

Auto Mechanics Lodge No. 1101, District Lodge 93, International Association of Machinists and Aerospace Workers AFL-CIO and La Rinconada Securities, Inc. d/b/a Los Gatos Acura. Case 32-CB-3053

September 15, 1989

DECISION AND ORDER

**BY CHAIRMAN STEPHENS AND MEMBERS
HIGGINS AND DEVANEY**

On March 29, 1989, Administrative Law Judge James S. Jenson issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed exceptions and a supporting brief and the Charging Party filed a brief in response to and in support of the General Counsel'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, and conclusions and to adopt the recommended Order as modified.¹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Auto Mechanics Lodge No. 1101, District Lodge 93, International Association of Machinists and Aerospace Workers, AFL-CIO, San Jose, California, its officers, agents, and representatives, shall take the action set forth in the Order.

1. Substitute the following for paragraph 1.

"1. Cease and desist from

"(a) Refusing as the collective-bargaining representative of the employees in the appropriate unit to bargain collectively with Los Gatos Acura on all issues involving wages, hours, and other terms and conditions of employment.

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

¹ The Acting General Counsel has excepted to the judge's failure to order the Respondent to withdraw its Sec 301 suit in which it has alleged that Los Gatos Acura is the alter ego of Stevens Pontiac and accordingly bound by the agreement between the Respondent and Stevens Pontiac. The filings in that case are not a part of the record in the instant case. Nor does the complaint allege that the Respondent's filing of the lawsuit violate the Act. Under these circumstances, we will not order the withdrawal of the lawsuit. It would appear, however, that continued maintenance of that lawsuit would be inconsistent with our determination here that the Charging Party, Los Gatos Acura, is not an alter ego to Stevens Pontiac GMC, Inc.

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO MEMBERS

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with La Rinconada Securities, Inc. d/b/a Los Gatos Acura on all issues involving wages, hours, and other terms and conditions of employment affecting the following employees:

All full-time and regular part-time employees employed by Los Gatos Acura at its Los Gatos, California facility in the classifications of Machinists, Automotive Mechanics, Automotive Diesel Engine Mechanics, Automotive Electrical Machinists, Automotive Welders, Automotive Fender, Body and Radiator Mechanics, Automotive Trimmers, Automotive Spraymen, Color Matcher, and Stripers, Sanders and Rubbers, Apprentices or Trainees, Service Writers, Dispatchers, and any employee who performs any of the following: Rebuilding, Dismantling, Assembling, Repairing, Installing, Cleansing, Preparing, and Conditioning of all parts, units, and auxiliaries connected with Tractors, Excavating Equipment, Automotive Equipment, and Machinery that is propelled by any type of combustion; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL bargain in good faith with La Rinconada Securities, Inc. d/b/a Los Gatos Acura, at its request on all issues involving wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed contract.

**AUTO MECHANICS LODGE NO. 1101,
DISTRICT LODGE 93, INTERNATIONAL
ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO**

Gary Connaughton, for the General Counsel.
 Christopher E. Platten and Robert E. Jesinger (*Wylie, McBride, Jesinger & Sure*), of San Jose, California, for the Respondent.
 Robert G. Hulteng and Joseph Ryan (*Littler, Mendelson, Fastiff & Tichy*), of San Francisco, California, for the Employer.

DECISION

STATEMENT OF THE CASE

JAMES S. JENSON, Administrative Law Judge. I heard this case in San Jose, California, on December 7, 1988, pursuant to a complaint which was issued on October 4, 1988.¹ The complaint alleges, in substance, that the Respondent Union, which was the designated collective-bargaining representative of a unit of employees employed by Stevens Pontiac GMC, Inc. (Stevens Pontiac) has refused to bargain with La Rinconada Securities, Inc. d/b/a Los Gatos Acura (Los Gatos Acura), as the successor to Stevens Pontiac, in violation of Section 8(b)(3) of the Act. While the Respondent contends it is willing to bargain with Los Gatos Acura as the successor to Stevens Pontiac, it has taken the position with the Employer, and in a Section 301 suit in the United States district court, that Los Gatos Acura is the alter ego of Stevens Pontiac and accordingly bound by the agreement between it and Stevens Pontiac. All parties were afforded full opportunity to appear, to introduce evidence, to argue orally, and to file briefs. Briefs were filed by each of the parties and have been carefully considered.

On the entire record in the case, including the demeanor of the witnesses, and having considered the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

It is admitted and found that Los Gatos Acura is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and found that the Respondent Union is a labor organization within the meaning of Section 2(5) of the Act, and that business representative Lynn Huckaby is its agent within the meaning of Section 2(13) of the Act.

III. ISSUE

The nature of the bargaining relationship that exists between the Respondent Union and Los Gatos Acura.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. Stevens Pontiac

Until late December 1987, Stevens Pontiac operated a Pontiac car and GMC truck dealership at 620 Blossom Hill Road in Los Gatos, California. Its technicians (me-

chanics and body shop employees) had been represented by the Respondent Union for a number of years pursuant to a series of collective-bargaining agreements, the most recent of which was effective from October 16, 1986 to November 4, 1989. Other employees were represented by the Teamsters and covered by a contract with that organization. Ted Stevens was the sole owner, its president, and managed the business on a day-to-day basis. John Dees and Grant Bishop were vice presidents but neither owned stock nor was active in its day-to-day operations. Chuck Elwood was the service manager and in charge of labor relations involving the technicians; Arnold Fried was parts department manager; Rick Montgomery was the body shop manager; and Anthony Alexander was the sales manager.

A decision was made in the latter part of 1987 to close the dealership since it was losing money and another Pontiac dealership had opened several miles away in direct competition. The Pontiac and GMC truck franchises, the stock of new Pontiacs and GMC trucks, and the stock of car and truck parts and specialized repair equipment were sold to Moore Buick, a dealership located about half a mile away. All employees were terminated and paid in full for accrued wages and benefits, and the facility closed in late December. The stock of used vehicles was disposed of through other dealers or wholesalers. While Stevens Pontiac still exists as an entity, it has surrendered its DMV dealer's license and is no longer engaged in the sale or service of vehicles.

B. Los Gatos Acura

Los Gatos Acura was incorporated in September 1987 and commenced the operation of its Acura new-car sales and service and used car sales business on January 8, 1988, at the same location formerly occupied by Stevens Pontiac. John Dees, who owns 25 percent of the stock, is the dealer of record, president of the corporation, and manages the business on a day-to-day basis. Grant Bishop owns 25 percent of the stock and is the corporate secretary. He is not, however, actively involved in the day-to-day operations. Ted Stevens is the vice president and owns the remaining 50 percent of the business. While he is occasionally consulted on some problems, he is not as active in the business as he was with Stevens Pontiac. Tony Alexander, the former sales manager at Stevens Pontiac, was hired as general manager of Los Gatos Acura in December 1987. He was responsible for labor relations and did all of the employee interviewing and hiring for the new entity, although some of the technician applicants were also interviewed by Service Department Manager Mark Bergthold, who had not formerly been employed by Stevens Pontiac. While Alexander had placed an ad for applicants in the San Jose Mercury News newspaper, of the 12 to 15 technicians hired, all but two were formerly employed by Stevens Pontiac. Although medical benefits are the same for all employees, wages and other benefits were negotiated individually between Alexander and the applicants.

Los Gatos Acura obtains all of its new cars, parts, and special tools from American Honda Motor Co., whereas Stevens Pontiac obtained those items from General

¹ All dates are in 1988 unless stated otherwise

Motors Corporation. Los Gatos Acura has not performed any service work commenced by Stevens Pontiac nor honored any Pontiac or GMC warranties. The premises on Blossom Hill Road is leased to Stevens Pontiac, who in turn has subleased it to Los Gatos Acura. Because of leasehold improvements, immovable fixtures, and office equipment rental, the rent paid by Los Gatos Acura is double the rent paid by Stevens Pontiac. The two entities have separate bank accounts and there has been no intermingling of funds between them.

C. *The Request to Bargain*

Apparently in response to a letter from Respondent Union, on January 26, 1988, Alexander, as general manager of Los Gatos Acura, wrote the Union acknowledging that Los Gatos Acura was a successor to Stevens Pontiac and offering to bargain with it with respect to the mechanics and body shop employees. This was followed by a series of letters and meetings between counsel for Respondent Union and counsel for Los Gatos Acura, who is also counsel for Stevens Pontiac, wherein the Union took the position that Stevens Pontiac and Los Gatos Acura were alter egos, that Los Gatos Acura was created so as to circumvent the provisions of the collective-bargaining agreement; between it and Stevens Pontiac, and that the agreement was applicable to Los Gatos Acura employees. A demand to arbitrate the issue was also made, which Los Gatos Acura declined. The Employer filed the instant charge, and the Respondent Union filed a Section 301 action alleging Los Gatos Acura is the alter ego of Stevens Pontiac and, accordingly, bound by the contract between it and Stevens Pontiac.

Discussion

The General Counsel and Los Gatos Acura contend that Respondent Union has refused to bargain with Los Gatos Acura as the successor to Stevens Pontiac by insisting that Los Gatos Acura is the alter ego of Stevens Pontiac and therefore bound to the terms of the collective-bargaining agreement between the Union and Stevens Pontiac. Respondent Union argues that since it "is willing to accept Acura as at least the successor of Stevens." I am not required, nor should I "rule on any issue involving allegations of alter ego status. The matter must be left for litigation, if any, to the federal court in any Section 301 breach of contract suit." In my view, the bargaining obligation of Respondent Union, as well as that of Los Gatos Acura, is dependent upon the relationship between the predecessor, Stevens Pontiac, and the successor, Los Gatos Acura. Under the doctrine of successorship, new employers who substantially continue the operations of a previous employer, and whose work force is comprised of a majority of workers from the former business, must continue to bargain with the preexisting union. Failure to do so violates its bargaining obligation. Under the alter ego doctrine, a new employer who is substantially identical to the previous employer, is required to continue bargaining with the union and bound by the terms of its predecessor's agreements with the union. Thus, a new employer that is not substantially

identical to the previous employer has a different bargaining obligation than an alter ego. It is not obliged to accept the terms of its predecessor's agreement with the union, but only to recognize and continue bargaining with the preexisting union. Hence, in determining the bargaining obligations of the parties, whether Los Gatos Acura is the alter ego or merely a successor to Stevens Pontiac is the critical issue. Here there is no question but what Los Gatos Acura is the successor to Stevens Pontiac. It is alleged in the complaint, admitted by Respondent Union and the facts so establish. Thus, Los Gatos Acura is obliged to recognize and bargain with Respondent Union, which it seeks to do. It cannot, however, be forced to accept the predecessor's contract unless it is the predecessor's alter ego. In this regard, in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), the Supreme Court concluded that a new employer did not violate its bargaining obligation under the Act by refusing to honor the collective-bargaining agreement negotiated by its predecessor. In so concluding, it found that to impose the predecessor's collective-bargaining agreement on a "successor-employer" would be contrary to the policy of free collective bargaining reflected in Section 8(d) of the Act and the principles enunciated in *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). Correspondence between counsel, positions taken at meetings, and the position Respondent Union has taken with respect to the Section 301 suit, clearly establish that it seeks to force Los Gatos Acura, as the alter ego of Stevens Pontiac, to accept the collective-bargaining agreement it has with Stevens Pontiac. If the alter ego relationship exists, the Respondent Union's position is valid and the complaint must be dismissed. If not, and in the absence of a disclaimer of interest in representing the Company's employees, it must bargain about all issues affecting the unit employees.

The legal principles to be applied in determining whether separate employers are in fact alter egos is well settled. Although each case must turn on its own facts, the Board has generally found alter ego status where the enterprises have "substantially identical" management, business purpose, operation, equipment, customers, and supervision, as well as ownership. *Crawford Door Sales Co.*, 226 NLRB 1144 (1976). Whether the purpose for the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act, is also a consideration. *Fugazy Continental Corp.*, 265 NLRB 1301, 1302 (1982). No one factor of the alter ego test is dispositive.

It is clear that each of the entities involved here, Stevens Pontiac and Los Gatos Acura, are independent legal entities, and there is nothing in this record to either show or raise a suspicion that Stevens Pontiac closed, or that Los Gatos Acura was established or came into existence in order to avoid a union or any union obligation. Rather, the evidence establishes that Los Gatos Acura was created to deal in a new line of vehicles and that Stevens Pontiac was closed for legitimate business considerations and its Pontiac and GMC franchises, inventory of new vehicles, parts and specialized repair equipment sold to an unrelated General Motors dealer. While it is clear that Los Gatos Acura hired a majority of Ste-

vens technicians represented by Respondent Union, it is also clear that the two businesses are entirely different. Ted Stevens owned 100 percent of Stevens Pontiac stock and ran the business on a day-to-day basis, whereas neither Dees nor Bishop owned any interest or was active in running it. In Los Gatos Acura, however, Dees and Bishop each own a 25-percent interest and Dees runs it on a day-to-day basis. It is further clear that supervision of the unit employees has changed substantially. Elwood was Stevens Pontiac service manager and in charge of labor relations involving technicians. Berghold has replaced him as service manager for Los Gatos Acura and Alexander, the sales manager for Stevens Pontiac, became Los Gatos Acura's general manager and in charge of its labor relations. As such, he hired all of the successor's technicians and negotiated on an individual basis their wages and benefits. While the record does not disclose who is sales manager for Los Gatos Acura, since Alexander became general manager, it is apparent that two of its four department managers are different than those employed by Stevens Pontiac. Upon the foregoing facts, it is concluded that the ownership, management, and supervision at Los Gatos Acura is substantially different from that at Stevens Pontiac.

With respect to business purpose, premises, and equipment, Stevens Pontiac was in business to sell Pontiac cars and GMC trucks it acquired from General Motors and to service them with parts and equipment specially adapted to service General Motors products. Los Gatos Acura is in business to sell Acura cars which it acquires from American Honda and to service them with parts and equipment specially adapted to that make of car. Thus, while it operates out of the same location, it is not licensed to sell, or equipped to service, any of the General Motors products sold and serviced by Stevens Pontiac, nor does it handle a line of trucks as did Stevens Pontiac. There is no indication, furthermore, that the sublease of the premises, fixtures, and office equipment was not an arm's-length transaction.

Under all the circumstances present, it is found that while Los Gatos Acura is a successor, it is not the alter ego of Stevens Pontiac.

Under Section 8(b)(3) of the Act, a labor organization which represents a majority of an employer's employees in an appropriate unit is required to bargain with that employer at its request concerning wages, rates of pay, hours, and other conditions of employment of employees within the unit. As stated in *Hospital Employees Local 1115*, 248 NLRB 1234, 1241 (1980), a case cited by all three parties:

A successor employer is free to set his own terms of employment before he hires his complement of employees, but once he becomes a "successor," he must then bargain with the Union which represented the employees of his predecessor. In accord with normal rules of bargaining, the successor need not submit to the Union's demands that he change the initial and unilaterally established terms, but bargain he must. Similarly, *the Union may not refuse to bargain on the ground that the successor is bound to*

comply with the Predecessor's contract; bargain it must. [Emphasis added.]

Accordingly, Respondent Union's refusal to bargain with Los Gatos Acura on any basis other than as the alter ego of Stevens Pontiac and therefore bound by its predecessor's contract, constitutes a refusal to bargain in good faith in violation of Section 8(b)(3) of the Act. See, for example, *Hotel & Restaurant Employees Local 19 (Seasons Restaurant)*, 277 NLRB 842 (1985); *Little Rock Mailers Union No. 89*, 219 NLRB 707 (1975).

REMEDY

Having found that Respondent violated Section 8(b)(3) of the Act by refusing to bargain on all issues involving wages, hours, and other terms and conditions of employment of the employees in the bargaining unit, I shall recommend that it cease and desist therefrom and that it bargain with Los Gatos Acura upon request regarding all terms and conditions of employment.²

CONCLUSIONS OF LAW

1. La Rinconada Securities, Inc. d/b/a Los Gatos Acura is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.
3. On or about January 8, 1988, Los Gatos Acura succeeded to the bargaining obligation of its predecessor, Stevens Pontiac.
4. Los Gatos Acura is not the alter ego of Stevens Pontiac.
5. At all times since January 8, 1988, the following employees have constituted a unit appropriate for collective bargaining within the meaning of Section 9 of the Act:

All full-time and regular part-time employees employed by Los Gatos Acura at its Los Gatos, California facility in the classifications of Machinists, Automotive Mechanics, Automotive Diesel Engine Mechanics, Automotive Electrical Machinists, Automotive Welders, Automotive Fender, Body and Radiator Mechanics, Automotive Trimmers, Automotive Spraymen, Color Matchers, and Strippers, Sanders and Rubbers, Apprentices or Trainees, Service Writers, Dispatchers, and any employee who performs any of the following: Rebuilding, Dismantling, Assembling, Repairing, Installing, Cleansing, Preparing, and Conditioning of all; parts, units, and auxiliaries connected with Tractors, Excavating Equipment, Automotive Equipment, and Machinery that is propelled by any type of combustion; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

² The complaint does not allege filing the Sec 301 suit constitutes an unfair labor practice. For that reason, and for reasons expressed by the Board in the following cases, the General Counsel's request that the Union be ordered to withdraw the Sec 301 suit is denied. *Electrical Workers IBEW Local 532 (Brink Construction Co.)*, 291 NLRB 437 (1988); *Teamsters Local 483 (Ida Cal)*, 289 NLRB 924 (1988)

6. At all pertinent times Respondent Union represented a majority of Los Gatos Acura's employees within the unit set forth above and was recognized by Los Gatos Acura as their exclusive collective-bargaining representative.

7. Since on or about January 26, 1988, Los Gatos Acura has requested that Respondent Union meet and bargain with it concerning the rates of pay, wages, hours of employment and other terms and conditions of employment of the unit employees.

8. By refusing to bargain with Los Gatos Acura on all issues involving wages, hours, and other terms and conditions of employment, Respondent Union has failed and refused to bargain with Los Gatos Acura in good faith in violation of Section 8(b)(3) of the Act.

9. The foregoing is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent Union, Auto Mechanics Lodge No. 1101, District Lodge 93, International Association of Machinists and Aerospace Workers, AFL-CIO, its officers, agents, successors, and assigns, shall

1. Cease and desist from refusing as the collective-bargaining representative of the employees in the unit set forth above, to bargain collectively with Los Gatos Acura on all issues involving wages, hours, and other terms and conditions of employment.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request bargain with Los Gatos Acura on all issues involving wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed contract.

(b) Post at its offices and meeting halls, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Forward signed copies of said notice to the Regional Director for Region 32 for posting by Los Gatos Acura, if willing, at its Los Gatos location where notices to employees are customarily posted.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps have been taken to comply.

³ 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.

⁴ If 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 read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board"