

In the Matter of THE FULLER AUTOMOBILE COMPANY D/B/A THE FULLER AUTOMOBILE COMPANY AND FULLER MANUFACTURING & SUPPLY COMPANY, EMPLOYER *and* INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA, AND LOCAL No. 829, A. F. L., UNION¹

Case No. 9-RM-41.—Decided March 27, 1950

DECISION
AND
DIRECTION OF ELECTION

Upon a petition duly filed, a hearing was held before Alan A. Bruckner, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Herzog and Members Houston and Reynolds].

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the National Labor Relations Act.
2. The labor organization involved claims to represent certain employees of the Employer.
3. The question concerning representation:

The Union contends that a collective bargaining agreement between it and the Employer, executed in June 1947, constitutes a bar to this proceeding. The Employer contends that the contract is no longer in effect, and cannot therefore operate as a bar.

By its terms the contract was to remain in effect until May 31, 1949, and was to continue from year to year thereafter, unless either party gave at least 30 but not more than 45 days' notice of desire to change its terms before May 31, 1949, or any subsequent anniversary date of the contract. The contract also provides that in the event of such

¹ The name of the Union has been corrected, as the record indicates that the International and its Local desire joint certification rather than alternative certification as would appear from the petition filed by the Employer.

notice, the agreement was to remain in effect until agreed changes were incorporated therein. On March 28 and April 18, 1949, the Employer gave notice to the Union of its desire to change the provisions of the contract. Some meetings were thereafter held at which proposals and counterproposals were submitted, but no agreement was reached.

It is clear that the April 18 notice, given to the Union by the Employer in accordance with the terms of the agreement, forestalled automatic renewal of the 1947 contract. It is equally clear that although the contract may still be in effect, the notice of desire to change its terms transformed it at best into a contract of indefinite duration, and therefore not a bar to a present determination of representatives.²

Accordingly, we find that a question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act.

4. The appropriate unit:

The Employer seeks two separate bargaining units, comprising, generally, (1) employees of its automobile sales and service agency, known as The Fuller Automobile Company, and (2) employees of its motor reconditioning division, known as Fuller Manufacturing & Supply Company. In support of this position, it contends that the personnel and business policies of the two divisions are different. The Union contends that a single unit, including both groups of employees, is appropriate because of the history of bargaining on that basis. The parties agree that the control clerk, new and used car and truck salesmen, parts panel salesmen, office clerical employees, and supervisors should be excluded from the unit or units found appropriate; they disagree as to the inclusion or exclusion of six body shop employees, three foremen, two service writers, a watchman, two group leaders, a swing man, and two car jockeys.

The Employer is a corporation located and doing business in Cincinnati, Ohio. Under the name of The Fuller Automobile Company, herein called the Automobile Company, it sells and services new and used cars and trucks and sells automobile parts and accessories; it also owns and operates a public parking garage, known as the Braunstein garage. Under the name of Fuller Manufacturing & Supply Company, herein called the Manufacturing Company, it reconditions and sells automobile motors and connecting rods.³ The Automobile Company is located in a building on Reading Road which

² *J. E. Kimsey, d/b/a Kimsey, Manufacturing Company*, 87 NLRB 651; *Worthy Paper Company Association*, 80 NLRB 19; *General Aviation Equipment Co., Inc.*, 52 NLRB 394.

³ The Employer originally carried on its reconditioning operations, as well as its automobile agency, under the name of The Fuller Automobile Company. In 1944, it organized the Manufacturing Company as a separate division of the corporation, registered under its own name, to take over the work of the reconditioning department.

originally housed the Employer's entire plant. The Manufacturing Company occupies a building on Central Avenue and part of the Braunstein garage building on Hamer Street.

Until April 1948, the two companies were under common management. Since that time, an executive committee has managed the business and determined the policies of the Automobile Company; William Thompson, general manager of the Manufacturing Company, has performed the same functions for it. The executive committee has no jurisdiction or control over the Manufacturing Company, and Thompson has no present connection with the Automobile Company.⁴ Both are responsible to, and consult with, the president of the corporation.⁵

The Automobile Company pays income and social security taxes and workmen's compensation for both companies. However, the Manufacturing Company has its own bookkeeping department, keeps its own financial and personnel records, makes up separate financial reports, and has its own bank account; it also has a separate contract with the Ford Motor Company. It sells some motors to the Automobile Company, but such sales are handled in the same manner as sales to other customers. There is no interchange of employees between the two companies, but there have been some transfers from one to the other. In general, the employees of the Manufacturing Company do not have the skills required of employees of the Automobile Company.

On the above facts, standing alone, we might find two units appropriate. Since 1941, however, all employees of the Employer, irrespective of the division in which they are employed, have been covered, as a single unit, by successive contracts between the Employer and the Union,⁶ and in 1948 they were all included in the voting unit in a union authorization proceeding under Section 9 (e) (1) of the Act.⁷ The changes in management in April 1948 do not convince us that bargaining on this broader basis is no longer feasible. Furthermore, no labor organization is seeking to represent the employees of either the Automobile Company or the Manufacturing Company in a separate unit. On the entire record, therefore, we are convinced and find that a single over-all unit is appropriate.

A question remains as to the inclusion or exclusion of certain employees.

⁴From early 1946 until April 1, 1948, Thompson was general manager of both the Automobile Company and the Manufacturing Company.

⁵The only officers of the corporation are president and vice president. The vice president appears to be active only in the management of the Automobile Company.

⁶Since the formation of the Manufacturing Company, three such contracts have been executed, the most recent being the 1947 contract, discussed in paragraph numbered 3, above.

⁷*Fuller Automobile Company and Fuller Manufacturing & Supply Company*, 88 NLRB 1452.

Body Shop Employees

The Union would include six body shop employees whom the Employer would exclude as employees of an independent contractor.

Joseph Guerrea, formerly the Employer's used car reconditioning manager, operates a paint and body shop in space provided by the Employer on the second floor of its Reading Road building. The Employer furnishes heat, light, and power; permits Guerrea to use certain tools, machinery, and equipment belonging to the Employer; handles the collection of the body shop accounts; and advertises its services. All of Guerrea's work is done on service orders originating at the Employer's service desk, and most of it is done for the Employer. However, he has as customers other used car dealers, whose business he has procured through personal solicitation, and the Employer places no restriction on the amount of such work handled. Except in the case of certain installation jobs which must be done in accordance with specifications of the Ford Motor Company, Guerrea fixes the prices charged for his services. He furnishes his own materials, purchases new tools and equipment needed, and pays for repairs on the Employer's equipment. He is responsible for the work performed and for any damage to customers' cars while in the shop.

All body shop employees work exclusively in that shop and under Guerrea's sole supervision. He hires, discharges, and disciplines them, keeps and computes their time, sets their hours, arranges their vacations, directs their work, pays their wages, and makes workmen's compensation, unemployment insurance, and social security payments for them. He maintains his own payroll and keeps his own records. The Employer receives 25 percent of the gross receipts of the shop. The other 75 percent, less expenses, goes to Guerrea.⁸

It also appears that these employees were permitted to vote in the union authorization election among the Employer's employees in 1948; that some of them are covered by the Employer's group insurance plan; and that the Employer has participated in discussions of their grievances, and has, in some cases, recognized their right to plant-wide seniority. Guerrea himself has never entered into a general bargaining contract with the Union; but he has, in the past, recognized it as the representative of the body shop employees, has discussed grievances with it, and has negotiated wage rates for the body shop employees to be incorporated in wage schedules agreed on by the Employer and the Union.

⁸ The control and method of operation of the body shop, described herein, have been the same since 1945. Between 1945 and 1949, Guerrea operated the shop together with a partner under written contract with the Employer. Since August 1949, he has carried on individually, and expects to make substantially the same contract alone.

Although a few of the facts in this case, particularly the enjoyment by some body shop employees of group insurance and seniority privileges granted by the Employer, point to an employer-employee relationship between them and the Employer, we believe that the record as a whole compels a conclusion that, within the meaning of the Act, they are employees of Guerrea. As we have previously stated, "an employer-employee relationship exists where the person for whom the services are performed reserves the right to control the manner and means by which the result is accomplished [but that] an employer-independent contractor relationship exists where the control is merely limited to the result to be accomplished and does not apply to the method and manner of the services rendered."⁹ It is clear that with respect to the day-to-day operation of the body shop as well as the fixing of these employees' working conditions, Guerrea exercises complete control. We find, therefore, that he operates the body shop as an independent contractor, and that the shop employees in question are his employees and not employees of the Employer. Accordingly, we shall exclude them from the unit.

Foremen

The Union would exclude three individuals, Ralph Dent, Lyle Conn, and Luther Sumner, on the ground that they are supervisors. The Employer takes no position regarding them.

Dent is foreman of 11 mechanics who work on customers' cars. He receives or himself writes up orders for car repairs. He then assigns the jobs to the mechanics, helps them with their work, and is responsible for it. He tests the cars after repair, and if he finds any defective because of poor workmanship, has authority to reassign the job to the mechanic, who reworks it without pay.

He reports his complaints about mechanics' work to the service manager, who considers them in judging the efficiency of the mechanics. Through the assignment of jobs, he may affect the earnings of the mechanics. Approximately 90 percent of Dent's time is spent in direction and 10 percent in physical labor.

Conn is foreman of the new car "get ready" and used car reconditioning department. He gives directions to the four mechanics and four or five porters in that department, helps them with the work, and is responsible for the efficiency of the department. He does not reprimand employees himself; but if they do not cooperate with him, he reports to the service manager, who investigates the report. Like Dent, Conn has authority in some cases to give employees time off

⁹ *Morris Steinberg and Julian Leslie Steinberg, a Louisiana Partnership, d/b/a Steinberg & Company*, 78 NLRB 211.

without consulting the service manager. He spends about 75 percent of his time in directing and 25 percent in helping on rush jobs.

Dent and Conn are salaried employees. Although neither of them has power to hire or discharge any employees or otherwise cause changes in their employment status, we are satisfied that they exercise sufficient control over the employees whose work they direct so as to be considered supervisors as defined in the Act. We will therefore exclude them from the unit.

Sumner, although referred to as a foreman, is listed as a lube man. He writes up orders for work in the lubritorium, tries to sell customers whatever they need, and tells two employees what is to be done. He has no authority to reprimand the employees, to report on their efficiency, or to give them time off. He spends approximately 90 percent of his time in directing their work, and the other 10 percent in writing up orders and checking cars to see what is needed. His hours and working conditions are the same as those of the other employees in the department.

In view of the routine nature of the work performed in the lubritorium, we believe that Sumner's duty to direct the work of the other two employees is itself only routine in character. As he was not shown to have any other indicia of supervisory authority, we find that he is not a supervisor, and we shall therefore include him in the unit.

Service Writers

The Employer would include two service writers. The Union contends that they should be excluded as clerical workers, and also because they assertedly have some supervisory duties.

The service writers receive customers who drive into the shop for service, write up their orders, diagnose mechanical troubles, give estimates as to the cost of repairs, and attempt to sell the customers anything needed to keep their cars in good running condition. They also road-test cars when customers are not satisfied with the work done, and rewrite the orders if they find anything wrong. In the absence of the foreman, service writers may give a mechanic an order and tell him to do the job, but they have no authority to criticize the mechanics or to make recommendations regarding them, and make no reports on them. Although, like the manager and foreman, they are paid on a salary basis, and wear white uniforms, they work on the same floor and approximately the same hours as the mechanics,¹⁰ and like them are under the supervision of the service manager.

¹⁰The mechanics work from 8 a. m. to 5 p. m. One of the service writers works from 7:30 a. m. to 5:30 p. m.; the other, from 8:30 a. m. to 5:30 p. m.

Upon these facts, we find that the service writers are not supervisors as defined in the Act. Furthermore, their interests and working conditions appear to be more closely allied to those of the mechanics in the service department than to those of clerical employees. We shall therefore include them in the unit.

Watchman

The Employer contends that a watchman at the Reading Road building should be excluded from the unit. The Union contends that he should be included, as he has been in the past.

The watchman is on duty from 6 o'clock at night until 5 or 6 o'clock in the morning. He watches the road and building, punching a clock at about eight stations every hour. He wears a police officer's cap and, after the other employees have left the building, carries a gun. Although his principal duty is to protect the Employer's property, he also turns on the stoker in the morning and removes clinkers; however, these duties take only from 15 minutes to half an hour a day. As practically all his time is devoted to protecting the Employer's property, we find that he is a guard within the meaning of the Act. Accordingly, we shall exclude him from the unit.¹¹

Group Leaders and Swing Man

The Union would exclude as supervisors two group leaders, Ray Rohrer and Ed Myer, and a swing man, Jake Golfman. The Employer admits that until recently they were foremen, but contends that since September 30, 1949, when there was a general reduction in personnel, they have had no supervisory duties or authority.

Rohrer is group leader on the second floor of the Central Avenue building, where there are eight or nine other employees. He has the duty of telling these employees what to do, and of seeing that the various operations of the department are carried out. However, he spends 80 to 90 percent of his time in physical work, performing the same operations as the other employees; he has no authority to reprimand, or to hire, discharge, or recommend such action; and he makes no reports on efficiency.

Myer is group leader in the motor-tear-down department in the Hamer Street building. He has the duty of seeing that the work there is properly processed; but except for making occasional notations as to the receipt of motors from dealers, he spends practically all his time in physical work. He makes no reports on the quality of the work

¹¹ *F. C. Mason Company*, 86 NLRB 71; cf. *Radio Corporation of America (R. C. A. Victor Division)*, 76 NLRB 826.

done; the employees do not consult him when they want time off; and he has no authority to hire, discharge, or effectively recommend such action.

Golfman is a swing man on the second floor of the Central Avenue building. He has no employees under his supervision, and has no right to hire, discharge, or make recommendations regarding any employees.

As foremen, Rohrer, Myer, and Golfmen were paid salaries. Now they are paid by the hour, although they receive slightly higher rates of pay than the other employees in their departments. On these facts, we find that Rohrer, Myer, and Golfman are not supervisors within the meaning of the Act. We shall therefore include them in the unit.

Car Jockeys

The Union would include two individuals referred to as car jockeys, who are employed at the Braunstein garage. The Employer contends that they should be excluded because (1) they have no community of interest with other employees of the Employer, and (2) they are guards within the meaning of the Act. It further contends that one of the men, Al Braunstein, Jr., is a supervisor, and should be excluded on that ground.

Braunstein, who formerly owned the garage, is employed as manager. As such, he solicits business, sets rates for parking, bills customers, and makes collections. He also gives directions to the only other employee, Earl Gilbert, and supervises his work. He has authority to hire and discharge, and has actually exercised such authority.

Both Braunstein and Gilbert assist customers in parking their cars and get the cars when called for. They spend approximately 25 percent of their time in such work. They also have the duty of watching the cars to see that they are not molested. They do not work on any other operations of the Employer, and have practically no contact with other employees.¹² Braunstein is on duty from 6 a. m. to 2:30 p. m., but usually stays at the garage another half hour or 45 minutes to give Gilbert directions; Gilbert is on duty from 2:30 p. m. to 11 p. m. Both are hourly paid, but Braunstein also receives a commission on storage.

On these facts, we find, as the Employer contends, that Braunstein is a supervisor. Accordingly, we shall exclude him from the unit. As Gilbert's protective duties appear to be merely incidental to his other activities, we do not agree that he is a guard within the meaning of the Act. Nor do we believe that his interests are so different from those of the other employees of the Employer as to require his exclusion from the unit. We shall therefore include him.

¹² Although the tear-down department of the Manufacturing Company is located in the same building, it is separated from the garage by a partition.

We find that all employees of the Employer at Cincinnati, Ohio, including the lube man,¹³ service writers, group leaders,¹⁴ the swing man,¹⁵ and the car jockey,¹⁶ but excluding body shop employees, the control clerk, new and used car and truck salesmen, parts panel salesmen, office clerical employees, and all guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

5. Determination of representatives:

The parties disagree as to the voting eligibility of 37 employees of the Manufacturing Company who were laid off on September 30, 1949. The Employer contends that they have been permanently laid off and are therefore ineligible. The Union argues that they should be permitted to vote because, as it asserts, they have acquired rights, under the Union's contracts with the Employer, to be recalled to jobs with either the Automobile Company or the Manufacturing Company before any new employees are hired.

As we have previously held, the criterion for determining the eligibility of laid-off employees to vote is whether or not, at the time of the election, they have a reasonable expectancy of further employment with the Employer in the near future.¹⁷ In this case, the record clearly shows that the layoff resulted from the discontinuance by the Manufacturing Company of the reconditioning of certain automobile parts, an operation on which it had been sustaining losses for some months. At the time of the layoff, all the employees of the Manufacturing Company were told that it would be permanent, and those involved were given separation slips stating that the reason for their separation was "cessation of operations." According to the testimony of General Manager Thompson, the Manufacturing Company does not expect to resume the reconditioning of small parts or to recall any of the laid-off employees, and if any of them should apply when extra help is needed, they will be considered as new applicants. There is also testimony in the record that the Automobile Company has no present plans to hire additional employees in any of the classifications included in the unit.

In the circumstances, even assuming that the laid-off employees are entitled to preference if vacancies occur or new positions are created,¹⁸ we are of the opinion that they have no reasonable expectancy of

¹³ Luther Sumner.

¹⁴ Ray Rohrer and Ed Myer.

¹⁵ Jake Golfman.

¹⁶ Earl Gilbert.

¹⁷ *Hudson Motor Car Company*, 87 NLRB 452.

¹⁸ Under the 1947 contract, laid-off employees would apparently be entitled to such preference. As previously noted, however, the Employer contends that the contract has expired.

reemployment in the near future. Accordingly, we find them ineligible to vote in the election hereinafter directed.¹⁹

DIRECTION OF ELECTION²⁰

As part of the investigation to ascertain representatives for the purposes of collective bargaining with the Employer, an election by secret ballot shall be conducted as early as possible, but not later than 30 days from the date of this Direction, under the direction and supervision of the Regional Director for the Region in which this case was heard, and subject to Sections 203.61 and 203.62 of National Labor Relations Board Rules and Regulations, among the employees in the unit found appropriate in paragraph numbered 4, above, who were employed during the payroll period immediately preceding the date of this Direction of Election, including employees who did not work during said payroll period because they were ill or on vacation or temporarily laid off, but excluding those employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election, and also excluding employees on strike who are not entitled to reinstatement, to determine whether or not they desire to be represented, for purposes of collective bargaining, by International Union, United Automobile Workers of America, and Local No. 829, A. F. L.

¹⁹ *Hudson Motor Car Company, supra*; *United States Rubber Company (Milan Plant, Footwear Division)*, 86 NLRB 338 (Supplemental Decision and Direction); *F. C. Mason Company*, 86 NLRB 71; *Martin J. Barry, Inc.*, 83 NLRB 1146.

²⁰ The compliance status of International Union, United Automobile Workers of America, Local No. 829, A. F. L., has lapsed since the hearing in this manner. In the event it fails to renew its compliance with Section 9 (f), (g), and (h) within 2 weeks from the date of this Direction, the Regional Director is to advise the Board to that effect. No election shall be conducted unless and until compliance has been renewed.