**East Bay Chevrolet Co., d/b/a Time Chevrolet *and* East Bay Automotive Council.** Cases 32-CA-347 and 32-CA-651 (formerly 20-CA-13322 and 20-CA-13124)

May 30, 1979

## DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND MURPHY

On June 9, 1978, Administrative Law Judge James M. Kennedy issued the attached Decision in this proceeding. Respondent, the General Counsel, and the Charging Party filed exceptions and briefs. Thereafter, Respondent filed an answering brief in opposition to the Charging Party's exceptions, a motion to modify, and a request for oral argument. The Charging Party filed a reply to the motion to modify.

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, with the addition and modifications set out below, and to adopt his recommended Order.[1]

1. We agree with the Administrative Law Judge that Respondent violated Section 8(a)(5) and (1) by refusing to continue bargaining with the Council on a single-employer basis for a combined unit of its shop and sales employees. Consistent with his findings, we conclude that the combined shop/sales unit was the recognized unit and an appropriate unit.

Respondent, while under former ownership and a member of the Association, bargained for many years for its employees as part of a multiemployer unit.[2] Before 1972, the multiemployer unit was confined to shop employees—mechanics, painters, and car jockeys within the jurisidictions of the Machinists, the Painters, and the Teamsters unions which were affiliated with the Council. The Association bargained separately with the Salesmen's Union for a multiemployer unit of sales employees. In 1972, the Salesmen's Union, which was already a member of the Council, gave the Council authority to bargain for it and agreed to a procedure whereby votes of the shop employees and the sales employees were pooled for ratification of the bargaining contract. We find that from that time the multiemployer unit combined shop and sales employees in a single unit. We rely particularly upon the language of the 1974-77 bargaining contract between the Association and the Council. That contract states that it is between the Association, the Council, and affiliated locals, and refers to the labor organizations collectively as the Union.[3] It is signed by representatives of the Association, a representative of the Council, and a representative of each of the four affiliates. The recognition clause covers all employees of Association members under the work jurisidiction of the four affiliates.[4] The contract is divided into two parts with the wages and conditions of employment for shop employees set out in part I and those for sales employees set out in part II. While the two parts are printed in separate booklets,[5] they are connected by specific language of the contract.[6] We think the express terms of the contract and the adoption of a pooled-ratification procedure dem-

[1] Respondent's request for oral arguement is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties. The motion to modify is also denied.

[2] The parties stipulated that East Bay Chevrolet was a member of the Association and a part of the multiemployer bargaining unit, and that Time Chevrolet is the new name for the same corporation under new management and ownership effective April 1977. Respondent takes the position it is a successor employer.

[3] The opening paragraph of the contract reads:

> THIS AGREEMENT made and entered into this first day of June, 1974, by and between the EASTBAY MOTOR CAR DEALERS, INC., a corporation, acting for and on behalf of its member dealers, first party, hereinafter called Employer, and the EASTBAY AUTOMOTIVE COUNCIL, and the Local Unions affiliated with said Council, EASTBAY AUTOMOTIVE MACHINISTS LODGE NO. 1546, (affiliated with MACHINISTS AUTOMOTIVE TRADES DISTRICT LODGE NO. 190 OF NORTHERN CALIFORNIA), AUTO, MARINE AND SPECIALTY PAINTERS' UNION, LOCAL NO. 1176, TEAMSTERS AUTOMOTIVE EMPLOYEES UNION LOCAL NO. 78, and AUTOMOBILE SALESMEN'S UNION NO. 1095, second party, signatories hereto, hereinafter collectively called Union.

Art. I, among other things, defines "Employer" and "Union" as follows:

> (1) The term "Employer" as used herein shall mean the individual members of the Eastbay Motor Car Dealers, Inc.
>
> The term "Union" as used herein shall refer to the East Bay Automotive Council, and all of its affiliated Unions signatory hereto or who may hereinafter become parties to this Agreement.

[4] Art. II, par. (1) reads:

> ARTICLE II RECOGNITION AND BARGAINING AGENT
>
> (1) 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 are working or may perform work, coming within the work jurisdiction of the Union as hereinafter described.

Pars. (2), (3), and (4) set forth in detail the work jurisdiction of the Machinists, the Painters, and the Teamsters Unions. Par. (5) states that the work jurisdictions of the Salesmen's Union "is set forth in Part II of this Agreement."

[5] Although the two parts, in form, appear much like independent contracts, part II does not contain a recognition clause.

[6] The contract states on the back of the title page to part I that "Part 2 of the Master Agreement which covers all contract provisions applicable to the Automobile Salesmen's Union Local 1095 has been printed in a separate booklet for the convenience of all concerned." Immediately preceding the signatures on part I, the contract 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." Part I bears the names of the Association, the Council, and each of the four affiliates, with a signature from a representative of each of the organizations named. Part II bears the name of the Association, the Council, and the Salesmen's Union, with places for the signatures of representatives of the Association and of the Salesmen's Union.

onstrate that the parties intended to merge the previously separate units rather than merely to engage in coordinated bargaining for purposes of convenience.[7] Accordingly, we conclude that after 1972 the established multiemployer unit was a combined unit of shop/sales employees, a unit not repugnant to the policies of the Act.[8]

Upon Respondent's withdrawal from the Association and the multiemployer bargaining unit in April 1977,[9] the Council presumptively remained the majority representative of Respondent's employees in a single-employer unit. The character of the unit as a combined shop/sales unit did not automatically change for reason of the change from bargaining on a multiemployer basis to bargaining upon a single-employer basis, and we conclude, as did the Administration Law Judge, that the evidence does not show that the parties modified the combined unit. Respondent's letter withdrawing the multiemployer bargaining and stating an intention to conduct labor relations in an individual bargaining unit made no reference to the composition of the unit. The manner in which Respondent arranged the bargaining meeting of July 5, 1977,[10] and the recognition agreement signed at that meeting are not sufficient in our view to establish that the parties modified the existing shop/sales unit. Representatives of the Council, including the president of the Salesmen's Union, were present at the July 5 meeting and presented the recognition agreement as they had prepared it, referring to "a unit." At the meeting, Respondent's attorney changed the words "representative" and "unit" to the plural form, but left a reference to a single "agreement." He explained the changes as clarifying the recognition agreement, and the union representatives did not inspect or object to the changes. There is no evidence that Respondent explicitly proposed that the combined unit be changed to separate units or that the Council and affiliates affirmatively agreed to such a change.

2. The Administrative Law Judge referred to the Board the Charging Party's suggestion that the Board institute proceedings to discipline Respondent's attorney. While the conduct complained of by the Charging Party may be lacking in good faith, we do not think disciplinary action is warranted. We deny Respondent's motion to modify the Administrative Law Judge's Decision by deleting his discussion of the matter.

[7] We consider *Consolidated Papers, Inc.*, 220 NLRB 1281 (1975), and *Duval Corporation*, 234 NLRB 160 (1978), distinguishable on the facts.

[8] Cf. *F. L. Babb, d/b/a Babb Motors*, 108 NLRB 1140 (1954); *Trevellyan Oldsmobile Company*, 133 NLRB 1272 (1961).

[9] Although the withdrawal was not timely under *Retail Associates, Inc.*, 120 NLRB 388 (1958), the Council accepted the withdrawal, and there is no contention that the withdrawal was untimely.

[10] Respondent sent separate communications to the Council, the Machinists, the Painters, and the Teamsters, referring to a meeting "to reach an early agreement between your Union and Time Chevrolet."

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, East Bay Chevrolet Co., d/b/a Time Chevrolet, Albany, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached Appendix A is substituted for that of the Administrative Law Judge.

## APPENDIX A

### 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 parties had the opportunity to present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and we have been ordered to post this notice to our employees.

The National Labor Relations Act, as amended, gives all employees the following rights:

To organize themselves
To form, join, or support unions
To bargain as a group through a representative they choose
To act together for collective bargaining or other mutual aid or protection
To refrain from any or all such activity except to the extent that the employees' bargaining representative and employer have a collective-bargaining agreement which imposes lawful requirement that employees become union members.

WE WILL NOT withdraw recognition of the East Bay Automotive Council and its four affiliate local unions as the exclusive collective-bargaining agent of our employees in the previously recognized unit.

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

WE WILL immediately recognize and bargain in good faith with the East Bay Automotive Council and its affiliate local unions as the exclusive collective-bargaining representative of all our employees in the appropriate unit and, if an understanding is reached, embody such agreement in a written, signed agreement which shall be retroactive in all respects to July 26, 1977. If

any employee is entitled to backpay as a result of that contract, we will pay interest on that amount.

EAST BAY CHEVROLET CO., D/B/A TIME CHEVROLET

## DECISION

### STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge: This case was heard before me on February 9, 1978, in Oakland, California, pursuant to a consolidated amended complaint issued by the Regional Director of the National Labor Relations Board for Region 32 on January 27, 1978. The consolidated amended complaint is based upon charges filed by the East Bay Automotive Council (herein called the Council) for and on behalf of itself and its affiliated local unions. The first charge, Case 32-CA-651 (20-CA-13124), was filed on July 13, 1977.[1] The second charge, Case 32-CA-347 (20-CA-13322), was filed on August 25. The first charge was originally dismissed on August 10 by the Acting Director for Region 20. After the Director for Region 32 issued his original complaint in Case 32-CA-347, the Director for Region 20, on January 16, 1978, partially rescinded the earlier dismissal in Case 20-CA-13124 and the case was transferred to Region 32, where it was given a Region 32 docket number, 32-CA-651. That revival appears to have the General Counsel's response to a procedural defense raised by Respondent's answer in case 32-CA-347 (20-CA-13322) filed on November 29. On January 27, 1978, the Regional Director for Region 32 ordered both cases consolidated and issued a consolidated amended complaint on both charges. The consolidated amended complaint is not essentially different from the original complaint of October 31, though it does correct those allegations in certain minor respects. Both accuse East Bay Chevrolet Co. d/b/a Time Chevrolet (herein called Respondent) of having engaged in essentially the same violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended.

### Issues

The principal issue in this case is whether or not Respondent can properly rely upon a recognition agreement between itself and the Council in order to justify its refusal to bargain with one of the Council's affiliates, Automobile Salesmen's Union, Local 1095, Retail Clerks International Association, AFL-CIO. Closely connected to that issue is whether or not Respondent's attorney, Allen W. Teagle, engaged in deceitful conduct surrounding the execution of that agreement.

All parties were given full opportunity to participate, introduce relevant evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs, which have been carefully considered, were filed on behalf of all parties.

[1] Hereinafter all dates are in 1977 unless otherwise noted.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

### FINDINGS OF FACT

#### I. RESPONDENT'S BUSINESS

Respondent admits, and I find, that at all times material herein it has been a California corporation with its principal place of business in Albany, California, where it operates a Chevrolet dealership and sells and services new and used automobiles. During the past calendar year its gross revenues exceeded $500,000 and during that same period it purchased goods and materials valued in excess of $50,000 from sources outside California. Accordingly, it admits and I find that it is, and has been at all material times, an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. THE LABOR ORGANIZATIONS INVOLVED

Although Respondent denied, for lack of information, the General Counsel's allegation that the Council and its affiliated local unions are labor organizations within the meaning of Section 2(5) of the Act, it is clear, based on the unchallenged testimony of C. L. McMonagle, the chairman of the Council, as well as the area director of the Northern California Automotive Machinists, District Lodge 190, that all five organizations within the meaning of the Act. It appears from his testimony that four local unions have banded together to form the Council, an umbrella organization which negotiates collective-bargaining contracts with automobile dealerships in three counties of north-central California. The four local unions comprising the Council are: East Bay Automotive Machinists Lodge No. 1546, affiliated with Northern California Automotive Machinists, District Lodge 190, International Association of Machinists and Aerospace Workers, AFL-CIO; Auto, Marine and Specialty Painters Union, Local 1176, AFL-CIO; Teamsters Automotive Employees Union, Local 78, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; and Automobile Salesmen's Union, Local 1095, Retail Clerks International Association, AFL-CIO. Based on McMonagle's testimony, I find all four groups to be labor organizations within the meaning of Section 2(5) of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. *Background*

According to McMonagle, the Council has been in existence since approximately 1938 and since that time has negotiated many collective-bargaining agreements with auto dealerships in a three-county area of California (Alameda, Contra Costa, and San Joaquin Counties). In the greater Oakland area, it has negotiated with a multiemployer group known as The East Bay Motor Car Dealers, Inc., (herein called the Association). Between 1938 and 1972, the Automobile Salesmen's Union, although a member of the Coun-

cil, had not given the Council bargaining authority. It negotiated a separate contract with the Association. Insofar as the other three local unions were concerned, the Council negotiated on their behalf and signed a single contract covering employees within their constitutional jurisdictions. Thus, as of 1972, insofar as the Association was concerned, there were two multiemployer bargaining units. In generic terms, one unit consisted of auto mechanics, painters, and car jockeys, while the other unit consisted of new and used car salespersons. In 1972, the two units were merged into a single unit and a single collective-bargaining agreement was signed on behalf of all four employee "crafts."[2] When that contract expired in 1974, a second collective-bargaining agreement was negotiated covering the merged unit. The second contract expired on May 31, 1977. Thus, as of 1977, the Association had recognized the Council in a single all-employee unit for a period of two contract terms.

One of the employers bound by the Association agreements was Respondent corporation which was then known as East Bay Chevrolet and was under different management. In April 1977 the corporation was purchased by its current owners, who changed its trade name to Time Chevrolet. Prior to April, it is clear that Respondent was a member of the multiemployer Association bargaining unit and its employees were covered by the single four-craft agreement.

### B. *The 1977 Incidents*

On April 6, the Council met with the Association in order to begin negotiating for a new collective-bargaining agreement. On April 28, Respondent's General Manager L. E. Troyer, utilizing language drafted by Attorney Allen W. Teagle, wrote the Association, the Council, and the four affiliated locals a letter advising it was resigning from the Association and would no longer engage in multiemployer bargaining. Teagle concluded by saying "I am by this letter also notifying you that East Bay Chevrolet Co., d/b/a Time Chevrolet, will conduct all collective bargaining and all other labor relations matters on its own and separately on an individual employer basis only and only as an individual employer bargaining unit." All of the language in that letter, including the quoted portion, deals solely with the multiemployer side of the bargaining unit. It does not discuss in any way the unit makeup within the dealership.

Although the Council and McMonagle regarded Respondent's attempt to withdraw from the Association as untimely, as indeed it was under the doctrine of *Retail Associates*,[3] the Council erroneously advised its attorneys that negotiations had not begun until May 6. Based on that information, the attorneys advised the Council that Respondent had timely withdrawn from the association and was free to bargain separately from the Association. Thereupon the Council concentrated its efforts on the Association and its members and engaged in lengthy collective bargaining with it. On June 29, the Council commenced an economic strike against the Association members. It also began picketing Respondent's Albany facility.

On June 25, all of Respondent's salespersons had signed an informal petition saying they no longer wanted Automobile Salesmen's Union Local 1095, Retail Clerks International Association, AFL-CIO, to represent them for any purpose. Although Teagle and Troyer denied they ever saw that petition until July 5, nonetheless, on June 30, Teagle sent a mailgram to the Council, the Teamsters, and the Painters, requesting a meeting "to reach an early agreement between your union and Time Chevrolet." As a result of those wires and some followup telephone calls, a meeting was scheduled for 9 a.m. on July 5 at McMonagle's office in south Oakland.

The meeting convened as scheduled. Present for the Council were McMonagle, "Red" Wallace of the Teamsters, and Ferd Silva of the Automobile Salesmen's Union.[4] Representing Respondent were Teagle and Troyer. The meeting opened with McMonagle telling Teagle that before bargaining was to commence, Respondent would be required to sign a recognition agreement in view of the fact that it had withdrawn from the Association. When Teagle offered to obtain such an agreement, McMonagle advised that he had already prepared one. McMonagle produced it and gave it to Teagle for his examination.

While there is some conflict in the testimony about what was said and the order in which the document was signed, it is clear that after examining the document, Teagle made some changes. The changes include pluralizing the words "representative" and "unit," the insertion of the word "for" and the striking out of the phrase "no later than July 15, 1977." The exact changes may be seen in Appendix B, attached hereto, which is an exact reproduction of the document. [Appendix B omitted from publication.] All the changes appearing there are Teagle's.

McMonagle and Silva recall Teagle explained the changes as grammatical in nature; Teagle and Troyer say Teagle told them the changes were for clarity. It is undisputed that there was no discussion that the changes were intended to effect any changes in the bargaining unit.

At that point, McMonagle presented Teagle with a contract proposal following the proposal previously given to the Association, but limited to a single employer unit. That proposal dealt with three of the four crafts. While that was going on, Silva was handwriting a proposal regarding the salespersons. When McMonagle and Teagle finished their discussion, Silva gave Teagle the proposal relating to the sales employees.[5] The meeting then ended with the parties agreeing to resume bargaining on July 7.

Teagle and Troyer testified they then left McMonagle's office and returned directly to the dealership. There, upon entering Troyer's office, they discovered on Troyer's desk

[2] The word "craft" as used herein is not intended to denote true craft status, but is only a short-hand manner, used by the Unions, of describing the four employee groups within the unit.

[3] *Retail Associates, Inc.*, 120 NLRB 388 (1958).

[4] Other persons may have been present as well, but they do not appear to have participated in the meeting in any meaningful way.

[5] I attach no significance to the fact that McMonagle spoke for three of the crafts while Silva spoke for his own craft. The collective-bargaining contracts executed in 1972 and in 1974 consisted of two parts. Part I covered the mechanics, painters, and car jockeys while part II covered the sales personnel. These parts were published in separate booklets, but are clearly one contract. McMonagle and Silva were simply acting as the Council's spokesmen for their own areas of expertise. There is no reason to conclude, as Respondent contends, that Silva was bargaining separate and apart from McMonagle.

the June 25 petition signed by all the salespersons. Teagle took that document, returned to his office in San Francisco, and 2 hours later filed a petition for an election among Respondent's sales employees, Case 20-RM-2155.[6]

On July 7, the parties again met at McMonagle's office. Teagle and Troyer represented Respondent; McMonagle and Silva were also present. According to McMonagle, Teagle advised he could not bargain with the Council, including the Salesmen's Union, because the RM petition had been filed. McMonagle testified that since Teagle had said he would not and could not bargain with the Council, including all of the members of the Council, no bargaining session would be held.

Teagle's version is not significantly different, but says that his refusal was limited to dealing with the Salesmen's Union. His testimony was:

> I told them since our last get-together, something had happened that they presumably were aware of. I mentioned, in case they weren't, that the employer received independent objective evidence that the Salesmen's Union did not represent the salesmen in the salesmen's unit at Time Chevrolet and a petition for an election was on file.
>
> That, under those circumstances, the employer was not in a position to bargain about the salesmen's unit, but they were very anxious and happy to continue to negotiate with the unions concerning the other units and the employees covered by the other units in the contracts.

The principal difference between McMonagle's version and Teagle's is one of characterization. Both agree that Respondent did not intend to negotiate at all regarding its salesmen. McMonagle says Teagle also refused to bargain with the Council. Teagle contends he was willing to bargain with the other unions in the other units. Such testimony implicitly rejects the Council as the bargaining representative for the other three unions as well. Thus, I conclude that McMonagle's version is, even if conclusionary, correct: Respondent did not intend to bargain with the Council, for it represented all four local unions.

During this short meeting there appear also to have been some remarks by McMonagle that Respondent had signed a recognition agreement with the Council and should honor it. Furthermore, Teagle appears to have attempted to discuss a counterproposal regarding health insurance. In the course of ending the meeting, because Respondent refused to continue to recognize the Council, McMonagle apparently rejected that counterproposal. The meeting ended when McMonagle and the other union officials walked out of the office.

On July 20, the membership of the affiliated locals constituting the Council met at the Oakland Teamsters Hall and presented for ratification the newly negotiated agreement between the Council and the Association. The votes of the members of all four locals were pooled, pursuant to the Council's bylaws, and the resulting tally showed that the contract was overwhelmingly accepted. The strike against the Association and its members then ended.

On July 26, in order to reach a stop-gap resolution to the instant dispute, as the Council continued to picket it, Respondent simultaneously signed an independent agreement with the Council, limited to the mechanics, painters, and car jockeys, and a reservation agreement in which the parties agreed that the collective-bargaining agreement covering those three groups was "without prejudice to the parties thereto in connection with any dispute that has, or may hereafter arise concerning the representation status of Automobile Salesmen's Union Local No. 1095, and the Employer's employees including but not limited to cases 20-RM-2155 and 20-CA-13124 [32-CA-651], and that certain recognition agreement entered into July 5, 1977." The parties have been living under the terms of this stop-gap arrangement since that date, awaiting resolution of the recognition question.

## IV. ANALYSIS AND CONCLUSIONS

First, it should be observed that Respondent's procedural defense, together with its claim that the Regional Office has somehow trapped it, is totally without merit. Indeed, it appears frivolous. Respondent argues that the Acting Director's dismissal of the first charge on August 10 was a Board finding to the effect that Respondent could properly rely upon the salesmen's June 25 statement as a sufficient objective consideration that they no longer wished to be represented by Automobile Salesmen's Local 1095 and which raised a good-faith doubt regarding that union's continued majority status. Frankly, I am unable to see what that reliance was. Respondent had already negotiated its stop-gap measure on July 26. Even if the Acting Regional Director had considered the July 5 recognition agreement at the time he dismissed the charge, there was no procedural impediment to the Council's refiling it and submitting additional evidence. That is exactly what the Council did on August 25.

Moreover, the fact that the second charge was subsequently transferred to Region 32, when that Region opened for business, changes nothing. The right to issue complaints rests solely within the discretion of the General Counsel as delegated by him to the Regional Directors. The Director for Region 32, based on the evidence newly submitted in support of the second charge, issued his complaint. Later, when Respondent filed its original answer raising the procedural questions in order to show exactly what had occurred, the General Counsel directed Region 20 to partially rescind its earlier dismissal as based upon imcomplete information. There is no question that the General Counsel has a right, and, probably the obligation, to reopen a case he has previously dismissed when newly-discovered evidence justifies it. Moreover, the fact that two regional offices were involved is of no moment. Both offices are responsible to the directives of the General Counsel insofar as the issuance of complaints are concerned and there is no such concept as exclu-

[6] A hearing was scheduled on the petition for August 25. Later, according to Teagle, he learned he had an injunction hearing in state court on another matter which conflicted and he asked the Regional Director for a 1-day postponement. He says the Director refused to reschedule the hearing and accordingly, on August 25, he submitted and the Director approved, his request to withdraw the RM petition. Also on August 25, Troyer wrote a letter to Automobile Salesmen's Union Local 1095 advising that it was withdrawing recognition because the "union does not represent a majority of our employees. . . ."

sive jurisdiction among regions. Those geographical lines are for the administrative convenience of the Agency and create no procedural rights.

When, on January 25, 1978 (by letter which is not in evidence), Respondent "appealed" the Director for Region 32's issuance of the instant consolidated amended complaint, Respondent was merely attempting a delaying tactic. The rules provide for no such appeal. They do provide for the appeal of the dismissal of a charge, but not for the appeal of a decision to issue a complaint. The General Counsel's wire of February 8 (in evidence as an attachment to Respondent's answer to consolidated complaint and stamped as received on February 9) clearly and accurately details the General Counsel's authority.[7]

With regard to the merits of the dispute itself, I find that Respondent has violated Section 8(a)(5) and (1) of the Act since July 5 by refusing to recognize and bargain with the Council in the four-craft unit. I reach this conclusion based upon the lack of any probative evidence that Respondent did anything at all to change the scope of the unit other than to fortuitously obtain its withdrawal from the multiemployer unit. Its letter of April 28 was directed solely at that aspect of the bargaining unit and in no way reflected any intent to somehow split the four-craft unit into four separate bargaining units. When Respondent managed to extricate itself from the multi-employer unit, the four-craft nature of the unit nontheless remained. Moreover, by operation of law, there was a presumption that the Council continued to represent a majority of the employees within the four-craft unit.[8] Between April 28 and July 5, Respondent did nothing to question the Council's majority status.

On July 5, Respondent, through Teagle, began tinkering with the four-craft bargaining unit. He made changes, explained as clarifications, in the recognition agreement. Teagle argues in his brief that the clarifications were merely to reflect the changes in unit description as wrought by the April 28 letter and by his wires of June 29 arranging the July 5 meeting. However, none of these documents explicitly mentions that Respondent desired to divide the single four-craft unit into four separate units. Certainly there is no evidence that the Council ever agreed to such a change; indeed there is no evidence that such a change was ever explicitly proposed to the Council.

There is no question that the parties are permitted by law to modify unit descriptions. *N.L.R.B.* v. *Wooster Division of Borg-Warner Corporation*, 356 U.S. 342 at 349-350 (1958). However, such modifications may not be obtained unilaterally, nor may they be obtained by trickery. If a party wishes to negotiate such a change it must necessarily be clearly and explicitly communicated to the other party. Indeed, as in all facets of collective bargaining, candor must be the watchword. Collective bargaining is not a shell game or an act of prestidigitation by which one party outwits another. Certainly Respondent's letter and mailgrams, if they can be considered an expression of Respondent's desire to negotiate in separate units (a view which I cannot accept), are not a clearly articulated offer to modify existing bargaining units. Moreover, the Council's silence with regard to that alleged offer certainly cannot be deemed an acceptance of it.

Finally, when on July 5, Teagle "clarified" the recognition agreement by modifying it in certain respects, he engaged in no further explanation of Respondent's purpose. If, as he says, he was simply clarifying the document to reflect his belief that the parties were modifying the bargaining unit, he could easily have said so. He did not. Accepting for the moment, Teagle's explanation that the modifications were for clarification, I do not find the changes to have effected a clarification. In fact, as the General Counsel observes, the changes create ambiguities which did not exist before. Before the changes, it is clear that the recognition agreement aimed for a single contract between the Council as representative of the four affiliates in a single unit. After the changes, the first paragraph of the agreement would appear to contemplate multiple representatives in separate units, but the second paragraph specifically refers to a single agreement with all the unions. An internal inconsistency such as this cannot be explained as a clarification; it is just the opposite.

And, assuming that the meaning of the first paragraph of the agreement is accurately expressed therein, Respondent, on July 7, did not act consistently with it. Instead, it appears to have attempted to negotiate a single contract with McMonagle covering the mechanics, painters, and car jockeys, but omitting the salesmen. Had Respondent truly intended to split the remaining unit into three parts, it would have insisted on separate agreements with those three. Yet, on July 7 it was apparently willing to deal with those three as a single unit.

All of this leads me to conclude that the changes made by Teagle in the July 5 recognition agreement were made for no other purpose than to sever the salesmen from the four-craft unit. In this circumstance, I cannot credit Teagle and Troyer's testimony that they discovered the salesmen's June 25 sign-up sheet after the July 5 meeting had been concluded. They undoubtedly were aware of its existence prior to the meeting. In fact, I have no doubt that the sheet came to their attention shortly after it was completed. Such a petition would not have remained in the hands of the salesmen for 10 days; they would promptly have done something definitive with it. It is not a coincidence that 5 days after the sign-up sheet was signed, Respondent asked for bargaining. I recognize that the day before Respondent's requests for bargaining were made, the Council and its members struck the Association and Respondent. It may be that the strike prompted the requests. More likely, both the strike and Respondent's awareness of the sign-up sheet prompted the requests.

Accordingly, I conclude Teagle made the changes on July 5 in full knowledge of the fact that the salesmen no longer wished to be represented by the Salesmen's Union. As an experienced labor relations lawyer, he was well

[7] The wire was telephoned to the parties on February 8; written copies were not actually received until February 9.

[8] See the "Reno Casino" cases: *Tahoe Nugget, Inc., d/b/a Jim Kelley's Tahoe Nugget*, 227 NLRB 357 (1976); *Nevada Lodge*, 227 NLRB 368 (1976); *Carda Hotels, Inc., d/b/a Holiday Hotel & Casino*, 228 NLRB 926 (1977); *Silver Spur Casino*, 228 NLRB 1147 (1977); *Sahara-Tahoe Corporation, d/b/a Sahara-Tahoe Hotel*, 229 NLRB 1094 (1977); *Nevada Club, Inc.*, 229 NLRB 1186 (1977); *Finally Inc., d/b/a Palace Club*, 229 NLRB 1128 (1977); *Sparks Nugget, Inc., d/b/a John Ascuaga's Nugget*, 230 NLRB 275 (1977); *Sierra Development Company d/b/a Club Cal-Neva*, 231 NLRB 22 (1977); *Ponderosa Hotel & Casino, Inc.*, 233 NLRB 92 (1977).

aware that they constituted only a portion of a recognized bargaining unit and that it has long been Board law (craft severance cases not withstanding) not to permit decertification of a portion of a previously recognized appropriate unit. *Gill Glass & Fixture Co.*, 116 NLRB 1540 (1956). In order to obtain a decertification election, the salesmen had to be characterized as a separate appropriate unit. Undoubtedly Teagle determined the way to accomplish that purpose would be to change the recognition agreement's singular language to plural and immediately file a decertification petition claiming the Council had agreed to separate bargaining units. And, of course, that is precisely what Respondent did.

I conclude such conduct constitutes an unlawful withdrawal of recognition of the Council as the exclusive bargaining representative of the four-craft unit and thereby violates Section 8(a)(5) and (1) of the Act.

## V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The affirmative action recommended shall require Respondent to immediately recognize and bargain in good faith with the Council in the four-craft unit and if an agreement is reached, to embody such agreement in writing and upon request to sign it. Moreover, because of Respondent's trickery I shall recommend that the Board order the contract, including monetary benefits to be derived therefrom, to be retroactive to July 26, 1977, the date Respondent entered into the single three-craft contract and the reservation agreement. Such a remedy is not greatly different from a retroactive bargaining order in situations where a respondent's reaction to an organizing drive consists of unfair labor practices so serious as to warrant it. See *Trading Port, Inc.*, 219 NLRB 298 (1975), and its progeny. As observed in *Anna Lee Sportswear, Inc.* v. *N.L.R.B.*, 543 F.2d 739 at 744 (10th Cir. 1976) a prospective bargaining order allows the employer to profit from his own wrongdoing. I cannot allow that to occur here.

The Charging Party has asked me to recommend to the Board that criminal proceedings under Section 12 of the Act be brought against Teagle because he misrepresented facts to the Regional Office when he filed Case 20-RM-2155. Alternatively, it asks that I recommend to the Board that it begin proceedings to bar Teagle from practicing before the Agency. While I do not condone Teagle's activity here, I shall refer the Charging Party's recommendation to the Board for any appropriate action it wishes to take. I decline to make either recommendation because at this time the Board has not articulated any clear guidelines in either area.

The Charging Party has also asked for the extraordinary remedy that it be awarded costs and attorney fees because the litigation is "patently frivolous." While I agree that this litigation nearly reaches that level, I do not believe the litigation to be "totally without merit." See *Dalziel Supply Company*, 235 NLRB 56 (1978). Compare *Tiidee Products, Inc.*, 194 NLRB 1234 (1972) and *Heck's, Inc.*, 215 NLRB 765 (1974). I therefore decline to recommend that remedy.

Upon the foregoing findings of fact, and upon the entire record in this case, I make the following:

## CONCLUSIONS OF LAW

1. The Respondent, East Bay Chevrolet Co. d/b/a Time Chevrolet, is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. East Bay Automotive Council and its affiliates, East Bay Automotive Machinists Lodge No. 1546, affiliated with Northern California Automotive Machinists, District Lodge 190, International Association of Machinists and Aerospace Workers, AFL-CIO; Auto, Marine & Specialty Painters Union, Local 1176, AFL-CIO; Teamsters Automotive Employees Union, Local 78, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; and Automobile Salesmen's Union Local 1095, Retail Clerks International Association, AFL-CIO are all labor organizations within the meaning of Section 2(5) of the Act.

3. Those employees as described by the 1974-1977 collective-bargaining argreement between East Bay Motor Car Dealers, Inc., and East Bay Automotive Council (except for any reference to a multiemployer unit) constitute an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act.

4. At all material times the East Bay Automotive Council has represented a majority of Respondent's employees in the bargaining unit described above and by virtue of Section 9(a) of the Act has been and is now the exclusive representative of all Employees in that unit for the purpose of collective bargaining.

5. Since on or about July 5, 1977, Respondent has violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from East Bay Automotive Council and by refusing to bargain with it over employees in the appropriate unit.

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

## ORDER[9]

The Respondent, East Bay Chevrolet Co. d/b/a Time Chevrolet, Albany, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Withdrawing recognition from and thereby refusing to bargain in good faith with East Bay Automotive Council and its affiliate local unions.

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

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

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

(a) Immediately recognize and bargain collectively in good faith with the East Bay Automotive Council and its affiliate local unions as the exclusive representative of the employees in the appropriate bargaining unit herein and if an understanding is reached, embody such agreement in a written signed contract which shall be retroactive in all respects to July 26, 1977.

(b) If any employees are entitled to backpay as a result of the contract described above, interest shall be paid on such amounts in accordance with the Board's decision in *Florida Steel Corporation,* 231 NLRB 651 (1977).[10]

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay which may become due under the terms of this Order.

(d) Post at its place of business in Albany, California, copies of the attached notice marked "Appendix A."[11] Copies of the notice, on forms provided by the Regional Director for Region 32, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for a period of 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 the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[10] See, generally, *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962).

[11] 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."