactics" of a slowdown had *any* effect upon negotiations or upon the bargaining faculties of the employer's negotiators. Both counsel, although agreeing that the Respondent's exhibit containing the entire record of negotiations might be received in evidence, specifically reserved the right to object to its materiality. And General Counsel, at the conclusion of his case-in-chief when opposing the Respondent's motion to dismiss for failure to prove that negotiations had in any way been interfered with, declared:

We are not here concerned with the effectiveness or the failure of the activities of the Respondent. . . . Whether they achieved the result they sought to achieve is not in any way conclusive or indicative of the bad faith bargaining of the Respondent herein.

Elsewhere General Counsel said:

Whether or not Prudential was affected to the extent or degree which the Respondent hoped its activities would be effective, is not for us to decide. . . . It is clear that they were designed to affect negotiations. . . . It is the contention of General Counsel that . . . these activities were designed for that purpose . . . ; that these activities are illegal, under the circumstances, regardless of whether or not they proved effective.

He added:

Just as a strike has an impact upon the operations of the company, or *the collective bargaining negotiations*, so do these activities have an impact, and the nature of the impact is one which the Board can objectively evaluate by the nature of the activities itself.

General Counsel agreed that his position was analogous to that observed in the trying of an 8 (a) (1) case (interference, restraint, and coercion) wherein it was necessary only to prove the statement and not its effect. It may well be that the Board will be able to "objectively evaluate" the "impact" of activities upon "collective-bargaining negotiations" from the mere "nature of the activities," but the Trial Examiner is

⁵ Cong. Rec. 4322, April 29, 1947.

reluctant even to attempt this feat of mental pole vaulting with only presumption as a pole. The analogy of coercive statements seems not in point. A threat is a threat, and forbidden by law. A slowdown, whether designed to effect collective bargaining or not, is *not* forbidden by law. On the contrary, appraising a slowdown as a partial strike or a "method" of striking, as noted in the preceding section, the Supreme Court has pointed out that the Board is empowered to "forbid a strike" or "its method" *only* "when and because its purpose is one that the Federal Act made illegal."

In the absence of any evidence of effect of the slowdown upon negotiations, the Trial Examiner cannot find that such concerted activity in any degree *adversely* affected or impaired the process or progress of collective bargaining nor that, because of any possible effect upon bargaining, any distinction may be drawn between this slowdown and a statutory strike. Such a finding, moreover, would run counter to General Counsel's concession during the hearing:

On its face the bargaining engaged in by the Respondent and Prudential at the bargaining table might seem to be a free and good faith give-and-take type of bargaining.

Turning to the *intent* of the Union in directing the slowdown, intent being a point repeatedly stressed by General Counsel. The Respondent has conceded that its intent was to influence the progress of negotiations, and the point may quickly be disposed of. Precisely the same intent would have been involved in a *full* strike. A full strike would have been lawful, as General Counsel admits. Under such circumstance, the Trial Examiner believes it would be a painful torture of logic to reason that intent alone is sufficient to taint with illegality the method chosen to carry it out.

Now to the slowdown itself. Did it possess any feature, or assemblage of features, so distinguishing it from a full, legal strike, that circumstantial evidence is provided from which can be inferred, a "motive or state of mind" establishing "bad-faith" bargaining?⁶

First, as to what the slowdown was *not*. As counsel for the Respondent points out in his able brief:

Here, there obviously was no violation of contract. Cf. *N. L. R. B. v. Sands Mfg. Co.*, 306 U. S. 332 (1939). There was no violence or other violation of law in the manner in which the activities were administered. Cf. *Southern Steamship Company v. N. L. R. B.*, 316 U. S. 31 (1942); *Allen-Bradley Local No. 1111, etc. v. Wisconsin Employment Relations Board*, 315 U. S. 740 (1942); *N. L. R. B. v. Fansteel Metallurgical Corporation*, 306 U. S. 240 (1939).

Nor can it be found here, as was found by the Board in the previously cited *Personal Products* case, that:

These unprotected tactics interfered with production and put strong economic pressure on the Employer who was thereby disabled from making any dependable production plans or delivery commitments. Moreover, the Employer was not informed of any specific demands which these tactics were designed to enforce nor what concessions it could make to avoid them. (p. 746.)

On the contrary, General Counsel not only offered no evidence to prove loss of business but said, unequivocally:

I am not here attempting to establish the nature of the losses sustained by the company as a result of the activity. . . . I don't feel . . . that it is the proper province of this trial to establish any loss, the nature of the loss or the extent of the loss.

And the record is replete with documentary evidence, including thousands of pages of the bargaining record, proving that the employer was at all times well informed as to the "specific demands which these tactics were designed to enforce" and "what concessions it could make to avoid them."

Both General Counsel and counsel for Prudential conceded that the employer was aware of all directives of the Union, concerning planned and prospective activities, *before* their effective date. In no respect may it be found that the employer here was "harassed" by the element of surprise, depriving it of opportunity to take appropriate countermeasures. Furthermore, long before the Respondent openly announced that what it considered to be Prudential's unfair demands might necessi-

⁶ The quotation "motive or state of mind" comes from *N. L. R. B. v. Reed & Prince Mfg. Co.*, 205 F. 2d 131, 140 (C. A. 1), cert. denied 346 U. S. 887. The full sentence will be quoted later in this report.

tate action by its members, Prudential had good reason to *suspect* both the nature and the possibility of the action. For in the 1954-56 contract between the parties there had been this provision:

During the period of this Agreement the Union will not cause or permit its member to cause, nor will any member of the Union take part in any strike, stoppage, mass late reporting, mass blank production weeks, or slow down of duties or production, or picket any of the Employer's offices, for any reasons whatsoever; nor will the Union or its members engage or participate in any demonstration, display, publication, or advertisement, tending to incite sympathy or protests concerning the relations between the Employer and the Union and the Agents. The term "strike" shall include a strike of any nature, including such as are termed "sympathetic," as well as any cessation or reduction of normal business activities, or efforts by a group of Agents for the purpose of coercing the Employer.

The record contains no evidence to support any implied bearing on this case of the claim made by counsel for Prudential in his brief:

Where the employees continue as employees and accept their regular compensation from the company while refusing to perform the services required by the employer, then an imbalance of power has been created which is fatal to bargaining in good faith.

The employees here involved are insurance agents, not factory production workers. Their general duties are to sell and service insurance policies. No particular time or place for such employee services are required by the employer.⁷ There is no evidence in the record to show that the servicing of existing policyholders was in the slightest degree affected—as presumably would have been the case in a full strike. And as for the writing of new business—for which the agent receives a commission—it is plain that he was not paid for what he did not write.⁸

There is one feature of the activity which appears not to have been an element in cases above cited. Although General Counsel accorded it only casual attention in his oral arguments, counsel for Prudential stresses in his brief the claim that by "demonstrating" in front of company offices and by soliciting signatures upon petitions from policyholders, activities which were included in the Union's program, the participating agents violated their individual agreements with Prudential.

Even if the claim of violation of the employer-employee individual contracts were valid (and the history of proposed amendments to the Act makes it clear that Congress declined to empower the Board to decide such questions)⁹ it is difficult to perceive how any "imbalance of bargaining power" was thereby created between the employer and the Union. Testimony of the Prudential official is to the effect that punitive power was readily available to the employer. It could have fined or "docked" the participating agents. That it chose not to do so was its own responsibility, not the Union's.

In conclusion on the point raised, the Trial Examiner finds no feature, or combination of features, of the concerted activities involved so distinguishing them from the full, statutory strike, as to provide circumstantial evidence warranting the inference of a motive establishing bad faith bargaining.

The foregoing conclusion, of course, in no wise disturbs the fact that the Trial Examiner considers himself bound by Board decisions to find that the activities

⁷ Vice President Rosner, the one live witness at the hearing said that "The very nature of the job precludes setting a number of hours," and "the job of an agent is utterly different than that which you see every day."

⁸ Furthermore, on the item of "imbalance of power," under Board authority which, so far as the Trial Examiner is aware, has not been challenged in a reviewing court, Prudential could quickly have regained "balance of power" by simply declining to negotiate until the Union ceased its unprotected activities, since the Union's open and avowed purpose of the slowdown was to hasten negotiations and obtain a contract.

⁹ In H. Conf. Rept. 510, on H. R. 3020, it is stated: "The Senate amendment contained a provision which does not appear in section 8 of existing law. This provision would have made it an unfair labor practice to violate the terms of a collective bargaining agreement. . . . The conference agreement omits this provision of the Senate amendment. Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." The individual contracts were and are recognized in the contracts between the Respondent and Prudential.

themselves—although differing somewhat in nature from those which have been considered in other cases—fall within the scope of “unprotected concerted activities.”

2. Claim of failure and refusal to bargain

As noted above, it is the tenor of General Counsel's contention that an “atmosphere” not conducive to good-faith bargaining was created by the Union's program, that by creating such an atmosphere, the Union failed to bargain in good faith, and by failing to bargain in good faith refused to bargain.

Also as reviewed at length in the section immediately above, General Counsel not only failed to produce evidence showing the nature of the “atmosphere” but insisted that such proof was unnecessary. He declined to provide the Trial Examiner with any evidence of effect upon the negotiations, the negotiators, or upon the employer's business. Yet—in the presence of his own concession that the negotiations “might seem to be a free and good faith give-and-take type of bargaining”—he asks the Trial Examiner to conclude that because of an “atmosphere” (which, so far as General Counsel's evidence is concerned, apparently was a complete vacuum) there actually was *not* free and “good faith type of bargaining.”

Counsel for the Respondent appears to have well summed up General Counsel's position as follows:

Its case boils down to saying that even if there was good faith bargaining in fact, there could not have been in theory.

On the other hand, there is in the record some 72 volumes of transcript of negotiations. The Trial Examiner has not read them all. Although requested to do so by the Trial Examiner, neither General Counsel nor counsel for Prudential has cited any portion of this transcript in support of his position. From the sections he has read, the Trial Examiner concludes precisely what General Counsel conceded as to the apparent good faith, give-and-take nature of the negotiations.

Neither does General Counsel claim nor did he offer any evidence to warrant a finding that the Respondent did not honor to the full Congress' formula for bargaining collectively, as set out in Section 8 (d) of the Act:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representatives of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party . . .

So far as the record shows, each party met with the other when requested, conferred in good faith, negotiated an agreement, and signed it.

Indeed, again so far as the Trial Examiner can learn from the record, the only delay in negotiations was caused by the bringing of this case. And it was counsel for Prudential who vigorously opposed, before the Trial Examiner at the opening of the hearing, the Respondent's motion for postponement in order to permit completion of negotiations and the reaching of agreement. The postponement was granted on June 27, and on July 17 the new contract was executed. That contract, which does not expire until July 1959, contains a provision similar to that quoted above by which the Union agrees not to engage in the activities involved here.

Contrary to the apparent position of General Counsel and counsel for Prudential, the Trial Examiner considers such evidence of actual negotiations to have quite as much bearing upon the ultimate question of good- or bad-faith bargaining as does evidence of the slowdown. As the Circuit Court of Appeals said in *Reed & Prince*, 205 F. 2d 131, 139-140:

The ultimate issue whether the Company conducted its bargaining negotiations in good faith involves a finding of motive or state of mind which can only be inferred from circumstantial evidence.

The Trial Examiner sees no reason why the same principle of evidence should not apply whether an employer or a union is involved. And the actual record of negotiations can hardly be found so remote a circumstance of bargaining that it must be ignored.

From the “circumstantial evidence” of the bargaining itself it appears that but one inference is possible, particularly in view of General Counsel's concession noted heretofore: the Union's motive was one of good faith.

Against this—to the Trial Examiner—reasonable inference, should be weighed whatever inference may be as reasonably drawn from the Union's concurrent “un-

protected" activities. If clearly understood, General Counsel's contention is that the sole inference to be drawn from such conduct during negotiations is one of bad faith, and that this inference so far outweighs that which may be drawn from the negotiations themselves that a refusal to bargain conclusion must follow.

In reviewing all factors involved in this case the Trial Examiner has used more words than he intended to at the outset. As has been said by his betters, of this and earlier generations, words are inadequate conveyors of ideas.¹⁰ And the increase of quantity seldom adds to their quality. Although the Trial Examiner, having written them, thinks he has said that he is unable, upon analysis of all relevant elements, to infer a motive of bad-faith bargaining from the Union's slowdown conduct, perhaps that idea may be more clearly presented by means of a simple, mathematical formulation of the problem.

There are three distinct elements involved in the case: (a) the *intent* to influence bargaining; (b) the *method* of influencing bargaining; and (c) ultimate "bad-faith" bargaining. General Counsel's formula, then, is:

(a) plus (b) equals (c)

It will hardly be questioned that, in formula fashion, *greater* weight should be given to that which is *illegal*, *lesser* weight to that which is *not illegal* but by the Board has been found to be *unprotected*, and *none at all* to that which is neither illegal nor unprotected. Let us assign, then, the value of 0 to (a), 5 to (b), and 10 to (c). Substituting these values in the above formula:

0 plus 5 equals 10

And of course this is not so. Legal intent plus unprotected method do not add up to illegality, in this case and in the opinion of the Trial Examiner.

In summary, having given full consideration to the unprotected activities as evidence bearing upon the ultimate question of bad-faith bargaining, the Trial Examiner concludes and finds, because of their isolation in the light and weight of all other evidence, including stipulations and concessions noted above, which clearly establishes good-faith bargaining, that General Counsel's complaint is not sustained by the preponderance of evidence.

Upon the foregoing findings of fact, and upon the entire record in the case, the Trial Examiner makes the following:

CONCLUSIONS OF LAW

1. The operations of Prudential occur in commerce within the meaning of the Act.
2. Insurance Agents' International Union, AFL-CIO, is a labor organization within the meaning of Section 2 (5) of the Act.
3. The Respondent has not engaged in unfair labor practices, as alleged in the complaint, within the meaning of Section 8 (b) (3) of the Act.

[Recommendations omitted from publication.]

¹⁰ "Conventional English," said Alfred North Whitehead, "is twin sister to barren thought." (The Philosophical Review, vol. XLVI, p. 183.)

Paramount Cap Manufacturing Co. and United Hatters, Cap & Millinery Workers International Union, AFL-CIO. Case No. 14-CA-1529. December 13, 1957

DECISION AND ORDER

On March 18, 1957, Trial Examiner Alba B. Martin issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor