International Harvester Company *and* Sales Drivers & Helpers, Local 274, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 28–CA–3718

June 5, 1978

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

On December 7, 1976, the National Labor Relations Board issued its Decision and Order in this proceeding.[1] The Board found that Respondent violated Section 8(a)(5) and (1) of the Act by its failure to bargain with the Union about its decision to remove fleet account work and the job classification of fleet account executive from the bargaining unit at its Phoenix, Arizona, branch and by its failure to bargain about the effects thereof.

Thereafter, the Board filed an application for enforcement of its Order with the United States Court of Appeals for the Ninth Circuit. Respondent moved the court to remand the case to the Board for the purpose of receiving and considering additional evidence and, on July 11, 1977, the court entered an unpublished order remanding the case to the Board pursuant to Respondent's motion. On November 2, 1977, the Board issued an order reopening the record of this proceeding and ordering that a further hearing be held before an Administrative Law Judge for the purpose of taking evidence in accordance with the remand of the court.

A hearing was held on December 1, 1977, in Phoenix, Arizona, before Administrative Law Judge David G. Heilbrun. On January 27, 1978, he issued the attached Supplemental Decision in this proceeding. Thereafter, the Employer filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.

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

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

In November 1975, Respondent made a nationwide decision to remove fleet account work and personnel from its approximately 150 branches, and to establish separate centers for the sale of both new and used fleet trucks. Respondent's stated purpose for this reorganization of its marketing department was to separate the fleet and used-truck sales from the retail sales of the branches, and to place the branches on a strict profit and asset accountability, in order that it might determine the profitability of each branch. Respondent intended to change from a volume-oriented sales approach to one based entirely on profit. Benjamin Mercer, Respondent's principal witness at both hearings, testified that, after fleet sales were removed from the branches, the profitability and activities of each one were carefully analyzed and a decision was made whether to sell, close, or leave unchanged each particular operation.

Mercer testified that, regarding the operations that were disposed of prior to November 1975, the decision was based on the fact that they were small locations, combination dealerships, or similar concerns. He further testified that, since 1975, the decision was based on the profitability of each branch with used-truck sales and fleet sales removed, enabling the Company to look at the profit from a strictly retail standpoint.

Respondent contends that the branch closings are an integral part of a nationwide corporate reorganization of the kind that is so much at the core of entrepreneurial control as to be exempt from the duty to bargain. It further contends that the changes involved a substantial shift in the Respondent's assets and that bargaining about the decision to withdraw its assets from its branches would be a significant abridgement of the Company's freedom to invest its capital and to manage its business.

We do not agree. In our view of the evidence, including that of branch closings submitted at the second hearing, Respondent has at most reorganized the administrative and accounting arrangement of its marketing department. It must be emphasized that the issue is not whether Respondent was legally entitled to unilaterally decide to sell, close, or discontinue some of its branches throughout the United States but, rather, whether it was legally entitled to unilaterally remove most of the fleet account work as well as the job classification of fleet account executive from the duly certified bargaining unit in Phoenix, Arizona.

We are still of the opinion that Respondent's decision to remove fleet account work from the unit employees did not, as Respondent continues to claim, involve the termination, relocation, liquidation, closure, or sale of any of Respondent's activities, nor did it involve the sale of assets, basic capital reorganization, or significant investment or withdrawal of capital by Respondent such as that in *General Motors*

[1] 227 NLRB 85.

Corporation, GMC Truck & Coach Division.[2] The issue before the Board in that case was whether the respondent's disposal of a dealership constituted a sale or a subcontracting situation. The majority concluded that it was a sale and reasoned therefore that it involved a significant investment or withdrawal of capital which lies at the core of entrepreneurial control and is not the kind of subject which Congress intended to encompass within "rates of pay, wages, hours of employment or other conditions of employment." In the instant case, Respondent's removal of certain work from the branches is not a sale of assets. Nor is it in our view a basic capital reorganization or the termination, relocation, liquidation, or closure of any of Respondent's activities. Respondent has not ceased either retail or fleet sales; it has merely changed its administrative and accounting structure within one department.

With respect to the so-called reduction or shift in assets that occurred in November 1975, Mercer explained that such change reflected the removal of the fleet business from its branches and the placement thereof into fleet groups. Mercer referred to "asset base" as the fundamental capitalization of each branch, excluding its real estate. Thus it includes the trucks and equipment assigned to it as well as its accounts receivable, capitalized equipment, and cash on hand. The nationwide reduction in branch assets from $345 million to $180 million which occurred on November 1, 1975, reflected the transfer of certain fleet accounts from the books of the branches to the books of the fleet groups. All the fleet accounts are presumably still carried by the marketing department under the overall supervision and control of the vice president for marketing operations but under the newly set up chain of command through regional sales managers.

In our view the asset changes that took place after November 1, 1975, as a result of the sale or closure of retail branches had no necessary relation to Respondent's decision to remove fleet accounts from its branch operations because the fleet accounts had already been removed from the branch asset base before their disposition by Respondent. By Mercer's own admission the decision to close, sell, or continue a particular branch is based on the assessment of economic and other factors peculiar to each individual branch and is made after fleet accounts are removed. It is interesting to note that, despite the alleged vitally necessary profit and asset accountability achieved by Respondent's realignment of its inventory and thereby its accounting, Respondent's practices thereafter have not been consistent. It has decided not to close certain branches which have continued to lose money after November 1975 to the present time. In addition, Mercer testified that about 5 percent of the fleet accounts throughout the country are still being handled by the branches. It is clear that Respondent has given a rather flexible application to its so-called nationwide decision.

Respondent seems to assume that the Board's ordering it to bargain about its unilateral decision to remove fleet accounts from the Phoenix bargaining unit is tantamount to ordering it to bargain over its decision to restructure its marketing department. On the contrary, nothing in the record supports the contention that the retention of fleet account work and the job classification of fleet account executive in the Phoenix bargaining unit would preclude the effective institution of Respondent's new marketing philosophy. In fact, as we previously found, unit employees in Phoenix continue to handle fleet accounts under the branch manager's control and presumably in the branch's asset base. Furthermore, the record reveals that William Toph, the fleet account executive, continues to use the branch office where he uses the branch facilities, including filing space, a desk, the telephone, and answering service. Toph continues to use the services of the branch personnel who do his typing and accounting and secretarial work for a flat fee which is charged to the fleet group. In light of these facts, we wonder whether Respondent's desired segregation of fleet assets from the Phoenix branch's could not as easily have been accomplished through accounting procedures. However, we do not presume to suggest that Respondent should have accomplished its goals in that manner. We do require that Respondent bargain in good faith about its decision with respect to the Phoenix branch.

Accordingly, we affirm our original decision in this case that Respondent has violated Section 8(a)(5) and (1) of the Act by its refusal to bargain about its decision to remove fleet accounts from the Phoenix bargaining unit.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts the recommendations of the Administrative Law Judge and hereby orders that the Respondent, International Harvester Company, Phoenix, Arizona, its officers, agents, successors, and assigns, shall take the actions set forth in the Board's Decision and Order of December 7, 1976, reported at 227 NLRB 85.

[2] 191 NLRB 951 (1971).

SUPPLEMENTAL DECISION

DAVID G. HEILBRUN, Administrative Law Judge: On December 7, 1976, the National Labor Relations Board issued its Decision and Order in this proceeding,[1] finding that Respondent had violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by failure to bargain with the Union about its decision to remove fleet account work from the bargaining unit and to remove the job classification of fleet account executive from the unit, and by failure to bargain regarding the effects on unit employees of its decision to so remove the job classification and to so remove fleet account work which was previously performed by such employees at a branch in Phoenix, Arizona.

Thereafter, the Board filed an application for enforcement of this Decision and Order with the United States Court of Appeals for the Ninth Circuit, and Respondent moved the Court to remand the case to the Board for the purpose of taking additional evidence. On July 11, 1977, the court entered an unpublished order remanding the case to the Board for the purpose of taking additional evidence as requested in Respondent's motion. The Board duly considered the matter and, on November 2, 1977, issued an order reopening the record of this proceeding for further hearing before an Administrative Law Judge for the purpose of taking additional evidence in accordance with the court remand.

Upon evidence adduced at the re-opened hearing held December 1, 1977, in Phoenix, Arizona, including my observation of witnesses appearing at that time, examination of the entire record,[2] and consideration of posthearing briefs filed with me by General counsel and Respondent, I conclude the Board should adhere to its earlier disposition.

Prior to November 1975, Respondent had closed 2 (of some 150) branches based on fortuitous executive judgment relating to smallness of their location and undesirability of maintaining combination dealerships. During the period February 1, 1976–December 1, 1977, Respondent closed or sold 23 branches.[3] As of re-opened hearing on December 1, 1977, six other branches were in process of sale for a further anticipated asset change of $7,292,000. In all instances of branch sales (except that for Charleston, effective on December 1, 1977) Respondent either sold, leased, or sublet the real estate involved (its Resp. Exh. 6 showing sublease of a facility at Kankakee, Illinois, in November 1976 cannot be reconciled with the basic chronology of branch changes because that location does not appear as being sold). Additional real estate income generated from the overall program of such branch sales (or in the case of Paterson, New Jersey, when it was simply closed) was $1,028,000 plus current annual rental income of $78,000 (both figures contradicting the tabulations in Respondent's brief).

A second facet of the court's remand permitted evidence of "the written request of the majority of the retail sales persons at Respondent's Phoenix branch to terminate Teamsters, Local 274, as their bargaining representative and the granting thereof by the Director of Region 28 . . . ." As to this, the certified bargaining unit consisted of five retail sales representatives by October 1976. In that month, three of them signed a letter requesting termination of their bargaining representative and on October 19, 1976, signatory Kenneth Nelson filed a decertification petition. He requested its withdrawal on November 9, 1976, and the Regional Director promptly advised interested parties of his approval thereof without prejudice.

The matters so presented hold no likelihood the Board will depart from its original rationale.[4] While additional gloss has clarified much of what occurred,[5] the essential character of Respondent's choice may still be termed a decision of national scope "to remove the job classification of fleet account executive from the bargaining unit and to remove the fleet account work, which was previously performed by employees in the unit." Approximately 5 percent of Respondent's total fleet business remains undifferentiatedly dispersed among its many existing branches. The crucial point is that asset changes relating to the fleet groups "had already been . . . redeployed prior to" March 1976. It is in this sense that the Board's opinion must be comprehended as viewing such "wholly internal realignments of capital" as mere accounting exercises. The further negation of any showing that "termination, relocation, liquidation, closure, or sale of any of Respondent's activi-

[1] 227 NLRB 85 (1976), Member Walther dissenting in part.

[2] Errors in the transcript have been noted and corrected.

[3] This total includes two parts and service stores, a type of facility referred to in the underlying Decision (ALJD) by Administrative Law Judge Roger B. Holmes. Of the remaining 21 changes, 11 were closings and 10 were sold with an aggregate asset change for both type transactions of $16,570,000. These facts are reasonably comparable to Administrative Law Judge Holmes' recitation of testimony in March 1976 by manager-dealer marketing (then manager of truck branch operations) Benjamin Mercer that two branches had "already closed" since November 1975 with three other branches "to be closed" during March 1976 (the month of trial) and "eighteen more to go." An asset change total of $17,338,579 appearing at page 14 of Respondent's brief erroneously includes duplicative $769,000 asset change projection *as of July 29, 1977* for selling the Charleston, South Carolina, branch.

[4] The balance of this Supplemental Decision treats only evidence of branch sales and closings that postdate the first hearing. Contrary to the implication of Respondent's motion to the court, the Regional Director did not grant a majority request for termination of a labor organization's certified bargaining rights. All that occurred was routine approval of a withdrawal request filed *at a point in time requiring* that decertification proceedings be withdrawn because of unremedied unfair labor practices arising under Sec. 8(a)(5) of the Act. In such a circumstance, the petition was inappropriate and otherwise ripe for dismissal under doctrine allowing a full, unimpeded certification year. In achieving remand on this point, Respondent cited *N.L.R.B.* v. *Coca-Cola Bottling Co. of San Mateo*, 472 F.2d 140 (C.A. 9, 1972), and *Peerless of America, Inc.* v. *N.L.R.B.*, 484 F.2d 1108, 1117 (C.A. 7, 1973) to the court. These cases are not germane to the Board's ultimate action here, and further note is made of the fact that *Coca-Cola* involved only the court's invitation, not its order, that the Board reconsider the "unique facts presented in this case." The great weight of firmly settled case law in this area provides no basis to disturb the Board's original holding, or its Regional Director's action in permitting withdrawal of the decertification petition when he did. Cf. *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Quaker Tool & Die, Inc.*, 162 NLRB 1307 (1967); *Groendyke Transport, Inc.*, 207 NLRB 381 (1973); *John Hutton Corp., d/b/a KUMU Radio AM/FM*, 213 NLRB 73 (1973); *Bishop* v. *N.L.R.B.*, 502 F.2d 1024 (5th Cir. 1974).

[5] The understood difference between a dealership and a branch was found not to be, as to the former, an entity "independently owned and financed and has no ties with the Respondent other than its sales agreement." Contrarily, a Dealcor component of Respondent's corporate whole, in fact, finances most dealer start-outs and incubates their profitability toward the eventual buy-out of Respondent's stock interest.

ties, nor the sale of assets, basic capital reorganization, or significant investment or withdrawal of capital by Respondent" was involved is implicitly addressed only to the fleet-leasing aspect of Respondent's overall enterprise. The Board inexorably linked a profoundly new marketing philosophy to organizational hierarchy and particular task responsibility at a single branch where a presumptively continuing certification applied to five sales employees. This linkage was seen as warranting application of the contracting out principles formulated in *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203 (1964), overlaid with "teaching" of *Ozark Trailers, Incorporated, etc.*, 161 NLRB 561 (1966), concerning the potential value of input from the labor organization involved. In this sense, the sale or closing of branches all occurring well after the major restructuring of November 1975 does not affect an outlook whereunder removal of the single fleet account executive at the Phoenix branch (and random retention of particular fleet account business by at least one of the remaining retail sales representatives) is considered an integral part of the business decision to be assessed under principles of *Fibreboard.*

My resultant opinion and recommendation that the Board reaffirm its original Decision and Order does not signify agreement with its controllingly stated reasoning. In the first instance, I would hold the essential events here are purely at the "core of entrepreneurial control" within the meaning of *Fibreboard, supra* at 223. The principal impetus to this entire matter arose out of Respondent's effort toward better assessing "accountability" of its retail branch managers. This was to be cast in terms of sales profitability measured on a given asset base. The technique was purely managerial in character, and attempted no more than what is routinely described in the literature of business.[6] In this doctrinal area, the chief focus must remain on employers as instrumentalities of commerce within constitutional and statutory purview. As such, each is a manifestation of basic free enterprise, an activity of which collective bargaining may be but one of several major components. This verity could not have been lost on the court in *Fibreboard*, and must explain the main opinion's reference to "our complex economy" and the concurring opinion's rather pointed negation of any labor relations duties when (expressly analyzed as including "sales") decisions concern "commitment of investment capital and the basic scope of the enterprise," even when "conditions of employment" (written about elsewhere as a phrase "no doubt susceptible of diverse interpretations") might "necessarily" be affected. *Fibreboard, supra* at 215, 221, 223. Early progeny of *Fibreboard* focused on whether "significant detriment" to employees had flowed from a business decision and distinguished it *and related cases* from situations of an employer "seeking to gain an economic advantage at the expense of its employees or of the Union." *Westinghouse Electric Corp., Bettis Atomic Power Laboratory*, 153 NLRB 443 (1965); *Sucesion Mario Mercado E Hijos d/b/a Central Rufina*, 161 NLRB 696 (1966). By both these tests, an exempt decision was present; however, beyond this the underlying dynamics were not, in my view, of an essence commanding prior notification and bargaining. An entrepreneurial conversion from a volume-oriented to a profit-oriented basis of retail marketing with attendant change in administrative apparatus is fundamentally as much an investment of capital as the branch sale was in *General Motors Corporation, GMC Truck & Coach Division*, 191 NLRB 951 (1971). To so change is to contemplate redirection of purchasing, product planning, manufacture, advertising, and sales in much the same fashion as General Motors would have plowed yield from the sale of its retail outlet at Houston, Texas, into total potential for re-deployment of capital. The fact that one fleet account executive had his form of employment reordered and a given retail sales representative retained a particular fleet account for customer relations purposes are but two instances of the point portended by *Fibreboard's* concurring opinion as it noted how "core" decisions often unloose an "effect" on employment. Many business decisions, never claimed to be collaterally assailable, have such an effect, particularly when the employee function lies in the rather intangible realm of seeking to make a sale. Judgment from above on matters of product emphasis, vigor of market penetration, and personality of chosen sales management officials are all matters that often and directly affect the employment conditions of persons ultimately expected to close deals. What evolves is a showing that, fundamentally, Respondent's decision must be viewed in broader perspective. When so done, the phenomenon present is not, as termed, a decision "to remove [etc.]," but in fact is a decision to restructure general marketing policies from which the concern of this case is but "*an effect*," and as such completely merged into the subsidiary result that bargaining *over such effect(s)* was lacking. Notwithstanding these observations, my closing fidelity must be to the Board's own law of the case. See *Avon Convalescent Center*, 203 NLRB 937 (1974).

Accordingly, I recommend reaffirmance of the Board's conclusion that Respondent's failure to bargain as to a decision to remove the job classification of fleet account executive from the bargaining unit and to remove most fleet account work constituted a violation of Section 8(a)(5) and (1), and that its stated remedy from which the appropriate Order was fashioned be fulfilled.[7]

[6] Thus a sales strategy using "profit contribution, rather than sales volume . . . " was described in "Managing by Profits," *Sales Management*, June 24, 1974, pp. 11–12. A less generalized article referring to a company which, as with Respondent here, is among the "Fortune 500" largest U.S. industrial corporations, illustrates use of a computer-generated branch financial contribution report (essentially similar in thrust to Resp. Exh. 5) as the means of "providing insights into the relative performance of all the branches" as divisional executives "started to get branch managers thinking in terms of profit rather than volume." "Pitney-Bowes Promotes Profit Awareness for Branch Managers," *Sales Management*, May 19, 1975, p. 43.

[7] In the event no exceptions to this Supplemental Decision, filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.