Airport Motors, Inc. *and* District Lodge 15, Local 447, International Association of Machinists and Aerospace Workers, AFL-CIO. Case 29-CA-5676

February 8, 1979

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

On February 8, 1979, Administrative Law Judge Peter E. Donnelly issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs, and Respondent filed a brief in support of the Administrative Law Judge's Decision.

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 briefs and has decided to affirm the rulings, findings, 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 complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge: The charge herein was filed on May 27, 1977, by District Lodge 15, Local 477, International Association of Machinists and Aerospace Workers, AFL-CIO, herein called Charging Party or Union. A complaint thereon was issued by the General Counsel of the National Labor Relations Board on December 30, 1977, alleging that Airport Motors, Inc., herein called Employer or Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union on a successor contract and by withdrawing and withholding recognition of the Union as the collective-bargaining representative of its employees. An answer thereto was timely filed by Respondent, and a hearing was held before the Administrative Law Judge on May 24, 1978. Briefs have been timely filed by General Counsel and Respondent which have been duly considered.

FINDINGS OF FACT

I. EMPLOYER'S BUSINESS

Employer is a New York corporation maintaining its principal office and place of business in the borough of Queens, city and State of New York, where it is engaged in the retail sale and service of new and used automobiles, automobile parts, and related products. During the past year Respondent, in the course and conduct of its operations, derived gross revenues therefrom in excess of $500,000. During the same period Respondent in the course and conduct of its business purchased and caused to be transported and delivered to its showroom and service shop, automobiles, automobile parts, petroleum products, and other goods and materials valued in excess of $50,000 were delivered to its said showroom and service shop in interstate commerce directly from States of the United States other than the State of New York. The complaint alleges, the answer admits, and I find that the Employer is engaged in commerce within of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that District Lodge 15, Local 447, International Association of Machinists and Aerospace Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

The contractual relationship between Respondent and the Union began in the 1950's and successive contracts were entered into thereafter for some 15 years with the most recent running from May 23, 1974, to May 23, 1977. That contract reads, in part, as follows:

> ARTICLE I
>
> This Agreement covers all Mechanics and Mechanics Helpers who are employed by the Company, and are members of Automobile Lodge No. 447, International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 15, New York, New York.
>
> All employees covered by this Agreement shall be members in good standing of Automobile Lodge #447, District No. 15 of the International Association of Machinists & Aerospace Workers, AFL-CIO. The Company when in need of employees coming under the classifications covered by this Agreement shall notify the office of the Union and the Union will render all possible assistance to furnish competent help. The Company may obtain its own help provided, however, that such help must join the Union within thirty (30) days after employment by the Company.
>
> Any employees who fail to maintain membership in good standing in the Union because of non-payment of

initiation fees or dues shall be summarily discharged by the Company upon receipt of notice from the Union.[1]

It is undisputed that only two of the Respondent's 8 to 12 employees have ever joined the Union. These were Joseph DiBarbari and Pericles Savas. Contributions under the contract to the District 15 Welfare Fund were made only on behalf of DiBarbari and Savas. DiBarbari died in 1975, and thereafter payments were made only for Savas, who also maintained his union membership.[2] At present only Savas is a member of the Union; only Savas is paid the contract wage rate; and only Savas is paid for unused sick leave under the terms of the contract. Most of the other contract provisions are not deserved or applied to any employees.

The F.M.C.S. statutory termination notice also reflects the coverage of the two most recent contracts as being limited to only two employees (Resp. Exh. 2 and 4).

The 1974-77 contract was negotiated by Union Representative Lawrence Stepp, who was replaced by Business Representative C. Joseph Lubas in 1977 who was responsible for negotiating the next contract. Lubas approached Respondent to negotiate a new contract, taking the position that the 1974-77 contract was actually a union shop contract covering all unit employees. Respondent took the position that the contract was a members-only contract covering only members of the Union and therefore refused to negotiate any contract covering all of its employees.[3] Thereafter Lubas contacted Daniel Koeppel, Respondent's vice president, directly to request contract negotiations for all the employees, but Koeppel likewise declined.

B. *Discussion and Analysis*

It is the position of the General Counsel that the 1974-77 contract is, in substance, a "union shop" contract covering all the unit employees, and that accordingly Respondent violated Section 8(a)(5) by refusing to bargain with the Union as the collective-bargaining representative of employees.

Respondent, on the other hand, contends that the contract is a "members only" contract limited in its coverage to those employees who joined the Union and that, as such, Respondent has no statutory bargaining obligation under Section 8(a)(5) of the Act.

The basic issue is whether the contract herein is a "union shop" contract with coverage extending to all unit employees or a "members only" contract limited in its coverage to those employees who joined the Union. This issue is basic because if it is a "members only" contract, the position of Respondent is correct in that there exists no statutory bargaining obligation.

In support of its position, the General Counsel urges that all three paragraphs of article I should be read together, and that so viewed it becomes apparent that article I includes essentially a union-security provision. I do not agree. The first paragraph of article I, standing alone, clearly limits the coverage of the agreement to union members. The next two paragraphs introduced an element of confusion by providing for notice to the Union when employees are needed and obligating such employees to obtain union membership within 30 days. Also provided is summary discharge for such employees failing to maintain membership in the Union because of nonpayment of initiation fees or dues. In these circumstances ambiguities are raised and it is necessary to look, not only to the express language of the contract, but to the practice under the contract and prior contracts to determine the meaning of the ambiguous provisions. In doing so, we discover that only two employees have ever joined the Union and that presently only one, Savas, is a union member. Welfare payments are made by Respondent to the Union only for Savas; only Savas is paid the contract wage rate; and only Savas is paid for unused sick days. Most of the other contract provisions are not observed at all. It also appears that this limited application of the contract has been the case, not only with the most recent contract, but since the beginning of the contractual relationship between the Union and Respondent some 15 years ago and has been adhered to consistently. That the Union recognized the problem is apparent from its attempt to negotiate a union-shop provision in its most recent contract proposals, as noted above.

In these circumstances, the General Counsel's reliance on the *Hess* case[4] to support its position is misplaced. The *Hess* case deals with a contract containing an *unambiguous* union-security provision. It goes on to conclude that despite the fact that the contract was not enforced for a period of about a year, it retained its "vitality and vigor." In the instant case, having found that the contract is, in essence, a members-only contract, rather than a union-security contract, the *Hess* case is obviously inapposite.

The General Counsel also argues that the mere failure of employees to join the Union does not privilege Respondent to withdraw recognition and that the Union enjoys a presumption of majority status. Such presumption has not been rebutted, the General Counsel argues, simply because

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[1] It does not appear that any attempt was made by the Union to cause the discharge of any employee under article I of the contract.

[2] It appears that union authorization cards were signed by four other employees, one in 1974 and three in 1976, but none ever became union members.

[3] At a contract discussion between Lubas and Respondent's attorneys Cooper and Englander, Lubas submitted a contract proposal unacceptable to Respondent, which would modify article I of the contract to provide the following:

Article 1. *Recognition*

1.1 The Company recognizes the Union, its designated agents and representatives, its successors and/or assigns, as the sole and exclusive bargaining agent on behalf of all of the employees of the Company within the bargaining unit as hereinafter defined, with respect to wages, hours and all other terms or conditions of employment.

1.2 The term "employee" as used in this agreement shall mean and include all classes of mechanics and helpers.

Article 2. *Union Shop*

2.1 It shall be a condition of continuous employment that all employees of the employer covered by this Agreement who are members of the Union in good standing on the effective date of this Agreement, shall remain members in good standing and those who are not members on the effective date of the Agreement shall, not later than the thirty-first (31st) day following the beginning of such employment, become and remain members in good standing in the Union.

2.2 The Company will within three (3) working days after receipt of notice from the Union, discharge any employee who is not in good standing in the Union as required by the preceding paragraph.

[4] *Luigi Ferraioli, d/b/a Hess Service Station*, 165 NLRB 423 (1967).

only one man joined the Union. However, this argument assumes that the Union had at some time previously gained majority status. The record does not support this, particularly where the record shows that only two men in a unit of some 8 to 12 employees ever joined the Union under these members-only contracts. There is no presumption to rebut since none ever arose.

In short, the 1974-77 contract, prior contracts, and the practice and conduct of the parties throughout some 15 years since the original contract make it clear that it was the intention of the parties that the Union represent only those employees who were also union members. The law is clear that such a contract will not support a refusal-to-bargain allegation under Section 8(a)(5) of the Act. *Don Mendenhall, Inc.*, 194 NLRB 1109 (1972). Accordingly, the complaint herein must be dismissed.

CONCLUSIONS OF LAW

The Respondent has not engaged in any conduct violative of the Act.

Upon the foregoing findings of fact and conclusions of law I hereby issue the following recommended:

ORDER[5]

The complaint is dismissed in its entirety.

[5] 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.