International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) Amalgamated Local No. 55 *and* Don Davis Pontiac, Inc. Case 3–CP–258

November 30, 1977

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

On December 3, 1976, Administrative Law Judge Robert Cohn issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

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 record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

Respondent, Local 55, was the certified representative of Davis' approximately 20 shop employees when Davis was located at 2845 Bailey Avenue, Buffalo, New York. The latest contract between the two had been due to expire March 20, 1976, but was continued from day-to-day until May 18, 1976,[1] when Davis made a final offer that Local 55 rejected. Local 55 struck Davis at midnight May 19. The next day, Davis purchased Al Ives Pontiac, a dealership located at 2277 Niagara Falls Boulevard, Tonawanda, New York, a town close to Buffalo.

On May 22, Davis, in a letter to Ives, committed itself to retain all Ives' shop employees. It notified Auto Mechanics Lodge 1053, International Association of Machinists and Aerospace Workers, AFL–CIO, or IAM, the bargaining representative of the shop employees at Ives, of its decision to do so on June 4. On June 11, Davis closed its operations on Bailey Avenue; it opened for business at the Tonawanda location on June 15.

On June 16, at a meeting scheduled to discuss the effects of the alleged closing of the Bailey Avenue shop, Davis announced it had purchased the Ives' dealership, hired all Ives' former shop employees, about 16 altogether, and entered into a contract with the IAM. Local 55 asked for preferential hiring rights at Tonawanda for the Bailey Avenue employees, but Davis refused, stating these employees had been terminated as of June 11.

Local 55 did not begin picketing Davis at Tonawanda until June 21. The pickets initially carried signs that read: "UAW on strike for justice" and "UAW on strike for equity," the same legends as the signs carried at Bailey Avenue. The following Monday, June 28, Local 55 gave Davis a letter that stated it was ending the strike and that the Bailey Avenue shop employees intended to report to work the next day. When these employees reported to the Tonawanda location, Davis told them that there were no vacancies. No picketing took place that day. On June 30, Respondent resumed its picketing at Tonawanda; the signs, however, were changed to read: "Local 55 UAW Protests the Refusal of Davis Pontiac, Inc. to reemploy its members."

Given the surrounding circumstances and facts, we believe the evidence shows that the only object of Respondent's picketing of Davis' Tonawanda dealership was to obtain what the Bailey Avenue shop employees thought were their jobs, which had suddenly and without notice disappeared with Davis' previously unannounced change of location.

The Administrative Law Judge, however, found that Local 55 picketed Davis at Bailey Avenue to obtain a contract[2] and this purpose did not change when the picketing shifted to Davis' Tonawanda location, beginning June 21. In our opinion this finding ignores the factual realities of this case. Thus, Davis did not notify Local 55 of the purchase of Ives' Tonawanda dealership until the June 16 meeting. At this meeting, Davis also announced he had hired all of Ives' shop employees. Presented with a *fait accompli,* and obviously realizing Davis would not bargain over either his decision or transfer rights, Local 55 proposed the only possibility left, a preferential hiring list for the Bailey Avenue employees at Tonawanda, which Davis immediately rejected.[3]

Looking at Davis' stance and the proposals made by Local 55 at this meeting, we doubt the latter thought picketing could lead to another contract with Davis after June 16. We find the Union's immediate goal after June 16 was much more basic than obtaining a contract and was to influence Davis to

[1] All dates hereinafter refer to 1976.

[2] This is obviously true, at least at Bailey, as Respondent represented the Bailey Avenue employees and was negotiating for and picketing for a contract.

[3] As a purchaser of Ives, Davis was under no statutory obligation to retain Ives' employees. Davis asserts the Bailey Avenue dealership was liquidated and a new business begun at Tonawanda. According to Davis, there was therefore no obligation to bargain about a decision to relocate, as no relocation took place. However, if the move to Tonawanda had been considered a relocation, Davis would have been obligated to bargain about transfer rights for the Bailey Avenue employees to Tonawanda and could not have properly assumed a contractual obligation to hire Ives' former employees because, given the total number of jobs at the Tonawanda shop, doing so would have precluded any meaningful bargaining about transfer rights from taking place. Local 55 filed a charge alleging this conduct violated Sec. 8(a)(5), but the General Counsel, after considerable reflection, from July 6, 1976, until June 30, 1977, decided not to issue a complaint.

grant the Bailey Avenue employees some sort of status as Tonawanda employees, either through reinstatement or the use of a preferential hiring list. The purpose was to preserve jobs Local 55 believed rightfully belonged to the Bailey Avenue employees. The only means available to the Union to achieve this result was through picketing Davis at Tonawanda. The June 29 offer to return to work further buttresses this view. We therefore find the object of Local 55's picketing after June 16 was job preservation.[4] The picketing at Tonawanda therefore did not violate Section 8(b)(7)(A).[5]

ORDER

It is hereby ordered that the complaint be, and it hereby is, dismissed.

[4] The fact that the Respondent filed charges alleging that Davis violated Sec. 8(a)(2) by recognizing the IAM at Tonawanda and Sec. 8(a)(5) by refusing to bargain about the decision to relocate or the conditions under which the Bailey Avenue employees could transfer to the new location provides further support for this view. Respondent believed that Davis could not extend recognition to another union at Tonawanda until impasse had been reached with Respondent regarding the transfer rights of the Bailey Avenue employees to Tonawanda and that a question concerning representation existed when Davis entered into a contract with the IAM. Consistent with these allegations, Respondent filed a representation petition. The General Counsel's subsequent dismissal of the Respondent's unfair labor practice charges and representation petition shows that Respondent's belief regarding the legality of Davis's conduct, at least in the General Counsel's view, was incorrect, not that Respondent did not hold such a belief. Compare *Local 259, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW, AFL–CIO (Fanelli Ford Sales, Inc.)*, 133 NLRB 1468 (1961).

[5] See *Waiters & Bartenders Local 500, et al. (Mission Valley Inn)*, 140 NLRB 433 (1963). We also believe this case is distinguishable from *International Longshoremen's and Warehousemen's Union Local No. 8 (Waterway Terminals Company)*, 193 NLRB 477 (1971). Chairman Fanning does not adhere to *Hotel, Motel, Restaurant Employees and Bartenders Union, Local 737 (Jets Services, Inc.)*, 231 NLRB 1164 (1977), and agrees with Member Jenkins' dissent therein. Member Penello would distinguish that case for the reason that the object of Local 55's picketing changed after June 16.

DECISION

STATEMENT OF THE CASE

ROBERT COHN, Administrative Law Judge: Pursuant to an original charge filed on June 21, 1976,[1] by Don Davis Pontiac, Inc. (herein called the Charging Party or Company), and a complaint and notice of hearing issued on June 25, this case came on for hearing at Buffalo, New York, on July 12. The complaint alleges, in substance, that International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) Amalgamated Local No. 55 (herein called Respondent or UAW), violated Section 8(b)(7)(A) of the National Labor Relations Act, as amended (herein called the Act), by picketing the Charging Party's Tonawanda facility with an object to force or require the Charging Party to recognize and bargain with Respondent at a time when the Charging Party was lawfully recognizing and bargaining with Auto Mechanics Lodge 1053, International Association of Machinists and Aerospace Workers, AFL–CIO (herein called the IAM). By its duly filed answer, Respondent denied that it had violated the Act. Helpful posthearing briefs have been received from counsel for the General Counsel and from counsel for Respondent, which have been duly considered.

Upon the entire record in this proceeding, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Don Davis Pontiac, Inc., is, and has been at all times material, a New York corporation engaged in the business of retail sale and service of automobiles and related products. Prior to on or about June 11, the principal office and place of business of the Company was on Bailey Avenue, Buffalo, New York. Since on or about June 15, the principal office and place of business of the Company has been at 2277 Niagara Falls Boulevard, Tonawanda, New York.

Annually, the Company, in the course and conduct of its business operations, sells and distributes products the gross value of which exceeds $500,000. During the same period of time, the Company receives goods valued in excess of $50,000, which are transported to its place of business directly from States of the United States other than the State of New York.

I find, as the answer of the Respondent admits, that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

The evidence in the record establishes that Respondent and the IAM have been at all times material herein labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

For a number of years prior to the events here in question, the Company had operated an automobile dealership which was located on Bailey Avenue in Buffalo, New York. In November 1966, the UAW was certified as the collective-bargaining representative of the Company's employees in the following unit:

> All service employees, including all mechanics, service advisors, helpers, collision men, washers, polishers, painters, undercoaters, lubrication men, janitors and parts department employees, excluding all office clerical employees, all salesmen and all guards, professional employees, and all supervisors as defined in the Act.[2]

The last collective-bargaining agreement between the Company and the UAW expired on March 20, but was

[1] All dates hereinafter refer to the calendar year 1976, unless otherwise specified.

[2] See Case 3–RC–4022 (Resp. Exh. 1).

extended by oral agreement on a day-to-day basis during the negotiations which commenced between the parties on March 18. The record shows that the parties had about 10 negotiation meetings between that date and June 16.

Meanwhile, since at least November 7, 1975, the Charging Party had been contemplating the selling of its dealership and the acquisition of another dealership with "larger long range potential." This desire was made known to the Pontiac Motor Division in a letter from the president of the Charging Party as follows:

Nov. 7, 1975

Mr. J. P. Ware, Zone Mgr.
Pontiac Motor Division
5225 Sheridan Dr.
Williamsville, N.Y. 14221

Dear Jack:

This is to confirm to you that after due consideration, we have decided to sell this dealership.

As you know, my son John has progressed well in the management of this business and we would like to acquire a dealership with a larger long range potential.

While we would prefer to sell our facilities, we would lease them to a responsible candidate on a realistic basis.

Your assistance by putting us in communication with prospective candidates, acceptable to Pontiac, for the purchase of this dealership, and or putting us in touch with other available dealerships with a greater long range potential, will be greatly appreciated.

Very truly yours,

DON DAVIS PONTIAC INC.

Donald L. Davis, Pres.

In April, Ware notified the Charging Party that a Pontiac dealership, Al Ives Pontiac, in Tonawanda, New York, would be available, and that Ware would consider the Charging Party as a candidate for the purchase of that dealership.[3]

On May 19, the Company notified the UAW by letter that "it was contemplating a decision to terminate our Bailey Avenue Shop operations for economic reasons," and that it was therefore affording the UAW "an opportunity to discuss the situation before any decision is made."[4] Also, on May 19, Vice President John Davis discussed with Al Ives the various aspects of the purchase of the latter's operation, and on May 20 entered into an "agreement of purchase" of that operation.[5] One of the stipulations of such "agreement of purchase" was that the Charging Party assume all obligations of Al Ives with respect to a collective-bargaining agreement dated February 4 between Al Ives and the IAM (art. 10). On May 22, the Charging Party, by letter, confirmed to Al Ives Pontiac that "we intend to retain in our employ all of your employees currently members of the bargaining unit of [IAM] as covered by the collective-bargaining agreement with the same dated the 4th day of February, 1976."[6]

B. *Commencement of the Picketing*

As a result, apparently, of the failure to reach a new agreement, the UAW commenced picketing the Company's Bailey Avenue location on May 20. The picket signs contained the following legends: "UAW on strike for justice; UAW on strike for equity."

On May 24, the UAW, by letter, responded to the Company's May 19 letter hereinabove referred to. The letter stated, in essence, that since the Company had not, as yet, reached a firm decision to close the Bailey Avenue operation, the UAW saw no purpose in meeting to discuss the decision. However, in the event that the Company did reach a decision to terminate the operation, the UAW reserved the right to meet to discuss the effects on the employees. The letter closed with the statement that "the Union stands ready to meet at any time [with the Company] for the purpose of negotiating an honorable agreement, hopefully resulting in the termination of the strike."[7]

The Company responded by letter dated June 3 to the UAW advising that the Company intended to terminate the Bailey Avenue operations on June 11, and that the Company was available, upon request, to meet with the UAW to discuss the effects of such decision. After some telephone communication, a tentative date for such a meeting between the Company and the UAW was set for June 16. On Friday, June 11, the Company closed its Bailey Avenue operations, and on Tuesday, June 15, the Company commenced operations at the old Al Ives location at 2277 Niagara Boulevard in Tonawanda, New York.

On June 21, the UAW commenced picketing the Tonawanda facility. The picket signs carried by the picketers bore the same legends as the picket signs used at Bailey Avenue, hereinabove set forth. On June 28, UAW representatives came to the Tonawanda facility and presented the Company with a letter stating, in effect, that the UAW was prepared to terminate the strike and that their members were ready, willing, and able to unconditionally return to work on Tuesday, June 29. The

[3] Testimony of John Davis, vice president of the Company.

[4] G.C. Exh. 3. The Company and the UAW had had a collective-bargaining negotiation meeting on May 17 before a mediator. John Davis testified, on cross-examination, that it was "fair to state" that there had been a tentative agreement as to a collective-bargaining agreement between the parties at that time, although there were two issues still to be resolved; one was a holiday, and the other concerned the time period over which the proposed wage increases would be implemented.

[5] G.C. Exh. 4.

[6] G.C. Exh. 5. The IAM had, on October 14, 1975, been certified as the collective-bargaining representative of the employees of Al Ives Pontiac, Inc., in the following unit:

> Including all mechanics, helpers, bodyshop, collision, painters, washers, greasers, lotmen, maintenance men, service advisors and parts truck-driver, excluding all office clerical, managerial employees, professional employees, guards, and supervisors as defined in the Act. [Case 3-RC-6408; G.C. Exh. 13.]

[7] G.C. Exh. 6.

Company, having employed all of Al Ives' old employees who were desirous of working, advised the UAW that there were no job vacancies at that time, but that the employees could fill out applications for employment and would be considered as vacancies occurred.

On June 29, the UAW ceased picketing the Company's operations for a period of 1 day. On June 30, the UAW resumed its picketing with a change in the legend on the picket signs as follows: "Local 55 UAW Protests the Refusal of Davis Pontiac, Inc. to reemploy its members."

On July 6, the UAW filed with Region 3 of the National Labor Relations Board a petition seeking to be certified as a representative of the Company's garage employees.[8] On the same date, it filed charges against the Company alleging violations of Section 8(a)(1), (2), (3), and (5) of the Act.[9] On July 9, the petition and the 8(a)(2) allegations in the charge were dismissed by the Region assertedly upon the authority of *N.L.R.B.* v. *Burns International Security Services,* 406 U.S. 272 (1972). However, at the time of the hearing, the investigation of the remaining allegations of the charge was continuing, and no determination had been made.[10]

C. *Analysis and Concluding Findings*

Section 8(b)(7)(A) of the Act, in pertinent part, makes it an unfair labor practice for a labor organization to picket an employer "where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees . . . where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under Section 9(c) of this Act."

There can be little question that an object of Respondent's picketing of the Charging Party which commenced on or about May 20 at the Bailey Avenue operation, and continued at the Niagara Falls Boulevard location when the Company opened its operations there, had a recognitional and/or bargaining objective. This finding is based on the contents of Respondent's May 24 letter to the Charging Party, the legend on the picket signs, the filing of the representation petition in July, and the testimony of Business Representative Lawrence Sardes who stated, in essence, that Respondent commenced picketing at the Bailey Avenue location because it did not have a contract with the Company and that it hoped to bring pressure on the Company to enter into an agreement with Respondent; that after the Company notified the UAW that it had terminated its Bailey Avenue operation, the UAW moved the picketing over to the Niagara Falls location after operations commenced over there; and that the UAW was "still concerned with negotiating a contract for John Davis employees."

The second requirement of this section, i.e., that the employer has lawfully recognized another labor organization and a question concerning representation (QCR) may not appropriately be raised, is also satisfied by the evidence. Thus, the IAM was certified as the collective-bargaining representative of the Al Ives' employees in an appropriate unit only 7 or 8 months prior to the sale of the business to the Company. Accordingly, the certification year had not run, and it is highly unlikely that the IAM's status as collective-bargaining representative could have been upset at that time in these circumstances.[11] That is to say, the facts clearly show that the Company is a successor to Al Ives—that it took over the latter's operation and maintained it in the same manner and style as it had been previously operated; it sold essentially the same kinds of automobiles, utilized the same inventory, parts, and equipment, and generally carried on the same business as the seller. Accordingly, the "employing industry" remained the same, and "[i]t has been consistently held that a mere change of employers or of ownership in the employing industry is not such an 'unusual circumstance' as to affect the force of the Board's certification within the normal operative period if a majority of employees after the change of ownership or management were employed by the preceding employer."[12]

Of course, the Court, in *Burns,* acknowledged that "it would be different if Burns had not hired employees already represented by a union certified as a bargaining agent." Here, as a condition of the sale, the Company, retained the Al Ives' employees rather than its Bailey Avenue employees.

This leads us to a consideration of Respondent's defense, which is bottomed upon its contention that the picketing is the consequence of the Respondent's unfair labor practices, which include a refusal to bargain in good faith and the refusal to employ the Bailey Avenue employees at the Niagara Falls Boulevard location. However, there is a lack of substantial evidence in this record to substantiate the Respondent's position. As previously stated, at the time of the hearing herein, its charges against the Company in this respect were still under investigation, and the Administrative Law Judge has not been advised by any party since the hearing of the result of that investigation. Accordingly, there is no substantial evidence before me that the Charging Party has committed any unfair labor practices. Moreover, the hiatus in the picketing for 1 day on or about June 29 did not materially change the objective of the picketing. It is true that the legend on the picket signs was changed, but even the new legend did not assert that the Company had engaged in unfair labor practices. Furthermore, there was no communication by Respondent to the Company that the initial objective of the picketing (which was admittedly for recognition and bargaining purposes) had changed. Finally, the filing of the petition in July is further evidence that Respondent maintained such a bargaining objective even after the hiatus in the picketing. Under all circumstances, therefore, Respondent's defense must be rejected. I therefore find and conclude that at all times since on or about June 21 an object of Respondent's picketing of the Company has been, and is, to force or require the Company to recognize and bargain with

[8] Case 3–RC–6657, G.C. Exh. 18.

[9] Case 3–CA–6626, G.C. Exh. 19.

[10] See G.C. br., p. 5; see also G.C. Exhs. 14 and 15. As of the present date, the Administrative Law Judge has not been notified by any party of the disposition of the said charges.

[11] See *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96 (1954).

[12] *N.L.R.B.* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 279 (1972).

Respondent as the collective-bargaining representative of the employees in the unit currently represented by the IAM, in violation of Section 8(b)(7)(A) 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 the interstate operations of the Company 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 obstrucing commerce and the free flow thereof.

V. THE REMEDY

Having found that Respondent has violated Section 8(b)(7)(A) of the Act, I shall recommend that it cease and desist therefrom, and take certain affirmative action necessary to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The UAW and the IAM, and each of them, are labor organizations within the meaning of Section 2(5) of the Act.
3. By picketing the Company after June 21, in the manner described above, with an object of forcing or requiring the Company to recognize or bargain with Respondent as the representative of its employees where the Company has lawfully recognized in accordance with the Act another labor organization, and a question concerning representation may not appropriately be raised under Section 9(c) of the Act, Respondent has violated Section 8(b)(7)(A) of the Act.

[Recommended Order omitted from publication.]