

Golden Bear Motors, Inc., d/b/a Golden Bear Ford and Automobile Salesmen's Union Local 1095, United Food and Commercial Workers International Union, AFL-CIO¹

Weatherford Motors, Inc. and Automobile Salesmen's Union Local 1095, United Food and Commercial Workers International Union, AFL-CIO

Gil Ashcom Toyota and Automobile Salesmen's Union Local 1095, United Food and Commercial Workers International Union, AFL-CIO

Berkeley Lincoln-Mercury, Inc. and Automobile Salesmen's Union Local 1095, United Food and Commercial Workers International Union, AFL-CIO

Weatherford Motors, Inc. and East Bay Automotive Council. Cases 32-CA-264 (formerly 20-CA-13123), 32-CA-299 (formerly 20-CA-13204), 32-CA-301 (formerly 20-CA-13210), 32-CA-302 (formerly 20-CA-13211), and 32-CA-366 (formerly 20-CA-13354)

September 25, 1979

DECISION AND ORDER

On April 17, 1978, Administrative Law Judge Earledean V. S. Robbins issued the attached Decision in this proceeding. Thereafter, Respondents Golden Bear Ford, Gil Ashcom Toyota, and Berkeley Lincoln-Mercury, Inc., filed exceptions and a supporting brief, Respondent Weatherford Motors, Inc., filed exceptions and a supporting brief; and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt her recommended Order.²

¹ The name of the Charging Party, formerly Automobile Salesmen's Union Local 1095, Retail Clerks International Association, AFL-CIO, is amended to reflect the change resulting from the merging of Retail Clerks International Union and Amalgamated Meatcutters and Butcher Workmen of North America on June 7, 1979.

² The General Counsel contended and the Administrative Law Judge found that Respondent Employers violated Sec. 8(a)(5) of the Act by their untimely withdrawal from the multiemployer unit and by repudiating the collective-bargaining agreement negotiated between the employers in the unit and the East Bay Automotive Council. Respondents excepted to this finding, claiming that an impasse during negotiations justified their withdrawals. The Administrative Law Judge declined to resolve the question of whether there was such an impasse for, even assuming that an impasse existed, she noted that under established Board law impasse does not constitute an unusual circumstance sufficient to justify withdrawal. We agree with the Administrative Law Judge, particularly noting that, following the issuance of

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 Respondents, Golden Bear Motors, Inc., d/b/a Golden Bear Ford; Weatherford Motors, Inc.; Gil Ashcom Toyota; and Berkeley Lincoln-Mercury, Inc., Berkeley, California, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notices are substituted for those of the Administrative Law Judge.³

her Decision, the Board issued its Supplemental Decision in *Charles D. Bonanno Linen Service, Inc.*, 243 NLRB No. 1093 (1979), wherein we reemphasized and fully explained why a bargaining impasse does not justify an employer's unilateral withdrawal from the multiemployer unit.

In this proceeding it was further contended that the withdrawals of three of the four Respondents were additionally improper because they withdrew from group bargaining only as it related to *part* of the unit. Three Respondents withdrew as to the salesmen but continued to bargain on a multiemployer basis with regard to the craft employees. A resolution of this contention requires a determination of whether all employees represented in the group bargaining were part of one overall unit or whether, as contended by the three Respondents, the group bargaining consisted of two separate units (one unit of craft employees and one unit of salesmen) and that they totally, and thus lawfully, withdrew as to one of these units. While the Administrative Law Judge found that all the employees comprised a single unit, she made no express finding of whether the withdrawals were partial and therefore were additionally improper. In view of our above finding, we find it unnecessary to determine whether these withdrawals were partial or total in finding them to have been untimely.

³ The Administrative Law Judge inadvertently failed to conform her notices with her recommended Order. We shall modify her notices accordingly.

APPENDIX

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

After a hearing at which all sides had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice, and we intend to carry out the Order of the Board.

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

WE WILL recognize and bargain with the East Bay Automotive Council and its affiliates as the exclusive bargaining representative of our employees in the following appropriate unit:

All employees engaged in the sales, maintenance, painting, washing and lubricating of new and used automobiles and trucks em-

ployed by the employer-members of East Bay Motor Car Dealers, Inc., excluding office clerical employees, supervisors and guards as defined in the Act.

WE WILL forthwith sign, or otherwise acknowledge that we are bound by, the 1977-80 master agreement between the East Bay Automotive Council and the East Bay Motor Car Dealers, Inc.

WE WILL comply with the terms and conditions of said agreement both retroactively and for the balance of its terms.

GOLDEN BEAR MOTORS, INC., D/B/A
GOLDEN BEAR FORD

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WE WILL comply with the terms and conditions of said agreement both retroactively and for the balance of its terms.

WEATHERFORD MOTORS, INC.

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GIL ASHCOM TOYOTA

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BERKELEY LINCOLN-MERCURY, INC.

DECISION

STATEMENT OF THE CASE

EARLDEAN V. S. ROBBINS, Administrative Law Judge: This case was heard before me in Oakland, California, on December 20-22, 1977. The charge in Case 32-CA-299 was filed by Automobile Salesmen's Union Local 1095, Retail Clerks International Association, AFL-CIO (the Salesmen's Union) on August 1, 1977, and a copy thereof was served on Respondent Weatherford Motors, Inc. (Weatherford) on August 4, 1977. A first amended charge therein was filed by the Seamen's Union on August 11, 1977, and served on Weatherford on August 13, 1977; and a second amended charge was filed by the Seamen's Union and served on Weatherford on August 30, 1977. The charge in Case 32-CA-366 was filed by Teamsters Automotive Employees Union Local 78, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, a constituent member of East Bay Automotive Council (the Teamsters) on September 2, 1977, and a copy was served on Weatherford on September 3, 1977. A first amended charge therein was filed by East Bay Automotive Council (the council) and served on Weatherford on October 11, 1977.

The charge in Case 32-CA-264 was filed by the Salesmen's Union on July 13, 1977, and a copy thereof was served on Golden Bear Motors, Inc., d/b/a Golden Bear Ford on July 15, 1977. The charge in Case 32-CA-301 was filed by the Salesmen's Union on August 1, 1977, and served on Gil Ashcom Toyota (Ashcom) on August 4, 1977. A first amended charge was filed therein on August 11, 1977, and served on Ashcom on August 13, 1977, and a second amended charge was filed by the Salesmen's Union and served on Ashcom on August 30, 1977. The charge in Case 32-CA-302 was filed by the Salesmen's Union on August 1, 1977, and served on Berkeley Lincoln-Mercury, Inc.

(Berkeley) on August 4, 1977. A first amended charge therein was filed by the Salesmen's Union on August 11, 1977, and a copy thereof was served on Berkeley on August 13, 1977; and a second amended charge was filed by the Salesmen's Union and served on Berkeley on August 30, 1977.

An order consolidating Cases 32-CA-264, 32-CA-299, 32-CA-301, and 32-CA-302 issued on September 29, 1977. An order consolidating cases and a consolidated complaint in Cases 32-CA-299 and 32-CA-366 issued on October 31, 1977; and a consolidated amended complaint in Cases 32-CA-264, 32-CA-301, and 32-CA-302 issued on November 11, 1977, alleging that Weatherford, Golden Bear, Ashcom, and Berkeley, herein collectively called Respondents, violated Section 8(a)(1) and (5) of the Act. An order consolidating the above cases issued on November 11, 1977. Post-hearing briefs were filed by the General Counsel and by Respondents.

The basic issue herein is whether, at the time of Respondents' attempted withdrawals from the multiemployer bargaining unit, there existed "unusual circumstances" of a nature to justify such withdrawals after the commencement of negotiations.

Upon the entire record, including my observation of the witnesses and after due consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Each of Respondents is a California corporation with a principal place of business in Berkeley, California, where it is engaged in the sale and servicing of new and used automobiles.

East Bay Motor Car Dealers, Inc., herein called the association, is an incorporated association of employers with its principal place of business in San Leandro, California, which admits to membership firms engaged in the servicing and sale of motor vehicles and which exists in part for the purpose of negotiating, executing, and administering multiemployer collective-bargaining agreements on behalf of its employer-members with the collective-bargaining representatives of their employees. At all times material herein, each of Respondents has been a member of the association.

During the past calendar year each of the Respondents, in the course and conduct of its business operations, received gross revenues in excess of \$500,000 and purchased and received goods, materials, and supplies valued in excess of \$50,000 which originated outside the State of California.

During the past calendar year, the employer-members of the association, in the course and conduct of their business operations, received gross revenues in excess of \$500,000 and purchased and received goods, materials, and supplies valued in excess of \$50,000 which originated from outside the State of California.

Upon the pleadings and the evidence, I find that the association and its employer-members, including Respondents, is now, and has been at all times material herein, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATIONS

The consolidated complaints allege, and Respondents admit, that the Salesmen's Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

Upon the pleadings and the evidence, I find that the council is an association of four labor organizations, including the Salesmen's Union, which exists in part for the purpose of negotiating, executing, and administering a collective-bargaining agreement with the association, and is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

The council and the association have been parties to successive collective-bargaining agreements since 1948. Originally the council was comprised of three labor organizations—East Bay Automotive Machinists Lodge 1546, affiliated with the Machinists Automotive Trades District Lodge 190 of northern California, herein called the Machinists; Auto, Marine and Specialty Painters' Union, Local 1176, herein called the Painters; and Teamsters Automotive Employees Union, Local 78, herein called the Teamsters. The Salesmen's Union was affiliated or cooperated in some respects with the council but did not become a member until 1972. Since April 18, 1972, the council has been the collective-bargaining agent for the Salesmen's Union, and the Salesmen's Union participated in and was bound by the negotiations between the council and the association in 1974 and 1977.

In 1974 the council and the association entered into a collective-bargaining agreement effective by its terms from June 1, 1974, to May 31, 1977, herein called the 1974 agreement. The agreement was in two parts—part I, a master agreement, which set forth the working conditions of the Machinists, the Painters, and the Teamsters; and part II, captioned "Working Agreement," which sets forth the terms and conditions of employment of the salesmen. The 1974 agreement specifically provides that the employer recognize the council and all its affiliated unions as the collective-bargaining representative of its employees who perform certain work described therein. Part I specifically provides that part II is incorporated therein.

Golden Bear, Ashcom, and Berkeley were members of the association and bound by the 1974 negotiations which culminated in the 1974 agreement. Initially, Weatherford was not covered by part II of the 1974 agreement.¹ Thereafter, Weatherford entered into the following agreement:

THIS AGREEMENT, made and entered into the day and date hereinafter set forth between WEATHERFORD MOTORS, INC., the Employer and AUTOMOBILE SALESMEN'S UNION LOCAL NO. 1095, EAST BAY AUTOMOTIVE COUNCIL, the Union.

¹ Weatherford's 1972 application for union membership shows that it had no employees covered under part II of the agreement.

That as of January 1, 1976, all salesmen employed by the Employer are represented by the Union, and that said Automobile Salesmen's Union, Local No. 1095 shall be the sole bargaining agent for said salesmen.

That all conditions including remuneration, hours, holidays, vacations, health and welfare benefits, pension contributions, demonstrator plans and any and all other agreements contained in the Working Agreement in effect between Automobile Salesmen's Union, Local No. 1095, East Bay Automotive Council and the East Bay Motor Car Dealers Association shall be in full force and effect and shall apply to any and all salesmen employed by Weatherford Motors, Inc. now or during the terms of this Agreement.

The term of this Agreement shall be from January 1, 1976 to May 31, 1977, and any and all arrangements to open or extend this contract shall apply as outlined in said Agreement between Automobile Salesmen's Union, Local No. 1095 and the East Bay Motor Car Dealers Association.

/s/ Greg Weatherford

Greg Weatherford

/s/ Fernand D. Silva

Fernand D. Silva, President
Weatherford Motors, Inc.

Automobile Salesmen's Union

Local No. 1095

East Bay Automotive Council

Pursuant to the provisions of the 1974 agreement, the council and its affiliates gave the association notice of reopening by letter dated March 20, 1977,² the body of which reads:

Pursuant to Article XXIII of the Master Agreement titled "Effective and Anniversary Date", this communication is our official notice of opening of the collective bargaining agreement between the East Bay Automotive Council and its affiliated Local Unions and the Eastbay Motor Car Dealers, Inc. for the purpose of negotiating amendments thereto.

In the event that the parties do not reach agreement on proposed changes on or before June 1, 1977, you are hereby further notified that conferences on the aforementioned proposed changes shall immediately be terminated and that the East Bay Automotive Council and its affiliated Local Unions reserve the right to take economic action.

Will you please advise when and where we may meet for the purpose stated herein at your earliest opportunity.

By letter dated March 30, the council requested that the association furnish it with copies of all powers of attorney

² All dates herein are in 1977, unless otherwise indicated.

the association holds with each individual firm that it represents as of April 1.

Negotiations for a new agreement began on April 6, and subsequent negotiation sessions were held on May 3, 4, 5, 11, 18, 25, and June 6, 7, 9, 10, 14, 22, and 28. It is unclear whether a negotiation session was actually held on June 25. That is the date of the association proposal which reflected agreements reached on June 22. Both Edward Dohnt, president of the association, and C. L. McMonagle, chairman of the council, testified that they did not attend a June 25 meeting. On May 26, prior to the May 31 contract anniversary date, a proposal was submitted for ratification to the members of the council affiliates and was rejected. Thereafter, mediation was sought. Although it is not completely clear from the record, it appears that a federal mediator participated in the June 6 session at which concessions were made, including a compromise on the apprenticeship training. The old contract had a 6-month period. The association proposed 36 months. They agreed on 18 months. Concessions were also made at the May 26 meeting, including agreement on new car, used car, and leasing commission rates.

By letter dated April 12, the association provided the council with a list of its members as of April 1 and notified the council that Pat Patterson Cadillac had withdrawn from the multiemployer bargaining unit. Respondents were listed on this membership roster. It is undisputed that several employer-members of the association—Albany Ford, English Motors of Berkeley, H. W. McKeivitt Company, San Leandro Chrysler, Nohrs Import, Pat Patterson Cadillac, Good Leasing, and Pat Patterson Leasing Company are not covered by part II of the contract. Some of them have no salesmen employees, and none of them have ever been part of the multiemployer bargaining association as to salesmen employees.³

By letter dated June 7, Golden Bear notified the association that effective immediately it was withdrawing its power of attorney to the association to represent it in dealings with the Salesmen's Union. By letter dated June 8, the association notified Golden Bear that the revocation of its power of attorney was ineffective as it was not timely given under the reopening provision of the 1974 agreement.

By letter dated June 8, Golden Bear notified the Salesmen's Union:

You are advised herewith that Golden Bear Motors, Inc. revoked its power of attorney to the Eastbay Motor Car Dealers, Inc. as to its authority to negotiate with the Union. Golden Bear Motors Inc. remains a member of the Eastbay Motor Car Dealers, Inc. for all other purposes.

Please contact Ralph B. Hoyt of Hoyt & Goforth, 405 14th Street, Oakland, California 94612, telephone 893-0990, who will represent Golden Bear Motors, Inc. in contract negotiations with your Union concerning the hours, wages and working conditions of salesmen employed by Golden Bear Motors, Inc.

³ It is not clear from the record whether Pat Patterson Cadillac had ever been part of the multiemployer unit as to salesmen. It did timely withdraw from the unit, and the Salesmen's Union has a contract with it in a single-employer bargaining unit.

By letter dated June 13, the Salesmen's Union notified Golden Bear that its attempted withdrawal was untimely.

On June 21, according to the minutes of an association membership meeting held on that date, Dohnt informed the membership that there had been limited discussions on the salesmen's part of that contract, and as to the shop employees portion, the council was trying to secure terms comparable to the San Francisco agreement. In Dohnt's opinion, they had two choices—"to take the San Francisco proposal with some modifications" or to "present a final proposal, sit tight and accept a strike if we have to." He further stated that a strike was inevitable if they offered less than a 55-cent-an-hour increase. The membership voted on three options—propose the 55 cents an hour and "hold tight," agree to the San Francisco proposal, or offer less than 55 cents an hour. It was unanimously decided to submit a 55-cent proposal with further negotiations on the salesmen's part of the contract.

The association submitted a written proposal on June 22. Various changes were negotiated on that date which are reflected in the association proposal dated June 25 which, on June 29, the Council submitted to the membership of its affiliates for ratification with a recommendation to reject.⁴ The association's proposal was rejected by the membership, and a previous strike vote was reaffirmed.⁵ On June 29 the council and its member-affiliates went on strike against the employer-members of the association. Some unit employees, including some Weatherford employees, did not honor the picket line.

On June 29 Golden Bear sent a letter to the Salesmen's Union reiterating its revocation of power of attorney to the association and further stating that since the revocation occurred prior to the strike, Golden Bear was not part of the negotiations which resulted in the strike, and therefore it would be inappropriate for the Salesmen's Union to picket Golden Bear since Golden Bear was prepared to negotiate a new contract.

After the strike commenced, no negotiation session was held until July 12.⁶ Arrangements for this session were made a few days prior thereto, probably on or after July 9. On that date representatives from the Council met with Dohnt, at which time it became apparent that some positions were flexible, and the participants agreed to convey this indication of flexibility to their respective negotiating committees.

By letter dated July 5 addressed to the association, the council, and its four affiliate-members, Weatherford gave notice that effective immediately it was withdrawing from the multiemployer unit and revoking its power of attorney to the association to act as its collective-bargaining agent and was willing to bargain only in a single employer unit.

⁴ According to the undenied testimony of McMonagle, the association requested that the contract be submitted to the council affiliates' membership and took the position that, if not approved, the association would not agree to retroactivity.

⁵ Following the initial strike vote, the member affiliates have to secure a strike sanction from their respective International unions and then take a strike reaffirmation vote before a strike can actually commence.

⁶ Fred Silva, president of the Salesmen's Union, McMonagle, and Dohnt met informally on July 8 or 9, at which time they explored their relative positions as to problem areas.

Ashcom and Berkeley sent separate letters to the Salesmen's Union dated July 8 which, in pertinent part, were identical to the one set forth above which was sent by Golden Bear. On that same date Ashcom and Berkeley sent individual letters to the association revoking their powers of attorney to the association to represent them in dealings with the Salesmen's Union.

By letter dated July 15, the association acknowledged Weatherford's revocation of power of attorney and notified Weatherford that certain requirements of the association bylaws must be met to effect resignation from the association. By separate letters dated July 18, the association notified Golden Bear,⁷ Berkeley, and Ashcom that their revocation of powers of attorney to represent them in dealings with the Salesmen's Union was approved by the association's board of directors at a meeting held on July 18.

Article X of the association's bylaws, as amended on January 27, 1972, provides:

Section 1. Every person, upon joining the Association, automatically gives, by virtue of accepting such membership, specific powers of attorney to the Association to act for the member in all matters having to do with Labor relations; particularly in dealings with Automobile Salesmen's Union Local 1095 and/or East Bay Automotive Machinists Lodge No. 1546, Auto, Marine and Specialty Union Local 1176, and Teamsters Automotive Employees Union Local 78, the last three of which are collectively called East Bay Automotive Council; and every member upon joining the Association contracts and agrees with the Association, and with each of the other members thereof, not to bargain collectively with any of the above-named Labor Organizations other than by and through the Association, acting pursuant to the specific powers of attorney herein given and made, during such period of time that said specific powers of attorney remain in full force and effect and unrevoked.

Section 2. The specific powers of attorney, and each of them, given and made pursuant to the foregoing section and the obligation of any member to bargain collectively by and through the Association, with the Labor Organizations mentioned in the foregoing section, or any of them, may be revoked and terminated at any time by giving notice in writing to the President or Secretary of the Association stating the intention of such member to revoke the specific and or all powers of attorney and terminate the member's obligation to bargain collectively through the Association as to the particular Labor Organization for which said specific power is revoked. Said revocation to be effective immediately upon presentation to the President or Secretary unless otherwise set forth in said written notice.

The association's applications for membership provide, *inter alia*:

I/We hereby accept and agree to all of the provisions of the By-Laws of the Eastbay Motor Car Deal-

ers, Inc., as adopted April 22, 1942 and amended February 21, 1946 and January 11, 1949.⁸

I/We have been furnished with a copy of these By-Laws as amended, and have noted provisions thereof.

During the strike, negotiation sessions were held on July 12, 14, and 19. A Federal mediator participated in these sessions. Fred Silva, president of the Salesmen's Union, testified without contradiction that there was no modification of positions during the July 12 meeting. At the beginning of the July 14 meeting, the association remained adamant as to its previous position. However, during the course of the meeting the association modified its position as to the commission on gross profit—up from 30 percent to 35 percent. They upped their proposal of \$100 minimum commission to \$125. They withdrew their proposal for changes in the provisions covering demonstrators and house deals, and agreed to a pension contribution equivalent to that enjoyed by shop employees. Further concessions and modifications were made on July 19.

On July 20 the association's proposals were submitted to the membership of the council affiliates and were ratified. By separate mailgrams dated July 21, the Salesmen's Union notified Ashcom, Golden Bear, and Berkeley that it considered each of them bound to the new agreement since they were members of the association as of the commencement of negotiations. On August 17 the Council declined Weatherford's request to bargain in a single employer unit and informed Weatherford that the position of the council is that Weatherford is bound by the new agreement.

By letter dated August 25, Weatherford notified the association that it wished to enjoy all association benefits, except collective bargaining, and enclosed its association dues for the third quarter. By letter dated August 30, the association notified Weatherford that, pursuant to its August 25 letter, the association considers it an active member and agrees that its power to bargain on behalf of Weatherford is revoked.

The council at no time agreed to, or acquiesced in, the attempted withdrawals of Respondents from the multiemployer bargaining unit. Golden Bear, Ashcom, and Berkeley are abiding by that portion of the new contract which pertains to shop employees.

B. *Position of the Parties*

1. Impasse

Respondents contend that their withdrawals from the multiemployer bargaining unit were timely, that they withdrew during a bargaining impasse, and that an impasse should constitute such an "unusual circumstance" as would permit withdrawal subsequent to the commencement of bargaining. Weatherford contends that an impasse was reached on June 22. In support thereof Weatherford argues that the key element of the association's proposal on June 22 was the 55-cent-an-hour wage increase which the council refused to accept, insisting on a \$2.20 increase over the 3-year term of a new contract. At the conclusion of the June

⁷ The association's attorney had advised that the association's earlier response to the attempted revocation was incorrect.

⁸ These applications are currently used, even though the bylaws were amended in 1972.

22 session, for the first time during negotiations, no further bargaining session was scheduled. The association's principal negotiator said 55 cents was as far as the association would go. At a meeting on June 21 the employer-members of the association agreed to offer 55 cents and accept a strike if necessary. The council negotiators stated they would recommend against ratification. Between the June 22 bargaining session and the June 29 union meeting, no serious attempt was made to resolve differences. The association spurned such an attempt by the Salesmen's Union on June 28. On June 29 the membership of the council affiliates rejected the association's proposal and voted to strike immediately. This was the first strike during the history of multiemployer bargaining. At the July 12 bargaining session, there was no change in the position of the parties and it was not until the July 14 negotiation session that the impasse was broken. Under these circumstances, Weatherford contends a genuine impasse existed as of July 5, when it withdrew from the multiemployer bargaining unit. *Charles D. Bonanno Linen Service, Inc.*, 229 NLRB 629 (1977); *Acme Wire Works, Inc.*, 229 NLRB 333 (1977); *Times Herald Printing Company*, 221 NLRB 225, 229 (1975); *Bill Cook Buick, Inc.*, 224 NLRB 1094, 1096 (1976); *Hi-Way Billboards*, 206 NLRB 22 (1973); *affd.* in relevant part 500 F.2d 181 (5th Cir., 1974).

Respondents Golden Bear, Ashcom, and Toyota make the same argument as to the existence of an impasse, except they contend that an impasse occurred on June 29 when the members of the council affiliates rejected the association's final offer and proceeded to strike the employer-members of the association, and that the impasse was not broken until July 15.⁹ They further argue that an impasse was reached on May 26 when an employer proposal was rejected by the membership of the council affiliates and the parties agreed to use the services of a federal mediator; and that the impasse continued through the next negotiation session on June 6, since there were either no concessions or no major economic concessions on that day.¹⁰

Respondents argue that the Board's current position, that an impasse does not constitute an unusual circumstance, fails to take into account the realities of the bargaining process and further gives unions an unfair advantage, since unions are permitted to negotiate separate interim contracts with employer-members of the association. Respondents therefore urge that the reasoning of various courts of appeals be followed and an impasse be considered as constituting an "unusual circumstance" which would justify a withdrawal from a multiemployer bargaining unit. *N.L.R.B. v. Associated Shower Door, Inc., et al.*, 512 F.2d 230 (9th Cir. 1975); *N.L.R.B. v. Beck Engraving Co., Inc.*, 522 F.2d 475 (3d Cir. 1975); *N.L.R.B. v. Hi-Way Billboards Inc.*, 500 F.2d 181 (5th Cir. 1974); and *Fairmont Foods Company v. N.L.R.B.*, 471 F.2d 1170 (8th Cir. 1972).

The General Counsel argues that I am bound by Board decisions which reject impasse as an "unusual circum-

stance." However, even assuming *arguendo* a change in the Board's position, no impasse existed at relevant times. Thus, the General Counsel argues that only five negotiating sessions had occurred prior to the May 25 session, no party was suggesting an unwillingness to make further concessions, at subsequent sessions additional proposals and concessions were made by both sides, and there is no evidence of hardening of positions or threats of strike or lockup.¹¹ Accordingly, there was no impasse as of Golden Bear's June 8 withdrawal. *Firch Baking Company of Jamestown, Inc.*, 199 NLRB 414, 420, *enfd.* 479 F.2d 732 (2d Cir. 1973).

As to the alleged impasse of June 22 or June 29, General Counsel argues that the Association did not characterize its June 22 offer as a final offer and that the strike cannot be viewed as an attempt by the Union to break a bargaining impasse. Rather, the Association demanded a vote on their latest proposal and threatened that it would not agree to retroactivity if a ratification vote was not taken. Thus, the insistence on a vote (with the resultant refusal to ratify the Association's offer) was a bargaining tool devised by the Association to test the employees' willingness to accept the Association's proposal. Cf. *J. H. Bonck Company, Inc.*, 170 NLRB 1471, 1479 (1968), *enfd.* 424 F.2d 634 (5th Cir. 1969).

Also indicating no impasse, according to the General Counsel, are the minutes of the June 21 association meeting which state it was "unanimously decided to submit the 55¢ proposal with *further negotiations* [emphasis supplied] on the Salesmen's Union's contract, then hold tight."¹²

2. Appropriate unit

Respondents Golden Bear, Ashcom, and Berkeley contend that the unit of sales and shop employees alleged in the complaint¹³ is "totally inconsistent with established Board policy and procedure." Rather, Respondents argue, all evidence and testimony point to the existence of two multiemployer bargaining units—a sales employee unit and a crafts employee unit. The principal argument in support of this position seems to be (1) the admitted method of table bargaining, whereby the representatives of the Salesmen's Union would be the chief spokesmen for the council when the discussions centered on the provisions applicable to the salesmen employees and took little or no part in the discussions concerning the shop employees; (2) the division of the contract into two parts—part I covering the shop employees and part II covering the salesmen employees, and that each part, by its language, stands alone as a total and complete collective-bargaining agreement; and (3) part II is signed only by the president of the Salesmen's Union and was signed on August 30, whereas part I was signed on November 21.

¹¹ At some point prior to June 29 the members of the council affiliates had voted to seek strike sanction from their respective International unions.

¹² Further negotiations did occur on June 22, and concessions were made.

¹³ Both consolidated complaints allege: "All employees engaged in the sales, maintenance, painting, washing and lubricating of new and used automobiles and trucks employed by the employer-members of East Bay Dealers, excluding office clerical employees, supervisors and guards as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act."

⁹ The evidence does not support this position. There was no change of position on July 12, but there were substantial changes on July 14.

¹⁰ I find, based on Silva's undenied testimony which I credit, that on June 6 the council accepted the association's proposal of an 18-month training program for salesmen. In the prior contract it had been 6 months.

Golden Bear, Ashcom, and Berkeley further contend that bargaining history does not support a single multi-employer/multiunion bargaining unit but rather demonstrates coalition bargaining. In support thereof they argue that a multiemployer unit comprised of employees within the jurisdiction of the three "craft unions" has been in existence since 1948 and that the Salesmen's Union first participated in such bargaining in the 1974 negotiations which resulted in the 1974-77 agreement.

Also supporting their position, it is argued, is the fact that the association has consistently recognized two units in article X of its bylaws and that all member firms are parties to part I of the master agreement, whereas 7 of the 39 members are not parties to part II,¹⁴ and that during the course of council-association negotiations, members of the council engaged in separate negotiations with several of these firms.¹⁵

They further argue that "there is no evidence of any common element looked to by the Board in establishing a common unit of 'craft' employees and 'sales' employees and that to find a single unit would be contrary to Section 9(b) wherein recognized crafts shall be allowed the right of self-determination. Thus, absent a certification based upon appropriate election processes conducted by the Board, there can be no finding of a single multi-employer/multiunion bargaining unit consisting of the 'crafts' and 'salesmen.'"

3. Unit fragmentation

Golden Bear, Ashcom, and Berkeley further argue that there had been a unit fragmentation which would constitute an unusual circumstance which would allow an employer to withdraw from a multiemployer bargaining unit. However, no specific evidence is argued as supporting this contention other than the above argument involving the association members whose salesmen employees have never been a part of the multiemployer unit and the separate contract with Pat Patterson Cadillac, who timely withdrew.

C. Conclusions

1. The appropriate unit

I find no merit in the contention that the unit alleged herein is inappropriate. In 1972 the council and the association consented to a multiemployer/multiunion bargaining unit comprised of shop and salesmen employees. In 1974

¹⁴ The only evidence to support this later contention is the testimony that the Salesmen's Union has a separate contract with Pat Patterson Cadillac. However, Pat Patterson Cadillac timely withdrew from the multiemployer unit.

¹⁵ Silva credibly testified that those employer-members who are not bound by part II of the agreement have never been so bound and that they either have no salesmen employees or the Salesmen's Union never represented the salesmen employees. Hence they never had salesmen employees as part of the multiemployer bargaining unit after the unit was expanded to include salesmen employees. Dean Corbitt, executive vice president, secretary, and manager of the association, credibly testified that when a new member joins the association it is presumed that all shop and sales employees are covered by the master agreement unless there is some affirmative indication to the contrary. Prior to the 1977 negotiations, Silva agreed that one specific new member would not be covered as to salesmen employees. However, the chairman of the council did not agree, and the matter was not pursued.

and 1977 negotiations bargaining in such a unit culminated in collective-bargaining agreements. Although the contract is in two parts—part I covering shop employees and part II covering sales employees, part I specifically states: "Part II of the collective bargaining agreement covers the Automobile Salesmen's Union No. 1095 contract and the terms and conditions of Part II are fully incorporated herein by reference thereto." Parts I and II both specifically state that the agreement is between the association and the council and its affiliates. The council and its affiliates are referred to in the agreement as the "Union." Article II of part I states the employer hereby agrees to recognize the union as the sole, exclusive bargaining agent, and this agreement shall cover all employees of the employer who perform work within the work jurisdiction of the union as described therein. The agreement then sets forth the work jurisdiction of the Machinists, the Painters, the Teamsters, and the Salesmen's Unions. The members of the council affiliates collectively vote to accept or reject a proposed contract in accordance with the specific provision of the council bylaws.

Clearly, there exists a bargaining history in the unit alleged as appropriate in the complaint. Such established bargaining relationship will not be disturbed where it is not repugnant to the policies of the Act. *Fraser & Johnston Company*, 189 NLRB 142, 151 (1971). There is nothing repugnant to the policies of the Act in combining shop and sales employees in one unit. In fact, the Board has found such a unit appropriate. *Bogalusa Motors, Inc., et al.*, 107 NLRB 97 (1953). Furthermore, contrary to Respondent's contentions, the Board's rules as to craft severance are not applicable here. See *Consolidated Papers, Inc.*, 220 NLRB 1281, 1283 (1975).

Accordingly, I find that the appropriate unit herein is:

All employees engaged in the sales, maintenance, painting, washing and lubricating of new and used automobiles and trucks employed by the employer-members of East Bay Motor Car Dealers, Inc., excluding office clerical employees, supervisors and guards as defined in the Act.

2. The attempted withdrawals

There is no dispute that Respondents consented to be bound by multiemployer/multiunion bargaining. The question is whether they timely withdrew from such unit. Once the multiemployer unit is established, the employer-members and the Union are bound by multiemployer bargaining, absent compliance with the rules governing withdrawal from such bargaining set forth by the Board in *Retail Associates, Inc.*, 120 NLRB 388, 393-395 (1958).

In *Retail Associates* the Board stated "while mutual consent of the union and employers involved is a basic ingredient supporting the appropriateness of a multiemployer bargaining unit, the stability requirement of the Act dictates that reasonable controls limit the parties as to the time and manner that withdrawal will be permitted from an established multiemployer bargaining unit." Accordingly, the Board held that prior to the date set by the contract for modification, or to the agreed-upon date to commence negotiations, withdrawal can be affected only by an unequivocal written notice expressing a sincere intent to abandon.

with relative permanency, the multiemployer unit, and to embrace a different course of bargaining on an individual employer basis. Once actual bargaining negotiations based on the existing multiemployer bargaining unit have begun, withdrawal can be affected only on the basis of "mutual consent" or when "unusual circumstances" are present.

It is undisputed that the attempted withdrawals occurred after the commencement of negotiations and that no "mutual consent exists." Respondents, relying on the court of appeals cases cited above, argue that the withdrawals occurred during a bargaining impasse and that such impasse constitutes an "unusual circumstance" which would permit withdrawal. However, I am bound by the decisions of the Board, *Insurance Agents International Union, AFL-CIO (The Prudential Insurance Company of America)*, 119 NLRB 768 (1957), and the Board has consistently rejected the contention that a bargaining impasse constitutes the requisite "unusual circumstances."

In cases subsequent to *Retail Associates* the Board has limited application of the term "unusual circumstances" to "those cases in which the withdrawing employer has been faced with dire economic circumstances, i.e., circumstances in which the very existence of an employer as a viable business entity has ceased or is about to cease." *Hi-Way Billboards, Inc.*, 206 NLRB 22 (1973). Applying this limitation, the Board held in that case (206 NLRB at 23, 24):

Thus, a genuine impasse is akin to a hiatus in negotiations. In the overall ongoing process of collective bargaining, it is merely a point at which the parties cease to negotiate and often resort to forms of economic persuasion to establish the primacy of their negotiating position. Moreover, the occurrence of a genuine impasse cannot be said to be an unexpected, unforeseen, or unusual event in the process of negotiations since no experienced negotiator arrives at the bargaining table with absolute confidence that all of his proposals will be readily and completely accepted. Therefore, it is clear that an impasse is but one threat in the complex tapestry of collective bargaining, rather than a bolt of a different hue. In short, a genuine impasse is not the end of collective bargaining.

For this reason, a genuine impasse in negotiations between a union and multiemployer bargaining association does not constitute an "unusual circumstance" within the meaning of that term as applied by us in cases subsequent to *Retail Associates*. A genuine impasse in such a situation does not call into question the actual continued existence of any multiemployer bargaining association member as a viable business entity. Rather, it is merely a momentary eddy in the flow of collective bargaining. Were we to hold otherwise, we would be denying the practical reality of collective-bargaining negotiations, we would herald the demise of multiemployer bargaining, we would effectively negate the benefits of such bargaining to all parties and to employees, and we would allow an employer to seize upon such an occurrence and use it as a ground for withdrawal merely because it was dissatisfied with the impending agreement, as *Hi-Way* did in the instant case. Consequently, we hold that it would not effectuate the purpose or policies of the Act to allow an em-

ployer member of such an association to withdraw solely on the ground that an impasse in negotiations has been reached.

Notwithstanding rejection by four circuits, the Board has adhered to this rule. *Bill Cook Buick*, 224 NLRB 1094 (1976). I therefore find it unnecessary to reach the question of whether an impasse actually existed, and I reject Respondent's argument that its attempted withdrawal was permissible due to "unusual circumstances."

Accordingly, I find that each Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize the council as the exclusive bargaining representative of its employees in the above-described appropriate unit; that Respondent Weatherford violated Section 8(a)(5) and (1) by refusing to execute or to abide by the terms and conditions of the 1977 master agreement—part I and part II; and that Respondents Golden Bear, Ashcom, and Berkeley violated Section 8(a)(5) and (1) of the Act by refusing to execute or to abide by part II of the 1977 master agreement.

CONCLUSIONS OF LAW

1. The East Bay Motor Car Dealers, Inc., and its employer-members, including Respondents, are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Automobile Salesmen's Union Local 1095, Retail Clerks International Association, AFL-CIO, and the East Bay Automotive Council and its affiliates are labor organizations within the meaning of Section 2(5) of the Act.

3. All employees engaged in the sales, maintenance, painting, washing, and lubricating of new and used automobiles and trucks employed by the employer-members of East Bay Motor Car Dealers, Inc., excluding office clerical employees, supervisors and guards as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein the council and its affiliates have been, and are now, the exclusive representatives 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 withdrawing recognition from the East Bay Automotive Council and its affiliates as the exclusive collective-bargaining representative of Respondents' employees in the multiemployer unit described above, and by repudiating all or a part of the collective-bargaining agreement between East Bay Automotive Council and East Bay Motor Car Dealers, Inc., each of the Respondents 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 each of the Respondents has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that Respondents be ordered to cease and desist therefrom and from

any like or related unfair labor practices and take certain affirmative action designed to effectuate the policies of the Act.

I have found that each Respondent has violated Section 8(a)(1) and (5) of the Act by its untimely withdrawal from the multiemployer bargaining unit and by repudiating the collective-bargaining agreement between the East Bay Automotive Council and the East Bay Motor Car Dealers, Inc. I shall therefore recommend that each of the Respondents recognize the East Bay Automotive Council and its affiliates as the exclusive bargaining representative of its employees in the multiemployer bargaining unit found appropriate herein, that it sign or otherwise acknowledge that it is bound by the 1977-80 master agreement—part I and part II—between the East Bay Automotive Council and the East Bay Motor Car Dealers, Inc., and that it comply with the terms and conditions of said agreement, both retroactively and for the balance of its term.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby issue the following recommended:

ORDER¹⁶

Respondents Golden Bear Motors, Inc., d/b/a Golden Bear Ford, Weatherford Motors, Inc., Gil Ashcom Toyota, and Berkeley Lincoln-Mercury, Inc., their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

¹⁶ 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, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Refusing to recognize the East Bay Automotive Council and its affiliates as the exclusive representative of its employees in the above-described appropriate unit, and refusing to acknowledge that it is bound by the 1977-80 master agreement between the East Bay Automotive Council and the East Bay Motor Car Dealers, Inc.

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

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Forthwith sign, or otherwise acknowledge, that it is bound by the 1977-80 master agreement between the East Bay Automotive Council and the East Bay Motor Car Dealers, Inc., as it applies to employees of Respondent in the above-described multiemployer bargaining unit, and comply therewith as indicated in the remedy section of this Decision.

(b) Post at its facilities in Berkeley, California, copies of the attached notice marked "Appendix."¹⁷ 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, 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.

¹⁷ 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".