Bauman Chevrolet, Inc. *and* Paul A. Keyes. Case 6–CA–5071

May 20, 1971

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND KENNEDY

On January 4, 1971, Trial Examiner Melvin J. Welles issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter the Respondent filed exceptions to the Decision and a brief in support thereof; the General Counsel filed limited exceptions to, as well as a brief in support of, the Trial Examiner's Decision.

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

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings,[1] conclusions,[2] and recommendations of the Trial Examiner as modified herein.

ADDITIONAL CONCLUSION OF LAW

By promising its employees benefits in order to discourage union membership and activity, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner as modified herein and hereby orders that Bauman Chevrolet, Inc., Pittsburgh, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order, as so modified:

1. Insert the following as paragraph 1(d) and reletter the following paragraph accordingly:

"(d) Promising employees benefits in order to discourage union membership or activity."

2. Substitute the attached Appendix for the Trial Examiner's Appendix.

[1] Contrary to the Trial Examiner, we find, in agreement with the General Counsel's exceptions, that the promises made by Respondent on June 5, 1970, to change "house deals" and work schedules were made in order to discourage union membership in violation of Section 8(a)(1) The Trial Examiner found the General Counsel had not met his burden of proof in this regard because the complaint alleged Baldwin "promised employees benefits if they did not select the union" and the evidence failed to reveal that the change in "house deals" and work schedules announced by Baldwin at the June 5 sales meeting was in any way contingent upon the employees rejecting the Union

At the hearing the Respondent, after the General Counsel had presented his case, moved to dismiss the entire complaint At the Trial Examiner's request the General Counsel explained his position on this particular allegation The Trial Examiner in denying Respondent's motion to dismiss made specific reference to this allegation Although forewarned the Respondent offered no evidence on this or, in fact, any other 8(a)(1) allegation Therefore, the General Counsel's evidence with respect to Respondent's alleged 8(a)(1) conduct stands unrefuted

The promises were made at a sales meeting on the morning following the only union meeting held by the employees The Trial Examiner found the union meeting was under surveillance by the Respondent in violation of 8(a)(1) The Trial Examiner also found that Respondent violated 8(a)(1) when on the day of the union meeting Respondent had advised on employee not to attend the union meeting and threatened that the plant would be closed if the Union came in At the sales meeting, during which the benefits were promised, Respondent informed certain employees they had been observed at the union meeting on the previous evening In these circumstances, we believe it is reasonable to conclude that the promises were made in order to discourage union membership in violation of 8(a)(1), there was no evidence to the contrary

[2] These findings and conclusions are based, in part, upon credibility resolutions to which the Respondent has excepted, alleging that the Trial Examiner was biased and prejudiced After a careful review of the record we conclude that the Trial Examiner's credibility findings are not contrary to the clear preponderance of relevant evidence. Accordingly, we find no basis for disturbing those findings and reject the charge of bias and prejudice on the part of the Trial Examiner *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd 188 F 2d 362 (C A 3)

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a trial in which both sides had the opportunity to present their evidence the National Labor Relations Board has found that we, Bauman Chevrolet, Inc., violated the law and has ordered us to post this notice.

WE WILL NOT discharge any employee for supporting the Machinists Union or any other union.

WE WILL NOT threaten to close our business if the employees choose a union to represent them.

WE WILL NOT spy upon union meetings of our employees or tell our employees we have spied upon them.

WE WILL NOT promise you benefits in order to discourage union membership or activity.

WE WILL NOT punish you in any way for supporting the Machinists Union or any other union.

WE WILL pay Paul A. Keyes for the wages he lost when we fired him.

BAUMAN CHEVROLET, INC.
(Employer)

Dated By
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

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

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1536 Federal Building, 1000 Liberty Avenue, Pittsburgh, Pennsylvania 15222, Telephone 412–644–2977.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

MELVIN J. WELLES, Trial Examiner: This case was heard at Pittsburgh, Pennsylvania, on October 13 and 14, 1970, based on a charge filed June 16, 1970, and a complaint issued August 28, 1970. The complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act. Respondent filed an answer denying that it violated the Act. Counsel for the General Counsel and for the Respondent filed briefs.

Upon the entire record in the case, including my observation of the witness, I make the following.

FINDINGS OF FACT

I THE BUSINESS OF RESPONDENT

Respondent, a Pennsylvania corporation, is engaged in the sale and servicing of new and used automobiles at its place of business in Wilkinsburg, Pennsylvania Its gross income during the year preceding issuance of the complaint exceeded $500,000, and during the same period, it received goods valued in excess of $50,000 from outside Pennsylvania I find that Respondent is engaged in commerce within the meaning of the Act.

II THE LABOR ORGANIZATION INVOLVED

International Association of Machinists and Aerospace Workers, District Lodge No. 1060, AFL–CIO, herein called the Union, admits employees to membership, and bargains with employers over wages, hours, and working conditions. I find that it is a labor organization within the meaning of Section 2(5) of the Act.

III THE UNFAIR LABOR PRACTICES

A. *The Facts*

On June 4, 1970, Paul A. Keyes, a used-car salesman for Respondent, telephoned Union Business Representative Ted Bold about the possiblity of the Union's organizing the Company's salesmen. A meeting was arranged, and Keyes spoke to seven other salesmen, all of whom said they would attend the meeting. Keyes and four of the seven, Casteel, Manteris, Neely, and Schempp, did attend the meeting held that evening at the Park Tavern. The other three salesmen to whom Keyes had spoken, Devereaux, Ellwood, and Frame, did not attend the meeting. Respondent's vice president, Jerry Nuzum, spoke with Schempp before the latter left for the meeting. He told Schempp he did not think Schempp would go to a union meeting, that Mr. Bauman was "opposed to these unions," and "if there was a union in the plant there was a possibility of the place being closed."[1]

At the time of the union meeting, salesman Casteel saw used-car manager, Ray Baldwin, and new-car manager, Rege Feddish, driving by the Park Tavern.[2]

The next morning, June 5, at a salesmen's meeting, Baldwin mentioned to salesmen that he had observed them at the meeting the night before, that he knew where they had been, and that Casteel had been surprised to see Baldwin and Feddish the night before.[3] At the meeting, Baldwin told the salesmen that "house deals"[4] would thereafter be split among all the salesmen, rather than only a few, and that there would be new "time off" schedules for the used-car salesmen.

There was a regular salesmen's meeting on June 10, 1970, which Keyes apparently did not attend at all [5] The next day, June 11, Keyes reported to work at about 9:15 a.m. He was then called into Ray Baldwin's office by Vice President Nuzum. Nuzum told Keyes that starting time was 9 o'clock. Keyes' and Nuzum's versions of the ensuing colloquy then part company in some respects. According to Keyes, Nuzum said "When I hired you, I warned you that if you were ever late that you would be fired;" Keyes said "You never said anything like that," and that other salesmen constantly come in late; then Nuzum told Keyes to turn in his keys, that he was discharged. Nuzum's version has Nuzum saying that other salesmen were complaining about Keyes' coming in late, when they were not permitted to do so, that Keyes replied, "I don't want to take this shit, if you are looking for an excuse to fire me, then go ahead and fire me." Nuzum then said that they were trying to keep him, that they had "many excuses" to fire him every week if they wanted to, that "if you don't like it here, you can turn in your keys." Keyes, according to Nuzum, then threw his keys on the desk, and walked out the door.

Keyes was originally employed by Respondent in September 1968. He worked then for about 2½ months and quit. He worked for Bauman again for three different periods in 1969, the last one ending about November, when he was fired by Baldwin. His most recent period of employment began about January 15, 1970, and ended with the incident of June 11, 1970, described above. His return to the Company in January 1970 occurred when Nuzum asked him to come back to work when Keyes was visiting another salesman at Bauman's premises.

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[1] Nuzum testified on behalf of Respondent, but was not asked about this conversation

[2] Neither Baldwin nor Feddish testified Respondent denied that Baldwin is a supervisor The uncontradicted evidence shows that as used-car manager, Baldwin directs the work of the six used-car salesmen, all of whom report to him, that he hires and fires salesmen, approves their requests for time off, and conducts, sometimes jointly with Vice President Nuzum, meetings of the salesmen These facts plainly establish Baldwin's status as a supervisor within the meaning of Section 2(11) of the Act There is neither an allegation as to Feddish, nor testimony concerning his functions, so I made no finding as to his supervisory status

[3] Based on the testimony of Neely, Schempp, Casteel, and Manteris As noted, Baldwin did not testify

[4] Cars sold by the manager

[5] The record is somewhat confusing At one point Keyes said he attended a meeting on June 10, describing some of the events of the meeting Subsequently, counsel seemed to assume, and Keyes confirmed with an "I don't believe so," that he was not at the June 10 meeting

B. *Conclusions*

1. The 8(a)(1) violation

The uncontradicted facts establish that Respondent violated Section 8(a)(1) by Vice President Nuzum's threat to close the plant if a union came in; by Supervisor Baldwin's statements to employees that he had observed them at union meetings and by the actual observation of the union meeting by Baldwin, which, since it was not explained in any way by Respondent, I find to be surveillance. The complaint also alleged as violative of Section 8(a)(1) that Baldwin "promised employees benefits if they did not select the Union." The evidence of a change in the distribution of "house deals" and in work schedules announced by Baldwin on June 5, were not in any way contingent upon employees rejecting the Union, and were apparently put into immediate effect. I do not therefore regard the complaint's allegations in this respect as having been proved by a preponderance of the evidence.

2. The 8(a)(3) violation

Of the six employees who testified on behalf of the General Counsel and the five employees and Vice President Nuzum who testified on behalf of Respondent, only one, employee Gordon Ellwood, testified that anyone had been fired for coming in late. Respondent, in its brief to me, states as follows:

> Mr. Ellwood further testified that coming in early as a penalty, for being late was a rule established by the salesmen, and that, in fact, he knew of two salesmen, Joe Hubert and Dick Smithton, who had been fired for coming to work late.[6]

Although Respondent's principal argument is that Keyes was not fired, but quit, Respondent does argue that the record would not support the contention that Keyes was fired for union activities. Its argument, essentially, is that although five salesmen participated in union activities, and signed union cards, only one, Keyes, was fired (if he was), that Keyes was the top producer of the five and "it would be ridiculous to assume that not only did we fire a man for Union activities, but that we would pick out the one who would be the most financially advantageous to us to discharge and keep the other four poorer salesmen on the payroll." Respondent does not, in this summation, again refer to the Ellwood testimony Furthermore, Nuzum was not asked, and did not mention, any firings in the part for coming in late, nor did any other employee so testify.[7]

In these circumstances, I cannot credit Ellwood's unsupported statement to that effect, particularly as Respondent does not appear to rely upon it, presented no records to show any such discharges, and did not elecit any testimony along these lines from Nuzum, and because the tenor of the testimony of the other witnesses asked about lateness or the rule was to the contrary

I am satisfied that Keyes was fired rather than quit. Keyes' testimony, as noted above, was that Nuzum told him to "turn my keys in, I was discharged"; Nuzum's that he told Keyes, "if you don't like it here you can turn in your keys." Even accepting Nuzum's version of the discussion, the circumstances make it clear that at most Keyes was taking a "you can't fire me, I quit" position. That Nuzum's "if you don't like it here," was rhetorical, and the "turn in your keys" a command, is evident from the fact that just before the termination meeting Nuzum called Respondent's attorney to ask his advice, and followed that advice Although there is nothing in the record to show what the advice was, I cannot believe that Nuzum called for advice, and received it, to the effect that he should mildly suggest that if Keyes were unhappy, he was free to quit. Indeed, even the words "if you don't like it here, turn in your keys," given the proper intonation, could be as peremptory as "get out."

As noted, Respondent defends, assuming a discharge rather than a "quit," on the ground that Keyes was late on June 11, 1970.[8] I am convinced that this was not the reason.

In the first place, the testimony of Respondent's own witnesses establishes that Keyes was an habitually tardy employee. This is not to say that Respondent's previous failures to discharge Keyes for lateness estopped it from doing so on June 11, but when the only additional factor at the time of the discharge is Keyes' union activity, it is a reasonable inference that the latter motivated the discharge.

As noted, Respondent argues in its brief to me that it would hardly discharge (one of) its top salesmen producers for union activity, while keeping others with lower sales records also known to have engaged in union activity. I find this argument singularly unpersuasive. Indeed, it seems much more likely that the top salesman could survive after coming in 15 minutes late whereas he might not (and in this instance did not) survive after having been instrumental in bringing the Union in to organize the other salesmen. Had Keyes been the Company's poorest salesman, and come in late, the inference that he was discharged for contemporaneous union activity would be much less apparent. I would not be surprised if this were the first time a company had defended a discharge on the ground of the dischargee's competence I find, for these reasons, that Respondent discharged Keyes because of his union activities, in violation of Section 8(a)(3) and (1) of the Act.

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. Respondent Bauman Chevrolet, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2 International Association of Machinists and Aerospace Workers, District Lodge No 1060, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By giving its employees the impression that their union activities were under surveillance, by engaging in surveillance, and by threatening to close its business if the employees selected the Union as their bargaining representative, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discharging Paul A. Keyes because of his union activity, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

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[6] The testimony was that the two salesmen left (later clarified as "were fired") "on account of not obeying our policy "

[7] The testimony of the other witnesses was rather to the effect that lateness was prevalent, with no one having been fired therefor

[8] Although there is much testimony in the record about a rule originally instituted by the employees themselves that anyone coming in late, or, apparently, missing one of the regular Monday, Wednesday and Friday salesmen's meetings had to come in a half hour early for three consecutive days thereafter, Nuzum's own testimony was that he said to Keyes when Keyes came in at 9 15 a m on June 11, "starting time [is] 9 o'clock " It is thus plain that the rule about reporting early had nothing to do with the June 11 event

THE REMEDY

Having found that Respondent violated Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discriminatorily discharged Paul A. Keyes on June 11, 1970, I shall recommend that it make him whole for any loss of earnings he may have suffered from the time of his discharge to the date Respondent offered to reinstate him [9] Backpay is to be computed in accordance with the formulae set forth in *F. W. Woolworth Company,* 90 NLRB 289, and *Isis Plumbing & Heating Co.,* 138 NLRB 716.

The nature of the unfair labor practices found, and Respondent's previous violations of the Act (*Bauman Chevrolet, Inc.,* 173 NLRB No 78) require, in my opinion, that it be ordered to cease and desist from infringing in any other manner upon the rights of its employees guaranteed in Section 7 of the Act. *N.L.R.B.* v. *Entwistle Mfg. Co.,* 120 F.2d 532, 536 (C.A. 4).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[10]

ORDER

Respondent, Bauman Chevrolet, Inc., its officers, agents, successors, and assigns, shall.

1. Cease and desist from:

(a) Discouraging membership in International Association of Machinists and Aerospace Workers, District Lodge No. 1060, AFL–CIO, or any other labor organization, by discharging or in any other manner discriminating against employees in regard to their hire or tenure of employment or any terms or conditions of employment.

(b) Threatening to close the business if the employees select a union to represent them.

(c) Engaging in, and creating the impression that it is engaging in, surveillance of the employees' union activities.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

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

(a) Make Paul A Keyes whole for any loss of pay suffered by reason of his discharge in the manner set forth in the section hereof entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of the recommended Order.

(c) Post at its plant at Wilkinsburg, Pennsylvania, copies of the attached notice marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 6, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[12]

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[9] As Respondent made such an offer at the hearing, General Counsel does not request a reinstatement order now

[10] In the event no exceptions are filed as provided by Section 102 46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 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

[11] In the event that the Board's 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 be changed to read "Posted pursuant to a judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board "

[12] In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read "Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith "