

In the Matter of AVEDIS BAXTER AND BEN BAXTER, INDIVIDUALLY AND AS CO-PARTNERS, D/B/A BAXTER BROS. and INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE No. 87

Case No. 20-CA-207.—Decided November 6, 1950

DECISION AND ORDER

On May 26, 1950, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondents filed exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the rulings of the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the additions and modifications noted below.

1. The Respondents are franchised dealers of Chevrolet automobiles with their sole place of business at Fowler, California. As detailed by the Trial Examiner in the Intermediate Report, the Respondents make all sales and purchases within the State of California. Under Respondents' franchise agreement with the Chevrolet Motor Division, General Motors Corporation, they have the exclusive privilege of selling new Chevrolet cars and using the word "Chevrolet" and the trade-marks thereof in Fowler, California. The franchise also provides, in part, for certain controls as to the Respondents' place of business, hours, service facilities, location, and signs, as well as provision for the payment by Respondents of certain sums for local advertising purposes to be used at the general discretion of the Chevrolet Motor Division. The Respondents are also restricted as to handling cars of competitor companies. In the course of their business, the Respondents purchase new cars, trucks, and parts from the Oak-

land, California, plant of Chevrolet. The Oakland plant, in turn, is a part of a Nation-wide organization devoted to the manufacture, assembly, and distribution of Chevrolet products. The Respondents contend that, because they make no purchases or sales outside the State of California, they are not engaged in operations affecting interstate commerce and the Board is without jurisdiction in this case. We do not agree and we find that the Respondents are engaged in commerce within the meaning of the Act.¹

Having recently reexamined Board policy concerning the exercise of jurisdiction, we are of the opinion that when an employee is an integral part of a multistate enterprise, the Board should exercise its discretion in favor of taking jurisdiction.² We consider franchised automobile dealers, such as the Respondents, to be enterprises of this nature, even though, as here, the business may be locally owned and make all its sales within the State. In reaching this conclusion, the Board has considered the franchise arrangements under which the Respondents operate and the fact that they function as an essential element in a Nation-wide system devoted to the manufacture and distribution of automobiles.³ Accordingly, we find that it will effectuate the policies of the Act to assert jurisdiction over the Respondents.

2. The Trial Examiner found, and we agree, that the Respondents violated Section 8 (a) (1) and Section 8 (a) (3) of the amended Act, through threats, interrogation, and the discriminatory discharge of employees Frank and Hovsepian.

The Remedy

As neither Carl Hovsepian or Elmer L. Frank desires reinstatement, we shall limit the affirmative action ordered taken by the Respondents herein, to payment of back pay. We shall order the Respondents to make whole each of them by payment of back pay from the date of Respondents' discriminatory action against him to the date when he decided he did not desire reinstatement.⁴ Since the issuance of the Trial Examiner's Intermediate Report, however, the Board has adopted a method of computing back pay differing from that prescribed by the Trial Examiner.⁵ Consistent with that new policy we

¹ See *Kaljian Chevrolet Company*, 82 NLRB 978 and cases cited therein.

² See *The Borden Company, Southern Division*, 91 NLRB 628.

³ See *Johns Brothers, Inc. et al.*, 84 NLRB 294.

⁴ The Trial Examiner did not order back pay by the Respondents to Carl Hovsepian, as he believed the latter's earnings since the date of his discharge exceeds the amount he would have earned had he remained in the Respondents' employ. As we feel computation of back pay is best determined in compliance proceedings, in accordance with usual practice, we shall order back pay to Carl Hovsepian.

⁵ *F. W. Woolworth Company*, 90 NLRB 289.

shall order that the loss of pay be computed on the basis of each separate calendar quarter or portion thereof during the period from the Respondents' discriminatory action to the date the discriminatees no longer desired reinstatement.⁶ The quarterly periods, hereinafter called "quarters," shall begin with the first day of January, April, July, and October. Loss of pay shall be determined by deducting from a sum equal to that which these employees would normally have earned for each quarter or portion thereof, their net earnings, if any, in other employment during that period. Earnings in one particular quarter shall have no effect upon the back-pay liability for any other quarter.

We shall also order the Respondents to make available to the Board, upon request, payroll and other records to facilitate the checking of the amount of back pay due.

ORDER

Upon the entire record in this case and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that Avedis Baxter and Ben Baxter, individually and as co-partners doing business as Baxter Bros., and their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Association of Machinists, District Lodge No. 87, or in any other labor organization, by discriminatorily discharging employees or in any other manner discriminating against employees in regard to their hire or tenure of employment or any other term or condition of employment;

(b) By means of threats, warnings, interrogation, or in any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form labor organizations, to join or assist International Association of Machinists, District Lodge No. 87, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection and to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization

⁶ We agree with the Trial Examiner that back pay in the case of Elmer L. Frank should be tolled as of January 1, 1950. We accept the unchallenged statement of Frank at the hearing that he decided against returning to employment at Respondents' garage on the indicated date, at which time his personal business had begun to show a profit. Contrary to the contention of the Respondents, we do not regard the fact that Frank chose to conduct a business of his own as indicating, from the very start, a decision not to return to the Respondents if offered reinstatement.

as a condition of employment, as authorized in Section 8 (a) (3) of the Act, as guaranteed in Section 7 thereof.

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

(a) Make whole Elmer L. Frank and Carl Hovsepian in the manner set forth in the section herein entitled "The Remedy" for any loss of pay they may have suffered by reason of the Respondents' discrimination against them;

(b) Upon request, make available to the Board or its agents, for examination and copying, all personnel records and reports, and all other records necessary to analyze the amounts of back pay due;

(c) Post at its shop in Fowler, California, copies of the notice attached hereto marked Appendix A.⁷ Copies of such notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by Respondents' representative, be posted by Respondents immediately upon receipt thereof and be maintained by them for sixty (60) consecutive days including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Twentieth Region, San Francisco, California, in writing within ten (10) days from the receipt of this Order what steps Respondents have taken to comply herewith.

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT discourage membership in **INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE No. 87**, or in any other labor organization, by discriminatorily discharging employees or in any other manner discriminating against employees in regard to their hire or tenure of employment of any term or condition of employment.

WE WILL NOT by means of threats to close the shop or to reduce working hours, or by interrogation or in any other manner interfere with, restrain, or coerce our employees in the exercise of their

⁷ In the event this Order is enforced by decree of a United States Court of Appeals, there shall be inserted before the words "Decision and Order" the words "Decree of the United States Court of Appeals Enforcing."

right to self-organization, to form labor organizations, to join or assist INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE No. 87, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

WE WILL make whole the employees named below for any loss of pay suffered as the result of the discrimination against them:

Elmer L. Frank
Carl Hovsepian

All our employees are free to become or remain or to refrain from becoming or remaining members of any labor organization. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any labor organization.

BAXTER BROS.

Employer.

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Messrs. Clayton O. Rost and Rocco C. Siciliano, for the General Counsel.

Crossland & Crossland by Mr. William C. Crossland, of Fresno, Calif., for Respondents.

Mr. A. C. McGraw of Oakland, Calif., for the Union.

STATEMENT OF THE CASE

Upon a charge duly filed by International Association of Machinists, District Lodge No. 87, herein called the Union, the General Counsel of the National Labor Relations Board, herein called respectively the General Counsel and the Board, by the Regional Director for the Twentieth Region issued a complaint dated July 19, 1949, against Avedis Baxter and Ben Baxter, individually and as co-partners d/b/a Baxter Bros., herein called Respondents, alleging that Respondents had engaged in and were engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 61 Stat. 136. Copies of the complaint, the charge, and notice of hearing were served upon Respondents and the Union.

With respect to unfair labor practices, the complaint alleged in substance that from on or about February 1, 1949, until the date of the issuance of the complaint,¹ Respondents had vilified, disparaged, and expressed disapproval of the Union, interrogated employees concerning their union affiliation, threatened and warned employees in connection with assisting, becoming members of, or remaining members of the Union, threatened to keep and did keep union meetings under surveillance, and threatened to close their business unless the employees ceased their activities on behalf of the Union. The complaint further alleged that on or about February 7, 1949, Respondents discharged Carl Hovsepian and Elmer L. Frank because of their union membership or other protected concerted activity.

In their answer filed November 4, 1949, Respondents denied that they were subject to the Board's jurisdiction and denied the commission of unfair labor practices.

Pursuant to notice, a hearing was held in Fresno, California, on January 17 and 18, 1950, before the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel was represented by staff attorneys, the Respondents by counsel, and the Union by an international representative. All parties participated in the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues. Upon the submission of stipulations of fact concerning Respondents' purchases and sales, the hearing was closed on May 4, 1950. All parties were granted to May 19, 1950, for the submission of briefs or proposed findings and conclusions. None was received within the time allowed. Upon the entire record in the case and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENTS

Respondents constitute a copartnership maintaining a place of business in Fowler, California, where they are engaged in the buying, selling, and repairing of new and used automobiles and trucks under franchise from the Chevrolet Motor Division of General Motors Corporation. During 1949, Respondents sold new Chevrolets, which they received from the Chevrolet Motor Division, Oakland, California, for a total of \$135,469, and in addition, made sales totalling approximately \$91,000, of used cars and parts. Although Respondents' franchise is nonexclusive, they are the only Chevrolet dealer in Fowler, California.

Respondents make no purchases, so far as the record reveals, directly from without the State of California, and make no sales to persons residing outside the State of California.

More than 50 percent in value of the production of the Chevrolet Motor Division at Oakland, California, eventually reaches points outside the State of California, and more than 50 percent in value of the materials used in such production originates at points outside the State of California.

Contrary to the contention of Respondents, I find that they are engaged in commerce within the meaning of the Act.²

¹ Over objection of Respondents, I permitted the complaint to be amended at the hearing to allege further unlawful interrogation by Respondents on January 13, 1950.

² *Kaljian Chevrolet Company*, 82 NLRB 978; *M. L. Townsend*, 81 NLRB 739; *Midtown Motors, et al.*, 80 NLRB 1679; *Valley Truck and Tractor Co.*, 80 NLRB 444.

II. THE ORGANIZATION INVOLVED

International Association of Machinists, District Lodge No. 87, is a labor organization admitting to membership employees of Respondents.

III. THE UNFAIR LABOR PRACTICES

A. *Interference, restraint, and coercion*

On January 21, 1949, Elmer L. Frank, a mechanic in Respondents' employ since 1946, secured a number of designation cards from the Union and during the next few days solicited other employees in the shop to sign them. All did so. On January 25, the employees met with representatives of the Union. Seven of the eight employees then signed applications for membership in the Union.

On Monday, February 7, Avedis Baxter, the principal manager of Respondents' business, called the employees to his office, singly, and asked each if conditions in the shop were satisfactory and if there was any complaint against the foreman, John Tikijian. Some of the employees, among them Frank, were also questioned about some candy which was missing from a customer's car. At the conclusion of their interviews, Frank and Carl Hovsepian were discharged.

Later in the day, Respondent Ben Baxter asked employee Sarkus Najarian if there was any union activity in the shop and inquired, if there was, why he, Baxter, was not informed of it.³ Employee Fred Herod testified that at the end of the working day on February 7, while a number of employees were discussing the Union in the rear of the shop, Foreman Tikijian approached them and volunteered that Respondents could close the shop and get a new crew if they desired. Herod also testified that on the afternoon of Tuesday, February 8, Tikijian asked if Herod planned to attend a meeting that night. A union meeting for Respondents' employees was planned for that evening. The next morning, according to Herod, Tikijian asked if Herod had attended the meeting.

Avedis Baxter admitted in his testimony that he questioned each of the employees on February 8 concerning whether they had joined the Union and further testified that on January 13, 1950, he called all the employees together, asked them if they had joined the Union, if they had attended meetings, if they had paid money to the Union, and said that they could do as they liked but that hours would be cut to 40 a week from then on.⁴

Foreman Tikijian admitted that he questioned each employee about whether they had joined the Union, was unsure whether he had asked any of them about a union meeting, but denied that he said that the shop might close in consequence of union organization.

Employee George Ejadian, called by the General Counsel, testified with obvious reluctance that on February 8 Avedis Baxter remarked that if the shop was organized by a union he would close it.⁵

I credit the testimony of Fred Herod and George Ejadian as against the denials of Tikijian and Avedis Baxter. I find that on February 7, 8, and 9, 1949, and on January 13, 1950, Respondents interfered with, restrained, and coerced their employees in the exercise of rights guaranteed by Section 7 of the Act by means of the interrogations and threats set forth herein and that Respondents thereby violated Section 8 (a) (1) of the Act.

³ Ben Baxter so testified.

⁴ The normal working week was 52 or 53 hours.

⁵ Ejadian explained that Avedis Baxter was "just blowing off steam." Baxter denied that he uttered such a threat.

B. Discrimination

Carl Hovsepien was employed by Respondent in August 1945 as a painter. During the period that he worked in Respondent's shop he learned to do body work and at the time of his discharge on February 7, was receiving the highest pay of any mechanic there. Hovsepien testified that he was called to Avedis Baxter's office on the morning of February 7 and that Baxter first asked him how he was getting along with the foreman. Hovsepien replied that he had no difficulty with the foreman and that everything was "all right." Baxter then accused Hovsepien of stealing gasoline which Hovsepien at first denied and then recalling that he had put 10 gallons of gasoline in his car on February 4, explained that the matter had slipped his mind and that he had not paid for it. Baxter, according to Hovsepien, then became greatly excited, refused Hovsepien's offer to pay for the gasoline and said, "I don't think you and I can do any further business." Baxter continued, according to Hovsepien, asking what Hovsepien had to do with the men joining the Union. Hovsepien replied that he had nothing to do with it, that all of them had joined, but not at his instigation. Hovsepien paid for the gasoline and left the shop.

Elmer L. Frank testified that he, too, was called to Baxter's office on the morning of February 7 and that Baxter then questioned him about some candy which was missing from a customer's car. Frank denied knowledge of the candy. Baxter then asked him what he did not like about the working conditions in the shop and Frank replied that the foreman was pushing the men too much. Baxter questioned him further about some distributor points that Frank had put into a customer's car. Frank answered that he had followed the instruction of his foreman. Baxter then said that he was laying Frank off as the shop was losing money, and went on to say in an angry and excited manner, "You have been a trouble maker ever since you came down here. I should not have listened to the fellow who recommended you to me." According to Frank, Baxter also said that he had heard of Frank's attempts to organize a union.

Baxter denied that he mentioned the Union to any of the employees on that morning and asserted that at the time he called the employees individually into his office, he had no information that any of them was interested in a union. Baxter testified credibly that on Friday, February 4, he saw Hovsepien take 10 gallons of gasoline from the pump and watched to see if Hovsepien paid for it. On the following Monday, according to Baxter, the gasoline being neither paid for nor charged to Hovsepien's account, he decided upon the discharge. Baxter testified that Frank had been instructed to *check* the points on a customer's car on Saturday, February 5, that he, Baxter, delivered the car to the customer on Saturday afternoon and that the motor was not running satisfactorily. On Sunday, according to Baxter, he learned that Frank had put in a new set of points and that a couple of handfuls of lollipops was missing from the car. Reflecting, according to Baxter, that Frank was a poor workman, that he had on two prior occasions done unsatisfactory work, he decided to discharge him and did so the next day.

Foreman Tikijian testified that he told Frank to replace or to *check* the points and also testified that Frank had done unsatisfactory work on two prior occasions. Tikijian admitted, however, that on neither of these occasions had he voiced any criticism to Frank.

The work order of February 5, with relation to the points, was offered and received in evidence. On one line is the direction "Replace distr. points" and immediately below that in what appears to be different writing by a different

pencil is the further direction "or check points." Frank testified that the only instruction he had with respect to this car was to replace the points and that he followed this direction. Fred Herod, another employee, testified that he heard Tikijian so instruct Frank.

Conclusions

Hovsepien had been an employee for nearly 4 years and was the highest paid of the shop workers. His work had never been the subject of criticism. Of course, his discharge was not based upon any consideration of competency. Respondents admitted that it was the practice for the shop employees to take gasoline or other supplies at any time that they desired to do so and either to pay cash at the time of purchase or to submit some sort of memoranda indicating the debt. There is no doubt but that Hovsepien was delinquent in reporting the gasoline purchase but since there was no hard and fast rule with respect to just how or when this should be done, I do not believe that Baxter at any time came to a conclusion that Hovsepien was attempting a fraud.

With respect to Frank, Respondents' entire defense is, in essence, that Frank was an incompetent workman. The evidence to the contrary is substantial and is believed. Next to Hovsepien, Frank and Najarian were the highest paid among the shop employees. In the fall of 1948, Frank quit his employment with Respondent in order to work elsewhere as a truck driver. Deciding apparently a week later that he had made a mistake, he applied for reemployment. Avedis Baxter testified, disingenuously I find, that on the recommendation of Tikijian that "he is a poor fellow, he is nervous. Let's take him back," Baxter did so. I believe it unlikely that Frank was rehired because of a feeling of sympathy on the part of Baxter. Even if it be true, as Baxter testified, that in the fall of 1948, competent mechanics were difficult to find, it would not explain why if Frank was not competent, he was among the highest paid of Respondents' employees. The reason for the discharges was stated by Baxter to both Hovsepien and Frank when he told them that they were the instigators of the union movement. Fred Herod, one of the employees interviewed by Baxter on the morning of February 7, testified credibly that Baxter asked him if Hovsepien and Frank tried to get him to join a union. Finally, the testimony of Baxter as to the questions he asked the employees when he called them individually to his office on February 7 is susceptible of no other reasonable conclusion than that he was questioning them with respect to information, which he had in some fashion received, that they had joined or were about to join a union. No credible reason was offered by Respondents to explain the questions concerning their satisfaction with the foreman or with working conditions in the shop.

I find that by discharging Carl Hovsepien and Elmer L. Frank on February 7, 1949, because of their interest or suspected interest in the Union, Respondent discouraged membership in the Union and thereby violated Section 8 (a) (1) and (3) of the Act.

Both Frank and Hovsepien have obtained other employment and neither desires reinstatement. It was stated by the General Counsel at the hearing that Hovsepien's earnings since his discharge have exceeded the amount which he might have earned had he remained in Respondents' employ. Frank testified that he decided about January 1, 1950, that he no longer desired employment with Respondents.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondents set forth in Section III, above, occurring in connection with the operations of Respondents described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and such of them as have been found to constitute unfair labor practices, tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondents have engaged in unfair labor practices, it will be recommended that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

The remedy of reinstatement ordinarily recommended in cases of discriminatory discharge is not sought here and Carl Hovsepian has suffered no financial loss by reason of his discharge. It will be recommended, however, that Respondents make whole Elmer L. Frank for any loss of pay he may have suffered by reason of the discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned as wages from the date of his discharge to January 1, 1950, less his net earnings⁶ during that period.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. International Association of Machinists, District Lodge No. 87, is a labor organization within the meaning of Section 2 (5) of the Act.

2. By interrogating employees with respect to their disposition toward the Union, by threatening to close the shop in the event of union organization, and by threatening to reduce working hours in the event employees joined the Union, thus interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

3. By discriminating in regard to hire and tenure of employment of Carl Hovsepian and Elmer L. Frank, Respondent has discouraged membership in International Association of Machinists, District Lodge No. 87, and has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act.

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

[Recommended Order omitted from publication in this volume.]

⁶ *Crossett Lumber Co.*, 8 NLRB 440.