UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

In the Matter of:

DODGE OF NAPERVILLE, INC. AND
BURKE AUTOMOTIVE GROUP, INC.
D/B/A NAPERVILLE JEEP/DODGE,
A SINGLE EMPLOYER

and Case: 13-CA-45399

AUTOMOBILE MECHANICS LOCAL NO.
701, INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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Counsel for Respondents respectfully submits the following brief to the National Labor Relations Board.

I. STATEMENT OF THE CASE

Charging Party, Automobile Mechanics Local No. 701, International Association of Machinists and Aerospace Workers, AFL-CIO (herein "Union") filed a series of unfair labor practice charges against Respondents. General Counsel issued a complaint alleging, inter alia, Respondents Dodge of Naperville, Inc. (herein “Naperville” or “Naperville facility”) and the Burke Automotive Group, Inc. d/b/a Naperville Jeep Dodge (herein "Lisle" or "Lisle facility") constitute a single employer. The complaint further alleges that Respondent’s Naperville operations were temporarily relocated and upon relocation: 1) unit employees maintained their separate identity; 2) Respondents made certain threats regarding union activity; 3) Respondents constructively discharged unit employee Robert Adams; 4) Respondents unlawfully withdrew recognition of Local 701. Respondents answered denying these charges.

More specifically, the Union alleges these acts constitute unlawful termination of technicians covered by a collective bargaining agreement and subsequently forcing them to reapply for jobs as non-union technicians. Additionally, the charges allege that Naperville did not close, but decided to “temporarily relocate" its Naperville operations to the Lisle facility.

Furthermore, the complaint alleges that when the Naperville unit employees went to Lisle to pick up their checks, they were “threatened” when told that if they chose to work at the Lisle facility, it was a non-union store, it will never be unionized, and they would not have union benefits.

As a result of these alleged acts, the Union argues that Naperville unlawfully withdrew recognition and repudiated the collective bargaining agreement that was to expire on July 31, 2009. (GC. Exhibit #2).

A hearing was brought before the Honorable Paul Bogas on March 15 and 16, 2010 at the offices for the National Labor Relations Board – Region 13 at 209 South La Salle, 9th Floor, Chicago, Il 60604. Respondents and Counsel for the General Counsel each submitted a post-hearing brief April 20, 2010. The Administrative Law Judge issued a decision August 2, 2010. Respondent respectfully submits exceptions to the Administrative Law Judge's decision and a supporting brief.

In the Administrative Law Judge's decision issued August 2, 2010, he incorrectly found, inter alia, 1) Respondents Burke Automotive Group, Inc. and Dodge of Naperville, Inc. are a single employer; 2) Respondents unlawfully withdrew recognition of Local 701; 3) repudiated the collective bargaining agreement; 4) Respondents failed to respond to the Union's request for information; 5) constructively discharged unit technicians Robert Adams and Mike Marjanovich.

The Administrative Law Judge's decision is incorrect with respect to finding Burke Automotive Group, Inc. and Dodge of Naperville, Inc. are a single employer because, under the facts of this case, analysis of single employer factors shows that Burke Automotive Group, Inc. and Dodge of Naperville, Inc. did not conduct business as a single integrated unit, did not have management common to the unit and non-unit technicians, or have centralized control over labor relations.

The Administrative Law Judge's decision is incorrect with respect to Respondents unlawfully withdrawing recognition of Local 701 because the smaller former Naperville unit technicians were accreted into the larger non-unit technicians after Dodge of Naperville, Inc. had its franchise agreement terminated. As such, the Union lost majority support and Respondents could not recognize a minority union without violating Section 8(a)(2) of the Act.

The Administrative Law Judge's decision is incorrect with respect to Respondents repudiating the collective bargaining agreement because Respondents did not "temporarily

relocate" the former Naperville unit employees. The corporation employing the former Naperville unit employees was no longer licensed by the state of Illinois to sell Dodge products after bankruptcy court proceedings. Thus, Dodge of Naperville, Inc. did not temporarily relocate.

The Administrative Law Judge's decision is incorrect with respect to Respondents failure to timely respond to the Union's July information request. The Administrative Law Judge incorrectly found that a letter dated March 4, 2010, was Respondents response to the information request. However, that letter referenced a letter dated September 8, 2009, where the letter reads, "Pursuant to your request, enclosed please find the following documents between Chrysler Group LLC and Burke Automotive Group, Inc." The Administrative Law Judge incorrectly found the September 8, 2209 letter was not a response to the Unions request for information. (JD Page 14; Lines 6-11).

The Administrative Law Judge's decision is incorrect with respect to Respondents constructively discharging unit technicians Robert Adams and Mike Marjanovich by causing them to work without union representation. This is incorrect because Respondents could not recognize and bargain with a minority union. The former Naperville unit employees lost their separate identity once they began working at the Lisle facility and, as such, were accreted into the larger non-unit technicians.

The Administrative Law Judge incorrectly reasoned that Mr. Burke intentionally had Chrysler "change the contracts" for some other reason. As the Administrative Law Judge states Mr. Burke "embarked on an effort to convince Chrysler to reverse its decision." (JD Page 3; Line 40; JD Page 4; Line 1). Actually, the record shows that Mr. Burke was trying to keep as many franchises and as many employees as possible.

The Administrative Law Judge incorrectly reasoned that Mr. Burke should have kept the Naperville facility open because he did not need a franchise agreement to sell or service used

cars. This incorrectly assumes that Mr. Burke could afford or even wanted a used car lot. (JD Page 4; Lines 8-10).

The Administrative Law Judge incorrectly applies Western Union, 224 N.L.R.B. 274, 277 (1976) reasoning that a limited number of common corporate officials using equipment at a specific location to perform duties for the other location evidences sharing of facilities. The proper analysis is whether the business themselves shared facilities.

The Administrative Law Judge incorrectly reasoned that Burke Automotive Group, Inc. and Dodge of Naperville, Inc. were a single employer because Mr. Burke did not formally deactivate his Dodge of Naperville Corporation. This is incorrect because the record shows that the state of Illinois does not require any formal deactivation proceedings in order for a corporation to become dissolved. (Tr. 63-64; JD Page 7; Lines 21-22).

The Administrative Law Judge reasoned that Respondents incorrectly argued that "Chrysler made the selection" [to close Dodge of Naperville, Inc.] The record shows that it was Chrysler's decision to allow only two Dodge dealerships in the market. Chrysler had given one franchise to another dealer subsequently leaving only one for Mr. Burke. (Tr. 380-381). Mr. Burke chose to keep the dealership that had more employees and more franchise lines.

The Administrative Law Judge incorrectly reasoned that since Dodge of Naperville, Inc. was "temporarily relocated," Mr. Burke was going to have to obtain a Jeep license for the Naperville facility in any event. The Administrative Law Judge ignores the fact that as of June 20, 2009, Dodge of Naperville, Inc. was no longer licensed to sell Dodge products. Furthermore, if Mr. Burke were to obtain a Jeep franchise at the Naperville facility, it would not be for at least seventeen (17) months due to the fact that the facility was going to be rebuilt in accordance with Chrysler negotiations. Additionally, the Administrative Law Judge incorrectly reasoned that

Dodge of Naperville, Inc. "temporarily relocated" by relying on an allegation in the complaint which Counsel for the General Counsel chose not to pursue at the hearing.

The Administrative Law Judge incorrectly reasoned that Mr. Burke "persuaded Chrysler to permit him to retain [the Lisle] franchises and, instead, sacrifice the Naperville Dodge franchise – a move that may have been in the interests of Mr. Burke's overall business enterprise, but cannot be seen as being in the interests of Dodge of Naperville as an individual." (JD Page 17; Lines15-18). This reasoning is incorrect because there is no authority or statute directing an owner of multiple businesses to prioritize a corporation with an incumbent union over a corporation without a union.

II. STATEMENT OF FACTS

A. Mr. Burke is a Common Owner of Two Dealerships

Mr. Burke owned two automobile dealerships each operating under a separate corporate identity. (Tr. 60). The two dealerships are easily confused because of certain similarities which have no legal consequence. These similarities are: 1) they both reference the suburb “Naperville” in the name of their dealership (Tr. 60); 2) they are both located on Ogden Avenue (Tr. 62); 3) they are both licensed by the state of Illinois to sell Dodge products. (Tr. 62). However, the two are dissimilar in that: 1) only one dealership, Lisle, is licensed to also sell Jeep products (Tr. 369); 2) only one dealership, Naperville, employed technicians represented by Local 701 (Tr. 39, 41); 3) each dealership operates under a separate corporate identity. (Tr. 60).

B. Burke Automotive Group, Inc., Lisle, Illinois

Burke Automotive Group, Inc., is a Delaware corporation doing business as Naperville Jeep Dodge located at 3300 Ogden Avenue in Lisle, Illinois. (Tr. 60, 62). Lisle is licensed to sell Jeep and Dodge products. Lisle employs approximately fourteen technicians, all of whom are not and have never been represented by a union. (Tr. 67).

C. Dodge of Naperville, Inc., Naperville, Illinois

Dodge of Naperville, Inc. is a wholly owned subsidiary of Burke Automotive Group, Inc. (Tr. 61). Naperville was an Illinois corporation located at 1565 West Ogden Avenue in Naperville, Illinois. (Tr. 60, 62). Naperville had been licensed to sell only Dodge products. (TR. 369). Naperville ceased doing business on June 20, 2009, when Chrysler suddenly realized they had no Jeep dealerships in the western suburbs of DuPage county. (Tr. 83-86, 344, 378). Naperville employed six technicians who were all represented by Local 701. (Tr. 39). After Chrysler decided to close the Naperville facility, Mr. Burke gratuitously offered jobs to the Naperville unit employees at the Lisle facility. (GC. Exhibit #8). Four of the six former Naperville unit employees currently work at the Lisle facility. (Tr. 414).

D. Chrysler Bankruptcy, Subsequent Franchise Agreements with Burke Automotive Group, Inc., and Assignment of Dealer Code

A mistake made in the Chrysler Bankruptcy petition created much confusion and subsequently caused Chrysler to take steps to correct this mistake. Specifically, this mistake was inadvertently moving the bankruptcy court to reject all Jeep franchise agreements in the western suburbs of DuPage county. (Tr. 83-86).

Chrysler was able to correct this mistake by having Mr. Burke continue to operate his Lisle facility licensed to sell Jeep **and** Dodge products and close the Naperville facility licensed to sell **only** Dodge products. (Tr. 90-91, 339, 344, 378, 407).

As a result, the corporation operating the Naperville facility had it's franchise terminated and was no longer licensed by the state to sell Dodge products beginning June 20, 2009 while the corporation operating the Lisle facility continued conducting business. (Tr. 378).

1. Chrysler Bankruptcy Proceedings

On May 13, 2009, Chrysler mailed a letter to each dealership. Lisle received

a letter stating that due to changes in Chrysler operations, Chrysler would be filing a motion in Bankruptcy court rejecting the franchise agreement between Lisle and Chrysler. (GC. Exhibit #24). Naperville received the other letter stating the franchise agreement between Naperville and Chrysler would be assigned to the new Chrysler Group company and Naperville would remain in business. (GC. Exhibit #25).

On June 9, 2009, the Bankruptcy court authorized the rejection of the franchise agreement between Lisle and Chrysler. (GC. Exhbit #22). However, Chrysler eventually realized its mistake of inadvertently moving the court to reject all Jeep franchise agreements in the western suburbs of DuPage County. (Tr. 83-85). As a result, Chrysler had to take steps to correct its mistake.

2. Subsequent Franchise Agreements

On June 17, 2009, Mr. Burke signed an agreement with Chrysler for new franchises allowing Lisle to sell Jeep, Chrysler, and Dodge products in Lisle. These agreements were later memorialized in writing. (GC Exhibit #27, 28). However, at the time of signing, Mr. Burke told Chrysler representative, Bruce Velisek, that the contracts incorrectly named the dealership as Dodge of Naperville, Inc. d/b/a Naperville Jeep Dodge. The correct dealership is Burke Automotive Group, Inc. d/b/a Naperville Jeep Dodge. (Tr. 90, 375-377).

The documents naming Naperville as the dealer were incorrect because: 1) Naperville never did business as Naperville Jeep Dodge (Tr. 396-397); 2) Naperville is an Illinois corporation (Tr. 60); 3) Naperville is not located at 3300 Ogden Ave., Lisle, Il. (Tr. 62); 4) Naperville was never licensed by the state of Illinois to sell Jeep products. (Tr. 369).

Chrysler decided to give Mr. Burke his Jeep franchise in Lisle providing he agree to certain conditions. (Tr. 84-86). Specifically, Mr. Burke had to rebuild his smaller Naperville facility such that it could then accommodate Chrysler, Jeep, and Dodge products. (Tr. 85).

Chrysler then, after the new facility was built, wanted Mr. Burke was to relocate his existing Jeep and Dodge franchises from Lisle to Naperville. (GC. Exhibit #20, Attachment E).

At the request of Chrysler, Mr. Burke's attorney, James Hardt, sought to correct the written agreements by writing a letter to Chrysler requesting that they reissue the agreements correctly naming Burke Automotive Group, Inc. as the proper corporate entity. (GC Exhibit #29, Tr. 376, 384).

Chrysler corrected the documents to reflect Burke Automotive Group, Inc. d/b/a Naperville Jeep Dodge as the proper corporation. (GC. Exhibit #20, Tr. 90, 375-376). The agreements were signed by Mr. Burke on July 6, 2009 and then returned to Mr. Burke signed by a Chrysler representative on July 17, 2009. (CG. Exhibit #20, Tr. 90).

E. State Licensing With Respect to Franchises, Dealerships, and Locations

Dealerships wishing to engage in the business of selling new vehicle franchise lines must be licensed by the state. The state of Illinois issues licenses to corporations governing the business of the franchise dealerships. The license is specific to the corporation, the franchise lines, and the location of the dealership. (Tr. 357-358). Additionally, the corporation must be in existence before the state will issue a license. (Tr. 371). Furthermore, the state issues license plates specific to the corporation and in turn, location. (Tr. 356, 370). Thus, a state license to sell a specific product under a specific corporation at a specific location is not transferable to any other dealership, regardless of ownership.

F. Events Occurring From Friday, June 19, 2009 through Monday, June 29, 2009

1. Late Friday, June 19, 2009

Chrysler orally informed Mr. Burke late in the afternoon that his contract between Lisle and the new Chrysler Group for Dodge and Jeep franchises in Lisle had been accepted. (Tr. 344).

Mr. Burke was instructed by Chrysler to cease doing business in Naperville beginning Saturday, June 20, 2009, and to start selling at the Lisle facility. (Tr. 102, 344, 378).

2. Saturday, June 20, 2009

The technicians were notified that: 1) the Naperville facility was closing; 2) they needed to pick up their tools by Monday, June 22, 2009; 3) they could pick up their pay checks at the Lisle facility; and 4) they could apply for jobs at the Lisle facility. (Tr. 158, 206, 248).

3. Monday, June 22, 2009

When three of the six former Naperville unit technicians went to the Lisle facility to pick up their paychecks, they were offered jobs and handed job applications. (Tr. 160, 206, 249). None of those three former unit technicians chose to fill out any of the paperwork at that time. (Tr. 183).

4. Tuesday, June 23, 2009

The former Naperville unit technicians received a letter stating they should report for work at the Lisle facility or they will be deemed as having quit. (GC. Exhibit #29).

Three of the former Naperville unit technicians went to the Union Hall and spoke with Dennis Jawor, the directing business representative for Local 701. (Tr. 209). Jawor wrote a letter for the former Naperville unit technicians to take back to the dealership the following morning. (GC. Exhibit #9).

5. Wednesday, June 24, 2009

Upon arriving at the Lisle facility, unit technician Rob Adams handed Service Manager Ray Rossi the letter written by Jawor that was virtually identical to a letter Jawor wrote and faxed to Rossi. (GC. Exhibit #3, #9). Rossi took the letter and handed Adams a time card and proceeded to show him where to work. (Tr. 166). All but one of the technicians showed up for

work on this Wednesday morning and continued to work through the end of the work day Friday, June 26, 2009.

6. Friday, June 26, 2009

A meeting was held with the following in attendance: Mr. Burke, Rossi, General Manager Sam Guzzino and several of the former Naperville unit employees. The former Naperville unit attendees were told that their wages were going to remain the same as they were at the Naperville facility and their benefits would be the same as the other technicians currently employed at the Lisle facility. However, they were also informed that the Lisle store was a non-union store and, as a result, there could be no union benefits. (Tr. 215, 256).

7. Monday, June 29, 2009

Former Naperville unit technicians Adams and Mike Marjanovich independently decided that they could not afford to work at the Lisle facility and told Rossi that they quit. (Tr. 173, 222).

G. Chrysler Assigned the Dealer Code from Dodge of Naperville, Inc. to Burke Automotive Group, Inc.

Automobile franchisees are assigned a dealer code by their respective franchisor. Each dealership has its own dealer code. (Tr. 337). The purpose of the dealer code is to facilitate internal communications between Chrysler and the dealership for billing and shipping purposes. (Tr. 337). Here, Naperville was assigned the code 45120 and Lisle was assigned the code 23581. (Tr. 337).

Lisle was named in the initial bankruptcy proceedings with the dealer code 23581. (GC. Exhibit #22). When the bankruptcy court ordered the Lisle and Chrysler franchise agreement be rejected, the dealer code attached to Lisle was also rejected. (Tr. 116).

As the events which led to Chrysler realizing they had rejected all of the Jeep franchise agreements in western DuPage county unfolded, Chrysler had to assign a new dealer code to Lisle. As a matter of convenience to Chrysler, Lisle was assigned the dealer code from the closed Naperville dealership. (Tr. 345).

III. ARGUMENT

A. Recognition of Local 701 at the Lisle Facility Would Violate Section 8(a)(2) of the Act

In the Administrative Law Judge's decision, he found that "at the time Respondent withdrew recognition from the Union, the unit continued to be an appropriate bargaining unit with a distinct identity and that the withdrawal of recognition violated the Act." (JD Page 19; Lines 21-23). However, the current fourteen technicians at the Lisle facility have never been covered under a collective bargaining agreement. When Naperville facility was no longer licensed to sell Dodge products, the six former Naperville unit employees were offered jobs at the Lisle facility. Section 8(a)(2) of the Act makes it unlawful for an employer to recognize a minority union. Therefore, Mr. Burke could not recognize Local 701 at the Lisle facility without violating Section 8(a)(2) of the Act.

B. Respondents did not Withdraw Recognition in Violation of Section 8(a)(5) of the Act

1. The Union Lost Majority Support When Dodge of Naperville, Inc. Was No Longer Licensed to Sell Dodge Products

Under Levitz Furniture Company of the Pacific, Inc., 333N.L.R.B. 717, 717 (2001), The Board held that "an employer may unilaterally withdraw recognition from an incumbent union only where the union has *actually lost* the support of the majority of the bargaining unit employees." The Board goes on to explain "an employer can defeat a post-withdrawal refusal to bargain allegation if it shows, as a defense, the union's actual loss of majority status."

Clearly, the Union lost majority support when Dodge of Naperville, Inc. was no longer licensed to sell Dodge products beginning June 20. There were six former Naperville unit technicians and fourteen technicians at the Lisle facility who are not and never have been covered by a collective bargaining agreement. The record clearly shows that Mr. Burke knew the Union had actually lost majority support on June 20, when Dodge of Naperville, Inc. was no longer licensed to sell Dodge products because Dodge of Naperville, Inc. employed six technicians and Burke Automotive Group, Inc. employed fourteen technicians. See Diversicare Leasing Corp., 351 N.L.R.B. 817, 817 (2007); Highlands Hospital Corp., 347 N.L.R.B. 1404 (2006).

2. The Unit Employees Were Accreted With the Non-Unit Employees at the Lisle Facility and Thus, Were No Longer an Appropriate Unit for Bargaining

In the Administrative Law Judge's decision, he found that "at the time Respondent withdrew recognition from the Union, the unit continued to be an appropriate bargaining unit with a distinct identity." (JD Page 19; Lines 21-23).

The former Naperville unit employees were accreted with, and shared a community of interest with, the employees at the Lisle facility after the Naperville facility was no longer licensed to sell Dodge products. The Board has stated that when determining whether a particular group of employees shares a community of interest with other employees, the following factors should be considered: 1) whether the employees are organized into a separate department; 2) have distinct skills and training; 3) have distinct job functions and perform distinct work; 4) are functionally integrated with other employees; 5) have frequent contact with other employees; 6) interchange with other employees; 7) have distinct terms and conditions of employment; 8) have separate supervision. United Operations, Inc., 338 N.L.R.B. No. 18, (2002).

In the Administrative Law Judge's decision, he found that Respondent has failed to identify, much less demonstrate the existence of, any "compelling circumstances, " that would permit withdrawal of recognition based on the temporary relocation of the Naperville unit." (JD Page 19; Lines 44-46). However, the Administrative Law Judge failed to consider the record and testimony showing that Dodge of Naperville, Inc. was no longer conducting business and that the former Naperville unit employees had been accreted. (Tr. 378). Additionally, witnesses Adams and Lein testified that during the time they worked at the Naperville facility, they worked along-side the fourteen other technicians who were already working at Lisle before the former Naperville employees were offered employment. (Tr. 186-187, 281). Additionally, they both testified that Rossi was the supervisor for all the technicians at Lisle. (Tr. 281-282). As a result, the former Naperville unit technicians were not able to maintain their separate identity and thus, were accreted into the larger group of technicians at Lisle. Therefore, the former Naperville unit technicians were no longer an appropriate unit for bargaining. As such, Mr. Burke was not required to bargain with the Union.

This present case should be distinguished from Comar, 349 N.L.R.B. 342 (2007). In Comar, the Board affirmed the Administrative Law Judge's finding that where a single employer decided to move certain manufacturing operations from one of the employer's facilities to another facility, the transferred unit employees were not accreted and they continued to maintain their separate identity for purposes of collective bargaining. Under the facts of Comar, the employer moved the equipment the employees worked on to the other facility and placed the equipment in a different part of the facility than where that facility's current employees worked. The Administrative Law Judge, in Comar, found that the transferred employees continued to perform the same work, on the same equipment, under essentially the same supervision as they

had at the previous facility, and the transferred employees had little daily interaction with non-unit employees.

The facts under Comar are completely different than the facts under the present case. Here, Lisle and Naperville are not a single employer for reasons discussed infra. Additionally, Mr. Burke did not transfer operations from one facility to another. Instead, Chrysler ordered Naperville, the employer for the unit employees, to cease operations. Once the former Naperville unit employees accepted new jobs at the Lisle facility, they began working along-side and interacting with the Lisle technicians while performing the same jobs as the Lisle technicians. (Tr. 186-187, 281). Furthermore, they were under the same supervision as the Lisle employees, namely Rossi, but under different supervision than they were under at the Naperville facility, namely Rochacz. (Tr. 228, 283). For reasons stated above, this Board should find that the facts under the present case are entirely distinguished from those under Comar.

In the Administrative Law Judge's decision, he found that "where there is a lengthy history of collective bargaining for a unit, an employer must continue to recognize the Union even when operational changes result in unit employees doing the same type of work on the same equipment as non-unit employees within a broader facility or group." (JD Page 19; Lines 25-28). The Administrative Law Judge cites Radio Station KOMO-AM, 324 NLRB 256, 262-263 (1997); Children's Hospital of San Francisco, 312 NLRB 920, 929 (1993); Trident Seafoods, Inc. v NLRB, 101 F. 3d 111, 118 (D.C. Cir 1996); and Armco, Inc. v NLRB, 832 f. 2D 357, 363 (6TH Cir. 1987)

as authority. However, these cases are distinguished from the present case as discussed infra.

This case is also distinguished from Radio Station KOMO-AM and American Federation of Television and Radio Artists, Seattle Local, AFL-CIO, 324 NLRB 256(1997). In KOMO-AM, the Board found that after Respondents had merged three radio stations into the same building,

the unit employees continued to maintain their separate identity by virtue of the fact that, even though they were working in the same building, there was no interchange of employees between the three radio stations, employees were identified by the call letters of the station for which they worked, and unit employees spent their work day working with the other unit employees. Furthermore, each radio station had its own distinct voice, separate programming, and demographic target audience as well as independent marketing and ratings goals. This case differs in that, after the Naperville facility closed, there was an interchange of employees. Any one of the technicians, either former Naperville unit or non-unit technicians, are able to work on any one of the vehicles brought in for service. The facts are distinguished further in that the former unit and non-unit technicians currently work for the same corporation and are identified as all being employees of Burke Automotive, Inc. Additionally, the former unit and non-unit technicians work along-side each other.

The Administrative Law Judge cites Children's Hospital of San Francisco, 312 NLRB 920, 929 (1993). The facts under Children's Hospital are also distinguished from the present case where two hospitals merged and the new corporation continued to maintain both facilities. At issue was whether the registered nurses at one of the campuses continued to be an appropriate unit for bargaining after the hospitals merged. Witnesses in Children's Hospital testified that they continued to work in the same building, with the same fellow employees, under the same supervisor, and using the same equipment. As a result, the Board found that the registered nurses at one of the particular campuses continued to be an appropriate unit for bargaining. The Board stated that they have "long held, in the industrial context and the retail merchandising chains, that a single facility unit, geographically separated from other facilities operated by the same employer, is presumptively appropriate for the purpose of collective bargaining." The facts under the present case are distinguished in that the former Naperville unit technicians and the non-unit

technicians currently work along-side each other at the Lisle facility after Dodge of Naperville, Inc. ceased operations. As a result, there is no geographic separation between the unit and non-unit employees and the former Naperville unit is no longer an appropriate unit for bargaining.

The Administrative Law Judge also cites Trident Seafoods, Inc. v NLRB, 101 F. 3d 111, 118 (D.C. Cir 1996). The Administrative Law Judge relies on the Board's finding that "[T]he Board places a heavy evidentiary burden on a party attempting to show that historical units are no longer appropriate....") However, Trident Seafoods, along with cases cited under Trident, are successor employer cases. Successor employer is not at issue here. As such, Trident Seafood is not authoritative.

The Administrative Law Judge also cites Armco, Inc. v NLRB, 832 f. 2D 357, 363 (6TH Cir. 1987). Armco involves a completely different set of facts than are present under this case. Armco, Inc. owned and operated a facility where the employees were covered under a collective bargaining agreement. Armco subsequently bought and was thereby a successor employer to a separate facility where the employees were covered under a different collective bargaining agreement and organized by a different union. Armco sought to impose the union terms and conditions from its previously owned facility to the facility recently acquired. As such, the decision handed down in Armco, Inc. relating to "history of bargaining" is not controlling here because there was no other union competing with Local 701.

In addition to the Administrative Law Judge's finding that the former Naperville unit employees maintained their separate identity based on a history of bargaining, he also found that the bargaining unit has retained its separate identity because, under the collective bargaining agreement, the former Naperville unit technicians worked under unique terms and conditions.

The cases cited by the Administrative Law Judge to show the former Naperville unit technicians retained their separate identity support only bargaining history or unique terms and

conditions of employment as the only factors meriting consideration when determining whether a unit has retained their separate identity. The Administrative Law Judge did not address other factors considered by the Board.

Additional factors considered by the Board also support the position that the unit employees did not maintain their separate identity after the Naperville facility ceased operations. Specifically, the Board considers whether the employees are organized into a separate department. Here, as discussed supra, the former Naperville unit technicians joined the same service department as the non-unit technicians at the Lisle facility. Furthermore, the former Naperville unit technicians did not have distinct skills or training different from the non-unit technicians, nor were their job functions distinct from the non-unit technicians.

In Renaissance Center Partnership and International Union, Union Plant Guard Workers of America, 239 N.L.R.B. 1247 (1979), the Board found that where two corporations decided to join their security forces, the two groups could no longer be separately identified based on the fact that now, all security officers are commonly supervised, enjoy identical terms and conditions of employment, are randomly assigned to sections of the complex, regularly interact, perform identical duties, and wear identical uniforms. Here, all technicians at the Lisle facility have the same supervisor, they have the same terms and conditions of employment, they are randomly assigned vehicles, they regularly interact, and they perform identical duties. Thus, the Administrative Law Judge incorrectly found that the former Naperville unit technicians have not been accreted into the larger non-unit technicians at the Lisle facility.

Additionally, in Renaissance Center, 239 N.L.R.B. 1247, 1248 (1979), the Board held that "[T]he number of employees the Union desires to add to the certified unit exceeds the number currently included in that unit. The Union is thus seeking to resolve the status of the former hotel security officers without providing them an opportunity to express their desires

regarding representation." Similarly, the former Naperville unit technicians number six while the non-unit technicians number fourteen. Thus, the Union is seeking to resolve the status of the fourteen non-unit technicians without providing them an opportunity to express their desires regarding representation.

In the Administrative Law Judge's decision, he found the fact that the "Naperville bargaining unit has retained its identity is further supported by the unique terms and conditions of employment to which the unit mechanics are entitled under the collective bargaining agreement." (JD Page 19; Lines 51-52; Page 20; Line 1). However, the cases cited by the Administrative Law Judge do not support his finding. Specifically, the cases address terms and conditions of employment as a factor in determining whether unit employees fall under the rubric "craft unit." Whether the former Naperville technicians constitute a craft unit is not at issue here. However, the Administrative Law Judge seems to have found that the collective bargaining agreement is a factor necessary to determine whether the six former Naperville technicians retained their separate identity.

The Administrative Law Judge cites Super K Mart Center, 323 NLRB 582, 587 (1997). However, the facts under K Mart are distinguished from those under the present case. In K Mart, there was no previous history of bargaining and the issue was whether the meatcutters constituted an appropriate unit for bargaining. The Board found that meatcutters were required to possess a higher level of skill than other employees in the store as evidenced by their wages in that they were the highest paid hourly employees in the store. Additionally, there was little interchange of employees between the meat department employees and the other employees in the store. Furthermore, there was a supervisor exclusive to the meat department. As a result, the Board did not find that an appropriate unit may be based on terms and conditions alone as the Administrative Law Judge seems to have found.

The Administrative Law Judge also relies on Skyline Distributors, 319 NLRB 270, 277-278 (1995), as authority showing "differences in wages and employment benefits is a factor which can support finding that employees share a community of interest." (JD Page 20; Lines 2-3). However, the facts under Skyline Distributors are distinguished from the facts under the present case. Under Skyline Distributors, the "maintenance" employees sought union representation where there was no previous history of bargaining. Respondents argued that the "maintenance" employees shared a community of interest with the "sanitation" employees. The Board disagreed and applied the same reasoning as it did in K Mart, supra. The Board emphasized several factors supporting their finding that the maintenance employees maintained a separate community of interest. The Board emphasized that there was no interchange of employees between the maintenance and sanitation departments, maintenance employees had a supervisor separate from the sanitation supervisor, and they were required to possess a higher set of skills than required of the sanitation employees as evidenced by higher wages paid to maintenance employees. The Board found that based on the differences between the two sets of employees, the maintenance employees maintained a separate community of interest. See Mirage Casino-Hotel, 338 NLRB 529, 533 (2002) (the Board found "the carpenters are also highly skilled....Their skill is also reflected in the fact that their wages are near the top of the Employer's engineering department pay scale.)

The Administrative Law Judge has incorrectly found that the Board decisions in K Mart, supra, and in Skyline Distributors, supra, Mirage Casino-Hotel, supra, show that "differences in wages and employment benefits is a factor which can support finding that employees share a community of interest." (JD Page 20; Lines 2-3). However, in those cases, there was no history of collective bargaining. (JD Page 20; Lines 2-3). As such, there was no collective bargaining

agreement in place on which to base the assumption that the collective bargaining agreement gives rise to a unit's separate identity.

3. Relocation Under Harte & Company

In the Administrative Law Judge's decision, he found that, "it is hard to imagine how circumstances justifying dissolution of the established bargaining unit could be found here based on the relocation." (JD Page 19; Lines 48-49).

Dodge of Naperville, Inc. did not relocate. Dodge of Naperville, Inc. had it's franchise terminated, thereby losing its license to sell Dodge products on June 20. Subsequently, Burke Automotive Group, Inc. offered jobs to the former Naperville unit employees. (Tr. 344). Additionally, Mr. Burke's uncontradicted testimony revealed that certain accounts belonging to what had been Dodge of Naperville, Inc. were closed. Specifically, the payroll account was closed, the license and title account was closed, the credit line with Chrysler was closed, and Mr. Burke's personal credit line was closed. (Tr. 354).

Assuming, arguendo, that Dodge of Naperville, Inc. was not closed but had "relocated" as the Administrative Law Judge found. The Board in Harte & Company, infra, found that in relocation cases, an existing contract will remain in effect after a relocation if the circumstances can satisfy a two part test: 1) the operations at the new facility are substantially the same as those at the old; **and** 2) transferees from the old plant constitute a substantial percentage, approximately forty percent or more, of the new plant employee complement. Harte & Company, Inc., 278 N.L.R.B. 947, 948 (1986), General Extrusion Company, Inc., 121 N.L.R.B. 1165, 1167 (1958); Westwood Import Co., 251 NLRB 1213, 1214 (1980) (a collective bargaining agreement remains in effect following a relocation, provided operations and equipment remain substantially the same **and** a substantial percentage of the employees at the old plant transfer to the new location.) Marine Optical, 255 NLRB 1241, 1245 (1981). See also See Worchester Stamped

Metal Company, 146 N.L.R.B. 1683, 1685-1686 (1964) (finding that to decide that a larger number of 115 employees must accept as their bargaining agent one already selected by fewer than seventy employees, would appear to be by mandate, depriving them of their statutory right accorded them as long ago as 1935 of selecting, as principals their own bargaining agent. The Board went on to explain, "neither an employer nor a labor organization, nor the two acting in concert, have any right under the Act except as provided in Section 8(f), to select and determine the bargaining agent of employees.")

Testimony shows there were six former Naperville unit employees and fourteen technicians currently employed at the Lisle facility. Testimony revealed that Adams and Marjanovich only worked from Wednesday, June 24, thru Friday June 26, before they quit. However, when determining the percentage of former unit employees in the new operations employee complement, whether before Adams and Marjanovich quit, the result is the same. The former Naperville unit employees only constitute between twenty five and thirty percent of the new plant employee complement. Thus, even if Dodge of Naperville, Inc. relocated to the Lisle facility, the former Naperville unit employees did not enjoy majority status and, as a result, Mr. Burke could not have recognized the Union without violating the Act.

In the Administrative law Judge's decision, he found that the former Naperville unit employees were "temporarily relocated" in accordance with what the complaint alleged. However, record testimony shows that the relocation was not temporary. Counsel for the General Counsel offered into evidence pictures of the Naperville facility as it looked at the time of the hearing. (GC Exhibit #15, 16, 17; Tr. 274). Clearly no renovations were taking place at that time. Additionally, Mr. Burke testified that, at the time of the hearing, he was in arbitration with Chrysler and did not know which franchises he would ultimately be awarded or whether he would be moving. (Tr.410-411). As a result, the allegation in the complaint and the

Administrative Law Judge's finding that Dodge of Naperville, Inc. was "temporarily relocated" is factually incorrect and not supported by the record.

4. Respondents Did Not Fail to Respond to the Union's Request for Information

In the Administrative Law Judge's decision, he found that Respondent unreasonably delayed in providing the information sought by the Union's July 9, 2009, information request in violation of Section 8(a)(5) and (1). (JD Page 23; Lines 46-47). The Administrative Law Judge found further that Respondent did not answer the Union's request until March 4, 2010. (JD Page 23; Lines 22-23).

Counsel for the General Counsel offered into evidence a letter from Respondents counsel dated September 8, 2009. (GC Exhibit #20). The letter is addressed to Joyce Hoffstra at the National Labor Relations Board – Region 13 and copied to Sherri Voyles, counsel for the Union. The letter clearly references the case name and the case number. The body of the letter reads, "Pursuant to your request, enclosed please find the following documents between Chrysler Group, LLC and Burke Automotive Group, Inc." The letter then enumerates five attachments all relating to negotiations between Chrysler and Burke Automotive Group, Inc.

The Administrative Law Judge incorrectly found this letter was not a response to the Union's request for information. Instead, the Administrative Law Judge incorrectly found that a dated March 4, 2010 and addressed to Sherri Voyles is actually the response to the Union's request for information. (JD Page 23; Lines 23-24). However, that letter reads, "On September 8, 2009, I copied you on correspondence to Joyce Hoffstra concerning this case. With the exception of those documents, no correspondence requested in your letter of July 9, 2009 exists." (GC Exhibit #33). The Administrative Law Judge incorrectly found the September 8, 2009 letter was a position statement even though the words "Position Statement" appear no where on the letter.

(JD Page 14; Lines 5-11). Thus, Respondents replied to the request on September 8, 2009, and did not delay in providing the information sought by the Union's July 9, 2009, information request.

5. Respondents did not Repudiate the Collective Bargaining Agreement in Violation of Section 8(a)(5) and (1) of the Act

In the Administrative Law Judge's decision, he found that Respondents, by relocating the former Naperville unit employees, ceased abiding by the collective bargaining agreement and unilaterally changed the terms and conditions of employment. The Administrative Law Judge cites R. Sabee Co., LLC, 351 NLRB 1350, 1357-1358 (2007). However, R. Sabee is completely distinguished from the present case. Specifically, in R. Sabee, Respondent had a long history of running the businesses as a single entity by sharing a common owner and financial control, interchanging employees and equipment, and comingling [sic] and switching money from one company to another as it needed. The present case is distinguished because, as between Burke Automotive, Inc. and Dodge of Naperville, Inc., there was no interchange of employees, sharing of equipment, or comingling of funds.

R. Sabee is distinguished from the present case in that Burke Automotive Group, Inc. and Dodge of Naperville, Inc. did not run as a single entity for reasons discussed below.

In the Administrative Law Judge's decision, he found that "when Respondent relocated the unit mechanics from the Naperville store to the Lisle store, it ceased abiding by the applicable collective bargaining agreement." (JD Page 20; Lines 34-35). However, as discussed above, Respondent did not temporarily relocate. Additionally, the former Naperville Unit technicians were accreted into the larger group of non-unit technicians and, consequently lost their majority status.

C. Respondents Are Not A Single Employer

Under the seminal case, Radio & Television Broadcast Technicians Local 1264 v. Broadcast Service of Mobile, 380 U.S. 255, 256 (1965), single employer status is determined by weighing four factors: 1) inter-relations of operations; 2) common management; 3) centralized control over labor relations; and 4) common ownership or financial control. See also Flat Dog Prods., Inc., 347 N.L.R.B. 1180, 1181-1182 (2006). While no single factor is controlling, inter-relations of operations, common management, and centralized control over labor relations have been recognized as more determinative of single employer status. Pulitzer Publ'g Co. v. NLRB, 618 F.2d 1275, 1279 (8th Cir. 1980), Fedco Freightliners, Inc., 273 N.L.R.B. 399 (1984). The Board in Dow Chemical Co., 326 N.L.R.B. 288 (1998), further clarifies the single employer relationship by stating that, "a single employer relationship will be found only if one of the companies exercises *actual* or *active* control over the *day to day* operations or labor relations of the other."

In the Administrative Law Judge's decision, he found that in addition to the four well established elements, "Single Employer status ultimately depends on all the circumstances of the case and is characterized by an absence of an *arm's length* relationship found among unintegrated companies." NLRB v Browning-Ferris Industries, 691 F.2d 1117, 1122 (3d Cir. 1982).

1. Four Factor Test Under Radio & Television Broadcast Technicians Local 1264 v. Broadcast Service of Mobile

a. Inter-relations of Operations

In the Administrative Law Judge's decision, he found that the two entities constitute a single employer based on either incorrect interpretations of testimony or incorrect application of case law to the facts of this case.

In the Administrative Law Judge's decision, he incorrectly found inter-relations of operations as evidenced when Mr. Burke "persuaded Chrysler to permit him to retain those franchises [licensed to Lisle] and, instead, sacrifice the Naperville Dodge franchise – a move that may have been in the interests of Ed Burke's overall business enterprise, but cannot be seen as being in the interests of Dodge of Naperville as an individual entity." (JD Page 17; Lines 15-18).

The fact that Mr. Burke was able to maintain a bigger corporation while letting a smaller corporation become dissolved does not show inter-relations. In fact, it shows the opposite. Burke Automotive Group, Inc. and Dodge of Naperville, Inc. were so completely independent that one could cease to exist without effecting the other. Furthermore, there is no authority stating that an owner of multiple businesses should prioritize a smaller franchise with an incumbent union over a larger corporation without a union.

While Dodge of Naperville, Inc. was a wholly owned subsidiary of Burke Automotive Group, Inc., the two entities conducted business at an *arm's length*.

i. Arm's Length Relationship

The Administrative Law Judge cites Browning-Ferris, Industries, 691 F.2d 1117, 1122 (1982) where the court stated "Single Employer status ultimately depends on all the circumstances of the case and is characterized as an absence of an 'arm's length relationship found among unintegrated companies.'"

Testimony reveals that when Burke Automotive, Inc. and Dodge of Naperville, Inc. conducted business, they did so just as they would conduct business with any other competing dealership. (Tr. 332-333, 349).

In the Administrative Law Judge's decision, he found before Mr. Burke committed to moving Burke Automotive Group, Inc. to the Naperville site pursuant to negotiations with Chrysler, the two entities did not execute any lease or sale agreements or had any *arm's length*

dealings regarding the Naperville site. (JD Page 17; Lines 4-6). Mr. Burke did not know what Chrysler's ultimate decision would be. (Tr. 353, 415). Assuming that Mr. Burke knew that Chrysler would revive his franchises in Lisle, then it would not make sense to enter into a lease agreement with a corporation that's going to go out of business.

In the Administrative Law Judge's decision, he found that Mr. Burke's balancing of inventories "between the two entities, rather than making arm's length's transactions in which each entity considered only its own interests, strongly suggests that Burke Automotive and Dodge of Naperville were operating as a single integrated business enterprise." (JD Page 17; Lines 7-9). Mr. Burke testified he would "balance inventories" by conducting dealer trades between the two facilities just as he would with any other competing dealership. (Tr. 348-349). Therefore, Mr. Burke did, in fact, make *arm's length* transactions between the two facilities.

ii. Dealer Trades

The Administrative Law Judge brings forward two separate circumstances when Lisle sold Naperville's inventory: 1) pre-bankruptcy proceedings involving dealer trades; and 2) post-bankruptcy proceedings to dispose of the remaining Naperville vehicles. (Tr. 349; GC Exhibit #22). These two separate circumstances do not evidence inter-relations of operations as the Administrative Law Judge incorrectly found. The two entities engaging in dealer trades and the bankruptcy order providing for the disposition of property remaining after rejection of franchise agreements cannot support a finding of inter-relations of operations for the reasons set forth infra.

The Administrative Law Judge failed to consider Mr. Burke's uncontradicted testimony regarding dealer trades as a whole thereby incorrectly allowing the Administrative Law Judge to justify his finding that Lisle and Naperville conducted business absent an *arm's length* relationship.

The specific questions addressing this finding were elicited by Respondents counsel and answered by Mr. Burke. Specifically, Mr. Burke was asked:

> Question: Did the Lisle facility ever buy automobiles from the Naperville facility?"
> Answer: Yes.
> Question: Did they also buy cars from other Dodge dealerships?"
> Answer: Yes. (Tr. 332-333).
> Ed Burke was then asked:
> Question: And was this an actual sale between the stores?
> Answer: Yes, it was.
> Question: Would it be the same as what we refer to as a dealer trade with any other store?
> Answer: That's exactly what it was.
> Question: So, you could sell those same cars to Mancari Chrysler or, if it were still in existence – Dodge?
> Answer: Yes, or I could buy cars from them if I needed them. (Tr. 349).

Thus, the two facilities conducted business between themselves just as they would with any other dealership which Mr. Burke did not own. As a result, the Administrative Law Judge cannot rely on this testimony to show inter-relations of operations or that the two facilities conducted business absent *arm's length* transactions.

In the Administrative Law Judge's decision, he found that Mr. Burke proceeded to use "Burke Automotive to sell Dodge of Naperville's remaining inventory to the public." (JD Page17; Lines 37-38). The disposition of property resulting from the bankruptcy proceedings is provided for in the bankruptcy court order. (GC Exhibit #22). Specifically, the court order reads, "The Debtors have implemented a reallocation program under which qualified new Chrysler, Dodge and Jeep vehicles held by consenting Affected Dealers will be purchased from these dealers by remaining authorized dealers on terms and conditions substantially similar to the repurchase of vehicles that otherwise would occur under certain Dealers Laws upon a termination of a dealership." (GC Exhibit #22). Therefore, it was proper for the two entities to conduct dealer trades. As a result, the Administrative Law Judge's finding that Mr. Burke used

Burke Automotive, Inc. to sell the Naperville's remaining inventory as evidence of inter-relations of operations is not supported by and, in fact, contradicts record testimony and evidence.

The Administrative Law Judge attempts to support his above mentioned finding by citing Emsing's Supermarket, 284 NLRB 302, 304 (1987), where the Board found "single employer status is supported by propensity to operate both companies 'in such a manner that the exigencies of one would be met by the other' showing that relationship was not *arm's length*." Under the facts of this case, the two entities could make dealer trades between Lisle and Naperville the same as between any other competing dealership. (Tr. 349). Thus, Mr. Burke was not operating both companies such that the exigencies of one would be met by the other because he could balance his inventories by conducting dealer trades with any other Dodge or Jeep competitor.

iii. The Two Entities Did Not Share Facilities and Equipment, Personnel, or Accounting Departments

In the Administrative Law Judge's decision, he found that Burke Automotive, Inc. and Dodge of Naperville, Inc. shared facilities, equipment, personnel, and a single accounting department (JD Page17; Lines 120-24). Burke Automotive Group, Inc. and Dodge of Naperville, Inc. were located at separate addresses and as such, had separate facilities. Additionally, the record clearly shows there was no interchange of employees between the two facilities. (Tr. 332-335, 178, 282, 308, 325, 332). Furthermore, the record also clearly shows that the two corporations did not share equipment, phone lines, advertisements, license plates, resale tax identification number, bank accounts, or lines of credit. (Tr. 333-334, 336, 351).

The Administrative Law Judge found that "around the time of the alleged violations, the already significant sharing of facilities and equipment increased greatly." (JD Page 17; Lines 41-42). The Administrative Law Judge based this finding on Mr. Burke's announcement that he was "moving everything" from the Naperville facility to the Burke Automotive Group, Inc. store in

Lisle. (JD Page 17; Lines42-43). The Administrative Law Judge attempts to support this finding by relying on Mr. Burke's "promise" to Chrysler that in seventeen months he would renovate the Naperville facility and move the Burke Automotive operations back to the Naperville location. (JD Page18; Lines1-2).

However, Mr. Burke "moving everything" meant moving the remaining Naperville inventory to Lisle pursuant to the Bankruptcy order. (GC Exhibit #22). Mr. Burke was forced to accept Chrysler's conditions to rebuild in seventeen months. (Tr. 388). This "promise" is not evidence that the two corporations shared facilities. Rather, its evidence of a contract term between Mr. Burke and Chrysler where the term was imposed as a condition in allowing Mr. Burke to keep his franchises.

After June 20, there was no significant sharing of facilities and equipment because Dodge of Naperville, Inc. has its franchise terminated, ceased operations, and the building was locked up. (Tr. 250, 344). The vehicles remaining at the Naperville facility were moved over to the Lisle facility pursuant to the bankruptcy court order. (GC Exhibit #22). As a result, there could be no "global sharing" of facilities and equipment as the Administrative Law Judge found. (JD Page 18; Lines 6-8).

In the Administrative Law Judge's decision, he found that Mr. Burke was operating so as to simply draw "whatever resources he could from either entity in service of the best interests of a single, integrated, business enterprise." (JD Page 18; Lines 9-10). However, this finding is not supported by the record. The record shows that after Dodge of Naperville, Inc. had its franchise terminated, Mr. Burke did three things: 1) he conducted dealer trades with the remaining vehicles at Dodge of Naperville, Inc. pursuant to the bankruptcy court order; 2) assigned accounts receivable to Burke Automotive Group, Inc.; and 3) he gratuitously offered the six former Naperville unit employees positions with Burke Automotive Group, Inc.

The Administrative Law Judge incorrectly finds that between June 9 and 19, "Respondent had the non-unit mechanics at the Lisle facility continue making dealer warranty repairs by reporting the repairs as having been made by the Dodge of Naperville." (JD Page 17; Lines 33-35). The record states that the dealer code originally belonging to Lisle was surrendered during bankruptcy proceedings and could not be re-instated. (Tr. 345). As a result, Chrysler had Mr. Burke use the dealer code from the Naperville facility at the Lisle facility for Chrysler's own convenience. (Tr. 345). Therefore, it was not Mr. Burke's choice to report warranty repairs made at the Lisle facility as having been made at the Naperville facility. It was necessary as a result of the bankruptcy proceedings.

In the Administrative Law Judge's decision, he found that Naperville and Lisle had a single accounting department. While Squires performed the accounting duties for both corporations, she also performed accounting duties for all of Mr. Burke's businesses. (Tr 333). The Administrative Law Judge relies on Western Union, 224 NLRB 274, 277 (1976), which states in part, when determining single employer status, the Board should consider whether there are *combined* accounting records, bank accounts, telephone numbers, offices. Here, the record is clear that Lisle and Naperville did not have *combined* accounting records, bank accounts, telephone numbers, lines of credit, and sales tax identification numbers. (Tr. 335-336). Thus, Lisle and Naperville did not have a single accounting department.

In the Administrative Law Judge's decision, he found that the "record does show that there are some respects in which the dealerships have not been integrated. For example, they use separate bank accounts and lines of credit. However, to the extent that this evidence provides some support for viewing the two dealerships as functionally separate, that evidence is not only out-weighed, but also undercut, by the ways in which the dealerships are functionally integrated." (JD Page 18; Lines 27-31). The Administrative Law Judge incorrectly finds "Ed

Burke's maintenance of separate bank accounts for the dealership is reduced where, as here, the level of functional integration is such that one dealership was used to sell the other's inventory and accept assignment of the other's accounts receivable." (JD Page 18; Lines 32-35). As discussed supra, the two entities engaged in dealer trades between the two facilities the same as any other dealership. Thus, Mr. Burke did not use one dealership to sell the others' inventory.

In the Administrative Law Judge's decision, he found that Dodge of Naperville Inc. accounts receivable were assigned to Burke Automotive, Inc. (JD Page 17; Lines 39-38). This does not show anything other than Dodge of Naperville, Inc. was a wholly owned subsidiary of Burke Automotive Group, Inc. It does not show that prior to June 20, there was an inter-relation of operations, nor does it show common management, or centralized control over labor relations.

In the Administrative Law Judge's decision, he found that the two entities "shared numerous corporate and management officials" and as a result, "the two entities shared facilities and equipment because an official would sometimes perform work relating to Dodge of Naperville, Inc. while physically present at the Burke Automotive Group, Inc. facility in Lisle" (JD Page17; Lines 26-29). However, this is an incorrect application of Western Union, supra. Western Union stands for whether the *actual businesses* shared facilities, not whether one of the three common officials performed work for one of the entities while physically present at the other. Additionally, the Administrative Law Judge incorrectly found that Chris Belinski was the parts manager for the Lisle and Naperville facilities. (JD Page 15; Line 24). This finding is not supported by the record. The record testimony states Belinski was the parts manager at the Lisle facility. (Tr. 207). However, the record is void of any testimony stating the Belinski was also the parts manager at the Naperville facility. As such, the two entities had one common owner, Mr. Burke, one common corporate secretary, Squires, and one common general manager, Guzzino. (Tr. 60, 68). Thus, the two entities did not share "numerous corporate and management officials."

iv. Respondents Did Not Hold Itself Out to the Public as a Single Integrated Business

In the Administrative Law Judge's decision, he found that Respondent held itself out to the public as a single integrated enterprise based on advertisements and the fact that signs were posted at the Naperville facility which read "moved" to the Lisle location instead of "closed." (JD Page 18; Lines 19-21). The Administrative Law Judge incorrectly relies on Southern Interiors, Inc., 319 N.L.R.B. 379 (1995) as authority. However, the Administrative Law Judge's finding is not supported by Southern Interiors, Inc. because that decision was based on a Motion for Summary Default Judgment. Furthermore, the record shows that the choice to use the word "moved" instead of "closed" was to benefit the public and not demonstrative of whether Burke Automotive Group, Inc. and Dodge of Naperville, Inc. were a single employer (Tr. 347); 5) Mr. Burke was instructed by Chrysler to put the signs in the windows. (Tr. 346).

b. Centralized Control Over Labor Relations

In the Administrative Law Judge's decision, he found that the evidence regarding centralized control over labor relations was mixed, but favored finding Burke Automotive Group, Inc. and Dodge of Naperville, Inc. were a single employer. (JD Page 15; Lines 45-47). The Administrative Law Judge points to testimony by Rossi where Rossi testified that when Mr. Burke bought the Naperville facility, Rossi went there to train the employees. Rossi testified that his role while at the Naperville facility was to see that the employees were trained the same as they were at Lisle, "be married...everything does the same." (Tr. 125). Rossi's intent was to train the employees at Naperville as Lisle employees had been trained. (Tr. 125). The intent was *not* to run both facilities as the same business.

Mr. Burke incorporated Dodge of Naperville, Inc. on August 25, 2003 and subsequently bought Kohler Dodge September 15, 2003. (Tr. 62-63, 204, 246; GC Exhibit #34). The fact that

Mr. Burke incorporated Dodge of Naperville, Inc. and subsequently bought Kohler Dodge and began operating it as Dodge of Naperville, Inc. evidences Mr. Burke's intent to run both facilities as separate businesses.

In the Administrative Law Judge's decision, he found that the events occurring June 2009 and thereafter evidences centralized control over labor relations. (JD Page 16; Lines 9-10). The Administrative Law Judge based his finding on events which took place after Dodge of Naperville, Inc. had it's franchise terminated and was no longer licensed by the state of Illinois to sell Dodge products. (Tr. 356-357, 378). Thus, there was no centralized control over labor relations during a time in which when Dodge of Naperville, Inc. and Burke Automotive Group, Inc. did not both exist.

Prior to June, the two facilities did not share or exchange employees, the unit and non-unit technicians each had a separate manager, and each group of technicians worked under different terms and conditions. As a result, there was not centralized control over labor relations either before or after June 2009.

Testimony further revealed that Guzzino had no personnel or human resources responsibilities at the Naperville store. (Tr. 149). Guzzino testified that he was not involved in the approval or denial of anything relating to wage changes or hiring employees. (Tr. 149). Guzzino clarified his testimony by stating that "we had managers at that store", i.e., Naperville facility, and "the managers were in charge," i.e., of anything relating to wage changes or hiring. (Tr. 149). Rossi testified that anything that had to do with the union went to Mr. Burke. (Tr. 315). However, as stated above, there were other managers at the Naperville facility responsible for terms and conditions of employees not covered under the collective bargaining agreement.

In the Administrative Law Judge's decision, he found the fact that where the former Naperville unit employees were offered jobs without first obtaining job applications and the unit

employees began working without first knowing the terms and conditions of employment, also evidences centralized control over labor relations and is "generally more consistent with the way an employer relocates employees." (JD Page 16; Lines 21-27). However, this finding is not consistent with record testimony. Adams and Marjanovich both testified that they were given applications and employee handbooks when they went to the Lisle facility on Monday, June 22. (Tr. 159-161, 208). Lein testified that he went to the Lisle facility on Tuesday, June 23, and turned in his employment application and signed employee handbook. (Tr. 249-252). Lein went on to testify that he began working Friday, June 26. (Tr. 255). Marjanovich and Adams began working on Wednesday, June 24. (Tr.165, 210-211). Marjanovich and Adams were told they had until Friday afternoon or before they punched in on Monday, June 29 to turn in their applications. (Tr. 172, 213-214). The former Naperville Unit employees knew of the terms and conditions of employment at the Lisle facility before they started because testimony reveals they were given handbooks two days before they started working.

Furthermore, the former Naperville Unit employees were not offered jobs before the employer first obtained an application. Testimony reveals that on Saturday, June 20, the former Naperville unit technicians were told that the Naperville store had closed, their tools needed to be out by Monday, June 22, and they could apply at the Lisle store, if they wanted. (Tr. 158, 206, 248). Starting Monday, June 22, the former Naperville unit employees went to the Lisle facility and were then given applications and handbooks. Thus, the job offer was concurrent with providing them applications and the former Naperville unit employees were then given a window and a deadline in which to get the paperwork filled out and turned in. (Tr. 172, 213-214).

In the Administrative Law Judge's decision, he found that Guzzino, in his capacity as general manager, had active control over labor relations. (JD Page 15; Lines49-51). However, there is conflicting testimony in the record. Specifically, Lein's vacation request form has "Sam

G." printed at the bottom for approval. Rossi testified that Guzzino “never signs a document like that.” (Tr. 308). Guzzino testified that the signature on the request form was not his. (Tr. 325). Guzzino also testified that he regularly signs payroll checks and his signature is on Marjanovich’s paycheck. (GC. Exhibit #38). The signature on the vacation request form is completely different than the signature on the paycheck. Additionally, Rossi testified that, at the Lisle facility, he did not need Guzzino's approval all the time. (Tr. 313). While it may have been the policy that Guzzino was to give final approval for vacation time, it was not the actual practice. Therefore, in accordance with Dow Chemical Co., supra, *actual* or *active* control over the *day* to *day* operations or labor relations belonged to Rossi at the Lisle facility and Rochacz at the Naperville facility. (Tr. 136).

c. Common Management

In the Administrative Law Judge's decision, he found that differences in the day to day management "weigh lightly on the scale when compared to the multiple, and generally higher-level, instances of common management." The Administrative Law Judge relies on Sakrete of Northern California, Inc. v NLRB, 332 F.2d 902 (1964), where the court found "single employer finding not precluded where commonality of management is only at the highest level." Sakrete is not on point with the facts under this case. In Sakrete, the Board relaxed the traditional four factor test under Radio & Television Broadcast Technicians Local 1264, 380 U.S. 255, 256 (1965), where Petitioner argued they were not a single employer with Sakrete for jurisdictional purposes. The Board found that as long as the two are highly integrated with respect to ownership and operation, then they are deemed a single employer. Thus, the Board could *exercise jurisdiction* over Petitioner the same as it could over Sakrete even though Petitioner, on their own, did not satisfy the interstate operations requirement under the Act. Here, jurisdiction is

not at issue. Thus, the proper analysis to determine single employer is by applying the traditional four factor test under Radio & Television Broadcast Technicians Local 1264, supra.

However, under Dow Chemical Co., 326 N.L.R.B. 288 (1998), the Board found that, "Common ownership by itself indicates only *potential* control over the subsidiary by the parent entity; a single employer relationship will be found only if one of the companies exercises *actual* or *active* control over the *day to day* operations or labor relations of the other."

Under the facts of this case, Rossi had control of the day to day supervision over the fourteen non-unit employees at the Lisle facility and Rochacz had control over the day to day supervision over the six Unit employees at the Naperville facility. (Tr. 136).

In the Administrative Law Judge's decision, he found that Rossi's responsibilities of overseeing maintenance at the Lisle and Naperville facilities evidences common management. However, Rossi was responsible for maintenance at all of Mr. Burke's buildings. (Tr. 69). Additionally, Marjanovich testified that Rossi was the Naperville only once or twice a month. (Tr. 228). Rossi interacted with technicians at the Naperville facility on very limited and separate occasions, specifically, when the store opened in 2003, after Dodge of Naperville, Inc. had it's franchise license terminated in 2009, and once in 2008 to address a staffing concern. (Tr. 416-418). However, the record does not reflect that Rossi actually resolved the situation. The record only shows that Rossi was present with Rochacz and Lein. (Tr. 416-418). As a result, Rossi's involvement at the Naperville facility was too limited to deem Rossi a common manager.

Additional testimony in the record supports a finding of an absence of common management. Guzzino is the general manager at the Lisle facility and works at the Lisle facility. (Tr. 69, 138). Guzzino is also the general manager at the Naperville facility. (Tr. 138). However, Counsel for the General Counsel elicited testimony from Guzzino stating that while he was

general manager at the Naperville facility, he was primarily responsible for the sales department and occasionally in the service department on an as-needed-basis. (Tr. 69, 138-139).

The Administrative Law Judge cites Pathology Institute, 320 NLRB 1050 (1996) where the court found common management based on commonality at the shareholder/ member and director/ trustee level. Pathology Institute is distinguished from the facts under the present case in that the entities did actually share numerous corporate and management officials. Under the facts of the present case, there is one common owner, Mr. Burke, one common corporate secretary, Squires, and one common general manager, Guzzino.

However, as stated above, Guzzino's responsibilities at the Naperville facility were limited. Additionally, management over the terms and conditions of employment between unit and non-unit employees at the Naperville facility lied with managers other than Guzzino.

d. Common Ownership

Common ownership or financial control is the least important factor of the four factor analysis. Dow Chemical Co., supra. The Board found that, "Common ownership by itself indicates only *potential* control over the subsidiary by the parent entity; a single employer relationship will be found only if one of the companies exercises *actual* or *active* control over the *day to day* operations or labor relations of the other." Dow Chemical Co., 326 N.L.R.B. 288 (1998).

D. Alleged Constructive Discharge in Violation of Section 8(a)(3) and (1)

In the Administrative Law Judge's decision, he found that former Naperville unit employees Adams and Marjanovich were constructively discharged by virtue of their voluntary resignation based on Respondent's unlawful withdrawal of recognition, repudiation of the collective bargaining agreement, and unilateral imposition of non-union terms and conditions of employment. (JD Page 25; Lines 15-18).

As discussed supra, Mr. Burke was barred from recognizing or bargaining with a minority union because: 1) the former Naperville unit employees were accreted into the larger non-unit employees; 2) Dodge of Naperville, Inc. did not relocate, it was shut down; 3) Burke Automotive Group, Inc. and Dodge of Naperville, Inc. are not a single employer. As such, Adams and Marjanovich were not "already entitled to continued union representation" as the Administrative Law Judge incorrectly found. (JD Page 25; Lines 23-24).

E. Neither Mr. Burke Nor Rossi Made Threats Amounting to Unfair Labor Practices

In the Administrative Law Judge's decision, he found that "Respondent threatened unit employees in violation of Section 8(a)(1) by telling them that they would no longer receive union benefits, that their continued employment would be in a non-union shop, that the shop would never be unionized, and that if the unit employees engaged in a strike their employment would be terminated and they would be unable to receive unemployment compensation." (JD Page 24; Lines 22-26).

1. Respondent Did Not Make Threats Stating Employees Would No Longer Receive Union Benefits

In the Administrative Law Judge's decision, he found that Respondent threatened employees that they would no longer have any union benefits." (JD Page 24; Lines 22-26). The Naperville facility closed on June 20, 2009 after the franchise agreement was rejected. Any reference to union benefits at the Lisle facility was a statement of fact because Lisle employees were never covered under a collective bargaining agreement.

2. Respondent Did Not Make Threats Stating Unit Employees Continued Employment Would Be in a Non-Union Shop

In the Administrative Law Judge's decision, he found that "Respondent threatened unit employees by telling them that they would no longer receive union benefits." (JD Page 24; Lines 22-26).

However, testimony from Marjanovich and Lein failed to support this allegation. Marjanovich's testimony states that when Rossi called him, Rossi stated that the Naperville facility was closed, he should get his tools by Monday, and pick up his paycheck. (Tr. 206). Marjanovich did **not** testify that during the phone call, Rossi stated that the Naperville operations were temporarily relocating and upon transfer, the Naperville technicians would no longer be unionized. Furthermore, Lein testified that when Rossi called him, Rossi stated that Lein needed to get his tools, apply at the Lisle facility if he wanted to, and informed Lein that the Lisle facility was a non-union shop. (Tr. 248). Any reference to the Lisle facility being non-union is a statement of fact because there was never a collective bargaining agreement at the Lisle facility.

3. Respondent Did Not Make Threats Stating That the Shop Would Never Be Unionized

In the Administrative Law Judge's decision, he found that Respondent threatened the former Naperville unit employees when he said that the Lisle facility would never be unionized. (JD Page 24; Lines 22-296). As stated above, any reference to the union at the Lisle facility was a statement of fact because Lisle employees were never covered under a collective bargaining agreement.

4. Respondent Did Not Make Threats Stating Employees Would Be Terminated and They Would Be Unable to Receive Unemployment Compensation

In the Administrative Law Judge's decision, he found that Respondent threatened employees that "if they engaged in a strike, their employment would be terminated and they would be unable to receive unemployment compensation." (JD Page 24; Lines 22-26). However,

record testimony shows it is the general practice of Burke Automotive Group, Inc. to reject all unemployment claims and that Mr. Burke retained a firm to challenge all unemployment claims (Tr. 367). Thus, this threat was *not* specific to the former Naperville unit employees. It was the general practice of Burke Automotive Group, Inc.

F. Mr. Burke Did Not Refuse to Give Notice to Local 701

Late afternoon on Friday, June 19, 2009, Chrysler directed Mr. Burke to close the Naperville facility that same day. (Tr. 344, 378). It would have been impossible to provide notice to the Union and bargain over the effects of Chrysler's decision before the Naperville facility closed that same day.

Mr. Burke's testimony regarding negotiations with Chrysler is irrebuttable and Counsel for the General Counsel, by not calling Velisek, made no attempt to elicit evidence that could show otherwise.

"Barring highly unusual circumstances an employer is obligated to give timely notice to the union." Sierra International Trucks, 319 N.L.R.B. 948, 951 (1995). Highly unusual circumstances exist here as Chrysler did not tell Mr. Burke that his franchise agreement in Lisle was accepted until late in the afternoon on the same day that facility was to close. As a result, Mr. Burke did not have prior notice of which franchises or dealerships Chrysler was going to allow him to keep.

In the Administrative Law Judge's decision, he found that "the record would still not show that Chrysler required him to implement the change immediately, or in any way prevented him from waiting to make the change until after he had given the Union notice and an opportunity to bargain." The record reflects an order by the bankruptcy court to close certain Chrysler dealerships. It was necessary to implement the change immediately to comply with the bankruptcy order (JD page 5; Lines 10-13).

IV. CONCLUSION

For the foregoing reasons, Respondent respectfully submits that Counsel for the General Counsel has failed to establish that Respondent has violated the ACT in the manner alleged. Therefore, Respondent submits that the Complaint should be dismissed in its entirety.

Dated this 29th day of September, 2010

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Respondent's Post Hearing Brief has been furnished to the following:

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