

Kardon Chevrolet, Inc. and Donald M. Singer III, Petitioner and Teamsters Local 676, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 4-RD-888

May 16, 1980

DECISION ON REVIEW AND ORDER

BY CHAIRMAN FANNING AND MEMBERS
JENKINS AND PENELLO

On August 31, 1979, the Regional Director for Region 4 of the National Labor Relations Board issued a Decision and Direction of Election in the above-entitled proceeding in which he directed a decertification election in a unit of all full-time and regular part-time new and used car and truck salesmen. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Union involved filed a timely request for review of the Regional Director's decision on grounds that his inclusion of part-time employees in the unit found appropriate is a departure from officially reported Board precedent and is clearly erroneous on substantial factual issues. The Employer filed a brief in opposition to the Union's request for review.

By telegraphic order dated September 26, 1979, the National Labor Relations Board granted the Union's request for review. Pursuant to the Board's procedures, the election was held as scheduled on September 27, 1979, and the ballots were impounded pending the Board's decision on review.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case and makes the following findings:

The Employer, a New Jersey corporation, is engaged in the retail sale and service of new and used cars and trucks at its Mount Holly, New Jersey, location. On October 4, 1972, the Board certified the Union as collective-bargaining representative in a unit of all full-time and regular part-time new and used car and truck salesmen. Part-time salesmen were specifically included in the unit due to the fact that at the time of the election, September 1972, one part-time vehicle salesman, Fred Porter, was then employed at the Employer's premises.¹ Porter quit his employment in late 1975 or early 1976. Record evidence indicates that prior to the

¹ Although the Union questioned the part-time status of employee Porter, the record demonstrates that he was hired primarily to bring in whatever customers he could through his outside social and business contacts, and that, unlike the other salesmen, he did not work a full week of 35 to 40 hours, nor did he follow the set floor schedule.

instant labor dispute no other part-time salesmen have been employed.

Approximately 2 months after the Board's certification, the parties entered into a collective-bargaining agreement effective November 30, 1972, through November 29, 1975. The contract was subsequently extended by agreement of the parties through April 12, 1979. The pertinent provisions of the contract are as follows:

ARTICLE 1 SCOPE OF AGREEMENT

* * * * *

Section 2 Classification Covered

This agreement shall cover all vehicle salesmen employed by the Employer

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ARTICLE 26 MISCELLANEOUS

1. There shall not at any time be any part-time salesmen.

* * * * *

17. *Designated Man*—Mr. Fred Porter will enjoy all benefits agreed upon and entered in the contract. His floor time will be scheduled separately.

Paragraph 17 then sets out the salesmen's floor schedule which requires each salesman to work the floor approximately 37-1/2 hours a week on a rotating shift basis.

The contract expired on April 13, 1979. The parties were unable to reach agreement on a new contract and, as negotiations continued, the approximately 17 full-time salesmen went out on strike on May 4, 1979. The Employer has replaced these striking employees with approximately 24 salesmen who the Union alleges are part-time employees. One such replacement, Donald Singer, filed the instant decertification petition on May 15, 1979.

The Regional Director concluded that the parties' change in unit description from all full-time and part-time salesmen to "all vehicle salesmen," even when coupled with the fact that no part-time salesmen were hired following Porter's resignation in 1976, does not establish that the parties agreed to modify the certified unit to exclude part-time employees. Therefore, the Regional Director found that the unit as originally certified remains the recognized unit and is the appropriate bargaining unit for the decertification election.

The Union contends that the Regional Director erred in failing to consider the applicable provi-

sions of article 26,² and that, when such provisions are considered in conjunction with the other evidence presented, it is clear that the parties agreed to alter the bargaining unit to exclude part-time employees. We find merit in the Union's position.

When the parties executed their collective-bargaining agreement less than 2 months after certification in a unit of all full-time and regular part-time salesmen, they described the unit as "all vehicle salesmen" and thereby eliminated any specific reference to part-time employees. Moreover, in that same contract, the parties not only explicitly prohibited the Employer from hiring any part-time salesmen, but also created a special status for the one current part-time salesman and specifically granted him all contractual rights and benefits. Such contract terms when considered together strongly indicate that the parties intended to remove part-time employees from the bargaining unit. It would appear the parties understood by such action that, unless they made special provision

² See *Duval Corporation*, 234 NLRB 160 (1978), where the Board, in concluding that the parties did not intend to merge the warehouse unit into a broader unit, considered not only the entire collective-bargaining agreement between the parties, but also the manner in which negotiations were conducted and the separate identity of the warehouse employees.

for part-time Porter, who such a short time before had participated in the election, he would lose all contractual benefits. If part-time salesmen were still included in the bargaining unit, no special provision for Porter would have been necessary. It is also significant that, since the execution of the contract in 1972, the Employer has not hired any part-time employees.

In these circumstances we find that the parties mutually agreed to modify the certified bargaining unit to exclude part-time salesmen.³ Consequently, we amend the unit found appropriate by the Regional Director to exclude part-time salesmen.

ORDER

It is hereby ordered that this case be remanded to the Regional Director for Region 4, and that said Regional Director open and count the ballots of the employees in the unit found appropriate herein and issue the appropriate certification. The ballots of the part-time salesmen, if any, shall remain unopened.

³ As we have excluded part-time employees from the appropriate bargaining unit, we do not reach the Union's further contention that part-time strike replacements should not be allowed to vote as they were hired by the Employer for the purpose of padding the payroll in order to influence the election results.