Toyota of Walnut Creek, Inc. *and* Automobile Salesmen's Union, Local No. 1095, affiliated with United Food and Commercial Workers, AFL-CIO. Case 32-CA-3322

June 3, 1981

DECISION AND ORDER

Upon a charge filed on January 12, 1981, by Automobile Salesmen's Union, Local No. 1095, affiliated with United Food and Commercial Workers, AFL-CIO, herein called the Union, and duly served on Toyota of Walnut Creek, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 32, issued a complaint on January 28, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on December 16, 1980, following a Board election in Case 32-RC-1051, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about December 22, 1980, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On February 9, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On March 16, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment.[2] Subsequently, on March 19, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and its response to the Notice To Show Cause, Respondent essentially contests the validity of the Union's certification. Specifically, Respondent contends that the Board erred in overruling its objections to the election. In the Motion for Summary Judgment, the General Counsel maintains that Respondent is attempting to relitigate the issues it raised in the related representation proceeding. We agree with the General Counsel.

Review of the record herein, including the record in Case 32-RC-1051, reveals that in the election conducted on June 2, 1980, there were five votes cast for, and two votes cast against, the Union; there were three challenged ballots.[3] Respondent filed timely objections to the election alleging, *inter alia*, that the Union made material misrepresentations of fact and law to the employees and made material inducements and promises to the employees to encourage their support for the Union. After investigation, the Acting Regional Director, on June 30, 1980, issued his report on the objections and a notice of hearing, finding that Respondent's objections revealed substantial and material issues of fact which could best be resolved by a hearing. On August 11, 1980, following the hearing which was held on July 16 and 17, 1980, the hearing officer issued his Report and Recommendations on Objections, in which he recommended that Respondent's ojections be overruled and the Union be certified. Respondent filed with the Board timely exceptions to the Hearing Officer's report and a brief in support thereof. On December 16, 1980, the Board issued a Decision and Certification of Representative in Case 32-RC-1051, in which it adopted the Hearing Officer's findings and recommendations and certified the Union. It thus appears that Respondent is attempting to raise herein issues which were raised and determined in the underlying representation case.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled

[1] Official notice is taken of the record in the representation proceeding, Case 32-RC-1051, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] On March 23, 1981, the Union filed with the Board a document in which it joined in the General Counsel's motion for summary judgment, and requested attorney's fees. We hereby deny the Union's request for attorney's fees as lacking in merit. See *Tiidee Products, Inc.*, 194 NLRB 1234, 1236 (1972).

[3] The Acting Regional Director later approved the parties' stipulation that the challenge to one ballot be sustained, and thus the remaining challenged ballots were no longer determinative of the election results.

to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is, and has been at all times material herein, a California corporation with an office and place of business located at Walnut Creek, California, where it is engaged in the retail business of selling automobiles. During the past 12 months, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $500,000, and purchased and received goods or services valued in excess of $5,000 which originated outside the State of California.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Automobile Salesmen's Union, Local No. 1095, affiliated with United Food and Commercial Workers, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All regular full-time and part-time automobile salespersons employed by the Employer at its Walnut Creek, California facility; excluding office clerical employees, professional employees, all other employees, guards and supervisors as defined in the Act.

2. The certification

On June 2, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 32, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on December 16, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about December 22, 1980, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about December 22, 1980, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since December 22, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship 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 Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we

[4] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, series 8, as amended, Secs. 102.67(f) and 102.69(c).

shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Toyota of Walnut Creek, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Automobile Salesmen's Union, Local No. 1095, affiliated with United Food and Commercial Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All regular full-time and part-time automobile salespersons employed by the Employer at its Walnut Creek, California facility; excluding office clerical employees, professional employees, all other 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. Since December 16, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about December 22, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Toyota of Walnut Creek, Inc., Walnut Creek, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Automobile Salesmen's Union, Local No. 1095, affiliated with United Food and Commercial Workers, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All regular full-time and part-time automobile salespersons employed by the Employer at its Walnut Creek, California, facility; excluding office clerical employees, professional employees, all other employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

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

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facilities located at Walnut Creek, California, copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places,

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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

(c) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Automobile Salesmen's Union, Local No. 1095, affiliated with United Food and Commercial Workers, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

All regular full-time and part-time automobile salespersons employed by us at our Walnut Creek, California, facility; excluding office clerical employees, professional employees, all other employees, guards, and supervisors as defined in the Act.

TOYOTA OF WALNUT CREEK, INC.