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Europa Auto Imports, Inc. d/b/a Mercedes-Benz of San Diego and International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 190. Case 21-CA-63725

November 17, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding.¹ Pursuant to a charge filed on August 30, 2011, the Acting General Counsel issued the complaint on September 9, 2011, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain and to furnish relevant and necessary information following the Union's certification in Case 21-RC-21210. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Sections 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting an affirmative defense.

On September 23, 2011, the Acting General Counsel filed a Motion for Summary Judgment. On September 27, 2011, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On October 6, 2011, the Union filed a joinder supporting the Acting General Counsel's Motion for Summary Judgment.² The Respondent did not file a response to the Notice to Show Cause.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain and to furnish requested information³ but contests the validity of

¹ 357 NLRB No. 67 (2011).

² The Union also requests that the Board order the Respondent to read the Notice to Employees delineating the unfair labor practices found and to video record such reading for mandatory posting on the Respondent's website as additional remedies for the Respondent's unfair labor practices.

³ The Respondent's answer denies that the Union is the exclusive collective-bargaining representative of the unit, that the requested information is relevant and necessary to the Union's performance of its duties, and that the unfair labor practices affect commerce within the meaning of Sec. 2(6) and (7) of the Act. However, in its answer to the

the certification on the ground that three unit employees were improperly denied the right to vote in the representation election. In addition, the Respondent denies that the information requested by the Union is necessary and relevant.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

We also find that there are no factual issues warranting a hearing with respect to the Union's request for information. The complaint alleges, and the Respondent admits, that by letter dated August 26, 2011, the Union requested the following information:

- (1) A list of all employees in the bargaining unit from the date of July 1, 2010 to present, including names, addresses, phone numbers, email addresses, rates of pay and job classifications;
- (2) A copy of all company personnel policies or procedures applicable to the employees in the bargaining unit for the period of July 1, 2010 to present;
- (3) A copy of all benefit plans including Summary Plan Descriptions, plan documents, any other documents on which the plan has administered or sponsored for the period July 1, 2010 to present;
- (4) A copy of all flat rate manuals or flat rate procedures applicable to the employees in the bargaining unit for the period July 1, 2010 to present;
- (5) A copy of any workers compensation policy for July 1, 2010 to present;

complaint, the Respondent relies on its challenge to the Union's certification as a defense to its refusal to bargain. Additionally, the Acting General Counsel attached to his motion, as Exh. P, a letter dated September 1, 2011, from the Respondent's attorney to the Region, which states that "[t]he Employer admits that it has refused to bargain with the Union in that it disagrees with the Board's certification and is refusing to bargain to contest the Board's Certification of Representative." The letter further states, "[t]he Employer acknowledges receipt of the letter from [Union] attorney David Rosenfeld and admits that it has refused to bargain and/or provide information requested in Mr. Rosenfeld's letter. The purpose of refusing to bargain and provide information is that the Employer is contesting the Board's Certification of Representative." The Respondent does not contest the authenticity of this letter. Accordingly, we find that there is no existing material issue of fact warranting a hearing regarding the Respondent's failure and refusal to recognize and bargain with the Union or to provide the requested information.

(6) A copy of any employee handbook for the period of July 1, 2010 to present;

(7) A copy of all customer complaints including all comebacks with respect to any work performed by any technician for the period July 1, 2010 to present;

(8) A copy of all discipline imposed upon any member of the bargaining unit for the period July 1, 2010 to present;

(9) A copy of any documents previously requested and/or please provide a response to any previous information request.

It is well established that information concerning the terms and conditions of employment of unit employees is presumptively relevant for purposes of collective bargaining and must be furnished on request. See, e.g., *Metro Health Foundation, Inc.*, 338 NLRB 802 (2003). The Respondent has not asserted any basis for rebutting the presumptive relevance of the information. Rather, the Respondent raises as an affirmative defense its contention, rejected above, that the Union was improperly certified. We find that the Respondent unlawfully refused to furnish the information sought by the Union.

Accordingly, we grant the Motion for Summary Judgment, and will order the Respondent to bargain with the Union and to furnish the Union the information requested.⁴

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a California corporation, with a principal place of business located at 4750 Kearny Mesa Road, San Diego, California (the San Diego facility), has been engaged in the business of selling and servicing new and used vehicles.

During the 12-month period ending August 31, 2011, a representative period, the Respondent, in conducting its business operations described above, derived gross revenues in excess of \$500,000, and purchased and received at its San Diego, California facility goods valued in excess of \$50,000 directly from points outside the State of California.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, International Associa-

tion of Machinists and Aerospace Workers, AFL-CIO, District Lodge 190, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held August 31, 2010, the Union was certified on August 25, 2011,⁵ as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All flat-rate technicians, PDI Technicians, Roadside Assistance Technicians, and hourly Smart technicians employed by the Respondent at its facility located at 4750 Kearny Mesa Road, San Diego, CA; excluding all other employees, Service Advisors, all other hourly technicians, Parts Department employees, Loaner Department employees, Rental Car Department employees, Warranty Administration employees, Cashiers, Greeters, Car Washers, office clerical employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. *Refusal to Bargain*

On about August 26, 2011, the Union, by letter, requested that the Respondent bargain collectively with the Union as the unit employees' exclusive collective-bargaining representative and to furnish it with information that is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

Since about August 26, 2011, the Respondent has failed and refused to bargain with the Union as the unit employees' exclusive collective-bargaining representative, and has failed and refused to furnish the Union with the requested information. We find that this failure and refusal to bargain and to furnish requested information constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since August 26, 2011, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees and to furnish the Union with requested information, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

⁴ Member Hayes did not participate in the Decision and Certification of Representative. He agrees, however, that the Respondent has not raised any new matters or special circumstances warranting a hearing in this proceeding or reconsideration of the decision in the representation proceeding, and that summary judgment is therefore appropriate.

⁵ On October 27, 2011, the Board issued an erratum correcting an inadvertent error in the unit description.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. We also shall order the Respondent to furnish the Union the information requested.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).⁶

ORDER

The National Labor Relations Board orders that the Respondent, Europa Auto Imports, Inc. d/b/a Mercedes-Benz of San Diego, San Diego, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge 190, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Failing and refusing to furnish the Union with requested information that is necessary for and relevant to its role as the exclusive bargaining representative of the unit employees.

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

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

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All flat-rate technicians, PDI Technicians, Roadside Assistance Technicians, and hourly Smart technicians employed by the Respondent at its facility located at 4750 Kearny Mesa Road, San Diego, CA; excluding all other employees, Service Advisors, all other hourly technicians, Parts Department employees, Loaner Department employees, Rental Car Department employees, Warranty Administration employees, Cashiers, Greeters, Car Washers, office clerical employees, guards and supervisors as defined in the Act.

(b) Furnish the Union information it requested in its letter dated August 26, 2011.

(c) Within 14 days after service by the Region, post at its facility in San Diego, California, copies of the attached notice marked “Appendix.”⁷ Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.⁸ Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 26, 2011.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 17, 2011

Mark Gaston Pearce,

Chairman

⁶ As indicated above, the Union has requested that the Board additionally order the Respondent to read the Notice to Employees delineating the unfair labor practices found and to video record such reading for mandatory posting on the Respondent’s website. We deny the request because the Union has not shown that the Board’s traditional remedies are insufficient to remedy the Respondent’s violations. See *Bruce Packing Co.*, 357 NLRB No. 93 slip op. at 1, fn. 4 (2011); *First Legal Support Services*, 342 NLRB 350, 350 fn. 6 (2004).

⁷ 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.”

⁸ For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX
 NOTICE TO EMPLOYEES
 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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Association of Machinists and Aero-

space Workers, AFL-CIO, District Lodge 190, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT refuse to furnish the Union with requested information that is necessary to its role as the exclusive collective-bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All flat-rate technicians, PDI Technicians, Roadside Assistance Technicians, and hourly Smart technicians employed by us at our facility located at 4750 Kearny Mesa Road, San Diego, CA; excluding all other employees, Service Advisors, all other hourly technicians, Parts Department employees, Loaner Department employees, Rental Car Department employees, Warranty Administration employees, Cashiers Greeters, Car Washers, office clerical employees, guards and supervisors as defined in the Act.

WE WILL furnish the Union the information it requested in its letter dated August 26, 2011.

EUROPA AUTO IMPORTS, INC. D/B/A MERCEDES-BENZ OF SAN DIEGO