

Vanella Buick Opel, Inc. and Local 259, United Automobile Workers, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America. Case 22-CA-4606

April 7, 1972

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND KENNEDY

Upon a charge filed on October 1, 1971, by Local 259, United Automobile Workers, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, herein called the Union, and duly served on Vanella Buick Opel, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 22, issued a complaint on November 9, 1971, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before a Trial Examiner were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 10, 1971, following a Board election in Case 22-RC-4745, conducted pursuant to an agreement for consent election, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;¹ and that, commencing on or about September 20, 1971, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On November 18, 1971, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On December 6, 1971, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on December 10, 1971, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent there-

after filed a response to Notice To Show Cause, styled as a Memorandum in Opposition to Motion for Summary Judgment.

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

Upon the entire record in this proceeding, the Board makes the following:

RULING ON THE MOTION FOR SUMMARY JUDGMENT

In its answer the Respondent admits the material factual allegations of the complaint, denying only the Union's status as exclusive representative of a majority of the employees in the bargaining unit. As an affirmative defense, the answer asserts that the Regional Director improperly overruled challenges to the ballots of two employees in finding them eligible to vote in the election. This argument is also raised in the response to the Notice To Show Cause. Counsel for the General Counsel contends that the Respondent presents no factual issues litigable before the Board and that the Respondent's refusal to bargain in violation of Section 8(a)(1) and (5) has been established. We fully agree.

In the election held on October 8, 1970, pursuant to an agreement for consent election in Case 22-RC-4745, the Union received seven votes, another union received six, one vote was cast for no union, and two ballots were challenged on the ground that the voters were not employees. In a Report on Challenged Ballots issued October 30, 1970, the Regional Director postponed his decision on the challenges pending determination of the unfair labor practice charges which alleged that the two voters casting the challenged ballots were the subjects of charges that they had been discriminatorily discharged in violation of Section 8(a)(3) and (1) of the Act. The Trial Examiner sustained the 8(a)(3) allegations and severed the representation case and remanded it to the Regional Director with the recommendation that the two ballots be counted. In its Decision and Order,² the Board found only one of the challenged voters had been discriminatorily discharged because of union activity, but did not order his reinstatement because, in the absence of discrimination, he would have been laid off at a later time.

Thereafter, the Regional Director issued a Supplemental Report on Challenged Ballots on August 26, 1971. On the basis of his "independent consideration of the entire record," including the Board's Decision and Order and the Respondent's brief to the Trial Examiner, he found that the two voters "were on lay-

¹ Official notice is taken of the record in the representation proceeding, Case 22-RC-4745, as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938, enf'd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151, *Intertype Co. v. Penello*, 269 F. Supp. 573 (D.C. Va., 1967), *Follett Corp.*, 164 NLRB 378, enf'd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

² *Vanella Buick Opel, Inc.*, 191 NLRB No. 107 (1971)

off status prior to the election and had a reasonable expectancy of recall as of the date of the election." He therefore overruled the two challenges. The Respondent did not request review of the Regional Director's action. After the counting of the challenged ballots, the revised tally showed nine votes for the Union and no change in the other votes, giving the Union a majority. The Regional Director then certified the Union on September 10, 1971.

Absent newly discovered or previously unavailable evidence, or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding.³ Here, the Respondent not only raises no issues not determined by the Regional Director under his authority to make final and binding determinations bestowed upon him by the parties to the consent-election agreement, but also it failed to appeal the Board the Regional Director's determinations.

In response to the Notice To Show Cause the Respondent seeks to have the case remanded to the Regional Director for hearing. It contends that the Regional Director improperly overruled the challenges to ballots since there was no indication that he had actually investigated the issue raised by the challenges, to wit, whether the employees had a reasonable expectancy of recall—the Regional Director apparently having conducted no investigation beyond an examination of the existing representation case record which allegedly contained no material evidence bearing on that issue. In essence, the Respondent is contending that the Regional Director's decision was therefore capricious and arbitrary.

By established policy the Board will not review the merits of a Regional Director's determinations under a consent-election agreement, which the parties agree are final and binding on them, unless fraud, misconduct, or such gross mistakes are raised so as to imply bad faith and support a conclusion that the rulings were arbitrary or capricious.⁴ On the record here, and contrary to the Respondent's contention, we find that the consideration of the entire record before the Regional Director constituted a sufficient investigative basis for his determinations in Case 22-RC-4745 which were not arbitrary or capricious. We therefore find no issue has been raised that is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

³ See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

⁴ *Van Tran Electric Corporation*, 187 NLRB No. 89 (1970); *Mitchiyoshi Uyeda, d/b/a Udaco Manufacturing Company*, 164 NLRB 700, 701-702 (1967); *Sumner Sand & Gravel Company*, 128 NLRB 1368, 1371 (1960), *enfd.* 293 F.2d 754 (C.A. 9, 1961).

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a corporation organized under the laws of the State of New Jersey, is engaged in the retail sale and service of automobiles at its principal office and place of business, 140 Fifth Street, Plainfield, New Jersey, and at 1750 Route 22, Scotch Plains, New Jersey. In the course and conduct of its business during 1970, a representative period, the Respondent received gross revenues valued in excess of \$500,000 and received goods valued in excess of \$50,000, which were transported in interstate commerce to its place of business from points outside the State of New Jersey.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Local 259, United Automobile Workers, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All shop employees, including service writers, partsmen, porters, lubrication men, bodymen, polishers, and mechanics, employed by the Respondent, excluding all other employees including office clerical employees, new- and used-car salesmen, watchmen, guards, and supervisors as defined in the Act.

2. The certification

On October 8, 1970, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 22 designated the Union as their representative for the purpose of collective bargaining

with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on September 10, 1971, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about September 20, 1971, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about September 20, 1971, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since September 20, 1971, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. 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 described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See

Mar-Jac Poultry Company, Inc., 136 NLRB 785; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229, enfd. 328 F.2d 600 (C.A. 5), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421, enfd. 350 F.2d 57 (C.A. 10).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Vanella Buick Opel, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 259, United Automobile Workers, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All shop employees, including service writers, partsmen, porters, lubrication men, bodymen, polishers and mechanics, employed by the Respondent, excluding all other employees including office clerical employees, new- and used-car salesmen, watchmen, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since September 10, 1971, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about September 20, 1971, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Rela-

tions Board hereby orders that Respondent, Vanella Buick Opel, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 259, United Automobile Workers, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

All shop employees, including service writers, partsmen, porters, lubrication men, bodymen, polishers, and mechanics, employed by the Respondent, excluding all other employees including office clerical employees, new- and used-car salesmen, watchmen, guards, and supervisors as defined in the Act.

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

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

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

(b) Post at Respondent's place of business copies of the attached notice marked "Appendix."⁵ Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's representative, shall be posted by 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 Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 22, 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

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 259, United Automobile Workers, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, 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 the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, 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 shop employees, including service writers, partsmen, porters, lubrication men, bodymen, polishers, and mechanics, employed by the Respondent, excluding all other employees including office clerical employees, new- and used-car salesmen, watchmen, guards, and supervisors as defined in the Act.

VANELLA BUICK OPEL, INC
(Employer)

Dated _____ By _____ (Representative) (Title)

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, Federal Building, 16th Floor, 970 Broad Street, Newark, New Jersey 07102, Telephone 201-645-2100.

⁵ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall 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."