

**Anderson Cupertino d/b/a Anderson Chevrolet-Chrysler/Plymouth and Teamsters Automotive Workers Local No. 665, International Brotherhood of Teamsters, AFL-CIO. Case 32-CA-17034**

March 13, 2001

**DECISION AND ORDER**

**BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND WALSH**

On August 3, 1999, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed a brief in opposition to the Charging Party's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order.

**ORDER**

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

*Judy Chang, Esq.*, for the General Counsel.

*Robert Hulteng, Esq.* and *Robert T. Landau, Esq. (Littler Mendelson)*, of San Francisco, California, for the Respondent.

*David A. Rosenfeld, Esq.* and *Manokharan Raju, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld)*, of Oakland, California, for the Charging Party.

**DECISION**

**STATEMENT OF THE CASE**

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in Oakland, California, on June 9, 1999, pursuant to a complaint issued by the Regional Director for Region 32 of the National Labor Relations Board on January 29, 1999. The complaint is based upon unfair labor practice charges originally filed by Teamsters Union Local No. 665, AFL-CIO on October 13, 1998. The complaint alleges that Respondent, Anderson Cupertino d/b/a Anderson Chevrolet-Anderson Chrysler/Plymouth, has violated Section 8(a)(1) and (5) of the National Labor Relations Act (NLRA), alleging an untimely withdrawal of recognition. Respondent,

<sup>1</sup> The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We agree with the judge that there is insufficient credible evidence to establish that the Respondent recognized the Charging Party as the representative of its lot employees. See *Trevoze Family Shoe Stores*, 235 NLRB 1229 (1978). A fortiori, there is insufficient evidence of recognition under the test of *Nantucket Fish*, 309 NLRB 794 (1992) (requiring clear, express and unequivocal evidence of recognition). In addition, there is insufficient evidence of majority status. Finally, in light of the above, we need not pass on whether the allegedly recognized unit was an appropriate one.

Anderson Cupertino, denies the commission of any unfair labor practices, asserting that it has never recognized the Teamsters in any unit, much less the unit alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

**FINDINGS OF FACT**

**I. JURISDICTION**

Respondent admits it is a California corporation which operates an automobile dealership at the facility in question in Cupertino, California. It further admits that its annual gross volume of business exceeds \$500,000 and that it annually purchases goods from outside the State valued in excess of \$5000. It therefore admits, and I find it to be, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it admits that Teamsters Local No. 665 is a labor organization within the meaning of Section 2(5) of the Act, and I so find.

**II. ALLEGED UNFAIR LABOR PRACTICES**

**Introduction**

In significant measure, this case depends on credibility resolution. Specifically, there are two stories being told which are in opposition. The first is by Teamsters Organizer Daniel "Dan" Lynch, who is supported in part by Andy Mattos, an area director for the District Lodge 190 of the International Association of Machinists and Aerospace Workers, AFL-CIO. Mattos represents IAM Local Lodge 1101 in its dealings with employers. Collectively, I shall refer to these entities as the IAM. In separate respects, however, Mattos does not corroborate Lynch, but tends to support Respondent.

The other version is presented by Richard Doyle. Doyle is currently the fixed operations manager for the entire Anderson Dealership Group<sup>1</sup> of which Respondent is a recent addition. During the period in question, late October 1997, through June 1998, Doyle was first the fixed operations manager for Respondent, later becoming its general manager in March 1998. The fixed operations manager is the executive responsible for the dealership's "behind the wall" operations, generally the service/repair facilities. That individual has no responsibility with respect to the automobile sales or parts departments. He does report to the dealerships' general manager.

Doyle was hired by Anderson Group to be Respondent's fixed operations manager on October 14, 1997. He assumed his duties at that location 2 weeks later on October 27, when Anderson took the facility from the previous owner, Davidson Chevrolet/Century Cadillac. Its principal was a Jerry Davidson.

Doyle and Mattos are longtime acquaintances. Moreover, Doyle, before he went into management, has been a member of both Teamsters and IAM local unions in the area.

It is undisputed that Davidson's mechanics had been represented by IAM Local Lodge 1101. When John Anderson purchased the facility, he asked Davidson's employees to apply for the same job with him. All of the mechanics did so and all were hired by Respondent.

As a result, Respondent early on recognized that it was, in labor relations terms, a successor employer obligated to recognize the IAM and Doyle appears to have been instructed to do so. The then general manager, Barry Rodenberg, gave Doyle some instructions and some guidelines in that respect. Those instructions required him to seek a wall-to-wall collective-bargaining contract with the IAM identical to that which covered the Anderson Chevrolet dealership in nearby Los Gatos.

In addition, it is undisputed that none of Davidson's lot people, if any, applied for work with Respondent. Respondent had to seek that type of employee from scratch. Doyle testified that the first such individual he hired was named Hess on November 5, 1987. Doyle also wanted to persuade a detailer at the Anderson Chevrolet store in Los Gatos to become the detail shop manager at Cupertino and had had several conversations with that individual prior to November 5.

<sup>1</sup> The Anderson Dealership Group is owned by John Anderson. It consists of five dealerships in the Santa Clara/San Mateo Counties area. Four, including Respondent, are unionized.

There is some curious testimony about whether Davidson's lot people<sup>2</sup> had been covered by any union contract. Lynch concedes that there was no Teamsters contract with Davidson; Mattos claims there was a Teamsters contract with Century.<sup>3</sup> (Oddly, Lynch believes the lot people at Davidson were represented by the IAM. Tr. 59.) Respondent, perhaps indirectly confirmed by Mattos,<sup>4</sup> asserts that if there was a Teamsters contract, it covered only one person, Mr. Davidson's personal chauffeur.<sup>5</sup> Whatever the situation, there is no contention that Respondent had any successor obligations insofar as the lot people are concerned.

Like Doyle, Mattos had instructions, too. He was to gain IAM representation of only the mechanics (technicians), body shop employees, and painters. In the past, prior to the return of the Teamsters to the AFL-CIO, there had not been much concern for the Teamsters "jurisdiction" over lot people. Indeed, that had led to IAM wall-to-wall representation at various dealerships in the San Francisco Bay area, if not throughout the country. It may be inferred that Anderson's Los Gatos Chevrolet's wall to wall IAM representation arose during the era when the IAM had no policy barring representation of lot people. It may also explain Lynch's belief that the Davidson lot people had been covered by the IAM contract. By 1997, however, the IAM's policy had changed to honor what was regarded as traditional Teamster jurisdiction, employees who were not performing repair work. Mattos was under instructions to follow that policy. Lot people were to be left to the Teamsters.

Prelude to the Meeting of November 5, 1997

Mattos, in late October 1997, had heard rumors that Davidson was going to sell the Cupertino operation to Anderson and decided to investigate. He somehow ended up talking to Doyle by telephone. Doyle says it was he who he called Mattos. In any event, in their first call, Doyle confirmed the sale and advised that he was in charge of the repair side of the business. This was good news to Mattos who has known Doyle for many years, had actually worked for him as a mechanic at one time, and had also performed union business with him at other locations where Doyle has worked. They had/have a good personal and professional relationship.

According to Mattos, Doyle recognized that Respondent had an obligation to recognize the IAM. Mattos said, "I advised him that we wanted to represent our traditional jurisdiction in that dealership and I hoped we didn't have a problem, and he made some joking reference to he didn't expect that he would have a problem with me, and we agreed to meet November 5th." Mattos also said he was going to bring a Teamster representative to the meeting. He says he told Doyle, "I want[ ] the Teamsters to have their traditional jurisdiction in that bargaining unit, I [do] not want their jurisdiction."

Mattos did not describe what the so-called "traditional" jurisdictions were to Doyle, as he thought Doyle already knew them. His assessment is probably correct, because both he and Doyle testified similarly:

MATTOS: "[H]e wanted [the IAM] to represent everybody wall to wall, that he didn't want a separate bargaining agreement with the Teamsters. He wanted me to take everyone like the Anderson [Chevrolet] store in Los Gatos has."

DOYLE: I said to Andy, we need to get together. I have a proposed contract I'd like to go over some points

<sup>2</sup> For our purposes, "lot people" are car washers, detailers, tire service workers, lubricators, tow truck drivers, car jockeys, and the like. In essence they are employees who are not trained mechanics.

<sup>3</sup> In retrospect Lynch's testimony is unclear. Did he mean the Teamsters had no contract with Davidson Chevrolet or both Davidson dealerships, the Chevrolet and the Cadillac entities? Until I heard Mattos' testimony I thought Lynch was referring to both since both were on the property and both were owned by Davidson.

<sup>4</sup> In her brief, counsel for the General Counsel asserts there was such a contract. If so, the evidence does not support the contention. Even so, it is a nondispositive side issue at best.

<sup>5</sup> A man known on this record only as "Johnnie."

with you and see what you want to do, see what I want to do, and go from there.

Q. (By Mr. Landau) Okay. And did you talk anything about who the contract would cover for the Machinists Union?

A. Yes. I asked him to mirror, somewhat mirror the contract that he had in our Los Gatos store with the Machinists and the porters and the car washers.

Q. There's been some discussion, as you sat here, about the Los Gatos store and what sort of contract arrangement they had. Could you briefly just outline for me what contract coverage there was for Los Gatos employees at Anderson?

A. As I understand it, and I read a copy of the contract in Los Gatos at the time before I called Andy—Andy had complete jurisdiction over all back end people, and I told Andy, Andy, this is what I want to do, because I know you, I've had some bad experiences with the other union, and I want you, you're my guy, I can talk to you and I want that contract and I want it mirrored.<sup>6</sup>

The conversation continued along those lines with Doyle attempting to cajole Mattos into taking the lot people and Mattos saying he couldn't. The conversation ended without any resolution over those individuals. Mattos says it was in that conversation, but Doyle says it was in a second phone call, that they made an appointment to meet at Doyle's office at Respondent's facility on November 5. Mattos told him he would bring a Teamster representative with him. Doyle didn't see the necessity for that, but when Mattos promised to buy lunch, Doyle yielded.<sup>7</sup>

The Meeting of November 5, 1997

The General Counsel first presented Teamsters Business Agent Dan Lynch to describe how he came to attend the meeting. Lynch's testimony:

Q. (By Ms. Chang): How did you first become aware of Anderson?

A. By speaking with Andy Mattos.

Q. Do you recall when that conversation took place?

A. That was roughly the end of October 1997.

Q. And was this by a phone conversation?

A. Yes, it was.

Q. What did Andy Mattos tell you at that time?

A. Andy Mattos asked me to attend a meeting with him at Anderson Cupertino, that they were going to—that they wanted a contract.

• • • •

<sup>6</sup> Elsewhere, Doyle gave additional testimony about the telephone call:

Q. All right. And how did Mr. Mattos respond to your position on this issue?

A. He laughed and said he couldn't do it, and I said, yes, you can—no, you can't—yes, you can—we had a back and forth on the first conversation on the phone, because I knew what I wanted and I wanted him to give me what I wanted.

<sup>7</sup> Doyle: "He called me on the phone and he said he wanted to bring the Teamsters guy down. I told him I really didn't want to meet with the Teamsters guy, and Andy said, 'Rich, you've got to meet with the Teamsters guy.' And I said, 'I don't have to do anything.' So, he said, 'Well, I'll buy lunch,' and I said, 'Well I'm a player for lunch, come on down you can buy me lunch.'"

MR. HULTENG: Your Honor, I would move to strike. I think I heard some testimony there, they wanted a contract, it wasn't clear to me who "they" are, but to the extent that this witness may be understood to be claiming that this is evidence that the employer wanted a contract, I would move to strike, it would be strictly hearsay.

JUDGE KENNEDY: Well, it's certainly hearsay as to that issue, but it doesn't sound to me like that's what he's saying. You're talking about Mr. Mattos' union wanted to have a contract, is that right?

THE WITNESS: No, Anderson Cupertino.

JUDGE KENNEDY: Well, how would Mr. Mattos know that, sir?

THE WITNESS: Because Mr. Mattos had been in contact with Mr. Doyle, as I understood it.

JUDGE KENNEDY: So, that's what you think he said, anyway?

THE WITNESS: Yes.

JUDGE KENNEDY: All right. I'll let it stand, counsel, it's hearsay but it's no—it doesn't constitute an admission.

....

Q. (By Ms. Chang): Okay. And again, what did Mr. Mattos—I don't know if you were able to complete your answer—what did Mr. Mattos tell you at that time?

A. That Anderson Cupertino wanted a contract and that basically that he was going to—that the Teamsters would have the jurisdiction for the lot men and the detailers, and the Machinists would have the jurisdiction for the technicians.

According to Mattos and Doyle the November 5 meeting began sometime between 11 and 11:30 a.m. in Doyle's office. In order to gain the proper flavor of the testimony I shall quote all three as they describe how the meeting began:

***Mattos' Version:***

THE WITNESS (Mattos): We sat, Dan Lynch and I, sat across the desk from Richard Doyle. Richard and I started in our usual somewhat combative fashion.

JUDGE KENNEDY: Friendly combat.

THE WITNESS: Friendly combative, which is our style. He again said to me that he wanted a single contract with the Machinists Union, like the store in Los Gatos, like he had in Los Gatos. I said to him that that wasn't what our intention was, that that's why I brought Dan Lynch with me from the Teamsters Union. I explained to him the new relationship that we had with the Teamsters Union, not the same one that we had in the past when the Los Gatos store was organized, and the history behind that. We bantered back and forth about this subject. He told me what he wanted in his position, and I told him what I needed to have from my position.

....

THE WITNESS: As I recall, he said that he wanted us to take everyone in the back lot, including what would be the Teamsters jurisdiction. And I said to him that we were not going to take the Teamsters jurisdiction, as I recall. I told him that Dan Lynch was there to represent that jurisdiction and that's what I would like him to do.

Q. By Ms. Chang: And what did Mr. Doyle say?

A. He stopped arguing with me at that point.

Q. Did he say anything?

A. No.

***Lynch's Version:***

On direct examination by the General Counsel, Lynch testified:

Q. By Ms. Chang: I believe I already asked you how did the meeting begin, what happened after the introduction?

A. After the introductions, Rich and Andy talked for a few minutes about their past dealership experiences.

Q. And then what happened?

A. And then Andy, once again, talked to, explained to Rich that the Teamsters would be—their traditional jurisdiction would be the lot men and the detailers, and that the Machinists would retain the technicians. Mr. Doyle indicated that he had no problem with that, and in fact handed me a Contract.

On cross examination Lynch testified:

Q. (By Mr. Hulteng) And did he in fact tell you that he wanted those [lot] persons to be covered by the Machinists 1101 contract?

A. No, he did not. He told us that he wanted them to be covered for health and welfare, which is we have the same health and welfare administrator.

....

Q. (By Mr. Hulteng) At any time did Mr. Mattos tell you that Mr. Doyle wished to have the Machinists Union represent lot persons and detailers at the Cupertino store?

A. Not that I recall.

Q. When you say not that I recall, are you telling me it never happened or are you saying you don't have a memory of whether or not he told you that?

A. Not that I recall, not that I remember.

Q. Did Mr. Lynch—excuse me—you are Mr. Lynch. Did Mr. Doyle ever say, in his meeting with you and Mr. Mattos, on November 5, that it was his wish to have the [ ] Machinists Union represent the lot persons and detailers?

A. No, actually the opposite. Mr. Doyle indicated that he had no problem with the Teamsters representing the lot men and the detailers.

***Doyle's Version:***

A. (Doyle): As I recall, the conversation was really brief because the restaurant we were going to is really crowded, and was across the street, so 20 minutes maybe.

Q. (By Mr. Landau): Okay. What do you recall was said during that conversation, and to the extent you recall direct words rather than just summarizing?

Q. (By Mr. Landau): What did you tell Mr. Mattos at the beginning of the conversation?

A. That I didn't want to have anything to do with the Teamsters. That I wanted to mirror the Los Gatos contract.

Q. Okay. And how did Mr. Mattos respond?

A. He responded in a way, well, you have to have somebody representing these guys because I can't do it.

Q. Did you talk more along this issue with Mr. Mattos?

A. We had a heated but not heated conversation about the same matter. I just didn't want the Teamsters representing—

THE WITNESS: I told Andy I didn't want the Teamsters to be representing the Cupertino employee s.

Q. (By Mr. Landau): Okay. And Mr. Mattos disagreed with you?

A. Correct.

Q. And did this take up much of the conversation, this issue?

A. Yes.

Q. Did Mr. Lynch talk at all during this meeting in the general manager's office?

A. As I recollect, very little.

Q. How did the conversation in the general manager's office end?

A. We went to lunch.

The General Counsel did not cross-examine Doyle with respect to this issue.

Thus, we have Doyle and the IAM's Mattos agreeing with each other that the principal matter which was discussed that morning was Doyle's desire to have the IAM represent the lot people as part of a wall-to-wall bargaining unit, and Mattos insisting that he could not do so. In essence this was a repeat of their earlier telephone conversation. Both agree they went round and round insisting on their respective positions.

Strangely, Lynch did not testify to any portion of that conversation or anything much like it, even though rather clearly the meeting began on that note and revolved in large part around it. Instead, Lynch reduces the entire matter to less than one sentence saying that a docile Doyle readily cooperated and handed him a proposal. Later he essentially denied the Mattos/Doyle exchange, asserting that Doyle was simply concerned that the lot people be covered by the health and welfare plan which the IAM and Teamsters seem to share. I find Lynch's characterization of the conversation to be unlikely, given the mutually corroborative elements of Mattos' and Doyle's versions, as well as the probability favoring that version.

The next matter of significance is Lynch's reference, quoted above, that after supposedly assenting to Teamsters' representation of the lot people, Doyle handed him a "contract." The document is in evidence as General Counsel's Exhibit 2. In this portion of the conversation, Mattos does corroborate Lynch, at least to the effect that Doyle handed Lynch the document. Doyle, on the other hand, says that he handed Mattos, not Lynch, a packet of papers which included General Counsel's Exhibit 2.

According to Lynch, Doyle told him this was their "contract offer and I could sign it now if I'd like." Mattos remembers it a differently. He said he remembers Lynch, not Doyle, "[making] some joke about 'you want me to sign this right now[?]', and I remember he looked at it and said there's—"[I]t looks like you took the Santa Clara Motor Car Dealers Agreement with the Teamsters and chopped it all up, and you took all the grievance language out of it.' Lynch, too, says he referred to the document as a chopped up version of the association contract.

The Charging Party finds this testimony mutually corroborative supporting the contention that Doyle told Lynch that the document was a contract proposal which he could sign right then, but Lynch declined because he had some objections to it. I do not find that interpretation to be the only reasonable view of the exchange. Mattos does not necessarily corroborate Lynch. Instead, since Mattos said nothing about what Doyle had said preceding the joke, it could just as easily be Mattos recalling only Lynch's joke and that Doyle said nothing. If intended as a joke, it did not require any response from Doyle.

Before attempting to resolve this testimonial mismatch, I look to the exhibit and to Doyle's explanation. It is 9 pages long, containing 20 articles. It is headed "Terms of Employment" and elsewhere in its body it characterizes itself as "This Agreement." The preamble portrays the

"Terms of Employment" as being between Respondent and Teamsters Automotive Workers Union Local No. 576. That Local Union number refers to a now defunct Teamsters local, one which merged with the Charging Party (Local Union No. 665) some 3 years previously. The document has many of the attributes of a collective-bargaining contract. It contains a jurisdiction (bargaining unit description) clause, a union-security clause, and provisions for wages, overtime, holidays, seniority, vacations, Santa Clara County Automotive Trades Welfare Fund health plan, a Teamsters pension plan and the like. It does not have a signature line nor is its duration clear. It has no beginning, though it does end on October 31, 2000. It certainly could be viewed as a contract proposal, some sort of starting point. Even so, it is not directed to the Charging Party, though one might reasonably be persuaded that the incorrect reference was simply an error.

Doyle testified that during the meeting he did give Mattos some papers. He says about 2 weeks earlier, (which would be shortly after being hired but before the takeover date) the dealership's general manager, Barry Rodenberg, had given him some papers to use during the collective-bargaining process. According to Doyle, they were to be used if they were needed. Doyle's testimony:

Q. (By Mr. Landau) Do you recall what you gave to Mr. Mattos at this—in the general manager's office?

A. It was a couple of, two sheets, two stacks of papers with regard to some type of proposals for Andy taking over the back end.

Q. Okay. Did you explain to Mr. Mattos what these documents were?

A. No.

Q. Did you give any materials to Mr. Lynch at this meeting?

A. I don't believe I did, no.

....

Q. How did it come about that you had this document?

A. I was given this document, along with the other documents, by the general manager, Barry Rodenberg.

Q. About how much time had passed since you had received this document from Mr. Rodenberg?

A. From the meeting[?]

Q. From when Mr. Rodenberg gave you this document?

A. A couple of weeks.

Q. Okay. Did you and Mr. Rodenberg have any conversations about why he was giving you this document?

[Objections interposed]

Q. (By Mr. Landau): What did Mr. Rodenberg say to you when he gave you this document?

A. Barry told me, here's a document, read it and use it if you need it.

Q. Did he tell you why he was giving you this document?

A. No.

Q. Okay. Did you ask him why he was giving you this document?

A. No.

....

Q. Had you had any meetings with any representatives from the Teamsters prior to receiving this document from Mr. Rodenberg?

A. No.

Q. And do you recall any conversations with Mr. Rodenberg as to why he was providing you this material?

A. We, [ . . . ] Mr. Rodenberg, told me that if I needed this document, I could use the document, just as I used the other document with Andy.

Q. So, as I understand it, you subsequently gave this document on November 5th to Mr. Mattos, is that your testimony?

A. I believe that, yes, sir.

Q. And did Mr. Mattos make any commentary about the document once he received it from you?

A. I can't say that, we joked about a lot of stuff and I can't say whether he specifically said anything about that document or not.

Q. Okay. Do you know if Mr. Mattos gave this document to Mr. Lynch during the meeting?

A. I don't know that to be a fact either.

Q. Did Mr. Lynch talk to you at all during the November 5th meeting about this document—and when I say this document, for the record I'm referring to General Counsel's Exhibit 2?

A. I don't remember that conversation.

Q. Do you remember any other details about conversations you had with Mr. Mattos or Mr. Lynch after your return from lunch on November 5, 1997?

A. Yes, after we returned from lunch that day, we were talking and Lynch said, can I go out and talk to the troops, and I told Lynch, I don't care, go ahead, they're out back. And Andy and I were discussing 1101 in the office.

Q. Did you have an understanding whether or not Mr. Lynch had represented Anderson Cupertino employees at that time?

A. He didn't.

Q. Why did you let him go back there?

A. If the union wants to come on the lot and talk to employees, it's always been my position, let them go.

Q. What did you and Mr. Mattos talk about when Mr. Lynch went out back to talk with some of the guys in the lot?

A. I told Andy that I didn't want the Teamsters representing the people, again, the recurring theme is Andy, hey, I just don't want the Teamsters, you can do the contract, let's get it done.

Q. And how did Mr. Mattos respond at that time?

A. Rich, I can't do the contract.

Doyle's testimony with respect to what transpired between him and Mattos and while Lynch was talking to some employees is not rebutted by anything which Mattos said.

One of the topics which Doyle and Mattos discussed during the November 5 meeting, was whether a detailer from Los Gatos, and in the IAM unit there, could remain in the IAM if he were transferred to Respondent to manage the detail shop. Although Lynch apparently had no problem with allowing that, some curious testimony connected to the topic occurred.

After Lynch had agreed to permit that person as an exception, he said both he and Mattos went outside to talk to some employees. (Mattos does not corroborate that he joined Lynch in meeting with employees. He is silent on the point.)<sup>8</sup> Lynch says he spoke to four employees,

three lot people and one detailer. He recalls one of them being a man named Rios. Assuming Doyle is credited that he didn't hire any lot people until that day, Lynch could not have spoken to three of them. At most there would only have been one, the newly hired Hess, presupposing Hess had reported to work on that day. So to whom did Lynch speak?

Lynch later testified about a December 12 meeting which he had with the lot people, once again saying that Rios was one of them, and that it was Rios who was the person for whom the exception was being made, allowing him to remain IAM.

The December 12 meeting with employees raises some other odd concerns. Lynch says he had gone to Respondent that day to deliver what he considered a finalized contract proposal to Doyle. He was accompanied by a fellow Teamster business agent, Ed Carter. After delivering the paperwork to Doyle, he says he and Carter met with three lot men in the lot. This was the first time that Teamster officials had attempted to obtain membership applications from any of Respondent's employees. To obtain those signatures, Lynch told them, "we had negotiated a contract with Anderson Cupertino, [and] they were going to become members of the Teamsters Union . . ." He says they were pleased, and two of them signed the applications.

One application was signed by a Johnny-Ray Mejia, dated that day; the other was by a Pedro Lemus, whose application is undated. Lynch says the Lemus' application was solicited by Carter and he really doesn't know much about it. Doyle testified that to his knowledge, Respondent has not employed anyone named Pedro Lemus. Lynch says the third employee was Rios, the individual who was going to remain in the IAM.

Doyle, (who must be credited because he knew the circumstances best and who gave detailed testimony about his efforts to recruit him) says the person who was to remain with the IAM was named Gary Neva. Moreover, Neva did not report for work at Respondent until the first week of December. That being the case, to whom was Lynch referring in the November 5 conversation, since "Rios" was one of those to whom he had spoken and who was also part of the December 12 meeting? If Lynch has mistaken Neva for Rios, how could he be speaking to Neva on November 5? Why then, did Lynch refer to the man as Rios rather than Neva? If he didn't remember the man's name, why not just say so? Was this simply a memory lapse, or was he trying to embellish by adding detail? But we know it could not have been Neva as Neva did not arrive until 5 weeks later.

Having obtained General Counsel's Exhibit 2 on November 5, Lynch took it with him. He says he revised it and the revision is General Counsel's Exhibit 4. Lynch says he then sent it to Doyle sometime in the following week, accompanied, not by a cover letter, but by a small post-it sticker asking Doyle to review it and to get back to him. General Counsel's Exhibit 4, like General Counsel's Exhibit 2, is not in any sort of final format. Like General Counsel's Exhibit 2 it is not ready for signature; it does contain significant changes.

Lynch says Doyle failed to respond to several messages, but on December 10 he was able to get through. He says Doyle told him it seemed fine, but he'd lost it and needed additional copies. Doyle, on the other hand, says that Lynch called him to ask if he'd reviewed the contract. He says he replied that he hadn't received one and Lynch said he would mail him another.

On December 11, Lynch mailed a copy of General Counsel's Exhibit 4 to David Andreasen, the health and welfare trust administrator. He said: "Enclosed please find a copy of a bargaining agreement between Anderson Cupertino and Teamster Union Local No. 665. This is a new account." Of course, it was not accompanied by the usual subscription agreement forms required by the administrators of such funds. Thus it was being submitted to the administrators without the employer's signature on any paper whatsoever. That circumstance is contrary to the requirements of Section 302(c)(5)(B) of the Act. That section requires such agreements be in writing. It is unlikely that an account can be opened with such a trust without some written evidence of an agreement. Even so, Lynch sent over a document which at best could only be described (on its face at least) as a counterproposal.<sup>9</sup>

The following day, December 12, Lynch says he hand delivered the same document to Doyle. Indeed, Lynch says he expected Doyle to sign it. He professed mild surprise when Doyle told him he could not do so, that company president Anderson was the one who had to

<sup>8</sup> Contrary to counsel for the General Counsel's factual explication in her brief, Doyle was not part of Lynch's meeting with employees.

<sup>9</sup> Lynch says he transmitted the document for the purpose of giving the administrator a "heads up" in order to avoid a lapse in health insurance coverage. I find this explanation to be contrived.

sign. Lynch's testimony is in the footnote.<sup>10</sup> Doyle does not agree; he thinks he first saw General Counsel's Exhibit 4 in February. Even so, Doyle does remember Lynch and Carter coming to the dealership in December. He remembers giving them permission to talk to the employees in the back. Whatever date the exhibit was delivered to Doyle, he says he put it in a drawer and did nothing about it. Lynch's testimony regarding December 12 is set forth in the footnote.<sup>11</sup> Neither the General Counsel nor the Charging Party called Carter as a witness.

As noted above, Lynch told the health and welfare trust on December 11 that he had negotiated a contract with Respondent; he repeated the assertion on December 12 when he and Carter came to the yard to speak to the lot people. At that point, if Lynch is to be credited, he had only sent some material to Doyle "for review," followed by a phone call in which Doyle had remarked that it seemed fine. ("please review them and get back to me..." "He indicated to me that they seemed fine with him.")

Even if Lynch is credited here, his subsequent assertion to the trust administrator that he had negotiated a contract, was clearly a premature exaggeration. Indeed, his nearly identical assertion to the employees that he had just negotiated a contract with Respondent was an overreach as well. Then he sounds as if he was going to impose membership on them. "[You are] going to become members of the Teamsters Union."

Moreover, saying something is "fine" is not clear evidence of much. It can just as easily be a noncommittal remark as the acceptance of something. Here Lynch is asserting that Doyle, by that remark, was accepting the terms of a contract, something with which the General Counsel does not even agree. Keeping in mind that General Counsel's Exhibit 4, like its predecessor, General Counsel's Exhibit 2, was only in draft form, it is unlikely that Lynch's expectation that Doyle would sign is realistic. It may not even rise to the level of wishful thinking.

#### Subsequent Events

Over the course of the next 6-1/2 months, Lynch called Doyle on two or three occasions. According to Doyle, Doyle simply put Lynch off, saying he was not going to do anything about the Teamsters until he finally resolved things with the IAM's Andy Mattos.<sup>12</sup> Doyle asserts that during these conversations, Lynch told him the contract would be "coming along any time."

On March 27, 1998, the IAM's Mattos sent Doyle a final version of its collective-bargaining contract, together with the appropriate subscription agreements for the fringe benefit trusts funds. That contract did not include the lot people in its bargaining unit. Eventually, on June 5, 1998, Doyle, now the Dealership's general manager, wrote Lynch/Carter saying he had reviewed the Teamsters' request for recognition and for a collective bargaining contract with

<sup>10</sup> LYNCH: Myself and Mr. Carter came down to see Mr. Doyle. I introduced Mr. Doyle to Mr. Carter. I presented Mr. Doyle with copies of the contract, which I expected him to sign at that time. He informed me that he couldn't sign them, and that he needed to send them to John Anderson to have him execute the contracts, but that he didn't see any problems with it.

<sup>11</sup> Q. (By Mr. Raju): On December 12, 1997, did you have a meeting with Ed Carter and Mr. Lynch?

A. I know that Ed Carter came in with Mr. Lynch, I don't know the date.

Q. Mr. Lynch didn't—didn't Mr. Lynch give you any papers at that time?

A. Not to my knowledge.

Q. He didn't ask you if you were ready to sign the contract?

A. Not to my knowledge.

Q. And you didn't say anything about sending a contract to John Anderson or getting his approval?

Q. Not to my knowledge.

<sup>12</sup> A. (Doyle): I told Mr. Lynch that I'm not going to do anything with him until I get through with Andy, or anyone else.

Q. And how many telephone conversations did you have with Mr. Lynch about this issue?

A. Specifically two to three.

Q. And what did Mr. Lynch say in response?

A. He would get a hold of Andy.

Counsel's and had concluded that there was no basis for recognition, particularly as there had been no demonstration of majority status. He declined recognition and advised he would not be responding to the Teamsters' proposal (apparently meaning G.C. Exh. 4). He advised that further inquiries should be addressed to its attorney, Mr. Hulteng.

The next day Lynch called Doyle. He testified: "I explained to Mr. Doyle that it wa[s] the union's position that we had negotiated an agreement in good faith, we had good-faith bargaining, and in fact I also reminded him that we did have applications from employees[13]at Anderson Cupertino, and that we should have a contract and that basically the only thing left to do was for John Anderson to execute said contract."

Doyle responded by referring Lynch to Anderson, Hulteng, and the June 5 letter.

Lynch advised Mattos of what had happened. Since Mattos had not yet gotten a signed contract from Respondent, he prepared some picket signs. The two went to Respondent's facility looking for Doyle, but he was not there. As a result they showed the picket signs to a service manager, telling him that they would begin picketing unless Respondent signed the agreements.

On June 26, Mattos, accompanied by Lynch, met with Respondent's owner John Anderson at his Isuzu dealership in Palo Alto. At that time Anderson signed the IAM contracts and the subscription agreements. Lynch attempted to have Anderson sign a formalized Teamsters collective-bargaining agreement (G.C. Exh. 7). He also showed Anderson the two union membership applications.

According to Lynch, Anderson declined to deal with him, saying he needed to talk to Doyle about the matter. He said Respondent would not recognize the Teamsters nor would he sign a contract.

The Charging Party did nothing further until October 13, 1998 when it filed the unfair labor practice charge.

### III. CREDIBILITY RESOLUTIONS AND LEGAL ANALYSIS

A review of the factual synopsis, together with quotations from the testimony, leads to the inevitable question: What's really going on here? The Charging Party (through Lynch) wishes to assert (though curtailed by the General Counsel's complaint) that it and Respondent reached a collective bargaining contract on the phone on December 10, 1997. The General Counsel asserts that Doyle on December 5 granted recognition to the Charging Party. Moreover, it says, the recognition cannot be challenged because it occurred more than 6 months prior to the charge being filed. Respondent asserts that there is insufficient evidence to warrant the conclusion that any recognition ever occurred, on November 5, December 10 or any other time.

Central to all three analyses is the credibility of Lynch. Can he be believed? It is upon his testimony that the entire structure stands. If his testimony cannot be credited, then it falls. In this regard, I have carefully viewed his testimony, his demeanor, as well as the probability of his being accurate and factual in the context in which he places the events. I have considered the same matters when looking at Mattos and Doyle as well, but it is Lynch's testimony which must be parsed first.

It starts with his testimony that Mattos told him in late October or early November 1997 that Respondent wanted both an IAM and a Teamsters contract. Given the fact that Mattos had already been in touch with Doyle, and knew Doyle wanted a wall-to-wall IAM contract, does Lynch make any sense? Why would Doyle want a Teamsters contract? Why would Mattos tell him Doyle said that? On its face Lynch's testimony is unlikely.

Then, given the November 5 repartee between Doyle and Mattos, as they fenced back and forth over the same issue—an IAM wall-to-wall unit—why does Lynch describe Doyle as docilely resigned to having the Teamsters? He doesn't even mention the exchanges between Mattos and Doyle, though both of them remember it vividly. It is true that Mattos testified that Doyle suddenly "stopped arguing," but it is equally true that Mattos cannot say that Doyle said anything like, "OK, I'll deal with the Teamsters." I must conclude that Lynch's description of what occurred here is too abbreviated and too pointed toward his self-interest to be credited.

<sup>13</sup> The only applications which Lynch had were those of Mejia and Lemus. He had never shown them to any of Respondent's officials until he showed them to owner Anderson on June 26, 1998.

Why did Doyle describe meetings on November 5 and December 10 in the back lot with employees including someone named Rios who is also the same person, Neva, who didn't transfer to Cupertino until December? He clearly described that person as the one who was going to remain IAM. This is more than a simple name mix-up. It is more likely invention. If it is not, then Lynch's powers of observation are called into significant question. I make this observation without even discussing Doyle's credible testimony that he had hired his first lot person, Hess, that very day. Where was Hess? To whom did Lynch talk that day? It doesn't seem likely that he spoke to any lot person. Why doesn't Mattos corroborate him here? Is it because Lynch didn't meet with anyone that day?

If Lynch's powers of observation are questionable, so are his analytical skills. He turned an ambiguous remark made on the phone ("*that's fine*") into the acceptance of a collective-bargaining contract in circumstances where the individual to whom he was speaking had said, according to Lynch's own version, that the person had lost or misplaced it. Then, based on that extrapolation, Lynch told the trust administrator that he had reached a contract with Respondent, shipping to the trust a document which can only be described on its face as a draft unready for signatures, much less the signatures themselves. And he did it without also submitting the signed subscription agreements.

His explanation for that omission doesn't wash either. He says he sent the 'contract' to the administrator so that employees wouldn't lose health coverage in the transition. Even if he knew that Respondent was then paying fringe benefits on behalf of the lot people to the IAM side of the IAM-Teamsters automotive trust, it would only have been a matter of subsequent bookkeeping adjustments to make certain the payments were properly credited. No employee was at risk. He certainly didn't know any specific employee who was at risk. In fact, it seems likely that he didn't know any lot person whatsoever when he took that step, because that occurred on December 11. He didn't meet with "Rios" and the other three until the next day, December 12.

Moreover, he wasn't interested in traditional union organizing. He didn't seek any union membership signatures until December 12, and even those are subject to careful scrutiny. He certainly didn't obtain any cards on November 5. Is that because he couldn't find anyone employed in the lot person classifications? When he did obtain two cards, he didn't seek any more, even though there must have been more employees aboard 6 weeks after the October 27 takeover date. Nor did he show the cards that he did have to any management official in order to remove any doubt about either the Teamsters majority status or the recognition itself. Did he fear the two would not constitute a majority? Did he believe the Lemus card to be defective? It appears to me that Lynch wanted recognition handed to him without his having to prove a majority.

Frankly, this individual's behavior does not generate sufficient confidence within me to trust his version of events. His testimony and demeanor are those of one who prefers short-cuts rather than candor. Thus, when he says on November 5, that Doyle handed him General Counsel's Exhibit 2, I am mistrustful of his accuracy. It is true that Mattos corroborates him, but Doyle is certain that he handed Mattos a sheaf of papers which only included the document in question. I simply can't believe at that stage of the proceedings that Doyle would have capitulated. Indeed, he did not, attempting to hold out for IAM representation of the lot people for another 6 months. Accordingly, I credit Doyle that he handed the sheaf of papers to Mattos, for his use, unaware that Rodenberg had for some reason drafted it to look like a company proposal to the Teamsters (with the wrong Local's number). When Mattos saw the Teamster phraseology on the first page, he naturally handed it to Lynch. It was such a routine occurrence no one can remember it accurately. Doyle remembers handing it to Mattos, but doesn't recall Mattos handing it to Lynch. Neither Lynch nor Mattos recall it first going to Mattos, no doubt because it seemed to be directed to the Teamsters. It is certainly a stretch to characterize such an ambiguous situation to be a clear grant of recognition.

Even so, there was some sort of discussion that day regarding the substantive terms contained in the paperwork. Respondent's Exhibit 8 is Mattos' very brief notes. The top portion relates solely to IAM issues. They are followed by a slash under which are three short notes: "Teamster—665," "Article 5 O/T needs to be . . ." and "Holidays OK." None of these suggests a grant of recognition. It is true, that they seem to be directed at General Counsel's Exhibit 2. The first would be a correction of the Teamsters Local number, the second an incomplete thought regarding overtime, and the last that the holiday provision is acceptable.

Respondent Exhibit 1 is Lynch's handwritten notes dated November 5, but is headed "Andy & Dan." Lynch asserts he made those notes during the meeting with Doyle. While Doyle's presence is certainly a possibility, notes of this type routinely list the names of the persons who are in attendance. Mattos's limited notes did; why didn't Lynch's? Respondent argues that this omission tends to show that the notes were made at some other time, in a meeting between only Mattos and Lynch, perhaps in one of the cars after their meeting with Doyle. I tend to agree, particularly since Lynch's testimony elsewhere seems to be of uncertain integrity. The notes do not demonstrate that Doyle was a part of whatever occurred during the "Andy & Dan" conference. Again, while keyed to General Counsel's Exhibit 2, it is certainly not evidence of recognition by Respondent. Even if the matters were discussed with Doyle, who was never asked if these items were considered, it is unclear that their discussion amounted to bargaining or, by inference, recognition.

There are two principal Board cases dealing with the sufficiency of evidence necessary to conclude that an employer has impliedly recognized a labor union as the representative of its employees. The first is *Trevose Family Shoe Stores*, 235 NLRB 1229 (1973), and the second is *Nantucket Fish Co.*, 309 NLRB 794 (1992). In *Trevose* the Board looked to an "objective evidence of recognition" test and found the evidence wanting. There the employer had met with the union and had even solicited copies of the union's standard area agreements. Yet, it never signed a recognition agreement and it procrastinated in responding to the union's demand for recognition. The Board, on those facts, declined to find that the employer had recognized the union. ("We adopt the Administrative Law Judge's conclusions because there is no credited objective evidence that the Respondent recognized the Union or committed itself [impliedly or otherwise] to bargain." *Supra* at fn. 1; brackets in original.)

Nineteen years later, the Board in *Nantucket Fish* tightened the test further. It required clear, express, and unequivocal evidence of recognition. *Supra* at 795. In that case in response to employee petitions and a demand for recognition (and probable majority support) the employer, during a court hearing on an unrelated matter (bankruptcy), agreed to meet with the union and then did meet briefly with the union afterwards where the employer said, "fine, we'll meet with you, but we've got a lot of things going on today and we'll call you later this afternoon." The Board found the circumstances ambiguous and reversed the administrative law judge who had held that the remark was an unequivocal recognition. The Board went on to say: "To hold in these circumstances that Glenn's brief response, 'fine we'll meet with you,' must be interpreted as an express recognition of the Union would be to ignore the realities of the situation and impose a bargaining relationship on the parties *in the absence of a clear, express, and unequivocal statement of recognition.*" (Emphasis added.)

See also *Ennor Home Care*, 276 NLRB 392 (1985), which appears to follow the *Trevose* objective proof test. In that case the administrative law judge said:

In the course of their discussion Shink [the employer] asked a number of questions regarding the probable nature and extent of the union demands and requested that Scalza [the union official] furnish a blank form of the union contract. At one point in the discussion, Scalza mentioned the number of paid holidays that would be demanded and Shink asked if the Union would accept a lesser number, to which Scalza responded that that was a subject that could be negotiated. At the conclusion of their meeting, Shink advised Scalza that he had to discuss the matter with his partners and told Scalza to get back to him in about 2 weeks.

The General Counsel contends that Shink extended recognition to the Union, arguing that he had held an initial discussion with Scalza respecting the terms of the proposed first contract, and that his subsequent refusal to go forward with the negotiations constituted an unlawful refusal to bargain. His view that Shink recognized the Union is, however, based on a strained and exaggerated interpretation of the actual testimony.

The General Counsel's presentation is devoid of any evidence that Shink ever expressly told Scalza that he recognized the Union as the collective-bargaining representative of Ednor's employees or that he said anything from which the intention to recognize the Union can reasonably be inferred—that is, without torturing the facts to fit the theory. Scalza's testimony, for example, is extremely vague as to what it was that Shink was supposed to let him know in 2 weeks.

There are two important omissions from the evidence adduced in support of the General Counsel's case. First, there is no statement attributed to Shink which even remotely connotes recognition of the Union. Second, there is no explicit testimony by Scalza that when he parted from Shink it was with the understanding that he would contact Shink in 2 weeks respecting contract terms.

Citing *Trevoise*, the judge dismissed the case and the Board agreed, although he does use language consistent with the later decided *Nantucket Fish* test (“[n]ever expressly told Scalza that he recognized the Union”). Emphasis added; edited for clarity.

In some ways *Ednor* closely parallels this one. The meeting between the manager and the union was longer than the brief comment in *Nantucket Fish* and there seemed to be some inquiry into what the union might accept. Even so, it still wasn't enough. There, the case wasn't confused by the questionable credibility of the plaintiff. Here, of course, it is. Even so, Lynch, like the union in all three cited cases never could quote Doyle as saying he was recognizing the Teamsters for collective bargaining purposes. Instead, Lynch began weaving a constructive recognition from whole cloth. His statement to the trust administrator is ample proof of that. Moreover, he seems to have convinced himself of the truth of his belief. But all that is entirely in his own mind, a mind which cannot be trusted. I do not fathom exactly why Lynch has done this. Perhaps it is as simple as having told his superiors he had succeeded in obtaining recognition when he had not and now has to behave consistently with that report. Whatever his reason, his testimony must be rejected.

Whether one applies the *Nantucket Fish* or the *Trevoise* test, there is simply no credible evidence that Respondent recognized the Teamsters as the representative of its lot people. There is no “clear, express, unequivocal evidence of recognition” here. And, objectively, Respondent entered into the November 5 conversation only by virtue of Mattos's invitation to Lynch to join them. Doyle never wanted him there in the first place. All Doyle did after that was to humor Lynch for 6 months hoping that Mattos's IAM would take the lot people or that Lynch would

go away. When neither occurred, Doyle wrote the letter declining recognition. He was entirely within his rights to do so.

The General Counsel's brief does not address the facts very well, assuming for its purpose that Lynch's version was credible and the only reasonable view of the facts. As a result of that unwarranted assumption, the bulk of the General Counsel's brief is based upon the belief that recognition was unequivocal,<sup>14</sup> and that being the case, the withdrawal was untimely even if the recognition occurred in circumstances barred by Section 8(a)(2) of the Act but unusable as a defense due to the Supreme Court's holding in *Machinists Local Lodge 1424 v. NLRB*, 362 U.S. 411 (1960), and cases which follow it. Unfortunately, that approach failed to recognize that the issue of no recognition is a fundamental defense itself.

The complaint will be dismissed.

Based on the foregoing findings of fact and analysis, and the record as a whole, I issue the following

#### CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. Teamsters Automotive Workers Local No. 665, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.
3. The General Counsel has failed to prove by credible evidence that Respondent violated Section 8(a)(5) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>15</sup>

#### ORDER

The complaint is dismissed.

<sup>14</sup> Citing *Jerr-Dan Corp.*, 237 NLRB 302 (1978); *Richmond Toyota*, 287 NLRB and similar cases. Those cases are all distinguishable as the evidence demonstrating voluntary recognition was much stronger and less equivocal.

<sup>15</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.