Zylan Pontiac *and* Amalgamated Local Union 355.
Case 29-CA-7127

September 16, 1980

DECISION AND ORDER

On July 15, 1980, Administrative Law Judge Julius Cohn issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Zylan Pontiac, Bayshore, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] Respondent has excepted to the Administrative Law Judge's findings that the wage increase was an unfair labor practice. We find merit to this exception in light of the fact that the complaint did not allege that the increase was unlawful.

Furthermore, we agree with the Administrative Law Judge that Respondent was a successor employer as of March 28, 1979, when it commenced operation of the business. In doing so, however, we place no reliance on *Border Steel Rolling Mills, Inc.*, 204 NLRB 814 (1973), which was cited by the Administrative Law Judge. In that case, the Board majority agreed with the Administrative Law Judge that the employer was not a successor and that the complaint should be dismissed.

DECISION

STATEMENT OF THE CASE

JULIUS COHN, Administrative Law Judge: This proceeding was heard in Brooklyn, New York, on November 13, 1979. Upon a charge filed and served on April 9, 1979, the Regional Director for Region 29 issued a complaint on May 31, 1979, alleging that Zylan Pontiac, herein called Respondent or the Company, violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain in good faith with Amalgamated Local Union 355, herein called the Union. Respondent filed an answer denying the commission of unfair labor practices.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. The General Counsel and Respondent submitted briefs which have been carefully considered. On the entire record in the case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

Respondent is a New York corporation engaged in the retail sale and distribution of new and used automobiles and related products at Bayshore, New York. Based upon a projection for a 12-month period beginning March 28, 1979, Respondent will have received gross revenue in excess of $500,000 from the sale of automobiles, of which goods and materials valued in excess of $50,000 will have been transported and delivered to its place of business directly from States of the United States other than the State of New York. The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

The undisputed evidence is that Respondent commenced operation of the automobile dealership in Bayshore, New York, on March 28, 1979, having purchased the business from Kerri Pontiac, who had terminated its operation on the previous day, March 27. The Union had a collective-bargaining agreement since 1974 with the predecessor of Kerri, Montauk Pontiac. Kerri took over the dealership in 1977 and thereupon recognized the Union and signed a collective-bargaining agreement with it running from November 1, 1977, until October 31, 1980. The agreement covered a unit of "all employees in the service department."

The record reveals that Respondent continued the business of selling automobiles and operating the dealership in much the same manner as previously and that the sales and office complement remained approximately the same. With regard to the service department employees involved herein, the testimony of Respondent's service manager, Jerry Childs, establishes that most of the employees who had been working for Kerri continued in employment with Respondent. Childs himself had been the service manager under Kerri.[1]

Childs credibly testified that there were 15 employees in the service department of Kerri, of which 12 came over to Respondent on March 28, and 3 did not. In addition, Respondent hired two employees who did not work for Kerri. Accordingly, a majority of Kerri's service department employees immediately began working for Respondent and they also constituted a majority of Respondent's service employees at the outset of its oper-

[1] The General Counsel failed to obtain and offer payroll records to indicate those employees employed by Respondent on March 28, who had also been employed by Kerri on March 27; nor did he offer any other probative evidence of the employee complements of both companies. However, the uncontradicted testimony of Respondent's witness, Childs, is sufficient to determine the number and identity of employees who came over to Respondent from Kerri.

ation. Childs stated that Respondent opened a body shop, a service which had been discontinued by Kerri, but this did not commence until about April 15, and, in any case, only consisted of two additional employees.

Marvin Raphael, business agent of the Union since November 1978, testified that from time to time, he visited the premises of Kerri and processed grievances. He introduced records of the Union indicating that dues had been checked off and welfare payments made by Kerri for the months of January and February 1979, for six employees. Raphael explained that he had problems with Kerri concerning employees who had just finished their probationary period, that Kerri had neglected to advise the Union of their presence or inform the employees of their obligation under the union-security clause. He said he last visited Kerri about 2 weeks prior to Respondent's takeover and had asked whether the new owner wanted to meet with the Union but he received a negative response. He finally met with Zylan of Respondent, on April 6, and asked him whether he would accept the Kerri contract or negotiate a new one. Zylan told Raphael he did not want a Union nor did he believe his people wanted one. Zylan also said he had initiated a new pay schedule and some employees had told him that they would just as well not have a Union. Zylan did not indicate who these employees were or how many there were. Raphael, on that date, also spoke to some employees who told him they had received large pay increases and, at that point, did not want a Union. Raphael told Zylan on April 6 that he had some new authorization cards under the new company name and exhibited four, but Zylan did not want to see them. Zylan did say, however, that if the Union won an election he would then have to bargain with it.[2]

B. *Discussion and Analysis*

It is clear from the foregoing that Respondent became a successor employer to Kerri on March 28, 1979, when it took over the automobile dealership and other assets and continued the same operation of selling new and used automobiles at the Bayshore, Long Island, location. It employed the same work force, or in any case, a majority of the service department employees who had worked for Kerri as well as the supervision. I find that Respondent was a successor as of that date.[3]

In *N.L.R.B.* v. *William J. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), the Supreme Court affirmed the Board's successor employer doctrine, finding that a successor employer, absent a reasonably based good-faith doubt of the incumbent union's majority, is obligated to recognize the continuing representative status of the bargaining agent of its predecessor's employees in an appropriate unit taken over from the predecessor. This is applied not only where the union's status was established by Board certification but also where it had been established by voluntary recognition.[4]

The presumptions of continuing majority status are applicable to the successor employer. If such presumption exists and has not been overcome, the incumbent union need not reestablish its majority status by an election or by a card showing and the successor violates Section 8(a)(5) if it refuses to recognize and bargain with the union.[5]

Respondent has set forth a number of contentions through which it urges that the Union is not entitled to recognition. First, Respondent claims that the unit is not appropriate because the description as contained in the prior collective-bargaining agreement refers only to "all employees in the service department." However, there is no requirement, inferred by Respondent, that the description expressly exclude other employees and supervisors. In this connection Respondent points to the fact that Tortorello, the parts manager, is a supervisor who was included in the unit. Other than his title as parts manager, there is no evidence in this record that Tortorello possessed the indicia of authority and responsibility that would establish he was indeed a supervisor within the meaning ot the Act.

Respondent's principal contention is that the Union did not represent a majority of the employees and Respondent had a reasonable doubt of this based upon objective considerations. In support of this, Respondent points to the union records submitted by the General Counsel which show that checkoffs had been made by Kerri for 6 employees in a unit of approximately 15, obviously less than a majority. With regard to dues-checkoff, the Board and courts have held that the fact that less than a majority of the unit employees were on dues-checkoff in recent months did not demonstrate that the union had lost its majority status or that Respondent could thus have had an adequate basis for reasonably based doubt of such status.[6]

Respondent, as its basis for objective considerations, mainly relies on alleged defections of employees from the unit. The only evidence offered in support of this argument is through the testimony of the business agent, Raphael, who stated that, when he demanded recognition, Zylan told him, among other things, that employees had said they did not want the Union. Zylan himself, as previously indicated, did not testify nor did any employees. The testimony of Raphael as to what Zylan told him he had heard from employees is of course hearsay. Moreover, even if true, there is no indication as to how many employees expressed these sentiments. Indeed, Raphael himself stated that "some" employees had told him they no longer wanted to be represented by the Union. This is an indefinite characterization. I find in these circumstances Respondent has not met its burden of showing by probative evidence sufficient basis for its allegation that the Union no longer represented a majority of the employees.

Even assuming that a sufficient number of employees had indicated to Respondent that they no longer desired union representation, in the circumstances of this case, it would not have been sufficient basis for Respondent's re-

[2] Zylan himself did not appear or testify at the hearing.
[3] *Border Steel Rolling Mills, Inc.*, 204 NLRB 814 (1973).
[4] *Virginia Sportswear, Inc.*, 226 NLRB 1296, 1300 (1976).
[5] *Barrington Plaza and Tragniew, Inc.*, 185 NLRB 962 (1970).
[6] *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho*, 213 NLRB 651 (1974); *Terrell Machine Company* v. *N.L.R.B.*, 427 F.2d 1480 (4th Cir. 1970).

liance on expressions of employee dissatisfaction or withdrawal from the Union. This is so because the uncontradicted evidence is that, upon assuming operation of the business on March 28, Respondent, despite its obligations as a successor employer, unilaterally granted raises in wages and other benefits to the employees. Thus, some employees told Raphael that they did not want the Union because of these increased benefits. Such conduct on the part of Respondent constitutes an unfair labor practice "of such a character as to either affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself."[7]

Although I have indicated that the unilateral changes instituted by the employer were an unfair labor practice, I shall not find a violation in that regard inasmuch as, for reasons best known to himself, the General Counsel has not alleged such conduct in the complaint as an unfair labor practice.

In sum, I find that Respondent is a successor employer, and it has failed to establish either that the Union did not in fact enjoy majority support, or that it had reasonable grounds, based on objective considerations, for believing so at the time of its refusal to bargain with the Union. Therefore, by its failure to recognize and bargain with the Union as the majority representative of its employees in an appropriate unit on and after April 6, 1979, Respondent violated Section 8(a)(5) and (1) of the Act.[8]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. All service department employees employed by Respondent at its Bayshore, New York, facility, excluding guards, supervisors as defined in the Act, and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. At all times material herein, the Union has been the exclusive bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.
5. By failing and refusing at all times since April 6, 1979, to recognize and bargain with the Union as the exclusive representative of the employees in the appropriate unit, 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 affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[9]

The Respondent, Zylan Pontiac, Bayshore, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively with Amalgamated Local Union 355, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All service department employees employed at its Bayshore, New York, facility, excluding all guards and supervisors as defined in the Act and all other employees.

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

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

(a) Bargain collectively, upon request, with Amalgamated Local Union 355, as the exclusive representative of the employees in the appropriate unit described above, 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 agreement.

(b) Post at its facility in Bayshore, New York, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's representative shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[7] *Guerdon Industries, Inc., Armor Mobile Homes Division*, 218 NLRB 658, 661 (1975).

[8] *L.A.X. Medical Clinic Inc., et al.*, 248 NLRB 861 (1980).

[9] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusion and Order, and all objections thereto shall be deemed waived for all purposes.

[10] 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."

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 recognize and bargain collectively with Amalgamated Local Union 355 as the exclusive bargaining representative of our employees in the following approriate unit:

All service department employees employed at our Bayshore, New York, facility, excluding all guards and supervisors defined in the Act, and all other employees.

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

WE WILL recognize and upon request bargain with the Union as the exclusive representative of our employees in the aforesaid appropriate unit, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an agreement is reached, embody such understanding in a signed agreement.

ZYLAN PONTIAC