

**Hubacher Cadillac, Inc., a Delaware Corporation  
and International Association of Machinists &  
Aerospace Workers, AFL-CIO, District Lodge  
No. 190, Local Lodge No. 2182. Case 20-CA-  
16746**

26 August 1983

**DECISION AND ORDER**

**BY CHAIRMAN DOTSON AND MEMBERS  
JENKINS AND HUNTER**

On 29 November 1982 Administrative Law Judge Clifford H. Anderson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The General Counsel filed cross-exceptions and a supporting brief, and Respondent filed an answering brief to the cross-exceptions.

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 Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> of the Administrative Law Judge and to adopt his recommended Order.<sup>3</sup>

<sup>1</sup> Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We hereby correct the Administrative Law Judge's inadvertent error in his description of the unit set forth in sec. III, A, par. 1, of his Decision. The appropriate unit is:

All employees employed by the Employer excluding clerical employees, salesmen, nonproductive foremen, members of other collective bargaining units, guards and supervisors as defined in the Act.

<sup>2</sup> In adopting the Administrative Law Judge's conclusion that Respondent did not violate Sec. 8(a)(3) and (1) of the Act by improperly limiting the total number of employees in the unit during relevant times in order to avoid recognition of the Union, we agree with the Administrative Law Judge that the General Counsel did not make out a *prima facie* case that such a violation occurred, principally because there was no evidence presented which indicated why Respondent did not simply hire nonunion members if it believed that a larger unit would be economically advantageous.

<sup>3</sup> In "The Remedy" section of his Decision, the Administrative Law Judge stated that Respondent shall be obligated to replace all nonpredecessor employees now employed, if their positions may be properly filled by the predecessor employee applicants. We hereby clarify the remedy by providing, as set forth in sec. 2(a) of the recommended Order, that Respondent shall be required to offer to unit employees of the predecessor who would have been employed but for the illegal discrimination against them immediate employment, discharging if necessary any employees hired in their place, without prejudice to their seniority and other rights and privileges.

Chairman Dotson and Member Hunter note that no exceptions have been filed specifically to that portion of the Administrative Law Judge's recommended Order which imposes certain notification requirements upon Respondent.

**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 Administrative Law Judge and hereby orders that the Respondent, Hubacher Cadillac, Inc., a Delaware Corporation, Sacramento, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order,<sup>4</sup> except that the attached notice is substituted for that of the Administrative Law Judge.

<sup>4</sup> Chairman Dotson finds it unnecessary in this case to express his view on the Board's laws concerning successorship.

**APPENDIX**

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

After a hearing in which all parties had an opportunity to present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice, to mail a copy to each former unit employee of our predecessor, Hubacher Cadillac, a California corporation, not now employed by us, and to obey its provisions.

**WE WILL NOT** refuse to hire or fail to employ employees of our predecessor, Hubacher Cadillac, a California corporation, because of those employees' union activities or because we wished to avoid recognizing and bargaining with International Association of Machinists & Aerospace Workers, AFL-CIO, District Lodge No. 190, Local Lodge No. 2182.

**WE WILL NOT** in any like or related manner interfere with, restrain, or coerce employees or applicants for employment in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

**WE WILL** offer the former employees of our predecessor, Hubacher Cadillac, a California corporation, who applied to us for employment but were denied employment because of our illegal discrimination against them, immediate employment, discharging if necessary any employees improperly hired in their place, without prejudice to their seniority and other rights and privileges.

WE WILL make whole the former employees of our predecessor, Hubacher Cadillac, a California corporation, who applied to us for employment but were denied that employment by virtue of our illegal discrimination against them, with interest, for any loss of earnings and other benefits they suffered by reason of our discrimination against them.

WE WILL notify the former employees of our predecessor, Hubacher Cadillac, a California corporation, who applied to us for employment, and the Union and the Regional Director for Region 20 of the National Labor Relations Board, in writing, each time there is a job opening in the unit. Notification will include the job title and duties of the position. If the position is filled by a person other than a former employee of our predecessor, Hubacher Cadillac, a California corporation, we shall certify that we have considered our predecessor's employees for the position.

HUBACHER CADILLAC, INC., A DELAWARE CORPORATION

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge: This case was heard before me in Sacramento, California, on September 2 and 3, 1982, pursuant to a complaint and notice of hearing issued by the Regional Director for Region 20 of the National Labor Relations Board on January 27, 1982, as amended on July 2, 1982, and further amended on August 25, 1982, based on a charge filed on November 19, 1981, and partially withdrawn with the approval of the Regional Director on August 25, 1982, by International Association of Machinists & Aerospace Workers, AFL-CIO, District Lodge No. 190, Local Lodge No. 2182 (the Charging Party or the Union), against Hubacher Cadillac, Inc., a Delaware corporation (Respondent).<sup>1</sup>

As of the time of the opening of the hearing on September 2, 1982, the complaint allegations had been narrowed to essentially a single contention: that Respondent in November 1981 and thereafter refused to hire employees of a predecessor employer in an attempt to avoid obligating itself to bargain with the Union, thereby violating Section 8(a)(3) and (1) of the National Labor Relations Act. Respondent denies the conduct attributed to it and further avers that its selection and hire of employees was based on business considerations and was independent of any and all considerations impermissible under the Act.

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to call, to

<sup>1</sup> The complaint was orally amended at the hearing to change the name of Respondent to identify it as a corporation existing under the laws of the State of Delaware.

examine and cross-examine witnesses, to argue orally, and to file post hearing briefs.

Upon the entire record herein, including briefs from the General Counsel and Respondent, and from my observation of the witnesses and their demeanor, I make the following:<sup>2</sup>

FINDINGS OF FACT

I. JURISDICTION

During the past calendar year, Respondent, doing business in Sacramento, California, had gross revenues in excess of \$500,000, and purchased and received goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of California.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

For a period of years Hubacher Cadillac, Inc., a California corporation (the predecessor), owned and operated a Cadillac automobile dealership in Sacramento, California (the dealership), which did business as "Hubacher Cadillac." The predecessor's owner, corporate president, and chief executive officer was Elmer Hubacher. The predecessor for many years had recognized the Union as representative of its employees in the following unit which is appropriate for purposes of collective bargaining (the unit):

All employees employed by the employer excluding office clerical employees, salesmen, guards and supervisors as defined in the Act.

The predecessor and the Union had been parties to a series of collective-bargaining agreements covering unit employees, the most recent of which was effective by its terms from August 1, 1981, through August 1, 1984.

The predecessor determined to sell its dealership and entered into negotiations with a purchasing consortium. Terms of sale were agreed to by September 1981. A new corporation, Respondent, was to purchase and operate the dealership. Respondent's stock was held by two other corporations: the majority interest by General Motors Holding Division of General Motors Corporation, and a substantial minority interest by Kuni Cadillac, Inc., through its agent Lee Castonguay. Kuni Cadillac, Inc., operates a Cadillac dealership in Oregon. Wayne Kuni holds 90 percent of the stock and 10 percent is held by Lee Castonguay.

The predecessor continued operations until November 6, 1981. At the end of that day it discharged its employees, including its 30 unit employees, and ceased doing

<sup>2</sup> The matters in controversy were significantly reduced by a series of stipulations at the hearing. Where not otherwise noted, these findings are based on those stipulations, admitted pleadings, unchallenged credible testimony, or documentary evidence.

business. Thereafter Respondent assumed charge of the premises. The final sale of the dealership was consummated on November 18, 1981, after a physical inventory of the stock and equipment had been taken.

#### *B. Respondent's Assumption of the Dealership's Operation*

In early October, perhaps October 6, 1981,<sup>3</sup> at the close of business Elmer Hubacher summoned the predecessor's unit employees to a meeting room at the dealership. Present with Hubacher were Kuni, Castonguay, and a financial officer of the General Motors Corporation. The meeting lasted about 30 minutes.

The statements made at the meeting were testified to by various employees whose versions of events were similar but not identical. Hubacher told the assembled employees that the rumors were true, Hubacher Cadillac had been sold. He introduced Kuni as an Oregon Cadillac dealership owner and the purchaser of the Hubacher dealership. Kuni told the employees that Castonguay would be running the Hubacher dealership and would soon be moving down from Oregon to do so. Kuni told the employees that the operation would remain a Cadillac dealership. Various employees recalled that he said there would be (1) few changes, (2) hardly any changes, or (3) no changes in its operations. Various employees recalled Kuni assured the assembled employees that there would be no personnel changes or that most of the crew would be retained. Again with variation in testimony, Kuni told the employees they would not be able to notice any changes or that most employees would not notice a change in operations at the dealership.

Denzile Austin, the union steward for unit employees of the predecessor, testified that after the meeting ended and as the employees were leaving he walked up to Kuni, with Hubacher and Castonguay nearby, and introduced himself as the union shop steward. Austin told Kuni the employees wanted the dealership to continue being union. Kuni answered that this was "no problem, everything is going on just like it is now." He added, "I don't have a choice anyway, do I?" Austin said that Kuni did but that the employees wanted to be union. Kuni agreed and the conversation ended. Hubacher and Kuni did not appear or testify at the hearing. Castonguay did not address this conversation or the meeting on his testimony.

On November 5, at the close of business, Hubacher again held a meeting with the predecessor's unit employees. There was no dispute that Hubacher told the employees that Respondent would take over the dealership at the end of the following day and that thereafter he would not be involved in the business. He announced that the employees would receive their final paychecks the following day and that with their checks employees would receive applications for employment with the new dealership. Hubacher said he hoped the employees would apply for work with the new employer but said he would have no role in the hiring process.

At the close of business, on Friday, November 6, the predecessor ceased operations and all employees, includ-

ing management staff, were terminated. Insofar as the record reflects, the predecessor had no further role in the matters at issue.

#### *C. Respondent Commences Operations*

On November 7, Respondent employed the predecessor's supervisory staff in their previous positions save that Castonguay replaced Hubacher as general manager. Included in the retained supervisory staff were Roy Banister, the service manager; Gene Buthenuth, parts manager; and Bob Moore, body shop manager. All are admitted agents of Respondent. Castonguay testified that advertisements were placed in a local newspaper announcing that job interviews were to be held on Monday and Tuesday, November 9 and 10, for unit positions. He instructed his managers to interview applicants on those days and to select the best people. After the interviews the managers were to meet with Castonguay and discuss with him their recommendations regarding hiring.

In early November Castonguay believed that if Respondent hired over 51 percent of the predecessor's unit employees it would be obligated to recognize the Union. He admitted that he preferred Respondent operate non-union.<sup>4</sup> In his initial discussions with his managers, Castonguay testified that he told them that he would prefer to run the dealership as a nonunion shop "if that's the way it turned out." He specifically denied telling the managers to select employees for hire based on their union membership or preference. Rather he told them to hire the best employee in each job category. In separate meetings with each manager, Castonguay discussed the minimum staffing needs of each manager's particular department. Castonguay testified that he was aware that the predecessor's business volume had been falling significantly for the past year or so preceding the sale. Further, he had discovered that during the predecessor's last business days it had ceased accepting certain new work for the shop so that Respondent's initial volume of service work would be reduced.

#### *D. Respondent Interviews and Hires Unit Personnel*

Each manager interviewed applicants for employment in his particular department on November 9 and 10. The interviewees included the unit employees of the predecessor and large numbers of applicants responding to the newspaper advertisements. Service Manager Ray Banister interviewed service or mechanic applicants. Parts Manager Gene Buthenuth interviewed parts department applicants. Body Shop Manager Robert Moore interviewed body shop applicants.

Service Manager Banister testified that he interviewed perhaps 100 individuals. When Banister reviewed a par-

<sup>4</sup> Castonguay also testified, however, that during the negotiations for the sale of the dealership a question arose concerning the possibility that Respondent might be liable for certain unfunded pension liabilities incurred by the predecessor unless the union contract's pension plan was assumed by Respondent. Castonguay had told Hubacher that, rather than be exposed to such liability, Respondent would adopt the union contract. It was later determined there was no such potential liability and the Respondent's assumption of the union contract was unnecessary. It was not assumed.

<sup>3</sup> All dates refer to 1981 unless otherwise indicated.

ticular interviewee's application he recorded on it the availability of the interviewee, e.g., by means of an entry "2 wks notices" or "available." He similarly noted if the employee applicant was "non-union." In some cases he also noted the area of speciality of the applicant, e.g., "Tune-up" or "Front end & Brake." Banister testified that he asked about each applicant's union affiliation in essence because of his long experience in a union shop and because he believed this information would be necessary should the shop be subject to union security. Banister denied that he initially told applicants that Respondent would operate without a union, but his pretrial affidavit states that when asked about the matter by some of the interviewees he told them Respondent would be non-union. Banister also testified that he did not ask employees if they could cross picket lines or if they were going to organize a union at the facility.

Various individuals testified concerning their interviews with Banister. Denzile Austin testified that Banister told him that Respondent was going to operate non-union and that he did not think Austin would want to work there since, as union steward for the predecessor, he was involved in trade unionism. Austin asserted he wanted the job. Banister responded again that Respondent would be nonunion and that he could only hire 40 percent of the former employees because if 50 percent of the former employees were hired Respondent would have to negotiate a contract with the Union which it did not want to do. Austin asked how Respondent could operate without its former employees. Banister replied that they would hire outside people. Austin questioned the experience of outsiders. Banister conceded that the applications he had received did not indicate Cadillac experience. Banister then asked Austin if he intended to attempt to organize Respondent's employees and if he would cross a picket line if the Union picketed the facility. Austin testified he did not answer either question. Following a discussion about wages and benefits, Banister told Austin he would call Austin the following day and tell him if he had been hired.

Wayne LaDue, a current employee, testified that Banister asked him if he would work in a nonunion shop. LaDue answered he would. Banister added that he had to avoid hiring more than 50 percent of former employees to keep the Union out. He told LaDue he would call him and let him know if he was hired. Charles Fiedler testified that he was also asked by Banister if he would work in a nonunion shop. Fiedler said he would. He was asked if he would cross a picket line and answered he would. Banister said he would call Fiedler with the final decision.

Charles Coleman testified that Banister asked him if he would be willing to work nonunion or if his union membership made a difference. Coleman said it would not make a difference. Banister said he would review the applications and get back to him. Robert Barnes testified that he was told by Banister that Respondent was going to operate nonunion and asked if he would work under those circumstances. Barnes said he would. Banister asked if Barnes was a member of the Union at his other employer and Barnes said no but he was a member of the Machinists Union. Barnes asked about his chances of

being hired. Banister replied that Respondent could only hire 48 percent of the former employees because they would vote the Union in.

Dale Woods testified that in his interview with Banister, Banister asked Woods if he were willing to work nonunion. Woods said he was. Woods asked if Banister thought he was going to be rehired. Banister responded that he did not know. Banister continued asserting that he could only hire some 40-odd percent of the former employees because Respondent was going to be non-union. Ultimately Wood returned to work on Wednesday, November 11.

Alan King, who had not worked for either Respondent or the predecessor, applied for work and submitted an application to Respondent on November 9. He was interviewed by Banister. Banister reviewed his application and then asked King, in King's recollection, how he felt about being nonunion. King expressed primary interest in obtaining employment and indifference to union status. King's application reflected his previous employment had been with an organized employer. Banister asked if King had been a union member at that job. King answered yes. The interview ended. Banister marked King's application in the upper corner with the notation "NC Service employee OK." King was not offered a position.

James Pitts, a union officer who had worked temporarily for the predecessor but was not employed at the time of the sale, applied for work in response to the advertisement in the newspaper. He requested an application from Banister on November 9. Banister told him that he was wasting his time taking an application because Respondent was going nonunion. Pitts said he needed a job and asked for an application. He received one, completed it, and returned the next day to interview with Banister. At that interview Banister again said Respondent was going nonunion and asked Pitts if he could work in a nonunion shop. Pitts said he needed the job. Banister asked Pitts how active he was in the Union and Pitts explained his official role in the Union. The interview concluded when Banister said he would put the application on file. Pitts' application bears no notation by Banister regarding Pitts' union membership.

Body Shop Manager Robert Moore testified that he interviewed some 50 applicants for body shop positions. Moore testified that he had initially discussed the positions to be filled with Castonguay. Castonguay told him that Respondent wanted to operate nonunion but Moore denied that he was told to discriminate against union members or former employees of the predecessor. He also denied that he discussed the Union or union membership with applicants until after their hire. On the application of Frank Lebeau, who was hired on November 11, Moore noted "non-union & no aspirations." On the application of Bob Conner, an employee of the predecessor who started work on November 11, Moore noted "discussed new program, fringe benefits & pay & non-union . . . agreed to accept." Parts Manager Gene Buthenuth testified that he initially discussed parts department staffing needs with Castonguay. Castonguay suggested

that they start with two employees. Thereafter Buthenuth interviewed some 65 parts department applicants.

On November 11 Respondent opened to the public. Its unit staff consisted of 15 individuals. Of these, 14 had been employed by the predecessor and 1 had not. One additional person previously employed by the predecessor had been offered employment but had declined.

Although the record does not indicate the process followed in each instance, the department managers evaluated each applicant and reported to Castonguay. Castonguay reviewed the applications and discussed the applicants with the appropriate department manager before approving each hiring recommendation. Castonguay testified that he did not have sufficient technical expertise to evaluate the skills of the applicants and relied on his managers' recommendations in this regard. Respondent's agents uniformly testified that employees were hired based on their skills and ability to do necessary tasks. All denied that union affiliation or status as a former employee of the predecessor was considered in making hiring recommendations or hiring decisions.

#### *E. Subsequent Events*

When they were not hired by Respondent, Austin, Fiedler, and LaDue went to the dealership on the morning of November 11 to pick up their tools. There they had a conversation with Banister. Fiedler testified that while the three men were in the work area, he saw Banister and hailed him. Fiedler recalled asking Banister why he was not rehired. Banister said because of the strike in 1978. Fiedler asked what he meant. Banister responded that it was the way Fiedler held his "stick" during the strike. Fiedler then asked about Austin. Banister responded "that Austin had been the union shop steward." Fiedler then asked about LaDue and Banister responded that LaDue was "a strong union man." LaDue recalled Fiedler asking Banister why they had not been hired. Banister responded that Austin should have known he was not going to be rehired because he was shop steward and a strong union man. Banister then continued saying that Fiedler and LaDue were strong union members and they had held their sticks wrong in the 1978 strike.

Austin testified that Banister answered Fiedler's question by telling him that he knew he was not coming back because he was the shop steward. Austin recalled that Banister then turned to Fiedler and LaDue and said that they had "held their sticks too high." LaDue then asked if he was referring to the 1978 strike. Banister said "I guess." Banister continued, "Mr. Hubacher and Mr. Kuni talked it over and they decided who was going to be back; they're the ones that told me who to bring back." The conversation then ended. Woods testified that he saw the four men talking on the morning of November 11 and heard portions of their conversation. He recalled Banister telling LaDue and Fiedler that they had held their picket signs too high and, without being able to identify the speaker, heard one individual say that Austin was the shop steward and "that's why he did not make it."

Banister testified that he had met the three men at the shop on November 11 but that he had not spoken to

them on that occasion. He specifically denied making the statements attributed to him by the others.

There had been an industry strike in 1978 and the predecessor had been picketed by its employees, including LaDue and Fiedler. There was some testimony that these two individuals were significantly more boisterous and active on the picket line than other striking employees. Counsel for the General Counsel asked Banister if LaDue and Fiedler had held their picket signs higher than others in the 1978 strike. Banister answered: "I heard rumors of it, but I don't know it to be any fact."

On November 13, union representatives Huntley Hennessy and Ed Klaux met with Respondent's general manager and its counsel. The Union demanded recognition and bargaining of Respondent. Respondent's counsel expressed doubts regarding the Union's representation of a majority of Respondent's unit employees. Hennessy asserted that the Union represented a majority of the 14 employees then working. Counsel noted that Respondent did not consider the 14 to be the appropriate group to test a majority because a full employment complement of unit employees had not yet been hired. Castonguay said he was still hiring employees and that, if the Union represented a majority of employees when a full complement was reached, he would recognize the Union. Castonguay suggested that a full complement would probably be reached by mid-January 1982. The Union's representatives also complained that Banister was improperly interrogating job applicants regarding their willingness to work nonunion and to cross a picket line. The meeting ended without recognition being granted.

#### *F. Later Hiring and Interviews*

Respondent hired one of the predecessor's unit employees on December 13 and in subsequent months many nonpredecessor employees. In several cases the subsequent hires were to replace employees who were fired, died, or otherwise left Respondent's employment. While Respondent's unit complement grew from the 15 who started in November, it has never reached 30 employees.

LaDue testified that he returned to the facility on December 3 and spoke with Banister. He told Banister that he was still interested in coming back to work and that he was willing to work in a nonunion shop just so he could get another job. Banister replied, in LaDue's recollection, that he still had to keep the Union under 50 percent but that he appreciated LaDue's time. The following week Banister spoke to LaDue by telephone. Banister asked if LaDue had found a job and if he was still willing to work nonunion. LaDue said he still needed a job and would work nonunion. Banister told LaDue to come down to the facility the following day, that Castonguay would like to meet him. The following day LaDue met with Castonguay and was offered and accepted a job which he started the following Monday.

Coleman testified that he stayed in touch with Respondent after he was not rehired on November 11. In the first week of December he returned to the facility and spoke to Banister about the possibility of returning to work. Banister told him work was slow. Banister told Coleman there was a possibility of hiring him but not

until business picked up. In the first week of January 1982, Coleman again inquired of Banister about the possibility of employment. Banister asserted that business was "real spotty and very slow and that he was having a time keeping the employees that he had working full time." Banister reasserted however that when business picked up "we'll have a place for you." Again in the first week of February 1982 Coleman had a similar conversation with Banister in which he was told that although business had improved sufficiently to employ those then on the payroll full time, it had not improved sufficiently to allow additional hiring. Banister asked Coleman to keep in touch.

In March or April of 1982 Coleman noticed an advertisement in the local paper placed by Respondent seeking a brake and front-end mechanic. That same day he went to the facility and spoke to Banister. Coleman testified that he asked Banister how business was and the likelihood of his being called to work. Banister replied that business was "so-so" and that he would not be called to work as yet. Coleman said that he saw the ad in the paper for a brake and front-end man. He noted he had a brake license. Coleman asked if Banister had filled the position. Banister said no. Coleman asked for "a shot" at the job. Banister said he could not hire Coleman yet. Coleman asked why. Banister replied:

I have too many union employees working here now; and I have to hire some more people that have no connection with the union before I can hire you.

Coleman suggested that he would then stop coming in. Banister said he was not suggesting that and that when business picks up "enough" then he would put Coleman back on. Coleman asked why Banister had to hire non-union people in preference to union people since the union people would work whether the job was union or not. Banister answered: "If there is an election, we don't intend to lose the election."

On May 13, 1982, Austin learned that an advertisement had been placed by Respondent in a local paper for a tuneup man. The Union told him to talk to Banister. Austin met with Banister that afternoon. Austin said he had come to make sure his application was on file. Banister located his application and asked if Austin was still in the Union. Austin said yes. Banister asked why since Austin was working in a nonunion shop. Austin noted his official position with the Union and asserted he was staying with it. Banister told Austin he would let him know about the position. Austin was not hired.

Respondent unconditionally recognized the Union as the representative of unit employees on March 4, 1982. Negotiations had produced a tentative agreement as of the time of the hearing which was to be submitted to the union membership for consideration.

### G. Analysis and Conclusions

#### 1. The positions of the parties

At the outset it is important to note that the General Counsel, by withdrawing all aspects of the complaint

save the failure-to-hire allegation, has eliminated any need to consider other violations of the Act. The various alleged statements and other actions of Respondent's agents in evidence are therefore relevant only to the hiring issue. This narrowing of the use of the evidence extends to the successorship question. The complaint no longer contains a successorship allegation. Findings on that issue are unnecessary. The General Counsel contends Respondent's conduct herein was part of a scheme undertaken in an attempt to avoid being obligated as a successor to the predecessor to recognize and bargain with the Union. That motivation theory must stand or fall on the subjective state of mind of Respondent's decision-making agents as to what they believed their legal obligations were rather than by any objective analysis of what actions would avoid or would not avoid a successorship obligation. Thus the case is not concerned with what acts and conduct would, in fact, obligate Respondent as a successor to the predecessor. Rather, the analysis must look to what Respondent's agents at the time believed, correctly or incorrectly, would have created or avoided such an obligation.

Counsel for the General Counsel argues on brief that "Respondent's true motive for refusing to hire the full complement of employees of [the predecessor] was its desire to avoid recognizing and bargaining with the Union." This argument implicitly advances two separate but related contentions. The first contention is that Respondent limited the total number of the predecessor's employees it hired. The second contention is that Respondent limited the total number of unit employees it hired by not bringing its unit employment complement up to capacity as measured by the predecessor's complement of 30 unit employees.

As to the latter contention, Respondent argues that the total number of unit employees it hired was determined by business considerations free from any issue of union recognition or successorship. It argues its initial reduction in staff when compared to its predecessor's unit complement, i.e., to about one-half the level of the predecessor, was based on the predecessor's deteriorating business volume generally and was further aggravated by the initial loss of business in process caused by the predecessor's 11th hour refusal to accept new work.

As to the former argument, Respondent argues that once it had determined the appropriate size of the unit employment complement, it selected individuals to fill those positions without regard to the fact that an applicant was a predecessor unit employee or not without regard to the consequences of hiring particular employees of the predecessor to Respondent's legal obligations to recognize the Union.

#### 2. Resolution of credibility

The evidence proffered by the General Counsel and by Respondent is at least in part mutually inconsistent and presents conflicting versions of events. The opposing versions of events directly contradict one another only in the testimony regarding alleged statements and actions by Service Manager Banister. The various employees and employee applicants, as noted *supra*, testified that

Banister told them (1) that Banister was ordered to insure that a majority of the predecessor's employees were not hired by Respondent, (2) that Banister carried out these instructions, and (3) that Respondent would hire only those of the predecessor's employees without strong union sympathies. Banister is alleged to have made such statements well into 1982. Banister specifically denied certain of the statements attributed to him. In some cases he generally denied the statements without being able to recall specifics. In some cases he did not specifically address the statements attributed to him.

The conflicts presented by this testimony are easily resolved by consideration of the various witnesses' demeanor and other factors traditionally relied on to evaluate credibility. Banister was an unbelievable witness. He evinced a nervous and unpersuasive demeanor. He responded erratically to questions put to him and frequently claimed failure of recollection or lack of understanding. His testimony was inconsistent and unconvincing. Arrayed against Banister were the numerous witnesses, noted *supra*. They included current employees of Respondent and disinterested job applicants with no apparent stake in the outcome of the case. While witnesses and their testimony are to be weighed and not numbered, Banister's version of events stands thus opposed by a veritable host of witnesses, testifying to similar conversations and/or to mutually corroborative events. Further, these witnesses each seemed to me to present a sound and convincing demeanor and made every effort to honestly answer the questions put to them. The testimony of each such witness to Banister's actions is more believable when looking to the record as a whole because each version is either corroborated by other testimony or is logically consistent with it. Thus these witnesses by their testimony create a picture which is in its totality even more persuasive than each individual's testimony standing alone. Banister's testimony is not so sustained. Considering all of the above, I have no difficulty in crediting the testimony of the witnesses, *supra*, whose testimony attributes the noted actions and statements to Banister. I credit Banister only to the extent his testimony is not inconsistent with the testimony of others regarding these events.

3. Did Respondent fail to hire certain of the predecessor's unit employees in an attempt to avoid being obligated to bargain with the Union?

Respondent's general manager Castonguay discussed staffing levels and individuals to be hired with his department Managers in the initial days of Respondent's operations. He admittedly believed in November 1981 that Respondent would have been obligated to recognize the Union if it hired 51 percent of the predecessor's unit employees. The predecessor employed 30 unit employees at the time it closed. Respondent initially hired 14<sup>5</sup> of

<sup>5</sup> Respondent notes that it offered a 15th employee of the predecessor a position but that it was refused. There is no evidence as to the timing of the various offers, i.e., whether this offer was made simultaneously with, before, or after other initial offers. Nor would the offer, if accepted, have raised the predecessor complement of Respondent's employees to the level of a majority.

the predecessor's employees and at no time thereafter to the date of hearing had it employed a majority of the predecessor's employees, i.e., 16 or more. Respondent's initial hires were virtually all employees of the predecessor—14 of 15 employees. Respondent, after its initial hiring to the time of the hearing, hired additional employees who were almost exclusively nonpredecessor employees. On several occasions at least it advertised to obtain these new employees.

The basic law applicable to this case is not in dispute. An employer is under no obligation to hire a predecessor's employees. However, it may not refuse to hire a previous employer's employees because those employees were represented by a union or because the employer may become obligated to bargain with a union if a certain proportion of employees are hired. *NLRB v. Burns Security Services*, 406 U.S. 272, 280-282, fn. 5 (1972). The General Counsel argues that it was not mere coincidence that Respondent hired almost but not quite a sufficient number of the Predecessor's employees to obligate it, in Castonguay's belief, to bargain with the Union. He urges a finding that an illegal plan underlay this hiring pattern. Counsel for the General Counsel urges that I draw the inference that Respondent's decision to advertise for new applicants rather than hire the experienced employees of the predecessor is evidence of an intention to avoid a bargaining obligation. He notes such an inference is permissible citing *Houston Distribution Services*, 227 NLRB 960 (1977). He makes the same argument regarding Respondent's apparent failure to consider the original applications of the predecessor's employees when later hiring additional unit staff citing *Macomb Block & Supply*, 223 NLRB 1285, 1286 (1976). The General Counsel also relies on the statements of Banister, as found *supra*, and the notations of Moore and Banister regarding union sentiment on the job applications as direct evidence of Respondent's illegal scheme. In opposition are the denials of Respondent's agents and their lengthy testimonial explanation why particular employees were hired at particular times.

I have considered the evidence of the General Counsel and the opposing assertions of Respondent's agents that merit only and not union or antisuccessorship motivations were the basis of unit hiring. In agreement with the General Counsel and discrediting Respondent's agents, I find that Respondent's asserted benign reasons for not hiring the predecessor's experienced employees were mere pretext to cloak its illegal scheme to avoid what Castonguay believed was an obligation to recognize the Union if Respondent hired more than half of the predecessor's unit employees.<sup>6</sup>

The primary basis for this finding is the extraordinary and continuing conduct of Banister, as found *supra*, which constitutes a virtual admission to employees and job applicants that Respondent was engaged in an ongoing

<sup>6</sup> I do not dispute Respondent's right to hire particular employees based on an evaluation of relative merit. Judgments of relative merit are for Respondent to make. The testimony of the managers regarding who they preferred to hire would, if credited, sustain Respondent's defenses. Based on my analysis *infra* however, I find the reasons asserted by Respondent's agent were not the true reasons for the hiring choices made.

ing illegal course of conduct designed to avoid recognition of the Union. Banister could not have made these statements or taken the actions for the reasons revealed by the statements without having been informed by Castonguay or others that Respondent was engaged in the course of conduct alleged by the General Counsel. Banister's conduct is the albatross which overweighs Respondent's claims of innocence. This finding is also supported by both Banister's and Moore's comments on employee job applications regarding applicant union sentiments. Moore could have no need to record his opinion that an applicant had "no union aspirations" unless such sentiments were in Moore's view a relevant factor in evaluating the applicant. Banister's explanation for his numerous entries regarding applicant union membership and sentiments is inconsistent with his admissions to employees that union membership was a critical factor in hiring. It is discredited.

Banister's incriminating statements reveal that Respondent's illegal effort to avoid hiring the predecessor's employees continued well after the initial hiring process and, even if such conduct was otherwise less logical given Respondent's subsequent recognition of the Union,<sup>7</sup> convinced me that Respondent's illegal refusal to hire predecessor applicants continued to the time of the hearing. For example, it is clear that Austin as late as May 1982 was not hired after Banister inquired about his union activity. Further, insofar as the record reflects, the unit hires made in 1982 to the time of the hearing were made by Respondent without contacting or considering the predecessor's unit employees whose applications remained on file with Respondent.

Based on all of the above, I find that Respondent's actions in refusing to hire more than a certain number of the predecessor's employees in order to avoid recognizing the Union violated Section 8(a)(3) and (1) of the Act.

4. Did Respondent reduce the size of its total unit employment complement in order to avoid recognition and bargaining with the Union?

The General Counsel's argument that Respondent failed to hire the entire unit complement of the predecessor in order to avoid recognition of the Union has been sustained to the extent that I have found that Respondent illegally determined to hire no more than half of the predecessor's employees. The second portion of the General Counsel's argument is that Respondent also reduced the total number of unit positions filled because of a desire to avoid recognizing the Union or for some other

impermissible reason. The critical difference in the consequences of being sustained in the two arguments may be illustrated by an examination of a situation prevailing in mid-November. Respondent initially hired 15 employees of whom 14 were predecessor employees. If Respondent is found to have improperly favored nonpredecessor employees over predecessor employees, without more, then Respondent illegally hired one nonpredecessor employee and therefore discriminated on that date against only one predecessor employee, i.e., Respondent harmed but a single individual at that time. If Respondent is also found to have improperly failed to hire the predecessor's full complement of 30 unit employees, then, irrespective of the number of employees actually on Respondent's payroll at any given time, Respondent has discriminated against all the predecessor's unit employees not offered employment. In early November, under this theory, Respondent discriminated against not one but 15 of the predecessor's unit employees.

The General Counsel argues that Kuni's remarks in early November to the predecessor's assembled employees that the dealership would remain unchanged was a statement by an agent of Respondent to the employees that they would all be retained. Respondent disputes the authority of Kuni in early November to bind Respondent, disputes what was said by Kuni at the meeting, and further disputes the relevance and/or weight to be accorded Kuni's remarks under all the circumstances.

Initially, I find that Kuni was an agent of Respondent at the time he addressed the employees. I make this finding for two reasons. First he was a major owner of a closely held corporation which in turn held a substantial portion of the stock of Respondent. Such an ownership relationship is sufficient to give Kuni authority to speak on behalf of Respondent in these circumstances. Second, and more directly, Kuni's remarks to employees that he had purchased the Hubacher dealership and put Castonguay in charge, all of which was acquiesced in by Castonguay and the General Motor's representative who were present at the meeting and stood silently by, creates a clear apparent authority by adoption or acquiescence in Kuni. Corporate principals cannot stand by approvingly when a fellow owner states to employees that he, in effect, is in charge. If they do they cannot thereafter avoid responsibility from the consequences of those remarks.

Having found Kuni an agent of Respondent, I do not find his remarks as testified to by various employees present at the meeting to be of particular significance. Various employees testified that Kuni said that the dealership would either be: (1) the same or unchanged, (2) almost the same, or (3) with few changes. Such optimistic reassurances to employees could well be expected from a purchasing principal who was not going to remain after to actively manage the enterprise. They are remarks of assurance and confidence. Such statements however can hardly be used to the level of a commitment or be taken as a binding statement of Respondent's considered intentions which in some fashion showed that Castonguay intended to hire all the predecessor's unit employees. These remarks must be weighed with other

<sup>7</sup> Respondent's continuing conduct lost the original motive of avoiding recognition after the Union was recognized on March 4, 1982. Respondent argues the absence of a post-recognition motive to discriminate is evidence Respondent's entire course of conduct was not improperly motivated. I have considered and rejected this argument as insufficient in light of the strong contrary evidence evidenced by Banister's conduct. Rather, Respondent's post-recognition conduct could have been designed to weaken union support among employees as indicated by Banister's "election" reference, could have resulted from Banister's ignorance of a change in management's plans, or could have been designed to avoid changing a course of conduct which was under attack in the instant litigation. In any case, I find that Respondent continued to hire employees without proper consideration of the predecessor's employees who had previously applied and that this was because of their union activities. Thus Respondent's conduct continued to violate the Act.

evidence. Having done so, I place little weight on the speech and, for the same reasons, I place little weight on the Kuni-Austin conversation occurring immediately thereafter. Kuni was simply not in a position to commit his manager, Castonguay, to specifics.

The General Counsel argues that Castonguay's statements to the Union's representatives on November 13, in response to the Union's demand for recognition, supports his theory here. Respondent's agents told the Union (1) that it did not represent a majority of Respondent's employees, (2) that Respondent had not as yet hired its full complement of employees, and (3) that it did not expect to reach a full complement until January. Castonguay said that if the Union represented a majority at that time it would be recognized. Castonguay admittedly asserted the reduced employee complement as a reason to decline to recognize the Union in November. Thus, the General Counsel argues Respondent's delay in hiring a "full complement" was part of its plan to avoid recognition.

Further, the General Counsel challenges Respondent's argument that the declining volume of business at the dealership required a reduced employment complement after the sale. Counsel for the General Counsel counters that Castonguay's testimony that he believed car sales at the dealership had been in substantial decline from previous years and that the dealership under the predecessor had recently shown a monetary loss is not relevant to the economics of or the staffing needs of the dealership's shop. It is of course true that new car sales may decline yet shop work, on the whole, increase. Respondent's department managers however testified that during the November startup period there was little carryover work from the predecessor. Further, Respondent offered unchallenged testimony that unit work was being successfully accomplished with reduced staff throughout the period in dispute. Further, there was no evidence that Respondent was improperly turning work away during the relevant period. The General Counsel failed to successfully challenge this testimony even though currently employed unit employees testified for the General Counsel on other matters.

I have considered the evidence and argument on this issue. On the record as a whole, I reject the General Counsel's arguments and find there is insufficient evidence to prove that Respondent at any particular time improperly reduced the total number of unit employees it hired. I make this finding for the following reasons.

The greatest weakness in the General Counsel's argument is his failure to suggest any logical or otherwise convincing motive for Respondent to deliberately refuse to hire additional nonunion employees. I have found Respondent had a motive to and did improperly limit the number of the predecessor's unit employees it hired. Given that finding, what is the motive not to hire additional nonpredecessor employees if economic conditions warranted? I have found that, in Castonguay's mind, so long as he hired no more than half of the predecessor's employees, he had no bargaining obligation. Thus if he needed 30 or more employees in the unit to engage in profitable work, there was no apparent reason for him not to hire any of the numerous nonpredecessor job applicants available in November and thereafter.

None of the numerous statements made by Banister, found *supra*, which were fatal admissions of Respondent's intention to limit its hiring of the predecessor's employees, suggest Respondent also intended or attempted to limit the hiring of needed employees, so long as those needed employees were not the predecessor's employees. Indeed to the contrary Banister told the predecessor employees he felt he could hire nonpredecessor or nonunion employees if business volume warranted. The General Counsel's reliance on Kuni's statements to the predecessor's employees and Castonguay's statements to the Union's representatives is not sufficient given this absence of a convincing rationale for the course of action alleged. As I have found, *supra*, Kuni's statements to staff were in the nature of general assurances. Castonguay's deferral of the Union's recognition demand to January may be suggestive of the proposition that Respondent had delayed hiring to put off the Union, but it is insufficient on this record to carry the General Counsel's burden of proof on the question again given the lack of any apparent motive for Respondent to defer hiring of nonunion staff.<sup>8</sup>

The General Counsel attacks Respondent's evidence concerning its business reasons for maintaining a smaller unit complement. The burden of proof however on this aspect of the case is on the General Counsel. There was no evidence offered by the General Counsel sufficient to support a finding that the smaller employee complement was overloaded with work or that additional staff was needed. Nor was there evidence offered sufficient to find that Respondent was diverting or declining shop work to justify its smaller unit staff. Irrespective of the weakness of Respondent's evidence, the General Counsel did not meet his burden of proof on the question.

Accordingly, I find that, while Respondent illegally favored nonpredecessor employees over predecessor employees, Respondent did not improperly limit the total number of employees in the unit during relevant times in order to avoid recognition of the Union or for any other reasons improper under the Act. Thus Respondent did not fail and refuse to hire the *full* complement of the predecessor's employees.

#### REMEDY

Having found Respondent has engaged in certain unfair labor practices, I shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act, including the posting of a remedial notice and the mailing of the notice to each of the predecessor's unit employees not now employed by Respondent.

Having found that Respondent violated Section 8(a)(1) and (3) of the Act by wrongfully failing and refusing to hire certain unit employees of the predecessor, I shall order Respondent to offer employment to unit employees

<sup>8</sup> I also find that, given the large numbers of applicants for work on November 9 and 10, 1981, Respondent could have immediately hired additional nonpredecessor employees if it desired to expand its staff further. I make this finding despite the statement of Banister to an applicant that he found the nonpredecessor employee applicants were not as experienced as the predecessor employees.

employed by the predecessor who would now be employed, but for its illegal motivation noted *supra*, discharging if necessary any employees hired in their place. Further I shall order Respondent to make all unit employees of the predecessor, who would have been employed during certain times in the past, but for Respondent's illegal motivation, whole for any losses they may have suffered by virtue of the discrimination against them by paying to them a some of money equal to that which they would have earned if properly employed by Respondent, minus interim earnings, if any, to be computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus appropriate interest as calculated in *Florida Steel Corp.*, 231 NLRB 651 (1977), see also *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Having rejected the contention of the General Counsel that Respondent improperly refused to hire the entire unit complement of 30 employees of the predecessor, I shall order Respondent to make whole and offer employment to only those employees of the predecessor who would have received the positions given nonemployees of the predecessor, but for the discrimination against them. Thus Respondent will not be required to expand his employment complement and make-whole calculations required *supra* shall not be based on an employment complement different from that actually employed at any given time. The measure of harm suffered by the unit employees of the predecessor shall be measured by the hours worked by the nonpredecessor employees hired by Respondent in their stead. Respondent shall be obligated to replace all nonpredecessor employees now employed, if their positions may be properly filled by the predecessor employee applicants.

The identification of specific employees of the predecessor wronged by the acts of Respondent in the past, who are to be made whole, and the specific employees of the predecessor who will be offered employment by Respondent under the terms of this decision involved consideration of which employees from the predecessor's unit complement had the appropriate skills and abilities to do certain tasks and therefore would have received the particular jobs filled by nonpredecessor employees. The identification of the specific individuals from the predecessor's unit who will benefit under the terms of this Order is best deferred to the compliance stage of the proceeding.

To insure that employees of the predecessor who are not to be immediately offered employment by Respondent under the terms of this Decision will be properly considered by Respondent for any future unit openings, I shall require Respondent to consider them for future openings and to notify each unit employee of the predecessor, the Regional Director, and the Union<sup>9</sup> in writing (1) each time it has a unit job opening and (2) each time it hires a new unit employee who was not a unit employee of the predecessor. This notification shall include the job title and duties of the open position. Once the job is filled, Respondent will certify that those employees of the predecessor who applied for work with Respondent, and have not withdrawn their application or otherwise

<sup>9</sup> The Union has been recognized by Respondent as the representative of employees in the unit.

affirmatively indicated they did not wish to be considered for employment, have been considered for the position. This notification obligation shall continue for one calendar year but in no event shall continue after all the predecessor's unit employees have been offered employment by Respondent.

Based on the foregoing findings of fact and the record as a whole, I make the following:

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) and (3) of the Act by failing and refusing to hire certain of the unit employees of its predecessor because of said employees, union activities and because Respondent sought to avoid becoming obligated to recognize and bargain with the Union.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Based on the foregoing findings of fact, conclusions of law, and upon the entire record herein, and pursuant to Section 10(c) of the Act, I hereby issue the following:

#### ORDER<sup>10</sup>

The Respondent, Hubacher Cadillac, Inc., a Delaware Corporation, Sacramento, California, its officers, agents, successors and assigns, shall:

1. Cease and desist from:
  - (a) Failing and refusing to employ unit employees of its predecessor because of those employees' union activities and because of a fear that hiring said employees might obligate it to recognize and bargain with the Union.
  - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.
2. Take the following affirmative action which is necessary to effectuate the purposes and policies of the Act:
  - (a) Offer to unit employees of the predecessor, who would have been employed but for the illegal discrimination against them, immediate employment, discharging if necessary any employees hired in their place, without prejudice to their seniority and other rights and privileges said employees to be identified in the manner set forth in the section of this Decision entitled "Remedy."
  - (b) Make the unit employees of the predecessor, who would have been employed but for the illegal discrimination against them, whole for any lost of earnings and other rights and privileges they may have suffered as a result of the illegal discrimination against them, said employees to be identified and the measure of injury to be

<sup>10</sup> In the event no exceptions are filed as provided in 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.

determined in the manner set forth in the section of this Decision entitled "Remedy."

(c) Notify the unit employees of the predecessor, the Regional Director and the Union, in writing, (1) each time it has a unit opening and (2) each time it hires a unit employee who was not a unit employee of the predecessor. Notification shall include the job title and duties of the position to be filled. Once the position is filled, Respondent shall certify that those employees of the predecessor who applied for work with Respondent and have not withdrawn their application or otherwise affirmatively indicated they do not wish to be considered for employment, have been considered for the position filled. This notification procedure shall continue for 1 year but shall in no event continue after all the predecessor's unit employees have been offered employment by Respondent.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all records necessary to ascertain the sums due under this Order and to otherwise ensure that the terms of this Order have been complied with.

(e) Post at its business location in Sacramento, California, copies of the attached notice marked "Appendix."<sup>11</sup> Copies of the notice, on forms to be provided by the Regional Director for Region 20, after being duly signed by an authorized representative of Respondent, shall be posted by 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 Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Mail copies of the attached notice marked "Appendix" to all unit employees of the predecessor not now employed by Respondent.

(g) Notify the Regional Director for Region 20, in writing, within 20 days of this Order, what steps Respondent has taken to comply herewith.

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<sup>11</sup> In the event that 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."