

Consolidated Equities Realty #3, LLC d/b/a Bob Townsend/Colerain Ford and District Lodge 34, International Association of Machinists and Aerospace Workers, AFL-CIO. Cases 9-CA-42545, 9-CA-42709, 9-CA-42710, and 9-CA-42921

November 29, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH

On March 26, 2007, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order as modified.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Consolidated Equities Realty #3, LLC d/b/a Bob Townsend/Colerain Ford, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(b).

“(b) Make Stanley Walton, Harold Thornton, Samuel Dishun and the Estate of Kevin Botkins whole for any loss of earnings and other benefits suffered as a result of

¹ There are no exceptions to the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(1) of the Act by threatening that unionization would be futile, or Sec. 8(a)(3) and (1) of the Act by laying off employee Stanley Walton. There are also no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by unilaterally warning and discharging employee Samuel Dishun.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they 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 the findings.

The Respondent contends that some of the judge's findings and conclusions demonstrate prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

³ We shall modify the judge's recommended Order to conform to the violations found.

the unlawful action taken against them, in the manner set forth in the remedy section of the decision.”

David L. Ness, Esq., for the General Counsel.
James F. Hendricks Jr. and Michael P. MacHarg (on Brief), Esqs., for the Respondent.
David L. Porter, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Cincinnati, Ohio, on January 23, 2007, pursuant to a consolidated complaint that issued on August 23, 2006.¹ The complaint alleges that the Respondent threatened employees that it would never sign a collective-bargaining agreement in violation of Section 8(a)(1) of the National Labor Relations Act (the Act), laid off employee Stanley Walton because of his union activities in violation of Section 8(a)(3) of the Act, and laid off Walton, Kevin Botkins, and Harold Thornton and warned and discharged Samuel Dishun without notice to or bargaining with the Union in violation of Section 8(a)(5) of the Act. I find no violation of Section 8(a)(1) and (3) of the Act, but find that the Respondent did violate Section 8(a)(5) of the Act as alleged in the complaint.²

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Consolidated Equities Realty #3, LLC d/b/a Bob Townsend/Colerain Ford, the Company, is a corporation engaged in the retail sale and service of automobiles at its facilities on Colerain Avenue, Cincinnati, Ohio. The Company annually derives gross revenues in excess of \$500,000 from its operations and purchases and receives goods valued in excess of \$50,000 directly from points outside the State of Ohio. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that District Lodge 34, International Association of Machinists and

¹ All dates are in 2005, unless otherwise indicated. The charge in Case 9-CA-42545 was filed on January 6, 2006, and amended on January 18, 2006. The charge in Case 9-CA-42709 was filed on March 16, 2006, and was amended on June 26, 2006. The charge in Case 9-CA-42710 was filed on March 16, 2006. The charge in Case 9-CA-42921 was filed on June 26, 2006, and was amended on August 21, 2006.

² At the outset of the hearing, I denied a motion by counsel for the General Counsel to keep the record open for the potential consolidation of Case 9-CA-43304 with these cases. The investigation of the charge in that case had not been concluded. The conduct alleged in that charge is unrelated to the allegations of the complaint and occurred in November 2006, almost a year after the alleged unfair labor practices in this proceeding.

Aerospace Workers, AFL–CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Bob Townsend Ford operated as an automobile dealership on Colerain Avenue in Cincinnati beginning in the late 1960s. On September 1, 2005, the dealership was purchased by Consolidated Equities Realty #3, LLC, a corporation formed by three investors including Yun Hee Jang, who is president and chief executive officer. Since September 1, she has been directly involved in the operations of Bob Townsend/Colerain Ford. The dealership has a parts and service department. In September, the service department operated with four teams, designated as the red, blue, yellow, and green teams, each of which included a service writer, who met and directly dealt with customers, and automotive technicians, one of whom was the lead technician, who actually performed the maintenance and repair of the vehicles.

Union activity among the employees began shortly after the Company purchased what had formerly operated as Bob Townsend Ford. Representation petitions were filed and, in November, elections were held in three separate units. On November 8, a representation election was held in the automotive technicians unit, and on November 16, the Union was certified as the exclusive collective-bargaining representative of that unit. Following separate representation elections held on November 18, the Union, on November 28, was certified as the exclusive collective-bargaining representative of the service writers unit and parts department unit, respectively.³

The alleged threat that the Respondent would never sign a collective-bargaining agreement purportedly occurred before the elections. The remaining allegations relate to conduct that occurred after the elections. The layoffs occurred in late November, and the discharge occurred on December 29.

B. The 8(a)(1) Allegation

The complaint alleges that President Jang threatened employees with the futility of organizing by stating that the Company would never sign a contract with the Union. Following the filing of the representation petitions, Jang hired a consultant who spoke to employees regarding unionization. Employees

recall that the individual was named Frank. The record does not reflect Frank's last name or whether he was an individual consultant or an employee of a consulting firm. Frank made separate presentations to the employees in the three separate units. The complaint does not contain any allegation relating to Frank. The evidence in support of the single complaint allegation is that President Jang, who was present briefly at some of the presentations, stated to the automotive technicians that the Company would never sign a contract with the Union.

Automotive technician Gary Shuler recalled attending three meetings at which Frank spoke. He initially testified that Jang was present for some period of time at all of these meetings, but, on cross-examination, admitted that he could not "say for sure" whether she was present for the first meeting. He recalled that Frank spoke about how the employees did not need a union but recalled nothing specific that Frank said at any of the meetings. At the last meeting, which he placed as occurring about a week before the election but the date of which he could not recall, Shuler recalled that Jang stated that she felt that employees had "disrespected her," that she would spend "every dime" to keep the Union out, and that, if the Union was voted in, that she, "by law," would have to "go meet," but that she "did not have to speak, negotiate a contract, or sign a contract."

Stanley Walton, in his initial testimony, recalled only that Jang said that she would spend "every dollar" to keep the Union out. When questioned by the representative of the Charging Party, he recalled that Jang also stated that she "would not get a contract." Walton admitted that the foregoing statement was not in a pretrial affidavit that he had signed on January 23, 2006, slightly more than 2 months after the event.

Jang acknowledged speaking to employees prior to the elections, but she denied making any statement relating to not signing a contract. She recalls that, following the elections in which the employees in the three separate units selected the Union as their collective-bargaining representative, employees questioned her regarding what would happen next. In a meeting that she places about 10 days after the elections, she informed the employees that they "now had union representation" but that she was not "legally required to agree to anything but I did have to bargain in good faith, which I would do."

No employee disputed Jang's testimony that she spoke about the Company's bargaining obligation after the election. Both Shuler and Walton heard Jang make some statement that they interpreted and from which Walton concluded that the Union would not get a contract and Shuler concluded that Jang would not sign a contract. Either conclusion could have been drawn from an interpretation of Jang's admitted statement that she was not "legally required to agree to anything." I credit Jang's denial that she made any statement relating to not signing a contract with the Union. I shall recommend that this allegation be dismissed.

C. The 8(a)(3) Allegation

The complaint alleges that Stanley Walton was laid off because of his union activities in violation of Section 8(a)(3) of the Act. Walton served as an observer for the Union at the election. Pursuant to *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), in order to establish that an

³ The automotive technicians unit is:

All full-time and regular part-time automotive technicians employed by the Employer at its 8571 Colerain Avenue, Cincinnati, Ohio facility, but excluding all other employees, including parts department employees, service advisors, shuttle drivers, porters, lot techs, body shop employees, office clerical employees, professional employees and all guards and supervisors as defined in the Act.

The service writers unit is:

All full-time and regular part-time service writers employed by the Employer at its 8571 Colerain Avenue, Cincinnati, Ohio facility, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

The parts department unit is:

All full-time and regular part-time parts department employees employed by the Employer at its 8571 Colerain Avenue, Cincinnati, Ohio facility, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

employee has been discriminated against in violation of Section 8(a)(3) of the Act the General Counsel must establish that the employee engaged in union activity, that the employer had knowledge of that activity, that the employer bore animus towards union activity, and that the employer's animus was a substantial and motivating factor for the alleged discriminatory action. Walton's presence at the election as an observer for the Union establishes the criteria of activity and knowledge.

The General Counsel argues that animus is established by Jang's statement that she would never sign a contract with the Union; however, I have found that she made no such statement. Thus, because there is no direct evidence of animus, any finding of animus must be inferred from the circumstances surrounding the layoff of Walton. Although all employees shared the same September 1 seniority date with the Company, Walton had worked for the predecessor since 1994, and was fully certified to repair diesel engines. Only one other automotive technician, Greg Beetz, had worked longer for the predecessor and only one other technician, Hugh Busch, was certified to repair diesel engines. The General Counsel notes the foregoing, points out that Walton had been chosen as a lead technician, and argues that the Respondent's selection of Walton was discriminatorily motivated. I agree that choosing to lay off this long-term skilled employee raises a suspicion of discriminatory motivation; however, suspicion is no substitute for proof. The Respondent, as hereinafter discussed, unilaterally determined to "cut out" the blue team, whose service writer Harold Thornton "volunteered" for layoff and whose lead automotive technician was Walton. Thus, the Respondent acted consistently, albeit unilaterally, by laying off Walton. Although, as hereinafter discussed, I find that the foregoing unilateral action violated Section 8(a)(5) of the Act, I shall recommend that the 8(a)(3) allegation be dismissed.

D. The 8(a)(5) Allegations

1. Facts

When the Company took over the Bob Townsend dealership, there was no hiatus. After commencing operations, Jang, whose background is in accounting, realized that the parts and service operations of the dealership, referred to as the fixed operations, were not profitable. She testified that she and her partners "focused on . . . [the] overstaffing of the departments." Asked whether she "took any steps during the first two months of operations, mainly September and October, to cut the costs of fixed operations," Jang answered, "No, I didn't, but I wanted to." Asked why she took no steps, Jang explained that she was told by "our consultant" who was speaking to the employees regarding unionization that she could not "do any kind of layoffs or anything to try to cut back on our expenses because . . . I would be charged with unfair labor practices. So I would have to wait until after the election." It does not appear that the consultant gave any advice or direction to her regarding the Company's obligations in the event that the employees selected the Union as their collective-bargaining representative.

Asked whether "after the election, did you take any steps to cut costs at your dealership," Jang answered that she did, that "the main thing we wanted to do was look at the work and decide who would be the best as far as the layoffs are concerned.

We had decided *at that time* that the best thing to do would be to cut one team out of the service department." (Emphasis added.)

Jang admitted that she gave no notice or opportunity to bargain to the Union. When asked whether, when she made the decision to eliminate a team, she bargained with the Union, Jang answered, "I didn't think about it."

On November 22, parts department employee Kevin Botkins was laid off. Jang explained that the parts department had five employees, two at the front desk who dealt with retail customers, and three at the back desk who provided parts to the automotive technicians who repaired vehicles in the service department. Having made the decision to lay off a team in the service department, Jang determined that three employees at the back desk were unnecessary and laid off Botkins.

Service writer Harold Thornton was aware that business was slow. He anticipated that the slow business could lead to layoffs. He was aware that, of the four service writers, he was the most financially secure. He spoke with Service Manager John Collins in mid-October, stating that he could feel "a change happening." He then told Collins that, if the Company was "going to lay anyone off, please consider me." He then explained to Collins that he felt he was better able "financially to survive" due to the family commitments of the other service writers.

On November 30, 2 days after the certification of the Union as the collective-bargaining representative of the service writers unit, Jang laid off Thornton, who was the service writer for the blue team. She also laid off Walton, who was the lead technician on the blue team. Jang testified that Walton was selected for layoff because the service writer for the blue team, Thornton, had "volunteered" to be laid off. The two technicians who had been on the blue team, Jim Riley and Jason Holtman, an asset student (an automotive technician in training), were reassigned to other teams, Riley to the green team, Holtman to the red team.

On December 1, Union Business Representative Steven Graham wrote Jang, stating that it had been brought to his attention that the Company had laid off bargaining unit members and advising her that "layoffs are a mandatory subject of bargaining." The letter then states, "The Union demands that you reinstate any and all represented members immediately with back pay."

On December 12, counsel for the Company responded. The response does not address the request for reinstatement and backpay, nor does it assert that the layoff decisions were made prior to the Union's election victories. It states, "If and when the company decides to reinstate anybody on lay-off they will do so and notify you."

In October, prior to the elections, the Company distributed an employee handbook that addressed various matters including absenteeism, tardiness, and discipline. In pertinent part the handbook provides that "each employee is expected to be at work on time each day. Excessive absenteeism or tardiness can result in discipline, up to and including discharge."

Although the employee handbook does not prescribe a progressive discipline system, documentary evidence, a suspension issued to automotive technician Glenn Gillette in January 2006

after he was absent on a Thursday with no call in and on the following day with a call in after noon, establishes that discipline more severe than a warning but less severe than discharge occurs. Jang admitted, and the foregoing suspension confirms, that the level of discipline given by managers is discretionary.

Samuel Dishun began working in the parts department of the predecessor in 1992. He continued to work in the parts department after the Company took over the dealership on September 1. It is undisputed that, prior to December 28, Dishun had never been disciplined, and it is also undisputed that the Company had not disciplined any employee for tardiness.

A stipulation by the parties reflects 62 instances of tardiness by employees in the parts department from September through December. In November, after the distribution of the handbook, employee Botkins, who was laid off on November 22, was never tardy. Employee Andrew Edwards, who was not laid off, was tardy five times, and employee Dishun, who was not laid off, was tardy seven times.

In December, employee Edwards was tardy 3 times and employee Dishun was tardy 15 times. The record does not reflect whether the tardies were for only a minute or two or for longer periods of time. President Jang testified that discipline was not triggered by a specific number of tardies, that it was within the discretion of the manager. Bill Collins became manager of the parts department in late November or early December. Jang did not recall the date he was hired. She acknowledged that he consulted with her before issuing a warning to Dishun on December 28 because he was a new manager.

On the evening of December 28, Parts Manager Bill Collins called Dishun to his office and presented him with a written warning stating that “[T]ardiness from Sam Dishun is not acceptable and he will be expected to be at work by the scheduled time of 9:00 am everyday [sic] effective immediately.” Dishun noted that there was a discrepancy between the timeclock and the wall clock. Collins replied that he would “straighten that out tomorrow.” There is no evidence that Dishun had been tardy on December 28. It is undisputed that no notice was given to the Union that Dishun had been disciplined for tardiness.

On Thursday, December 29, Dishun arrived at work prior to 9 a.m., but, before clocking in, turned in his dirty uniforms, which he did every Thursday. As he approached the timeclock, he observed Parts Manager Collins at the timeclock. The wall clock showed the time as 3 minutes past 9 a.m. Whether the timeclock was synchronized with the wall clock will never be known because Collins did not permit Dishun to punch the timeclock. He discharged him, stating that he “just gave you a written warning last night” and that he was 3 minutes late. Dishun explained that he had “stopped to drop off my uniforms at the locker room.” Collins told him, “Well, we’re done.” No notice was given to the Union that Dishun was discharged.

Negotiations for collective-bargaining agreements covering the three units began in March 2006, and concluded in November 2006. The current agreements, effective November 22, 2006, contain virtually identical general language but differing provisions specific to the units regarding wages. All three agreements contain the following article XXIII, definition of agreement, commonly referred to as a zipper clause:

It is agreed that during the negotiations leading to the execution of this Agreement, the Union has had full opportunity to submit all items appropriate for collective bargaining; that the Union expressly waives the right to submit any additional items for negotiation during the term of this Agreement irrespective of whether the item was or was not discussed during the course of negotiations . . . and that this Agreement incorporates the full and complete understanding between the parties . . . , all previously existing rights not specifically incorporated herein are hereby terminated.

Union Representative David Porter’s uncontradicted testimony establishes that there was no discussion relating to the effect of the foregoing paragraph in regard to the outstanding complaint in this case, which had issued on August 23, 2006.

2. Analysis and concluding findings

The vice in failing to bargain regarding layoff decisions and discharge decisions is “the injury to the union’s status as bargaining representative.” *Great Western Produce*, 299 NLRB 1004, 1005 (1990). That injury was demonstrated at Bob Townsend/Colerain Ford when the Respondent, without notice to or consultation with the newly selected collective-bargaining representative of the employees, began unilaterally laying off employees and discharging them. It is undisputed that the Respondent gave no notice or opportunity to bargain to the Union. President Jang “didn’t think about it.”

a. *The layoffs*

The Respondent, in its brief, citing various cases including *Starcraft Aerospace, Inc.*, 346 NLRB 1228 (2006), and *Consolidated Printers*, 305 NLRB 1061, 1067 (1992), correctly states that an employer is not obligated to bargain before carrying out a decision made prior to a union demonstrating majority support even though the decision is effectuated after the bargaining obligation attaches. The Respondent argues that “the un rebutted record testimony in this case proves that the Respondent made the decision to lay off employees prior to the Union’s certification.” Contrary to that argument, there is no testimony, un rebutted or otherwise, that the Respondent made any layoff decision prior to the Union demonstrating its majority status, and no such contention was made by counsel for the Respondent in his opening statement or at any other time at the hearing. The only testimony quoted in the brief of the Respondent is the testimony of Jang that the consultant informed her that she could not “do any kind of layoffs or anything to try to cut back on our expenses because . . . I would be charged with unfair labor practices. So I would have to wait until after the election.”

Jang did not claim that she had made a decision to “do layoffs or anything” at the time she received that advice from the consultant. Consistent with that advice, she did nothing. She waited until after the election to address the problem. Although Jang and her partners were concerned about overstaffing, Jang and her partners made no decision. When asked whether she took any steps to cut costs in September and October, Jang testified, “No, I didn’t, but I wanted to.” Jang did not testify what she “wanted” to do. Regardless of what she wanted to do, wanting to do something does not constitute deciding to do

something. When asked whether, “after the election,” she took any steps to cut costs, Jang answered that “we,” referring to herself and her partners, wanted to “look at the work and decide who would be the best as far as the layoffs are concerned. We had decided *at that time* that the best thing to do would be to cut one team out of the service department.” (Emphasis added.) The Respondent’s brief does not cite the foregoing testimony.

In *Starcraft Aerospace, Inc.*, supra, slip op. at 2 and 6, the Board determined that the layoff decision therein was made prior to December 8 and discussed by management on December 8, 3 days prior to a representation election scheduled for December 11. In that discussion, counsel cautioned that, if the decision was implemented prior to the election, it could be perceived as an unfair labor practice. In this case, there is no evidence that any decision was made prior to the election in the automotive technicians union, which occurred on November 8, or the November 18 elections in the service writers and parts department units. Jang did not at any time claim that the layoffs were implemented pursuant to a decision made prior to the elections in which the Union demonstrated its majority status. Following the advice of the consultant, Jang waited until after the elections to make any decisions or take any steps to reduce costs. The absence of any decision prior to the elections is established by Jang’s testimony. In response to being asked whether “after the election” she took steps to cut costs, Jang answered that she and her partners “look[ed] at the work” and “decide[d] . . . at that time . . . to cut one team out of the service department.” Jang and her partners had not even looked at the work with a view towards layoffs until after the election, much less made a decision that was then held in abeyance until after the elections.

President Jang admitted that the layoffs occurred in order to reduce labor costs. Thus, the decision falls under the second category of management decisions enumerated in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), that are “almost exclusively ‘an aspect of the relationship’ between employer and employee” and are mandatory subjects of bargaining. *Kajima Engineering & Construction*, 331 NLRB 1604, 1620 (2000). Thus, in this case as in *Kajima Engineering & Construction*, “it is unnecessary to engage in the *Dubuque Packing Co.* [303 NLRB 386 (1991)] . . . type of multistep analysis regarding subjects falling within this category . . . [because] the lack of available work layoff decisions here constituted mandatory subjects of bargaining. *Winchell Co.*, 315 NLRB 526 fn. 2 (1994); *Westinghouse Electric Corp.*, 313 NLRB 452, 453 (1993); *Holmes & Narver*, [309 NLRB 146 (1992)] . . . at 147.” *Ibid.*

Even when an employer has a past policy of laying off employees when business is slow, after a bargaining obligation exists it is not free to act unilaterally. It must give notice and bargain with the employees’ collective-bargaining representative. *Adair Standish Corp.*, 292 NLRB 890 (1989). This Respondent had no established policy or practice regarding reduction of its fixed costs. There was no past practice that employees who indicated a willingness to be considered for layoff would automatically be chosen. As the General Counsel correctly points out, Thornton’s willingness to be considered if a

layoff occurred did not vitiate the Respondent’s bargaining obligation. *All American Gourmet*, 292 NLRB 1111, 1135 (1989). Nor was there any precedent for automotive technician Walton, who had been assigned to the blue team but whose duties were totally different from those of service writer Thornton, becoming collateral damage due to Thornton’s actions. Although Jang testified that the decision made was “to cut one team out of the service department,” the blue team was not cut out entirely. Only the service writer and lead technician were laid off. The two technicians who worked under lead technician Walton, one of whom was in training, were retained and assigned to different teams.

It requires little speculation to believe that the Union, had it been given the opportunity, would have maintained that, insofar as the entire blue team was not being laid off, Walton, who had served as an observer for the Union at the representation election and who was second in seniority with the predecessor and certified to repair diesel engines, should not be laid off. Costs could be reduced in various ways other than layoffs, including introducing rotating shifts or instituting the option of job sharing. See *Holmes & Narver*, supra at 147. Union Steward Gary Shuler testified that, when former team leader, Bob Lay, had that position taken away, he was “moved down” to automotive technician. Although the record does not establish whether this occurred under the Respondent or the predecessor, demotion of Walton, rather than layoff, was certainly an option open to the Respondent.

Similarly, insofar as there was no notice to the Union regarding the layoff of a parts department employee, there was no opportunity for the Union to argue that Botkins should not be laid off and some other adjustment be made, such as dividing the total hours needed to operate the parts department among the work force. I am mindful that Botkins’ layoff on November 22 occurred after the parts department employees selected the Union as their collective-bargaining representative in the representation election but prior to the Union’s certification. It is well settled that an employer’s unilateral actions during the period pending certification following a union’s election victory are taken at its peril.

The Respondent, by addressing the need to reduce fixed costs by unilaterally implementing a policy of layoffs without notice to or bargaining with the Union and thereafter selecting the employees to be laid off without notice to or bargaining with the Union violated Section 8(a)(5) of the Act.

b. The warning and discharge

Although the Respondent had a published rule prohibiting tardiness, that rule was not enforced. The absence of enforcement is established by the admission of Jang that, prior to December 28, no employee had been disciplined for tardiness and the stipulation of the parties that reflects multiple instances of tardiness by employees in the parts department. Tardiness played no role in the Respondent’s layoff decisions insofar as Kevin Botkins, who had no tardies in November, was chosen for layoff whereas employee Andrew Edwards, who was tardy five times in November, and employee Samuel Dishun, who was tardy seven times in November, were not laid off. Neither Edwards, who was tardy 3 times in December, nor Dishun, who

was tardy 15 times, were disciplined on any occasion of tardiness prior to December 28. There is no evidence that Dishun had been tardy on December 28 when he was warned for tardiness. The Respondent had, prior to that date, tolerated tardiness and overlooked tardiness infractions.

The Respondent's brief does not address the discharge of Dishun. It is undisputed that there was no notice to the Union regarding the warning issued to Dishun on December 28. On December 29, when Dishun attempted to clock in after turning in his dirty uniforms, Parts Manager Collins stated that he had given Dishun a "written warning last night" and that he was 3 minutes late. Dishun explained, to no avail, that he had "stopped to drop off my uniforms at the locker room."

A unilateral change in enforcement policy violates the Act. "[D]espite the Respondent's written policy . . . the Respondent had not previously enforced this requirement. . . ." *Flambeau Airmold Corp.*, 334 NLRB 165, 166 (2001). The Respondent's unprecedented enforcement of its previously unenforced tardiness policy implemented a change in policy that affected employees' terms and conditions of employment. The Union was not informed that Dishun had been warned on December 28 or otherwise given notice that the Respondent had changed the terms of employment of employees by disciplining them for tardiness. Although the Respondent does not purport to have a progressive discipline system, the Respondent treated the warning issued to Dishun as a final warning, even though the warning does not state that the next offense of the previously unenforced prohibition of tardiness would result in termination. "If the Respondent's unlawfully imposed rules or policies were a factor in the discipline or discharge, the discipline or discharge violates Section 8(a)(5)." *Great Western Produce*, supra. The unilateral implementation of enforcement of the tardiness policy resulted in the discharge of Dishun. I find that the discharge of Samuel Dishun violated Section 8(a)(5) of the Act.

CONCLUSION OF LAW

By laying off and warning and discharging employees without notice to and bargaining with the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.⁴

In cases in which the General Counsel alleges an 8(a)(5) violation as a result of failure to bargain over layoffs in circumstances in which it was obligated to bargain, "then a full backpay remedy for the layoffs is in order." *Fast Food Merchandisers*, 291 NLRB 897, 901 (1988). Likewise, when employees are discharged pursuant to unlawfully changed rules or policies, the discharged employees are entitled to reinstatement and a

full backpay remedy. See *Great Western Produce*, supra at 1008.

At the hearing, counsel for the Respondent argued that the zipper clause constituted settlement of "all outstanding issues" including the issues raised by the complaint. In its brief, counsel for the Respondent, while maintaining that the Respondent was not obligated to bargain over the layoff decision, argues that any effects bargaining obligation was waived because, after the Union had notice of the layoffs, "it never sought to engage in effects bargaining" and it agreed to the definition of agreement, the zipper clause, in which it agreed that, during negotiations, it had the "opportunity to submit all items appropriate for collective bargaining; that the Union expressly waives the right to submit any additional items for negotiation during the term of this Agreement. . . ."

Contrary to the foregoing argument, the decision to lay off was made after the elections when Jang and her partners "look[ed] at the work and decide[d] . . . at that time that the best thing to do would be to cut one team out of the service department." Insofar as the Union did not learn of the layoffs until after they had occurred, the Union was presented with a fait accompli, and "[a] union is not obligated to request bargaining over a matter that is already a fait accompli. See *RCA Corp.*, 296 NLRB 1175, 1179 (1989), and cases cited; *Intersystems Design Corp.*, 278 NLRB 759 (1986)." *United Parcel Service*, 323 NLRB 593, 596 (1997). Although not obligated to request bargaining, the Union, as soon as it learned of the layoffs, informed the Respondent of its obligation to bargain and requested reinstatement of the affected employees. There was no waiver.

A waiver must be clear and unmistakable. It is undisputed that there was no discussion of the effect of the zipper clause with regard to the outstanding unfair labor practice complaint which had issued on August 23, 2006. "Any waiver of an employer's backpay liability by a union cannot be lightly inferred, however, but must be in 'clear and unmistakable' language. . . . A wrap-up clause of this nature, which does no more than indicate that the parties have embodied their full bargaining agreement in the written contract, affords no basis for an inference that the agreement contains an implied understanding over and beyond those actually written into the contract." *Master Appliance Corp.*, 164 NLRB 1189, 1190 (1967). See also *United States Gypsum Co.*, 155 NLRB 1216, 1219 (1965). The contract reflects the agreement between the parties relating to the employment relationship. It does not purport to alter statutory rights or settle an outstanding unfair labor practice complaint. The General Counsel, in August 2006, had issued a complaint seeking an adjudication in vindication of the alleged infringement of statutory rights. The Respondent made no motion to dismiss the complaint upon execution of the collective-bargaining agreement in November 2006. Even if there were some basis for claiming a purported waiver, there would remain the question whether "under the facts in any given case would such a waiver effectuate the policies of the Act?" *Finishline Industries*, 181 NLRB 756, 759 (1970). The zipper clause does not preclude an appropriate remedy for the unfair labor practices found herein.

⁴ Kevin Botkins died in October 2006, thus, obviating the remedy of reinstatement. I shall recommend that his estate receive whatever backpay to which he would have been entitled.

The Respondent having unlawfully laid off Stanley Walton, Kevin Botkins, and Harold Thornton and having unlawfully warned and discharged Samuel Dishun, it must offer Stanley Walton, Harold Thornton, and Samuel Dishun reinstatement and make them and the estate of Kevin Botkins whole for any loss of earnings and other benefits, computed on a quarterly basis from their respective dates of termination to date of proper offer of reinstatement or date of death, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent must also post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, Consolidated Equities Realty #3, LLC d/b/a Bob Townsend/Colerain Ford, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off and warning and discharging employees represented by District Lodge 34, International Association of Machinists and Aerospace Workers, AFL-CIO in its automotive technicians unit, service writers unit, and parts department unit without giving notice to and bargaining with the Union.

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

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

(a) Within 14 days from the date of this Order, offer Stanley Walton, Harold Thornton, and Samuel Dishun full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Stanley Walton, Harold Thornton, Samuel Dishun and the estate of Kevin Botkins whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs and warning and discharge, and within 3 days thereafter notify Stanley Walton, Harold Thornton, and Samuel Dishun in writing that this has been done and that the layoffs and discharge will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Cincinnati, Ohio, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 22, 2005.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT lay off or warn or discharge any of you who are represented by District Lodge 34, International Association of Machinists and Aerospace Workers, AFL-CIO in the automotive technicians unit, service writers unit, and parts department unit without giving notice to and bargaining with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of your rights guaranteed by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Stanley Walton, Harold Thornton, and Samuel Dishun full reinstatement to their former jobs or, if those jobs no longer

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Stanley Walton, Harold Thornton, Samuel Dishun, and the estate of Kevin Botkins whole for any loss of earnings and other benefits suffered as a result of the unlawful action taken against them, with interest.

WE WILL, within 14 days from the date of the Board's Order remove from our files any reference to the unlawful layoffs and warning and discharge, and WE WILL, within 3 days thereafter notify Stanley Walton, Harold Thornton, and Samuel Dishun in writing that this has been done and that the layoffs and discharge will not be used against them in any way.

CONSOLIDATED EQUITIES REALTY #3, LLC D/B/A BOB
TOWNSEND/COLERAIN FORD