

**Almaden Volkswagen and Automobile Salesmen's Union, Local 1095, Retail Clerks International Association, AFL-CIO.** Case 20-CA-6350

October 13, 1971

**DECISION AND ORDER**

BY CHAIRMAN MILLER AND MEMBERS  
FANNING AND JENKINS

On July 20, 1971, Trial Examiner Maurice Alexandre issued his Decision in the above-entitled proceeding, finding that 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, Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief and the General Counsel filed cross-exceptions. Respondent also requested oral argument.<sup>1</sup>

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 brief, the cross-exceptions, and the entire record in the case, and hereby adopts the findings,<sup>2</sup> conclusions,<sup>3</sup> and recommendations of the Trial Examiner.

Contrary to Respondent's contention that a bargaining order is inappropriate in this case, we find, in agreement with the Trial Examiner, that Respondent's conduct warrants such a remedy. The unlawful acts, committed by two of Respondent's highest management representatives, began immediately after the Union's demand for recognition and reached each employee in the bargaining unit. Those employees not specifically questioned regarding their union sympathies were nonetheless present when Iglebak solicited and encouraged the resignations. They were all aware of Garbez' role in contacting the Union, and his discharge apparently weighed heavily in their deciding that "they had made a mistake." Further, they were all affected by the increased commission rates adopted as an inducement to prevent further organizational efforts. Such a combined application of both illegal stick and illegal carrot is not likely to be forgotten by any employee in the unit.

In view of the entire course of conduct of Respondent and the obvious widespread and continuing effect that conduct had on the employees, we have no

doubt that the traditional remedies will neither erase the effects nor insure that such conduct will not recur. On balance, we find that the sentiments of the unit employees are more accurately expressed by the authorization cards than could be expressed by an election. Therefore, we adopt the Trial Examiner's conclusions in this regard.

**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 Examiner and hereby orders that Respondent Almaden Volkswagen, San Jose, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

<sup>1</sup> Respondent's request for oral argument is hereby denied. In our opinion, the record, including Respondent's exceptions and supporting brief, adequately presents the issues and positions of the parties.

<sup>2</sup> For the reasons set forth in his separate opinion in *United Packing Company of Iowa, Inc.*, 187 NLRB No. 132, Chairman Miller concurs in the issuance of a bargaining order but only on the basis of Respondent's numerous violations of Section 8(a)(1) and (3), referred to in the final paragraph of this opinion.

<sup>3</sup> The Respondent has excepted to certain credibility findings made by the Trial Examiner. It is the Board's established policy not to overrule a Trial Examiner's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions were incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enf'd 188 F.2d 362 (CA 3). We have carefully examined the record and find no basis for reversing his findings.

**TRIAL EXAMINER'S DECISION**

MAURICE ALEXANDRE, Trial Examiner: This case was heard in San Jose, California, on April 20 and 21, 1971, on a complaint issued on January 5, 1971,<sup>1</sup> alleging that Respondent had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended. In its answer, Respondent denied the commission of the unfair labor practices alleged. The principal issues are (1) whether or not Respondent unlawfully interfered with, restrained, and coerced its employees; (2) whether or not it unlawfully discharged Garbez; and (3) whether or not a bargaining order is warranted.

Upon the entire record,<sup>2</sup> my observation of the witnesses, and the briefs filed by the parties, I make the following:

**FINDINGS AND CONCLUSIONS**

**I. THE BUSINESS OF RESPONDENT**

Respondent has admitted the following allegations in paragraph II of the complaint:

(a) At all times material herein, Respondent, a California corporation with a place of business in San

<sup>1</sup> Based on a charge filed on September 22, 1970, by Automobile Salesmen's Union, Local 1095, Retail Clerks International Association, AFL-CIO (hereafter called the Union).

<sup>2</sup> The General Counsel's unopposed motion to correct the transcript is granted.

Jose, California, has been engaged in the retail sales of automobiles.

(b) During the past year, in the course and conduct of its business operations, Respondent received gross revenues in excess of \$500,000.

(c) During the past year, in the course and conduct of its business operations, Respondent purchased and received at its San Jose, California, facilities, goods and products valued in excess of \$50,000 from suppliers, which in turn purchased and received those goods and products directly from sources located outside the State of California.

I find the facts to be as admitted, and that Respondent is, and at all times material herein has been, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

Respondent has admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE UNFAIR LABOR PRACTICES

### A. *Sequence of Events*

Respondent opened its business as a Volkswagen dealer on September 13, 1969. In late August or early September 1970,<sup>3</sup> Respondent's automobile salesmen began discussing the possibility of unionizing. At a meeting with the Union on September 9, seven of Respondent's nine salesmen signed union membership application cards. On September 16, the Union requested recognition. During that day, officials of Respondent spoke to the salesmen, to whom they directed questions and made statements which, the General Counsel contends, were unlawful. On September 17, Respondent informed one of the salesmen of his discharge which, the General Counsel contends, was discriminatory. At a sales meeting on September 19, the salesmen who had executed Union application cards signed resignation letters which, the General Counsel contends, were unlawfully solicited and procured by Respondent by its prior interrogation and threats, by tentatively promising to increase employee sales commissions and by assisting in the preparation and mailing of resignations to the Union, and by conditioning the reinstatement of the discharged employee upon the execution of the resignations. A week or 10 days later, Respondent announced an increase in salesmen's commissions which, the General Counsel contends, was unlawfully motivated. Respondent has admittedly refused to comply with the Union's bargaining request and informed the Union on December 22 that it intended to avail itself of the Board's election procedures. The General Counsel contends that the refusal to bargain was unlawful and that a bargaining order is warranted.

<sup>3</sup> All dates referred to hereafter relate to 1970 unless otherwise stated.

<sup>4</sup> Contrary to the General Counsel's assertion, the record does not establish a statement by Iglebak that Respondent might abandon its practice and stay closed on Sundays if the men unionized. Johnstone

## B. *Interference, Coercion, and Restraint*

### 1. Interrogation and threats

On the morning of September 16, Union Secretary-Treasurer Fulco and another Union representative went to Respondent's premises and presented to Berglund, Respondent's new car sales manager, a letter advising that the Union represented a majority of Respondent's salesmen, requesting recognition, and requesting a bargaining meeting on September 21. After a few minutes, they were joined by Iglebak, Respondent's vice president and general manager, to whom Berglund gave the letter. In response to Fulco's request for a meeting, Iglebak stated that he had just returned from a vacation in Europe and that he would notify the Union when he would be available. Soon after the Union representatives left, Iglebak announced over the loudspeaker system that he wanted all salesmen on duty to come to the conference room. Employees Owen, Johnstone, and Davis reported as instructed, and found Iglebak, Berglund, and possibly the used car manager, Pisenti, in the room. It is undisputed that Iglebak appeared agitated and asked each of the three salesmen whether or not he had joined the Union, that Johnstone and Owen answered in the negative but Davis replied that he had joined, that Iglebak asked Davis how many other salesmen had joined, and that Davis responded that all but Johnstone and Owen had joined. Johnstone and Davis testified credibly that Iglebak asked whether they realized that if the men joined the Union, they might work fewer hours with a resulting decrease in earnings. Iglebak did not contradict their testimony. He merely testified that he might have referred to working hours, but that he could not recall what he said.<sup>4</sup>

At about 3 p.m. that day, Berglund asked Employee Garbez whether he had joined the Union, and the latter stated that he had. Shortly thereafter, Iglebak called Employee Sitzes to his office and, in the presence of Berglund, asked Sitzes whether he had signed a Union membership application. Sitzes answered that he had. Iglebak then asked him whether he knew who was responsible for "calling the Union in." When Sitzes replied that he did not, Iglebak asked whether he could find out. About a half hour later, Iglebak again called Sitzes to his office, and again Berglund was present. Sitzes had made inquiries and reported to them that Garbez was the one responsible for calling the Union. As discussed more fully below, Respondent discharged Garbez the following day.

The General Counsel contends that Respondent unlawfully interrogated and threatened its employees. Respondent contends that it is lawful to question employees in a proper manner to ascertain union strength, that its interrogation was not coercive, and that in any event the interrogation was minimal. It further argues that no threats were made, that its representatives merely engaged in "discussions" with employees regarding a reduction in working time, that at most Iglebak "may" have made a comment "to the effect that gross income could be less than if nonunion", and that an employer has the right to remind

merely testified that "it could very, very possibly be" that Iglebak mentioned such Sunday closing. Davis testified that neither Iglebak nor Berglund said anything about Sunday work

employees of the economic benefits which they enjoy. I agree with the General Counsel.

Respondent's interrogation, which was hardly minimal, was unlawful because it was not accompanied by the safeguards set forth in *Struksnes Construction Co.*, 165 NLRB 1062, and because it was accompanied by Iglebak's unlawful statement to employees that unionization might result in a reduction in working time with a consequent decrease in income. That statement was not merely a reminder of the benefits they enjoyed, nor was it a prediction of "demonstrably probable consequences beyond [Respondent's] control". *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575. There is nothing in the record to show that a reduction in work time was an inevitable consequence of unionization. Rather, the statement constituted a warning that Respondent might exercise its power to enforce economic reprisals against the employees if they unionized. Iglebak's statement thus constituted an unlawful threat.

I find that said interrogation and threat violated Section 8(a)(1) of the Act.

## 2. The resignations from the Union

On September 17, Respondent discharged Garbez. In the late afternoon on September 18, several of Respondent's salesmen, including Sitzes, Owens, and Kessler, went to a showing of 1971 Volkswagen models in San Francisco. During conversations after the showing, some of the employees stated to each other that they were no longer interested in the Union. Garbez, who had been at the showing, went to Respondent's premises, told Berglund that there had been talk by the salesmen about the regular sales meeting to be held on the following day, Saturday, September 19, asked whether he should be present, and was told by Berglund to be there between 9 and 9:30 a. m. Later that night, Sitzes and Owens each telephoned Iglebak at his home, told him that some, or most, of the new car salesmen had changed their minds about the Union, and invited him to be present at the sales meeting to be held the next morning. Iglebak agreed to be there.<sup>5</sup>

The sales meeting on September 19 began about 8:30 a.m., the usual starting hour. In addition to Iglebak, those present included four new car salesmen, Davis, Sitzes, Owen, Johnstone, Kessler, and possibly the used car manager, Pisent.<sup>6</sup> Following the completion of the usual business, there was a pause. Sitzes then brought up the subject of commissions. Iglebak testified that he replied as follows:

A lot of things were said. What I said was, "Well, you got yourselves into this thing and you apparently wanted to go that route, so it is voluntarily up to you what you want to do. The one way I know to get out of something is to resign from the club."

\* \* \* \* \*

Then I said, "This is up to you. You didn't need me

when I was gone to make your decision so I don't think you need me to help you make this one."

He further testified that he left the room and that when he returned the employees had decided to withdraw from the Union. One of the supervisors then went for paper. When he returned, the employees asked how the resignations should be worded, and a supervisor made suggestions. Davis, Kessler, and Sitzes wrote out and signed resignations. Kessler testified that he gave his resignation to Iglebak. Sitzes testified that he gave his to either Iglebak or Berglund. Davis testified that he left his on the conference table. Iglebak first testified that he did not see the men sign and did not receive their resignations during the meeting, that Sitzes showed them to him later that day, but that the latter did not leave them. Later, he admitted that he did see them sign, and that one or two resignations were handed to him during the meeting. Sitzes testified that none of the employees had the resignations when the meeting ended.

The men then discussed certain commission increases which they desired. When the discussion ended, Iglebak stated that he "didn't see much wrong" with the proposed commissions, but that he would let the men know whether or not he would approve the increases. The discussion then turned to Garbez. The employees expressed their desire that Garbez be returned to work. Iglebak stated that he had no objection, and Kessler left the room to fetch Garbez.<sup>7</sup> On their way to the conference room, Kessler told Garbez that the employees had resigned from the Union and that Iglebak would take Garbez back if he resigned. When they arrived, Iglebak told Garbez that the employees wanted him to come back to work, that they had resigned from the Union, that they had discussed a new commission schedule, and that it would be necessary for Garbez to resign from the Union before Iglebak could talk to him. Garbez thereupon wrote out and signed a resignation and gave it to Iglebak. The latter informed him that he intended to consider certain changes in commissions proposed by the employees and then told him to go back to work. The four resignations were received in the mail by the Union in a single envelope without an accompanying letter on or about September 22. In response to a question during his direct examination, Iglebak testified:

Q. Thereafter did you cause these particular, you, yourself, or did you cause anyone else to mail these particular documents to the union?

A. No. Mr. Sitzes brought them into my office and, as far as I know, until they showed up here now in an envelope, I looked at one or two of them and I did not put them in an envelope.

The General Counsel contends that Respondent violated Section 8(a)(1) by giving assistance to the employees at the September 19 meeting with respect to the preparation and mailing of their resignations from the Union, and by bartering its tentative promise of commission increases and the reinstatement of Garbez for the resignations. Respondent argues that its conduct at the meeting was not unlawful because the employees had decided prior to the meeting to resign from the Union, that it was the employees

<sup>5</sup> Iglebak testified that he normally did not attend the meetings.

<sup>6</sup> The used car salesmen customarily attended the sales meetings. In response to an inquiry by Kessler, Iglebak, or Berglund replied that the

used car salesmen had not been invited that morning.

<sup>7</sup> Garbez had arrived at Respondent's premises about 9 a.m.

who sought to bargain directly with Iglebak regarding the commission increases and the reinstatement of Garbez, and that it was proper for Iglebak to inform them that he could not talk to them so long as they were represented by the Union.

The record establishes, and I find, that Iglebak did not confine himself to a refusal to bargain with the employees because they were represented by the Union, but that he affirmatively suggested that they resign from the Union. I further find that he made his suggestion before they decided to resign. However, it is immaterial whether the suggestion came before or after their decision. If before, it constituted illegal solicitation of resignations. If after, it constituted illegal solicitation to adhere to and implement their decision. I also find that by furnishing the paper and suggestions for wording the resignations, Respondent unlawfully assisted in their preparation.<sup>8</sup>

Contrary to the General Counsel's contention, I find that the record fails to establish a tentative promise by Iglebak to increase commissions. According to the testimony, the discussion relating to commissions occurred after the resignations were signed, and Iglebak merely stated that he would let the men know what his decision was. On the other hand, I find that Respondent did unlawfully condition the reinstatement of Garbez upon his execution of a resignation.

I find that by soliciting and assisting the employees to resign from the Union, or to adhere to and implement a decision to resign, Respondent violated Section 8(a)(1) of the Act. I further find that by conditioning the reinstatement of Garbez upon his resignation from the Union, Respondent violated Section 8(a)(1) and (3) of the Act.

### 3. The increase in commissions

Iglebak testified that about a week or 10 days after the meeting on September 19, he issued a memorandum relating to commissions payable to the salesmen. The memorandum established increases in the commissions on the sales of a number of car models. It also provided for increases in the commissions payable upon financing and insurance contracts sold to automobile purchasers. Such increases were the same as those requested by the employees on September 19.

The General Counsel contends that the increases were unlawfully motivated by Respondent's desire to induce the employees to reject the Union. Respondent asserts that commission changes are normally discussed and established when new car models are introduced, that the commission increases which it adopted for car sales applied only to the 1971 models, that its new commissions were "in accordance with the rate paid by other dealers" in the area, and that their adoption was not related to Union activity. I agree with the General Counsel.

The record contains testimony that the employees had discussed commission increases on car sales with Respondent prior to the Union activity, that the customary occasion for a change in such commissions was the time

when new models were introduced, and that other Volkswagen dealers in the area raised the commissions payable on the sale of new car models at about the same time as Respondent. Assuming, without deciding, that Respondent's increases applied only to the 1971 models,<sup>9</sup> I nevertheless find that the increases were motivated, at least in part, by unlawful reasons. As already found, Respondent had succeeded, through unlawful means, in obtaining the employees' resignations from the Union. It was obvious that the employees resigned in the belief and expectation that Respondent would increase their commissions. If Respondent had then refused to increase the commissions, the execution of new Union applications would have been almost inevitable. In the circumstances, it is reasonable to conclude, and I find, that Respondent sought to prevent a resurgence of the employees' desire to unionize by satisfying their expectations regarding commission increases. In addition, the record shows that the Union had filed a petition for certification on September 18 (Case 30-RC-9581). I find that by satisfying such expectations, Respondent also sought to insure that the employees would vote against unionization if, despite the resignations from the Union and the unfair labor practice charge filed on September 22, a Board election should be held.

It may be that in increasing the commissions on car sales, Respondent was motivated in part by similar increases adopted by competitors. However, it is clear that Respondent's increases in the commissions payable on sales of financing contracts were in no way motivated by competitors' increases.<sup>10</sup> I find that, whatever other reason Respondent may have had for increasing commissions, at least one reason was its desire to prevent unionization. I further find that the commission increases were "reasonably calculated to have that effect." *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405. I accordingly find that the commission increases violated Section 8(a)(1) of the Act.

### C. The Discharge of Garbez

As noted, Respondent's salesmen began discussing possible unionization in late August or early September. They selected Garbez to pursue the matter, and he telephoned the Union's secretary-treasurer, Fulco. On September 9, Fulco and other Union representatives met with seven of Respondent's employees, and the employees signed Union application cards. Following Respondent's interrogation and threats on September 16, Employee Sitzes informed Iglebak and Berglund that Garbez was responsible for the unionization of the employees. On September 17, Iglebak called Garbez to his office and, in the presence of Berglund, informed Garbez that he was discharged. Iglebak told Garbez that this work performance was good; that according to information received from his automobile distributor, there would be a decrease in the number of cars delivered to Respondent during "the next month or so"; that Respondent would thus have insufficient merchandise

evidence relating to the models affected by the commission increases is confusing and insufficient to permit resolution of the issue

<sup>10</sup> Iglebak admitted that he did not know what commission his competitors were paying on sales of financing contracts

<sup>8</sup> Although it seems likely that Respondent mailed the resignations to the Union, it is superfluous and hence unnecessary to resolve that issue in view of the above findings relating to assistance

<sup>9</sup> I have no confidence in Iglebak's testimony to that effect. The other

to warrant six new car salesmen; and that he had selected Garbez for discharge because he had the least seniority.

The General Counsel contends that the discharge was motivated by a desire to punish Garbez for his union activities and constituted a tactic in Respondent's campaign to undermine the Union's majority. Respondent's position is that the discharge was dictated solely by economic considerations. I agree with the General Counsel. Iglebak testified that because of a decrease in sales volume during August and the first half of September 1970, and because of information that there would be a shortage in the shipment of new cars "for the remainder of the year", he decided on September 15 that fairness to his salesmen required that the sales force be reduced from six to five men; that it is company policy to select employees for layoff based on seniority; that on the afternoon of September 17 he asked Berglund which salesman had the least seniority; and that when the latter advised that it was Garbez, he informed the latter of his discharge. I am not persuaded by this testimony for several reasons. In view of his self-contradictions and evasiveness, as well as his demeanor, I find that Iglebak was not a credible witness. In addition, his testimony regarding business conditions receive little support from the sales data in the record. Although the gross sales for August and September were lower than those for some months during 1969 and 1970, they exceeded gross sales for other months.

Respondent's argument regarding the anticipated shortage of cars is similarly unconvincing. Garbez testified that there was no shortage of cars in October and that, in fact, October was the best month in Respondent's sales history. Nevertheless, Respondent furnished no figures showing whether sales that month reduced its inventory. The only corroboration of Iglebak consists of testimony by Keller. But he stated that the shortage began in December, *i.e.*, almost 3 months after the discharge of Garbez. The record thus casts doubt upon the accuracy of Iglebak's assertions concerning the predictions which he received. With regard to the matter of seniority, it is true that Garbez had the least seniority. However, Respondent's manual setting forth its policy relative to employment makes no mention of seniority. Although the manual states that during his first 90 days an employee is in a probationary period, it does not provide that probationers shall be laid off before others. On the contrary, the manual states that Respondent reserves the right to terminate "any" employee based on its needs, the employee's ability to perform and to get along with others, and his integrity. The record also shows that Respondent discharged Employee Denton as well as Garbez on September 17.<sup>11</sup> In view of Iglebak's testimony that he decided that business conditions warranted the discharge of one salesman, it would appear that the discharge of Denton would have solved the problem. Respondent has failed to explain why it was also necessary to discharge Garbez, particularly since he admittedly had a good sales record.

On the other hand, it is undisputed that Iglebak was

<sup>11</sup> Union Secretary-Treasurer Fulco testified without contradiction that Denton told him about the discharge, that Fulco complained thereof to Assmar, Respondent's secretary-treasurer, and that the latter replied that Denton had a bad driving record and could not be insured. I regard

informed on September 16 that Garbez was responsible for bringing in the Union, and that he discharged him the next day. Moreover, the evidence shows that the other salesmen wanted Respondent to take back Garbez. Nevertheless, despite Iglebak's testimony that he discharged Garbez primarily to protect the earnings of the other salesmen, he permitted Garbez to go back to work only after the latter, as well as the others, had resigned from the Union. Considering Respondent's knowledge of the role of Garbez in organizing the men, the timing of his discharge, his return to work only after he and the other men had resigned from the Union, the absence of a convincing explanation for his discharge, and Respondent's other acts of interference, restraint, and coercion, I find that the discharge was unlawfully motivated and violated Section 8(a)(3) and (1) of the Act.

#### D. *The Refusal To Bargain*

As noted above, on September 16, the Union requested Respondent to bargain, Iglebak replied that he had just returned from Europe and that he would notify the Union when he would be available, and immediately thereafter he called the salesmen to his office and interrogated and threatened them. By letter dated September 17 to the Union, Iglebak suggested a meeting at 10 a.m. on September 28. Fulco went to Respondent's premises at the appointed time, but Iglebak could not be located. On the same day, Iglebak sent a letter to the Union stating that he had assumed that the meeting was canceled inasmuch as the Union had filed a petition for certification on September 18, *i.e.*, after his letter suggesting the meeting. The letter went on to suggest that the Union call him if it wanted a meeting despite its petition. Thereafter, Fulco attempted to reach Iglebak by telephone a number of times during October and November, but each time he was told by Respondent's operator that Iglebak was not in.<sup>12</sup> Although he left word with the operator that he had called, Iglebak did not return his calls. Iglebak testified that he received at least one message from the operator, but that he did not talk to Union representatives after September 16. On December 17, Fulco attempted to reach Iglebak two or three times without success. During one call, the operator informed him that Iglebak was talking on another line. After he had waited about five minutes, the operator asked his name. When Fulco identified himself, she stated that Iglebak was not in the building. On December 21, the Union's counsel wired Respondent that a Union representative would appear at Respondent's premises on December 23 to bargain for a contract. On December 22, Iglebak sent the Union a wire stating that he was unable to meet at the designated time, that the matter was before the Board, and that Respondent intended to avail itself of the election procedures.

At the hearing, the General Counsel stated without contradiction that the Union withdrew its petition for certification on January 18, 1971. Counsel for Respondent stated that the latter had recently filed a petition for

Assmar's statement to Fulco as an admission by Respondent that Denton had been discharged

<sup>12</sup> Fulco had not identified himself before receiving such information

certification. In his brief, the General Counsel stated that Respondent's petition was filed after the hearing began on April 20, 1971, and that the Regional Director subsequently dismissed the petition on the ground that a question concerning representation could not appropriately be raised in view of the outstanding complaint.<sup>13</sup>

It is undisputed that the Union, on September 16, requested Respondent to bargain. In its brief Respondent expressly admits that it refused to bargain with the Union but asserts that the Union did not represent a majority and that the refusal to bargain is justified until the Union establishes its majority in a secret election.

1. At the hearing, Respondent amended its answer so as to admit, and I find, that the following constitutes a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All new and used car salesmen employed by Respondent at its San Jose, California, facility, excluding guards and supervisors as defined in the Act.

The parties stipulated that as of September 16 the unit consisted of the following nine employees. (1) New Car Salesmen, Tom Garbez, Herbert Davis, Fred Kessler, Kern Gene Sitzes, Nevell Johnstone, and William Owen; and (2) Used Car Salesmen, Hugh Curley, Joseph Polcynski, and Tom Denton

2. It is undisputed that seven of the above employees, *i.e.*, all but Johnstone and Owen, signed union membership application cards on September 9. However, Respondent contends that the cards cannot be used to establish a majority because the Union failed to follow its constitutional provisions governing approval of membership applications, because it failed to fulfill the requirements of contract law by neither executing nor acting on the applications, and because it failed to follow its constitutional provisions in fixing the amount of the initiation fee payable by the card signers

The evidence shows the following. The seven card signers attended the Union meeting on September 9. At the meeting, Union Secretary-Treasurer Fulco explained the benefits of representation by the Union, distributed union membership application cards together with information sheets, and read the following portion of the application cards:

I hereby make application for membership in the RETAIL CLERKS INTERNATIONAL ASSOCIATION and affirm that the above statements are true, and I agree that all moneys paid by me shall be forfeited and my membership declared void if they are not true. I authorize the RETAIL CLERKS INTERNATIONAL ASSOCIATION to represent me for the purposes of collective bargaining and handling of grievances either directly or through such local union as it may duly designate.

Fulco requested those present to fill out and sign the information sheets but merely to sign the application cards, stating that it was unnecessary to fill out the cards since the information placed on the information sheets would be

transferred to the cards. He further stated that by signing the documents, the employees were asking the Union "to represent them in negotiations and bargaining." At the meeting, six of the employees filled out and signed information sheets and signed application cards, and the seventh filled out and signed both documents. In addition, by September 14, each of the seven paid an initiation fee of \$25 and 1 month's dues of \$10.<sup>14</sup>

Contrary to Respondent's contention, the applicable test in determining the validity of the cards is not whether membership was perfected or validly obtained. The test is whether the card signers intended to designate the Union as their collective-bargaining representative. *Tower Enterprises, Inc.*, 182 NLRB No. 56 (TXD fn. 7). Applying that test here, I find that the seven card signers intended to and did designate the Union as their representative. The cards on their face were not only applications for membership but also unambiguous authorizations to the Union to represent the signers for purposes of collective bargaining. A Union representative clearly explained to the signers that by executing the cards and accompanying information sheets, they authorized the Union to represent them, and there is no evidence or claim of misrepresentation or other defect which would invalidate the cards. I accordingly find that the Union represented a majority of the unit employees when it requested recognition on September 16.

3. As found above, Respondent violated Section 8(a)(1) and (3) of the Act by interrogating and threatening employees, by its solicitation and assistance in connection with the resignations from the Union, by discharging Garbez, by conditioning his reinstatement upon his resignation from the Union, and by increasing commissions. I find that by engaging in these violations and by refusing to bargain with the Union, which represented a majority of the unit employees, Respondent violated Section 8(a)(5) and (1) of the Act.<sup>15</sup>

I further find that in view of the serious nature of Respondent's unlawful conduct the possibility of erasing its effects and of insuring a fair election is slight; and that on balance, the rights of the unit employees and the purposes of the Act would be better effectuated by reliance on the employee sentiments expressed in authorization cards rather than in the results of an election. Accordingly, I find that a bargaining order against Respondent is warranted.<sup>16</sup>

#### CONCLUSIONS OF LAW

1. By unlawfully interfering with, restraining, and coercing its employees, as found herein, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

2. By unlawfully discharging Garbez, and by conditioning his reinstatement upon his resignation from the Union, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

3. All new and used car salesmen employed by Respondent at its San Jose, California, facility, excluding guards and supervisors as defined in the Act, constitute a

<sup>13</sup> Attached to the General Counsel's brief was a copy of the Regional Director's letter of May 12, 1971, dismissing the petition, which bore Case 20-RM-1388

<sup>14</sup> Union representative Silva testified that the usual initiation fee is

\$150, but that during organization drives, it reduced this to \$25 or \$50

<sup>15</sup> *The Dalf Corp.*, 188 NLRB No. 57, *Gibson Products Corp.*, 185 NLRB No. 74; *Mink-Dayton, Inc.*, 181 NLRB No. 40.

<sup>16</sup> *Ibid*

unit appropriate for the purposes of collective bargaining within the meaning of Section (9)(b) of the Act

4. At all times on and after September 16, 1970, the Union has represented a majority and has been the exclusive bargaining representative, of the employees in the above unit.

5. By refusing to bargain with the Union on and after September 16, 1970, as found herein, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

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

#### THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I recommend that it cease and desist therefrom, and that it take certain affirmative action which I find necessary to remedy and remove the effects of the unfair labor practices and to effectuate the policies of the Act.

More specifically, I recommend that a bargaining order be issued against Respondent for the reasons discussed above. Since the record does not disclose whether or not Garbez was fully reinstated, I also recommend that Respondent offer Garbez immediate and full reinstatement to the position which he held prior to his unlawful discharge, or to a substantially equivalent position, without prejudice to his seniority and other rights and privileges. I further recommend that Respondent make Garbez whole for any loss of earnings he may have suffered by reason of the discrimination against him by paying to him a sum of money, with interest, equal to that which he would have been paid by Respondent absent such discrimination, less net earnings during said period. The loss of earnings shall be computed in the manner set forth in *FW. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:<sup>17</sup>

#### ORDER

Respondent, Almaden Volkswagen, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

- (a) Unlawfully interrogating and threatening employees;
- (b) Unlawfully soliciting and assisting employees to resign from the Union or to implement a decision to withdraw;
- (c) Unlawfully discharging employees, conditioning their reinstatement upon their resignation from membership in a union, or otherwise discriminating in regard to any term or condition of their employment;
- (d) Unlawfully increasing commissions or otherwise improving employee benefits;
- (e) Unlawfully refusing to bargain collectively with Automobile Salesmen's Union, Local 1095, Retail Clerks International Association, AFL-CIO, as the exclusive representative of the employees in the following appropriate unit:

All new and used car salesmen employed by Respondent at its San Jose, California, facility, excluding guards and supervisors as defined in the Act.

(f) In any other manner interfering with, restraining, or coercing its employees in the exercise of any right guaranteed in Section 7 of the Act.

2. Take the following affirmative action:

(a) Offer to Thomas M. Garbez immediate and full reinstatement to his former or a substantially equivalent position and make him whole for any loss of earnings he may have suffered by reason of Respondent's discrimination against him, in the manner set forth in the section herein entitled "The Remedy";

(b) Preserve and make available to the Board or its agents on request, for examination and copying, all payroll records and reports and all other records necessary to analyze the amount of backpay due and the right of reinstatement under the terms of this Recommended Order;

(c) Upon request, bargain collectively with Automobile Salesmen's Union, Local 1095, Retail Clerks International Association, AFL-CIO, as the exclusive representative of the employees in the unit found herein to be appropriate and embody in a signed contract any understanding reached;

(d) Post at its facility in San Jose, California, copies of the attached notice marked "Appendix."<sup>18</sup> Copies of said notice on forms provided by the Regional Director for Region 20, after being duly signed by a representative of the Respondent, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(e) Notify the Regional Director for Region 20, in writing, within 20 days from the receipt of this Decision what steps have been taken to comply herewith.<sup>19</sup>

<sup>17</sup> In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 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.

<sup>18</sup> In the event that the Board's 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 be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

<sup>19</sup> In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith."

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Act gives all employees these rights:

To engage in self-organization  
To form, join or help unions

- To bargain collectively through a representative of their own choosing
- To act together for collective bargaining or other aid or protection, and
- To refrain from any or all of these things

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT unlawfully discharge employees or otherwise discriminate against them because of their union activities.

WE WILL NOT unlawfully question or threaten our employees.

WE WILL NOT unlawfully solicit or help our employees to resign from membership in a union.

WE WILL NOT unlawfully increase commissions or otherwise improve employee benefits in order to induce our employees not to unionize.

WE WILL OFFER to reinstate Thomas M. Garbez to his old job and pay him for all the earnings he lost because of his discharge.

WE WILL, upon request, bargain collectively with Automobile Salesmen's Union, Local 1095, Retail Clerks International Association, AFL-CIO, as the exclusive representative of all our employees in the

following unit with respect to rates of pay, wages, hours of work, and other terms and conditions of employment, and embody in a signed agreement any understanding reached. The bargaining unit is:

All new and used car salesmen employed by us at our San Jose, California, facility, excluding guards and supervisors as defined in the Act.

ALMADEN VOLKSWAGEN  
(Employer)

Dated	By	(Representative)	(Title)
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This is an official notice and must not be defaced by anyone.

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.

Any questions concerning this notice or compliance with its provisions, may be directed to the Board's Office, 13050 Federal Building, 450 Golden Gate Avenue, Box 36047, San Francisco, California 94102, Telephone 556-3197.