

Woody Pontiac Sales, Inc. and Automotive Salesmen's Association (A.S.A.), affiliated with Siuna, AFL-CIO. Case 7-CA-6476

February 13, 1969

DECISION AND ORDER

BY CHAIRMAN McCULLOCH AND MEMBERS FANNING AND BROWN

On October 22, 1968, Trial Examiner Thomas A. Ricci issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel and the Respondent filed exceptions to the Decision and supporting briefs.¹

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, the motion to strike, and answer thereto, and the entire record in the case, and hereby adopts the findings,² conclusions, and recommendations of the Trial Examiner.

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 Trial Examiner³ and hereby orders that the Respondent, Woody Pontiac Sales, Inc., Hamtramck, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

¹The General Counsel filed a motion to strike the Respondent's exceptions and the Respondent filed an answer thereto. As the Respondent's exceptions are in substantial compliance with the requirements of Section 102.46(b) of the Board's Rules and Regulations, we deny the General Counsel's motion.

²In his decision, the Trial Examiner inadvertently stated that Leo George did not testify at the hearing, that Woody's letter to the Union regarding the company's pension system was written on April 15, 1967, and that union business agent Shekell's trip to Woody's was on October 11, 1967. The record reveals, however, that George did testify, that the letter to the Union was dated February 24, 1967, and that Shekell's trip took place on October 12 or 13. These inadvertencies do not affect the result reached herein and are hereby corrected.

³The bargaining order is explicated in the remedy section, and the General Counsel's requested amendment is therefore unnecessary.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Trial Examiner: A hearing in the above-entitled proceeding was held before the duly designated Trial Examiner on September 9, 1968, at Detroit, Michigan, on complaint of the General Counsel against Woody Pontiac Sales, Inc., herein called the Respondent, or the Company. The sole issue presented is whether the Respondent refused to bargain in violation of Section 8(a)(5) of the Act. The charge was filed on December 5, 1967, and the complaint issued on July 24, 1968. The Respondent filed a brief on October 15, and the General Counsel on the 16th.

Upon the entire record and from my observation of the witnesses, I make the following.

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Woody Pontiac Sales, Inc., a Michigan State corporation, is engaged in the retail sale and servicing of automobiles and related automotive products, with its principal place of business in Hamtramck, Michigan. During the calendar year 1967, a representative period, the Respondent's gross revenues from the sale and distribution of new and used automobiles and trucks, was in excess of \$500,000. During the same period it received goods and materials valued in excess of \$50,000 which were transported directly to its Michigan location from places outside the State of Michigan. I find that the Respondent is engaged in commerce within the meaning of the Act, and that it will effectuate the policies of the Act to exercise jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Automotive Salesmen's Association (A.S.A.), affiliated with Seafarers' International Union of North America, AFL-CIO, herein called the Union, was originally certified by the Regional Director (Case 7-RC-7547) without affiliation. Pursuant to a petition for amendment of the certification (Case 7-CA-66), and after hearing, the Regional Director in a formal decision, after opposition by the Respondent, amended the certificate to reflect that affiliation, which followed issuance of the certificate. The Respondent thereafter filed a request to appeal to the Board in Washington, attempting to set aside the Regional Director's action. The appeal was denied.

The answer denies the complaint allegation that the Union is a labor organization as defined in the Act, but no evidence was adduced at the hearing intended to disprove the Regional Director's findings. Accordingly, I find that Automotive Salesmen's Association (A.S.A.), affiliated with Seafarers' International Union of North America, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

This is a refusal to bargain case in that it is alleged the Respondent violated Section 8(a)(5) of the Act. More precisely, the charge is that the Company refused to meet and confer with the majority representative of its employees, and thereby directly committed the unfair

labor practice. The Union was certified by the Regional Director on October 18, 1966, following a Board conducted election. Between that day and December 5, 1967, when the charge was filed, the Respondent's agents -- a lawyer and the then general manager of the dealership -- met with union representatives, at their request, only twice. There was a short conference in the lawyer's office on February 24 and April 14, 1967. There were a number of demands upon the Respondent, before and after these meetings, in person upon company officials at the store, in person upon the company lawyer, and by mail upon both the Company directly and upon its attorney. In response to every separate request one reason or another was advanced for avoidance or delay. In the course of the many communications, the Union several times placed in the Company's hands a copy of its proposed collective-bargaining agreement; this was a comprehensive contract containing a number of clauses, all of a noneconomic nature.

Throughout the entire period the Respondent made no counterproposals. At no time did any of its representatives voice a doubt as to the Union's continued majority representative status. On December 6, 1967, its lawyer wrote to the Union unequivocally withdrawing all recognition because of the pendency of the AC petition, and stating it would not bargain until the question raised in that proceeding was finally resolved. By letter dated January 31, 1968, in consequence of the filing of the charge, the lawyer responded to a Board inquiry concerning this case. This is a detailed statement of position in explanation of the Respondent's conduct. It does not, among the defenses suggested, say there ever was a question of majority, or invalidity in the Union's certification.

An implied defense at the hearing nevertheless seems to have been that the Union did not represent a majority of the employees involved by the fall of 1967, that the Respondent -- whether or not it said this to the Union at the time -- had a right to refuse to bargain, and that in any event the Union agreed to defer its bargaining demand throughout the year 1967. For all these reasons the Respondent asks dismissal of the complaint.

Appropriate Unit and Majority Status

The election in Case 7-RC-7547, which underlay issuance of the certification in favor of the Union, was held pursuant to a consent agreement, which set out the agreed-upon bargaining unit. While conceding that the election was held and that a majority of the employees voted in favor of the Union, the answer denies the appropriateness of the same unit, which *in haec verba* is set out in the complaint. There is no evidence raising a question as to the correctness of that unit at any time since the election. Accordingly, I find that all new and used car and truck salesmen at the Respondent's place of business, excluding office clerical employees, guards and supervisors as defined in the Act, and all other employees, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

The answer also denies the entire complaint allegation that the Union represented a majority of the employees at the time of the certification and that it has since remained the exclusive representative. The issue which this denial attempts to raise is based upon certain factual assertions set out in the answer as affirmative defenses. These include allegations of improper conduct by union agents before the 1966 election, such as to cast a cloud upon the

results, and restatement of grounds originally advanced in opposition to the AC proceeding. There were no objections filed to the conduct of the election at the time, and the opposition to amendment of the certification has already been considered and rejected by the Regional Director. Therefore, neither of these contentions may be urged here. The third ground for disputing the continued validity of the certification is said to be high turnover among the employees and expressed desire by the employee complement not to be represented by the Union. For reasons which will appear below, I find these insufficient grounds on this record to support such contentions. I therefore find that since October 18, 1966, and at all times thereafter, the Union has been the representative for purposes of collective bargaining of all employees in the appropriate unit, and by virtue of Section 9(a) of the Act, has been and is now the exclusive representative of all the employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

Communications Between the Parties; Demand and Refusal

Appreciation of the conflicting contentions of the parties requires, at the outset, explanation of a collateral fact. Throughout the year 1967 Mr. Frederick Colombo, the Respondent's attorney, also represented a large number of other automobile dealers in the Detroit area, all of whom were also under obligation to bargain with this union because of outstanding certifications issued at approximately the same time. The Union had filed upwards of 200 like representation petitions, and won many elections. The number of dealers for whom Colombo spoke, and on who's behalf he talked with union agents, was variously estimated by witnesses at the hearing as from 22 to 37. One witness said "Mr. Colombo has an Association of dealers," and no one contradicted him. Although in all instances it was new and used car salesmen who were involved, it was the position of the individual employers, as voiced by Colombo, that bargaining for each had to be separate and independent of any negotiations concerning any other dealer. The Union, of course, found itself in the position of seeking to bargain with a large number of companies almost simultaneously. As Colombo said at the hearing, to him "This was a basic problem."

The evidentiary details as to precise telephone calls, dates of person-to-person conversations, and even meetings, are somewhat inaccurate in the testimony largely due to the fact that both the union agents and Colombo were during the same period concerning themselves with many companies in similar activities. Five union agents testified, and it is clear their attempts to bring about definite arrangements for negotiations with this particular company, Woody Pontiac, were but part of a more general responsibility to achieve some results with others at the same time. The lawyer, too, held meetings in his office, sometimes with a number of clients present. It was natural he would be a little vague as to details. However, there was virtual agreement between the witnesses in substance as to when oral communications occurred; there is, of course, very reliable evidence in the form of written communications received in evidence.

The following is the story as told by union agents; where written correspondence is indicated, it is reference to stipulated exhibits.

In late December of 1966 or early the following January, the Union invited a number of dealers, including this Respondent, to a mass meeting in a certain conference room. A number of auto dealer representatives came; Colombo was there, but with only one of his clients. No one appeared for the Respondent. The Union distributed a copy of its contract proposal, but Colombo said "he refused to have anyone else come there, because he didn't want all of his clients there as general members," and made clear he was not then representing anyone not physically present.

On January 25 Mr. Duane Ashley, the union attorney, wrote directly to the Company, demanding that it commence bargaining on February 7, and requesting that it respond by indicating agreement. There was no answer, and Ashley again wrote the Company on January 30, reiterating the demand. Colombo answered by mail dated February 1: "Please be advised the undersigned represents Woody Pontiac Sales, Inc." The letter went on to say that Mr. Woody, president of the Company, was in California, and therefore "we do not have authority to proceed to meet with you for the purpose of negotiating or discussing a contract," until "we have an opportunity to consult with Mr. Woody."

With Colombo saying he was but he was not in a position to act on behalf of Woody, Ashley wrote to him again on February 10 with reference to three companies

Stan Long Pontiac, Engle Chevrolet, and Woody and suggested February 24 as a negotiating date. To this Colombo agreed, but explained in a February 15 letter that the Woody matter be "tentatively set" for consideration that morning after the parties had taken up "the problems of several other clients."

On February 24 Colombo met in his office with Mulroy, president of the Union, Ashley, and Ashley's partner, a Mr. Plath. This was the meeting where Ashley expected to negotiate for three companies. The Union again gave Colombo a copy of its contract proposal. Mulroy said he wanted the dealers themselves to be present, but Colombo answered he spoke for all three. There was no discussion of the substance of the Union's demands, and the meeting lasted about a half hour. According to Ashley's uncontradicted testimony, Colombo left matters with saying "he was going to look this over and he would talk to the employers and get back at us. . . . He wanted to discuss this contract, this Exhibit 21, with these people and we would arrange another meeting." Ashley said it was his understanding Colombo "was going to get in touch with me."

John George, treasurer of the Union, sent to the store "either the middle of March or during March, or the very first part of April," looking for Mr. Woody. He found the manager, Leo George, instead, and asked for a bargaining date. The manager answered "he didn't want to have anything to do with the union or against the Union. . . . I would have to set the appointment up myself. . . ." Fred George, then a director of the Union, also spoke to Colombo by telephone at about this time and a meeting was fixed for April 14. In his office on that date the lawyer, Colombo, met with Fred George; now Colombo had with him Mr. Leo George, the Woody general manager and brother-in-law of the owner. Again Fred George gave Colombo a copy of the noneconomic contract proposals, the lawyer asked a number of questions, and then "said that they would talk over the agreement and issue us a counterproposal." The union agent asked for a new negotiating date, but Colombo replied "we will have to set it up later on, because I am

very busy at the time but we will set up another date, and I will give you a counterproposal at that time." All Mr. Fred George could recall of Colombo's questions was that the lawyer had posed the same inquiries at other meetings involving other auto dealers, and that among the details were the Company's right to discharge at will, elimination of any seniority concepts and transfer of company interest in the business.

On that same day, Mr. Woody wrote to the Union to advise that the Company had installed a pension system for all employees, including the salesmen, and asking did the Union have any reason why he should not do that. Ashley, for the Union, replied this was a subject of collective bargaining, and it would be improper for the Respondent to act unilaterally.

The parties never met again.

On October 4 Ashley wrote to the Federal Mediation and Conciliation Service seeking help to negotiate with 18 dealers, all represented by Colombo, including the Respondent. The next day he wrote to Colombo, asking him to arrange some kind of meeting, with three dealers

Engle Chevrolet, Woody Pontiac, and Stan Long. Colombo answered on the 9th; he spoke of these three plus three additional dealers for which Ashley had requested negotiations a few weeks earlier. "Obviously it is physically impossible to negotiate labor contracts for all 6 of these clients simultaneously. Will you kindly submit the names of any 2 of our clients who you wish to negotiate with at this time."

On October 10 Business Agent Shekell appeared at the Respondent's place of business; neither Woody nor the manager were there. He left his name and address, stated his desire to meet Woody, and asked to be advised. No one called him back. He was there again the next day, and found Rogers, the new general manager. He gave another copy of the Union's contract to Rogers, and asked for a bargaining meeting. Rogers said he would give the contract to Mr. Woody, and that Colombo was the company lawyer. Shekell also telephoned the store that day; now Woody told him he had received the contract. When Shekell asked for a meeting, Woody answered "he would have to contact his attorney Mr. Colombo." The next day Shekell telephoned once more "and asked for a negotiating date again. I asked him [Woody] if he had been in touch with Mr. Colombo, he said no. . . ."

Finally, the union agents did get a promise from the lawyer to talk about the Respondent. Shekell said he obtained the commitment at the end of a meeting in Colombo's office on November 15; Thomas White, another business agent who used to accompany Shekell on his rounds of the dealers, said it was promised at a November 24 meeting. In any event, the promised meeting — for November 28 — was never held because Colombo cancelled it. Now Shekell became exasperated. He called Woody at about 2 p.m. on the 28th and insisted there be a meeting that afternoon. ". . . I wanted to set up another negotiating date for him and his dealership. . . . He said he wouldn't do it he would have to have his lawyer, I said get your lawyer in the office in your dealership, we will be there at 5:00." Shekell told Woody "We will be there anyway," lawyer or no lawyer. Shekell went on to testify that he later called Woody several times that day, always without results. Once he asked had Woody been able to "get" his lawyer, but Woody said no. Shekell finally gave up and never went to the store. He also that day called Colombo, who gave him another date — January 13, 1968. This is the scheduled appointment which the lawyer on December 6 canceled because of the pending AC

petition.

The charge was filed on January 5, 1968

As stated above, except for information appearing as stipulated documentary exhibits — the correspondence between the parties — all of the foregoing facts are established by oral testimony of witnesses for the General Counsel. Leo George, the one time manager, did not testify. Neither did Rogers, the general manager who succeeded Leo George. Mr. Woody and Colombo did testify. But for a different version of his talk, or talks, with Shekell on November 28, Woody's testimony of what was said and done between union agents and company people, as well as that of Colombo, does not substantially conflict with that of the union witnesses. Considering the total evidence, including related facts set out below, I credit the testimony of the union lawyer and its agents. The disagreement between the witnesses as to what they had in mind at the time of the events, or why they did what they did, is something else again.

After briefly recalling in general the events of February and April of 1967, Woody said no one for the Union ever "contacted" him again until Shekell called him on the telephone on November 28. He then gave his view of that conversation. He denied Shekell called him in October. In the next breath he admitted the union agent did "come out to your [my] dealership in October of '67," and testified: "I would say that he [Shekell] did come the dates that he said. There is no problem there at all. The one date that I wasn't there could very well be and the next day he [Shekell] did see my manager, that could very well be . . . They did come there, yes, they did." The fact is, and I find, that in October the union agents several times demanded bargaining, even left still another copy of their contract proposal for Woody, but were denied any opportunity to bargain at all. Shekell said he spoke personally to Woody at that time, only to be told Woody would have to see Colombo first. I believe this, for it is the consistent position the Respondent took from first to last.

Colombo admitted he had agreed to a bargaining conference for November 28, and that he cancelled it. Woody's story is that Shekell telephoned him only once in the afternoon. "He said that he wanted to negotiate and he is coming over to negotiate right then and there. I said to him I was going to the zone office at that time and I would be glad to set up an appointment with him and my attorney. He says, no, he was quite belligerent and quite demanding, he says, no, we are coming over which sounded like a good threat to me, we were coming over now and I said 'I'll tell you what, I am still going to the zone office and I will be back at 5:00 and I will be here and meet you.' So I went to the office, I came back at 4.30 and I was waiting for the call for his presence and he did not show up, and never called that he wasn't coming."

Although the Respondent not once expressed doubt as to the Union's majority representative status — not even after the charge was filed, when its lawyer made a detailed statement in defense — it called two witnesses whose testimony was intended to prove the Union ceased being the bargaining agent as early as September of 1967. I accept as fact Woody's uncontradicted testimony that in March of 1967 seven of his eight salesmen quit; the eighth — Leo George — became manager. Woody hired new people, and had five or six salesmen by October. John Liss, a salesman, was hired on August 21. He testified that he, and three other men — Rolland McLean, C. B. Hicks and Haig Apkarian — decided they did not wish to be represented by any union and that all four of them

went to Woody together and told him so. He said these visits to Woody's office started "ten days or fourteen" after he was hired, and they continued thereafter "approximately twice a month and this continued until December." On November 24 Liss and these other three men went to the Labor Board's office to file a decertification petition; with the help of a Board agent they signed a statement in support of the petition, but because none of them wanted his name to appear on the petition itself, left without in fact filing it. Liss went to a lawyer — Bachara, Sr. — who, on December 4 filed the petition for them. Rolland McLean, another new salesman, corroborated Liss. There was another salesman, Ron Whitfield, who refused to participate in the rejection of the Union.

Woody also testified these four men came to him to explain their views: "They said they were going to express themselves by filing for decertification." Woody also said the men came to him on this subject "frequently and constantly . . . and most between the period of September until the end of the year . . . en masse and individuals." As to his knowledge of the decertification petition, Woody's testimony is "Either a day or two before they decided to go down."

Analysis and Conclusions

Certain fundamental principles of Board law must be kept in mind in appraising the merits of this complaint. The first is so obvious a truism that any citation of authority would be redundant. When employees choose to be represented by a labor organization their employer must meet with the union agents and talk about the conditions of employment. The complaint says simply that this Respondent was repeatedly asked to do this, but did not. Next, when the Board has certified a union as the bargaining agent, for a period of 1 year the employer has no choice in the matter; it must meet and bargain throughout that period. Barring what has been called "unusual circumstances," there is a virtually conclusive presumption that the majority status continues. *Ray Brooks v. N.L.R.B.*, 348 U.S. 96. Evidence of turnover or even disaffection in the employee complement does not constitute such an unusual circumstance as to permit departure from this rule of law. "Alleged, or even actual, loss of majority during the 1-year period is not such an 'unusual' circumstance as will justify an employer's repudiation of the certified union as the statutory representative of the employees in the unit which the Board found appropriate." *Reliance Clay Products Company*, 115 NLRB 1736, 1747.¹ Moreover, "The replacement of economic strikers within the certification year does not relieve any employer of the duty to bargain in good faith with the certified representative of its employees, . . ." *Alva Allen Industries, Inc.*, 154 NLRB 1772. In enforcement proceedings, the Court of Appeals, Eighth Circuit, denied enforcement on the ground that the certified union had abandoned its interest in the employees; as to the principle underlying the Board's view of the case, the Court said: "We accept the Board's promise and contention that the permanent replacement of economic strikers is not an 'unusual circumstance' that would justify a refusal to bargain in good faith with the Union during the certification year *N.L.R.B. v. Reliance Clay Products Company*, 245 F.2d 599. . . ." *N.L.R.B. v. Alva Allen Industries, Inc.*, 369 F.2d 310 (C.A. 8)

¹Enforced, *N.L.R.B. v. Reliance Clay Products Company*, 245 F.2d 599 (C. A. 5)

Throughout the year following the Union's certification in the case at bar — October 18, 1966, to October 18, 1967 — all the Union succeeded in accomplishing were two very short meetings with counsel for the Respondent, on February 24 with Mr. Colombo alone and on April 14 with Colombo and the store's general manager, Leo George. In each case Colombo accepted the Union's written contract proposal and promised to consult Mr. Woody and to think about them. He also promised to make counterproposals, but never did so. Colombo was correct in his testimony that at the close of the brief February 24 meeting "no other meeting" was in fact "set up." I have no reason, however, for not believing Ashley's recollection that the company lawyer then promised he "would get back at us," meaning Colombo would advise the Union when he was ready to discuss the proposals. It is also true no date was fixed on April 14 for a later meeting, but Colombo did not deny that he then told the Union he would take it upon himself to carry matters forward by offering counterproposals.

Other written requests to discuss Woody Pontiac received delaying responses from the attorney because he had numerous other clients that he had to service. For the time being, the Union did nothing about this, because the Respondent had a right to bargain separately and independently of any other dealer Colombo represented, and because no lawyer can do more than one thing at a time. The determinative point of this entire case, however, is that an employer cannot divest himself of a legal responsibility — wash his hands of the duty to bargain, as it were — by making it an onus upon the shoulders of a busy lawyer. Mr. Ashley, of the Union, could have complained to the Board then, but he waited.

By October more union agents had been hired to do the bargaining. This time Mr. Woody ignored them completely. The manager, Mr. Rogers, did nothing about the demand for bargaining, and simply passed along to Mr. Woody still a third copy of the Union's proposed contract. Following the pattern of the past, Woody shifted the responsibility again to Mr. Colombo, said he had to consult his lawyer, but never responded at all to the bargaining demands of Mr. Shekell despite repeated appeals only days apart. I find that during the first year of the Union's certification the Respondent failed to meet with union representatives on request and thereby refused to bargain as the statute commands.

There then came the period after the end of the certification year, of which Board law also speaks. The cardinal rule is set out in *Celanese Corporation of America*, 95 NLRB 664, 673:

However, after the first year of the certificate has elapsed, though the certificate still creates a presumption as to the fact of majority status by the union, the presumption is at that point *rebuttable* even in the absence of unusual circumstances. Competent evidence may be introduced to demonstrate that, in fact, the union did not represent a majority of the employees at the time of the alleged refusal to bargain. A direct corollary of this proposition is that after the certificate is a year old, as in cases where there is no certificate, the employer can, without violating the Act, refuse to bargain with a union on the ground that it doubts the union's majority, *provided* that the doubt is in *good faith*

And when the question of the Union's continuing majority representative status after the end of the certification year

is raised by the employer, and a refusal to bargain is defended on that ground, it must be proved that the expressed doubt was predicated upon objective considerations. As stated in *United States Gypsum Co.*, 157 NLRB 652, at such a time the employer "must demonstrate by objective considerations that it has some reasonable grounds for believing that the union has lost its majority status since its certification."

Actually, in the case of Woody Pontiac during the year 1967 it is neither necessary nor proper to consider possible applicability of this last stated rule. By October 18, the Respondent had already flouted its statutory duty to bargain, it had in fact refused to meet with the Union and discuss appropriate matters. While the *Celanese* case says the presumption of continuing majority after the certification year is rebuttable, it also makes clear that the employer may not raise the question at all "in a context of illegal antiunion activities, or other conduct by the employer aimed at causing disaffection from the union. . . ."

By the time salesman Liss and his friends filed their decertification petition on December 4, over a month after the anniversary the date of the certification, the Union had for 13 months been passed back and forth between the Respondent and its lawyer, frustrated at every turn, and simply denied any chance of collective bargaining. The entire course of conduct, so far as the Respondent is concerned, appears as part and parcel of a deliberate scheme to avoid bargaining. Had Woody negotiated with the union agents, as Section 8(d) of the Act requires, there might never had been disaffection among the employees, or any petition filed at all. In an analogous situation, the Board concluded that "a requirement that union membership be kept intact" after the first certification year "would result in permitting the Respondents . . . to profit from their own wrongful acts of coercion. . . ." *Key West Coca Cola Bottling Co.*, 150 NLRB 892, 908.²

The defense against the entire refusal to bargain allegation must fail for an additional reason. There was no good faith in the Respondent's attitude towards the Union even after the certification year. The most revealing fact in this aspect of the case — not only uncontroverted, but indeed conceded — is that no one on behalf of the Company ever said the refusal to bargain in the end was bottomed upon a belief that the Union no longer represented the employees. Not even at the hearing, 9 months after the charge was filed, was there an explicit contention, or an oral argument, that the Respondent honestly doubted the Union's majority status. The closest Mr. Woody came to the assertion was when he testified that he offered to meet with union agents on November 28 "because I was going to tell them what the wishes are of my salesman . . . I was going to negotiations on that basis."³ He said four of his five or six salesmen had been coming "frequently and constantly" from early September to say they did not want the Union. Why did he not tell this to Shekell when he came into the store several times in October and even left a contract with the manager? Shekell testified that on November 28, on the telephone, Woody again repeated the old refrain "he would have to have his lawyer." Woody contradicted Shekell's recollection of this critical conversation, but even in his

²Enforced in pertinent part *N.L.R.B. v. Miami Coca Cola Bottling Co.*, 382 F.2d 921 (C.A. 5)

³The Respondent's repeated statement, in its brief, that in the course of the AC proceeding it questioned the employees' continuing desire to be represented by the *Automotive Salesmen's Association*, is not true.

own version the company president said that his first response to Shekell was "I would be glad to set up an appointment with him and my attorney." Not a word about employees turning against the Union. An employer repeatedly asked by his employees not to deal with a union on their behalf is hardly likely to agree to any meeting, or to hide behind his lawyer for delay. Nor would he hurry back from a business appointment, as Woody said he did, only to tell the union agent to his face of such a refusal to bargain, when he could so conveniently have stated an honest doubt on the telephone. I do not credit Woody against Shekell. I find that when Shekell insisted on meeting with him and bargaining, Woody simply refused outright to meet with him.

The exact date in November when Colombo agreed to another bargaining date with the Union may be in doubt, but it is clear he did agree — after canceling the November 28 scheduled date to meet on January 13. The knowledge of the client — if in fact there ever was any before November 28 — must be imputed to the lawyer representative. And even as late as December 6, after the decertification petition had been filed, Colombo cut off all negotiations, but still without suggesting a doubt of majority status as his reason. At the hearing Colombo testified the filing of the petition "could well have been the reason for canceling the meeting on January 13. We didn't need to give them any reason . . ." and Woody said he "regretted" the fact the lawyer did not then speak of loss of a majority. In a case turning upon good or bad faith motivation, a statement 9 months later that one thing or another "may have been" the reason for earlier critical action taken, is indeed unpersuasive. The fact of the matter is neither of them even at that late date referred to a defense which 9 months later, at the hearing, is made to appear retroactively as the real grounds of defense. It may well be true that Liss, and other salesmen, during the decertification year were opposed to having a union. In the light of the total record, however with neither Woody nor his lawyer ever mentioning the fact to the union representatives, I cannot believe either Liss or McLean, on the one hand, nor Woody on the other, that the men made clear their position to the Respondent before the filing of the RD petition.

There are certain realities in this story that cannot be denied. The Respondent, like any employer, had a right to be represented by a lawyer in the RC and AC proceedings, and even to do its bargaining. Mr. Colombo, as a lawyer, can hardly be faulted if his great experience and high degree of professional competence attract clients in such numbers that they have to wait in line for his services. There is no doubt there were times, as this very record shows, when he could not avoid asking the Union to choose which auto dealers it wished to negotiate for before others. After all, he represents upwards of 20 or 30 separate companies, all in the same business and all under duty to bargain with the same union at the same time.

In this case, however, these facts cannot be viewed apart from the essential nature of the complaint allegation and of the law which underlies the entire proceeding. No finger of blame is pointed at the lawyer; he is neither a respondent nor a party. There was no duty upon him, so far as the statute is concerned, to bargain with anyone. The Union's certificate runs to the Company, and it is upon the Respondent that Section 8(a)(5) imposes an unqualified obligation to meet with the union agents and

discuss proper subjects of collective bargaining. At every stage Woody kept referring the Union to Colombo, even as late as November 28. The short answer to what the Respondent now calls laches on the part of the Union during 1967, is that an employer may not interpose a busy lawyer between itself and the bargaining agent of its employees, and later, because the union awaited patiently, accuse it of procrastination.

There is always the possibility that Mr. Woody really believed Colombo could somehow adequately satisfy the legal burden which the statute put on the Company, although the owner's indifference to the Union in October makes such a supposition highly unlikely. There is no reason to believe the lawyer was doing anything but his best to satisfy all his clients. In fact, what the lawyer called "a basic problem" in his office, was significantly revealed once again in this very case after the close of the hearing. Although the hearing lasted only 1 day and the parties were granted the full 5-week period thereafter for filing briefs — unquestionably adequate time in view of the simple issue presented —, 4 weeks later, on October 7, the lawyer filed a request for an additional 6 week period. And his reason — undoubtedly true — was that among other matters that demanded his urgent attention were eight briefs soon due in eight other pending unfair labor practice cases, presumably comparable to this one.

There was no choice but to deny the request for further delay in this proceeding. The Board's certificate is now 2 years old and there has as yet been no bargaining. The right of employees to engage in collective bargaining cannot await the personal convenience of any particular representative, whether hired by employer or labor organization.⁴

I find, upon the record in its entirety, that at all times after issuance of the certificate in favor of the Union, the Respondent refused to meet and negotiate with its agents, and thereby refused to bargain in good faith as required by Section 8(d) of the Act, and that therefore it violated Section 8(a)(5) and (1) of the Act.

IV. THE REMEDY

The Respondent having refused to bargain with the Union, it must be ordered to do so now. The complaint requests, as part of the remedial order, that the Union be granted a bargaining period of 1 year starting with the time when the Company does begin to bargain in good faith, very much in the fashion that the original Board certification carried a 1-year period of presumptive validity. In the circumstances of this case, I find the request reasonable and persuasive. The remedy for unfair labor practices committed must be tailored so as adequately to restore the status quo and thereby effectuate the policies of the Act. Whether it be now or then, the Union must have "ample time for carrying out its mandate." *Ray Brooks, supra*. Compliance with the affirmative order to bargain here, therefore, will mean that from the day the Respondent commences bargaining in good faith, at whatever stage of the proceeding it chooses to do so, the Union's statutory majority representative status will be the same as it was at the start of the original certificate year — on October 18, 1966. Compare *Minute Maid Corporation*, 124 NLRB 355.

⁴ *J H Rutter-Rex Mfg Co*, 86 NLRB 470; *Insulating Fabricators, Inc*, 144 NLRB 1325, enfd. 388 F.2d 1002 (C A 4)

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with its operations as described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing the free flow of commerce.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All new and used car and truck salesmen employed by the Respondent, excluding office clerical employees, guards and supervisors as defined in the Act, and all other employees, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act

4. Automotive Salesmen's Association (ASA), affiliated with Siuna, AFL-CIO, was on October 18, 1966, and at all times thereafter has been the exclusive collective-bargaining representative of Respondent's employees in the appropriate unit, within the meaning of Section 9(a) of the Act.

5. By refusing on and after October 18, 1966, to meet with the above-named labor organization and to bargain with it for purposes of collective bargaining, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that Woody Pontiac Sales, Inc., Hamtramck, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Automotive Salesmen's Association (ASA), affiliated with Siuna, AFL-CIO, as the exclusive representative of all employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights to self-organization, to form, join, or assist any labor organization, to bargain through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the Union as the exclusive bargaining representative of all employees in the appropriate unit described above, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its place of business in Hamtramck, Michigan, copies of the attached notice marked "Appendix."⁵ Copies of said notice, on forms provided by the Regional Director for Region 7, shall, after being signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director, in writing, within 20 days from the date of receipt of this Decision, what steps it has taken to comply herewith.⁶

⁵In the event that this Recommended Order be adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

⁶In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with Automotive Salesmen's Association (ASA), affiliated with Siuna, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

WE WILL bargain collectively, upon request, with the Union as the exclusive representative of all our employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

The bargaining unit is:

All new and used car and truck salesmen, excluding office clerical employees, guards and supervisors as defined in the Act, and all other employees.

WOODY PONTIAC SALES,
INC.
(Employer)

Dated _____ By _____ (Representative) _____ (Title)

DECISIONS OF NATIONAL LABOR RELATIONS BOARD

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice

or compliance with its provisions, they may communicate directly with the Board's Regional Office, 500 Book Building, 1249 Washington Boulevard, Detroit, Michigan 48226, Telephone 226-3244.