JD(SF)–25–09
Fremont, California

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES SAN FRANCISCO BRANCH OFFICE

STEVENS CREEK CHRYSLER JEEP DODGE, INC.

and

Cases 20-CA-33367
20-CA-33655
20-CA-33562
20-CA-33603

MACHINISTS DISTRICT LODGE 190, MACHINISTS AUTOMOTIVE LOCAL 1101, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

*David B. Reeves, Atty.*and *Cecily Vix, Atty.*,
San Francisco, California, for the General Counsel.

Daniel T. Berkley, Atty., (Gordon & Rees)
San Francisco, California, for Respondent.

Caren P. Sencer, Atty., (Weinberg, Roger & Rosenfeld)
Alameda, California, for the Union.

SUPPLEMENTAL DECISION

Statement of the Case

JAY R. POLLACK, Administrative Law Judge: I issued my original decision in this case on July 1, 2008. On April 20, 2009, the Board issued its Decision and Order Remanding. The Board found violations of coercive interrogation, creating the impression of surveillance, unlawfully requiring employees to execute union withdrawal cards, threatening plant closure, threatening not to hire employees because of their union affiliation, and granting wage increases to discourage union activities. In addition, the Board remanded the case to me to decide issues regarding the interrogation and discharge of employee Patrick Rocha; the March 2 pay cut threat by Service Manager James Garcia; the May 11 plant closure threat by owner Matthew Zaheri, and the unilateral change and refusal to provide information allegations. Further, the Board ordered that I address the remedial relief sought by the Union.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the post-hearing briefs of the parties, I make the following.

[1] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings, herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

I. Findings - Interrogaton and Discharge

Employee Patrick Rocha testified that, in December 2006, he was asked by Chris Nickerson whether he was still a member of the Local. Rocha replied that he was on withdrawal. Nickerson replied that the dealership would be a non-union shop. Nickerson denied asking any employee whether he was a member of the Union. Based on demeanor and the fact that other employees were required to obtain union withdrawals, I credit Rocha's testimony. Accordingly, I find that Respondent violated Section 8(a)(1) by interrogating Rocha as to whether he was a union member.

Employee Alque Baybayan testified that on March 5, James Garcia asked whether Baybayan had signed a paper at lunch. Garcia said that if the Union came in Baybayan's wage rate would go down. Baybayan's rate of $26 per hour would go down. Garcia denied making such a threat. I credit Baybayan's testimony. Accordingly, I find that Respondent unlawfully threatened Baybayan.

Employee Michael Lane testified that Mathew Zaheri told employees that the Union's unfair labor practice charges would cost him $100,000 to defend and could result in the loss of the business. On cross examination Lane stated that he did not "believe, I don't recall that he actually made the reference that $100,00 would cost him the business . . . ." Thus, I credit Zaheri's testimony that he did not make such a threat.

Rocha was discharged for attendance and productivity issues. Garcia testified that he counseled Rocha on February 12, 19 and 26 about his attendance problems. Rocha was late on February 27. According to Garcia, he contacted Zaheri and recommended discharge. Zaheri approved the discharge. Garcia testified that he intended to discharge Rocha on March 2 - the end of the pay period - but was delayed due to the unexpected arrival of a Chrysler factory representative. Rocha clocked out early on March 2. Garcia gave instructions to prepare Rocha's final check on Monday morning, March 5. The check gives Rocha credit for eight hours on March 5. Garcia could not find Rocha after the check had been prepared so he terminated the employee on March 6. Rocha was discharged when he reported for work on March 6. Rocha's separation notice states "Patrick's inability to get the work done correctly and on time" and "left early without permission did not advise anybody that he left."

Frontella testified that he spoke to Rocha in January 2007 about his late arrivals, his long lunches and early departures. Frontella also testified that he spoke to Garcia about Rocha's attendance the second week of February. He further testified that he spoke to Rocha about diagnostic issues.

In the period from January 22 to March 2, 2007, (30 working days) Rocha worked less than a six-hour day on eleven occasions and took more than an hour lunch on nine days. On four days, Rocha took more than a two-hour lunch. During that same 30-day period, Rocha left work early on 29 days.

Rocha testified that his early departures and extended lunches were due to the failure to assign him a sufficient number of repair work orders on a regular basis. Rocha testified that he complained to Garcia about this. Garcia admitted that Rocha made such complaints. Rocha testified that Garcia never counseled him or gave him a final warning. This testimony is not credited. Garcia's testimony is corroborated by documentary evidence.

Finally, while in defending the case in the investigation, Respondent relied on conduct of Rocha after the decision to discharge him, I do not find that such statements contradict the finding that the decision to discharge Rocha occurred before the knowledge of his union activities. The testimony of Garcia and the documentary evidence convinces me that the decision to discharge Rocha was made prior to the Union meeting of March 2. I adhere to my conclusion that the discharge of Rocha did not violate the Act. While Respondent did unlawfully threaten to blow Rocha out of the water, I find the statement was made under circumstances where Rocha was going to be discharged in any event.

General Counsel contends that a mechanic cannot cost Respondent money by clocking out early when there is no assigned work. However, Rocha did clock out when work was soon available. While Rocha did clock out when parts were not available, parts became available shortly after Rocha clocked out. Finally, I give no weight to the fact that the separation notice did not reference Rocha's prior counseling.

General Counsel asserts that Respondent should be ordered to bargain with Respondent as a remedy for its unfair labor practices. Based on this bargaining order, General Counsel contends that Respondent violated Section 8(a) (5) by not bargaining with the Union when it eliminated the job of employee Steve Rother, a lube technician. Further, General Counsel contends that Respondent refused to bargain with the Union in August 2007, when it failed and refused to furnish the Union with requested information relevant to collective bargaining.

II. Analysis and Conclusions

A. The Request for a Bargaining Order

Under *Gissel*, the Board will issue a remedial bargaining order, absent an election, in two categories of cases. The first category is "exceptional" cases, those marked by unfair labor practices so "outrageous" and "pervasive" that traditional remedies cannot erase the coercive effects, thus rendering a fair election impossible. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The second category involves "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine the majority strength and impede election processes." Id. at 614. In the latter category of cases, the "possibility of erasing the effects of past practices and of ensuring a fair election … by use of traditional remedies, though present, is slight and . . . employee sentiment once expressed [by authorization] cards would, on balance, be better protected by a bargaining order." Id.

In determining the propriety of a bargaining order, the Board examines the seriousness of the violations and the pervasive nature of the conduct, considering such factors as the number of employees directly affected by the violations, the size of the unit, the extent of the dissemination among employees, and the identity and position of the individuals committing the unfair labor practices. Intermet Stevennsville, 350 NLRB No. 94 (2007) citing *Abramson, LLC*, 345 NLRB No. 8, slip op. at 6 (2005) (citing *Garvey Marine, Inc.*, 328 NLRB 991, 993 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001)). Accord: *Holly Farms Corp.*, 311 NLRB 273, 281 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), cert. denied in pertinent part 516 U.S. 963 (1995). A *Gissel* bargaining order, however, is an extraordinary remedy. The preferred route is to order traditional remedies for the unfair labor practices and to hold an election, once the atmosphere has been cleansed by the remedies ordered. *Hialeah Hospital*, 343 NLRB 391, 395 (2004) (citing *Aqua Cool*, 332 NLRB 95, 97 (2000)).

After the Union obtained signed authorization cards from a majority of the unit employees, Respondent committed several violations of Section 8(a)(1), including requiring employees to withdraw their union membership, threatening plant closure, wage decrease and job loss, interrogating employees, threatening not to hire an employee because of his union affiliation, and unlawfully granting wage increases. Significantly, however, no employee lost employment as a result of the Respondent's unfair labor practices, *Intermet Stevensville*, 350 NLRB 1270 (2007). These unfair labor practices do not alone support the issuance of a *Gissel* bargaining order. See *Hialeah Hospital*, 343 NLRB 391, 395-396 (2004) (declining to impose a *Gissel* bargaining order against an employer that committed a retaliatory discharge and multiple 8(a)(1) violations directly affecting the entire unit, including threats, surveillance, promise of benefits, and removal of benefits, in unit of only 12 employees).

In *Hialeah Hospital* the Board found that the case fell into the second category of Gissel cases. Thus, the Board considered both the extensiveness of the employer's unfair labor practices and their likelihood of recurrence in determining whether a bargaining order is appropriate. Id. at 614. The Board cited *Desert Aggregates*, 340 NLRB 289, 294-295 (2003), in which it found that traditional remedies were adequate to redress the employer's discriminatory layoff of two union supporters and its solicitation and promise to remedy employee grievances in spite of the unit's small size of 11 employees. Similarly, in *Aqua Cool*, supra, at 97, the Board found that a bargaining order was not warranted in a unit of eight employees where the unfair labor practices committed by the employer included only a single hallmark violation. Likewise in *Burlington Times, Inc.*, 328 NLRB 750, 752 (1999), the Board declined to issue a bargaining order where an employer threatened to close the plant, made noneconomic grants of benefits, promised to improve wages and other benefits, and solicited grievances in a unit of 11 employees.

Bearing in mind that a *Gissel* bargaining order is an extraordinary remedy and should be reserved for those exceptional cases where the possibility of erasing the effects of the unfair labor practices is slight, I find that the Board's traditional remedies are sufficient here and that the issuance of a *Gissel* bargaining order is unnecessary.

Based on failure to find a bargaining order, I find that the derivative violations of a failure to bargain over the elimination of the lube tech job and the failure to provide the Union with requested information have not been established.

B. The Union's Remedial Requests

The Union requests for an internet/intranet posting. The Union argues that modern society now communicates in electronic format. Further, the Union argues that an internet/intranet posting allows an employee time to read the notice without standing in a location indicating to the employer that his in fact reading the notice. I find merit in this argument.

The Union also seeks an order requiring the employer to read the notice to employees. In view of the order requiring internet/intranet posting, I do not believe a reading of the notice is necessary.

Conclusions of Law

1. Respondent is an employer engaged in commerce and in a business affecting 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. By unlawfully interrogating employees Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By soliciting and requiring employees holding union membership to withdraw their union membership Respondent violated Section 8(a)(1) of the Act.

5. Respondent violated Section 8(a)(1) by telling an applicant for employment that it would not hire a person affiliated with the union.

6. By threatening plant closure, wage decreases and job loss Respondent violated Section 8(a)(1) of the Act.

7. By granting wage increases to employees in order to dissuade them from supporting the Union Respondent violated Section 8(a)(1) of the Act.

8. By creating the impression of surveillance of employees' union activities, Respondent violated Section 8(a)(1) of the Act.

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

10. Respondent did not otherwise violate the Act.

The Remedy

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[2]

ORDER

Respondent, Stevens Creek Chrysler Jeep Dodge Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from:

a. Interrogating employees about their activities or the union activities of fellow employees.

[2] 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.

b. Soliciting and requiring employees holding union membership to withdraw their union membership.

c. Threatening of plant closure and job loss for employees because of their support of the Union.

d. Threatening applicants for employment that it would not hire a person affiliated with the Union.

e. Granting wage increases to employees in order to dissuade them from supporting the Union.

f. Creating the impression of surveillance of employees' union activities.

g. 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 after service by the Region, post at its San Jose, California, facilities copies of the attached Notice marked "Appendix".[3] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced or covered by 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 attached notice to all current employees and former employees employed by the Respondent at any time since March 2, 2007. The notice shall also be posted on Respondent's internet/intranet cite for the same period of time.

b. 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 Respondent has taken to comply.

Dated, Washington, D.C., July 29, 2009

_____
Jay R. Pollack
Administrative Law Judge

[3] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice "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."

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 coercively interrogate employees about their union activities or the union activities of fellow employees.

WE WILL NOT require you to execute union withdrawal cards in order to obtain employment.

WE WILL NOT threaten plant closure, wage decreases or job termination in order to discourage union activity.

WE WILL NOT threaten job applicants that they will not be hired because of their union affiliation.

WE WILL NOT grant wage increases in order to discourage union activities.

WE WILL NOT create the impression of surveillance of employees' union activities.

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

Stevens Creek Chrysler Jeep Dodge, Inc.,
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

901 Market Street, Suite 400
San Francisco, California 94103
(415- 356-5130), Hours: 8:30 a.m. to 5 p.m.

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

This notice must remain posted for 60 consecutive days from the date of posting, including posting on the Company's Internet/Intranet cite, and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.