

Stevens Creek Chrysler Jeep Dodge, Inc. and Machinists District Lodge 190 Machinists Automotive Local 1101, International Association of Machinists and Aerospace Workers, AFL-CIO.
Cases 20-CA-33367, 20-CA-33562, 20-CA-33603, and 20-CA-33655

April 20, 2009

DECISION AND ORDER REMANDING

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On July 1, 2008, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief. The Charging Party joined in the General Counsel's exceptions and brief and filed additional exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order Remanding.²

This case arose out of an organizing campaign among the Respondent's automotive technicians at its newly opened dealership in San Jose, California. The judge found that between December 2006, when the dealership opened, and May 16, 2007, when the Union filed a petition for an election, the Respondent committed multiple violations of Section 8(a)(1).³ The judge dismissed several other 8(a)(1) complaint allegations, as well as 8(a)(3) discharge and refusal-to-hire allegations.

To remedy the coercive effects of the 8(a)(1) violations that he found, the judge determined that the Board's

traditional remedies were sufficient. Therefore, he rejected the General Counsel's request for a *Gissel*⁴ bargaining order, and dismissed several 8(a)(5) allegations that were dependent on the issuance of a bargaining order.

The General Counsel excepts to the judge's dismissal of the 8(a)(1) and (3) allegations, and to his failure to address and find additional 8(a)(1) violations alleged in the complaint. The General Counsel further excepts to the judge's failure to issue a *Gissel* bargaining order and to his dismissal of the contingent 8(a)(5) allegations.⁵

We find merit in certain of the General Counsel's exceptions. As explained in section 1 below, we find that in addition to the 8(a)(1) interrogations found by the judge, the Respondent unlawfully interrogated employees on two other occasions. We additionally find that the Respondent violated Section 8(a)(1) by creating the impression among employees that their union activities were under surveillance. As explained in section 2, we also remand to the judge for further consideration certain other 8(a)(1) allegations, as well the allegation that the Respondent violated Section 8(a)(3) by discharging employee Patrick Rocha.⁶ Finally, in view of the additional violations that we find, and the complaint allegations that we remand for further analysis, we shall direct the judge to reconsider the appropriateness of a *Gissel* bargaining order (and, if recommended, the contingent 8(a)(5) allegations), and other requested remedial relief.

1. As stated above, the employees commenced organizing efforts soon after the dealership opened in December 2006. There is no dispute that the Respondent learned of the organizing activity on March 2, 2007,⁷ after a group of employees returned from a lunchtime union meeting at a local restaurant. On the afternoon of March 2, and again on March 5, the judge found that the Respondent's service manager, James Garcia, violated Section 8(a)(1) by individually summoning several employees to his office and interrogating them as to whether

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the record evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

³ There are no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) by: unlawfully soliciting employees to withdraw their union cards; telling an applicant that he was "blackballed" and would not be hired because of the Union; and granting unannounced wage increases to eight employees to deter support for the Union. See also fn. 8.

⁴ *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

⁵ In addition, the Charging Party excepts to the judge's failure to order the additional remedies of internet/intranet notice posting and requiring the Respondent to read the notice to employees.

⁶ For the reasons stated by the judge, we agree that the Respondent did not violate Sec. 8(a)(3) and (1) by failing to hire Mark Higgins or Sec. 8(a)(1) by soliciting grievances. We also find, contrary to the General Counsel's exceptions, that the Respondent did not violate Sec. 8(a)(1): by Service Manager Mike Frontella interrogating employee Wells as to whether he obtained a union withdrawal card; by Owner Mathew Zaheri impliedly threatening employees that he "owned" them and that they were replaceable; or by service manager James Garcia threatening employees that it would be futile to select union representation, that a new facility would not be built if the Union was selected, and that several employees had withdrawn their support for the Union.

⁷ All dates are in 2007, unless stated otherwise.

they had attended the union luncheon and signed authorization cards.⁸

a. The additional 8(a)(1) interrogations

Record evidence shows that on at least two other occasions, Respondent officials questioned employees about their organizing activities. On March 5, Parts and Service Manager Chris Nickerson telephoned employee Michael Lane and asked him who was behind the organizing drive. Two months later, on May 11, Owner Zaheri asked employees, during a regularly scheduled shop meeting, who had paid for the pizza at their May 9 union meeting.

Although the complaint alleged that Nickerson's and Zaheri's questions were unlawful, the judge failed to address the allegations. We do so here and find the violations.

In determining whether an interrogation violates Section 8(a)(1) of the Act, the Board considers "whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Bloomfield Health Care Center*, 352 NLRB 252 (2008), citing *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984). Relevant factors to be considered under this totality of circumstances approach include "whether the interrogated employee is an open or active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation." *Bloomfield Health*, supra; see also *Intermet Stevensville*, 350 NLRB 1349, 1353 (2007). Applying these factors, we find that Zaheri's and Nickerson's questions were coercive and violated Section 8(a)(1).

First, although the Respondent learned of the organizing campaign on March 2, it did not know which employees supported the Union. Lane was not an overt supporter, and he actively sought to conceal his support when Nickerson asked him on March 5, who was behind the organizing campaign. Nor was there evidence that only open union supporters attended the May 11 shop meeting where Zaheri asked who had paid for pizzas at the Union's May 9 organizational meeting. See *RCC Fabricators, Inc.*, 352 NLRB 701, 702 (2008) (asking employees not known to be active and open union sup-

porters who attended a union meeting found unlawful). Second, Nickerson's and Zaheri's interrogations occurred against a background of the Respondent's hostility toward employees' union activity, as evidenced by the number of unfair labor practices (set forth above in fns. 3 and 8) the judge found. See *Holiday Inn-JFK Airport*, 348 NLRB 1, 4 (2006). Indeed, Nickerson interrogated Lane only 3 days after Service Manager Garcia unlawfully threatened Lane that Zaheri would discharge employees discovered to be union organizers or close the dealership if it was organized. Third, the March 5 and May 11 interrogations were by the Respondent's highest and second highest ranking officials: Owner Zaheri and Parts and Service Director Nickerson. See *Bloomfield Health Care*, supra, at 253. Finally, the nature of the information sought by Nickerson and Zaheri strongly supports a finding that their questions were coercive. Nickerson sought the identity of the union organizers, and Zaheri sought the number and identities of those who supported the Union by attending the May 9 union meeting. See *RCC Fabricators*, supra at 710–711. "There was no showing that Respondent had a valid purpose in seeking to determine the extent of its employees' union activity" or the identity of the union organizers. *BCE Construction*, 350 NLRB 1047, 1053 (2007). To the contrary, as demonstrated by Garcia's earlier 8(a)(1) threats, the Respondent established only an unlawful purpose in seeking this information—to discharge those who supported the organizing drive.

Accordingly, based on our consideration of the *Rossmore House* factors set forth above,⁹ we find that Nickerson's and Zaheri's questions constituted unlawful interrogations in violation of Section 8(a)(1).

b. Creating the impression of surveillance

The judge also failed to address complaint allegations that Garcia's March 2 interrogations and Zaheri's May 11 interrogations separately violated Section 8(a)(1) by creating the impression that employees' union activities were under surveillance. We find merit in the General Counsel's exceptions and find these violations.

The Board's test for determining whether an employer has created an unlawful impression of surveillance is whether, "under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance." *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1276 (2005). Accord:

⁸ The Respondent does not except to this finding or to the judge's finding that, during Garcia's interrogation of employee Lane on March 2, Garcia violated Sec. 8(a)(1) by: (1) threatening that "heads would role [sic]" and employees would "get in trouble" and possibly lose their jobs if the dealership was picketed or organized; (2) stating that if he found out that employee Rocha or another employee organized the March 2 meeting he would "blow them out"; and (3) stating that owner Matt Zaheri would close the dealership if employees selected the Union to represent them.

⁹ This conclusion is not affected by our failure to find that the location and method of the interrogations were coercive. It is not essential that every *Rossmore* factor be established to find an 8(a)(1) interrogation. *RCC Fabricators*, supra at 710.

Bridgestone Firestone South Carolina, 350 NLRB 526, 527 (2007). The standard is an objective one, based on the rationale that “employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways.” *Flexsteel Industries*, 311 NLRB 257 (1993). Under this precedent, Garcia’s and Zaheri’s statements violate Section 8(a)(1).

As noted above, after Garcia learned of the March 2 union meeting, he summoned individual employees to his office and unlawfully interrogated them about whether they attended the meeting and signed authorization cards. Among those Garcia summoned were Manuel Blanco and Alque Baybayan. Both testified that Garcia prefaced his interrogations by indicating that he already knew about the union meeting and that cards had been distributed. Although Garcia testified that he had learned about the union meeting from employee Ron Adamson, he did not identify his source when interrogating Blanco and Baybayan. His failure to do so is the “gravamen” of an impression of surveillance violation. *North Hills Office Services*, 346 NLRB 1099, 1103 (2006).¹⁰ When an employer tells employees that it is aware of their union activities, but fails to tell them the source of that information, the employer violates Section 8(a)(1). This is because employees are left to speculate as to how the employer obtained its information, causing them reasonably to conclude that the information was obtained through employer monitoring. *Id.* See, e.g., *Conley Trucking*, 349 NLRB 308, 315 (2007); *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB 253, 254 (2006). By contrast, when an employer tells employees that it learned of their union activities from another employee, or when those activities are overt such that employees would not reasonably conclude that the employer learned of them through surveillance, the Board has found no violation. See *RCC Fabricators*, supra, 352 NLRB at 702. See also *Bridgestone*, supra, 350 NLRB at 527; *Park N Fly, Inc.*, 349 NLRB 132, 133 (2007).

Here there is no evidence that the March 2 or May 9 union meetings were publicized, open events. By asking employees at the May 11 shop meeting who had paid for pizza at the employees’ May 9 union meeting, Zaheri indicated that he knew about their meeting but, like Garcia, failed to state the source of his information. Under these circumstances, we conclude that employees would

reasonably assume that their union activities were under surveillance and, therefore, that the statements by Zaheri and Garcia violated Section 8(a)(1).

2. The General Counsel excepts to the judge’s failure to address certain other 8(a)(1) complaint allegations, and to his dismissal of the 8(a)(3) discharge allegation pertaining to Patrick Rocha. For the reasons that follow, we find it necessary to remand these allegations to the judge for further findings and analysis.

a. The 8(a)(1) allegations

In December 2006, Parts and Service Director Nickerson interviewed some applicants for the Respondent’s initial complement of technicians. Among those he interviewed was Patrick Rocha, a technician with whom Nickerson had worked at another area dealership. As noted by the judge, “Rocha testified that when he was hired in December 2006, Nickerson asked him whether he was still a union member.” The General Counsel alleged that Nickerson’s query violated Section 8(a)(1), and excepts to the judge’s failure to find this violation.

Resolution of this allegation turns on credibility determinations that the judge must make in the first instance. The judge, however, did not address the allegation, make an express credibility finding regarding Rocha’s testimony, or address Nickerson’s contrary testimony that he did not ask employees whether they were in a union. Nor do we find that the judge’s general credibility footnote (see fn. 2 of his decision) establishes that he considered the allegation and implicitly rejected it on credibility grounds. Accordingly, we shall remand this allegation to the judge to make the necessary credibility resolutions and determine whether an 8(a)(1) violation has been established.

For essentially the same reason, we find it necessary to remand two other 8(a)(1) allegations that turn on unresolved credibility resolutions. The first involves an alleged statement by Garcia, during his interrogation of Baybayan regarding the March 2 union meeting, that Baybayan’s pay would be cut if employees selected the Union. The judge cited Baybayan’s testimony to this effect, but did not reference Garcia’s denial or address the complaint allegation that Garcia threatened Baybayan in violation of Section 8(a)(1). In addressing this allegation on remand, the judge must resolve the underlying discrepancy between Baybayan’s and Garcia’s testimony.

The judge also failed to address the complaint allegation that Zaheri violated Section 8(a)(1) by threatening employees with plant closure at the May 11 shop meeting. The General Counsel argues that this allegation is supported by Lane’s testimony that Zaheri told employees at the meeting that the Union’s unfair labor practice

¹⁰ Chairman Liebman dissented from the failure to find an impression-of-surveillance violation in *North Hills Office Services*, supra, under the circumstances presented there. (346 NLRB at 1104 fn. 24.) She agrees that the decision supports finding a violation in this case, which does not implicate her earlier dissenting view.

charges would cost \$100,000 to defend and could result in the loss of his business (Tr. 273, 1285–1286). Zaheri denied making any statement about the possible loss of business (Tr. 1196–1197). In addition, the Respondent argues that Lane’s testimony was inconsistent, noting that on cross-examination Lane stated that he did not “believe, I don’t recall that he actually made the reference that \$100,000 would cost him his business” (Tr. 275.) The judge did not discuss either Lane’s or Zaheri’s testimony. Because a finding on this allegation depends on a credibility assessment, we shall instruct the judge on remand to resolve the credibility dispute and determine whether a violation has been established.

b. The 8(a)(3) discharge allegation

As discussed above, Rocha was among the initial group of technicians the Respondent hired in December 2006. The General Counsel alleged that the Respondent unlawfully discharged Rocha on March 6, 2007, because Rocha attended the March 2 union luncheon, and because the Respondent believed he was the leader of the organizing campaign.

Applying the *Wright Line*¹¹ analysis, the judge dismissed the 8(a)(3) allegation. He found that the General Counsel satisfied his initial burden of showing that Rocha’s discharge was unlawfully motivated, noting that the Respondent knew that Rocha attended the March 2 union meeting and harbored animus as evidenced by Garcia’s threat that he would “blow out” Rocha if he learned that Rocha had organized the March 2 meeting. The judge concluded, however, that “[b]ased on the facts,” the Respondent met its *Wright Line* defense of showing that it would have discharged Rocha even absent his union activities.

The General Counsel excepts, arguing that the “facts” on which the judge relied in dismissing the allegation rest entirely on the testimony of the Respondent’s witnesses. The General Counsel asserts that the judge: provided no explanation for crediting their testimony; overlooked evidence that undermined their testimony; failed to address Rocha’s relevant testimony; and ignored compelling documentary evidence that strongly supports a finding that Rocha was unlawfully discharged. Because we cannot determine from his decision whether the judge fully considered all of the relevant evidence, we shall remand the Rocha discharge allegation to the judge for further analysis of this evidence, which we discuss below.

The judge found that Rocha was lawfully discharged for “attendance and productivity issues,” and not his un-

ion activities. In reaching this conclusion, the judge cited testimony from management officials Frontella, Garcia, and Nickerson. Frontella testified that in late January and early February he advised Rocha against arriving late to work, leaving early, and taking long lunches. Frontella also testified that he saw no improvement in this behavior and, thus, referred the matter to Garcia. Garcia testified that he met with Rocha on February 12, 19, and 26 and, as reflected in a computerized printout memorializing the meetings, counseled him for “taking too long to diag[nose] a job,” failing to work 40 hours a week, and producing too few “flat hours” per week (the “counseling report”).¹² Garcia testified that he issued Rocha a final warning on February 26, and obtained discharge authorization from Zaheri on February 27, when Rocha arrived late to work.

Rocha was not actually discharged, however, until March 6. The judge noted that Garcia provided several reasons for this delay. Garcia testified that he intended to execute the February 27 discharge decision on Friday, March 2, but was prevented from doing so because of an unexpected visit by a Chrysler factory representative and because Rocha left early that afternoon. Rocha’s termination check was prepared on Monday, March 5, but Garcia testified that he could not find Rocha to hand it to him and discharge him that day. He was finally discharged the next day and given a “separation report” stating that Rocha’s “ability to get the work done correctly and on time” was discussed with him on February 19 and 26, but “no improvement” was shown and he “left early without permission—did not advise anybody that he left.” Further, according to Nickerson, whose testimony the judge explicitly credited, “Rocha cost the dealership time and money by clocking out early.”

We agree that the foregoing testimony of the Respondent’s officials, as well as timeclock records cited by the judge, could support a conclusion that Rocha had significant time and attendance problems. However, there was countervailing record evidence, none of which the judge discussed or appeared to have considered.

First, the judge did not address Rocha’s testimony that his early departures and extended lunches were due to the Respondent’s failure to assign him a sufficient number of repair work orders on a regular basis. Rocha testified that this problem began in late January and that he complained to Garcia about it. On cross-examination, Garcia admitted that Rocha complained that he was not receiving enough work.

¹¹ 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

¹² Flat hours were described as hours billed to a customer for vehicle repairs, for which a technician is paid, as opposed to “time-clock” hours which reflect the time that a technician is on the job, but not necessarily performing repair work.

Rocha further testified that as a result of not receiving enough work, he often clocked out and left, rather than remaining idle. Rocha explained, and several employees and service manager Frontella confirmed, that clocking out when there was no work was accepted shop practice, provided there was management permission. Rocha testified that he followed this procedure and was denied permission to leave only once—on March 2—after the Respondent had assertedly decided to discharge him.¹³

Rocha's testimony is significant because it suggests that the circumstances on which the Respondent purportedly relied to discharge him—his extended absences—may have been created by the Respondent's failure to assign him enough work. Because we cannot determine whether the judge failed to address this testimony through oversight, or implicitly rejected it as not credible, we shall direct the judge to address Rocha's testimony.¹⁴

Second, Rocha testified that Garcia never counseled him or gave him a final warning about any of the attendance/performance issues set forth in either the counseling report prepared by Garcia or the separation report he received on March 6.¹⁵ The judge must consider this testimony in addition to Garcia's when making his credibility determination.

Finally, we find it necessary for the judge to re-examine his finding that the Respondent decided to discharge Rocha on February 27. This finding, based on the testimony of Garcia and Zaheri, is critical to the *Wright Line* analysis because it would establish that the discharge could not have been unlawfully motivated by Ro-

cha's union activities, of which the Respondent was not aware until March 2. There is record evidence, however, that contradicts Garcia's and Zaheri's testimony and suggests that the discharge decision was not made until after the Respondent learned of Rocha's union activities.¹⁶

Specifically, Zaheri's written statement to a Board agent, investigating the underlying unfair labor practice charges, states that Rocha arrived late on February 27, left early on March 1 and 2, and "[o]n the following Monday, March 5 he did not come in or call and the decision to terminate him was made" (GC Exh. 38). Second, the Respondent's attorney submitted a position statement during the investigative stage of this proceeding that recapped discussions with Rocha during the February counseling sessions, and concluded that "[n]o correction of the problems was evident on March 6, 2007, including an early unauthorized departure. Accordingly, Rocha was terminated on March 6, 2007" (GC Exh. 34).¹⁷ And finally, the judge's finding that the discharge decision was made on February 27 is at odds with Garcia's unlawful threat to Lane, after learning of the March 2 union meeting, that Garcia "would blow [Rocha] out" if it was determined that Rocha organized the meeting.

Because we are unable to determine whether the judge considered any of the foregoing evidence in concluding that the Respondent decided on February 27 to discharge Rocha, we shall direct the judge to address this evidence on remand as part of the overall reanalysis of Rocha's alleged 8(a)(3) discharge.

Conclusion

As set forth above, the judge found that the Respondent committed multiple violations of Section 8(a)(1), as referenced in footnotes 3 and 8 of this decision. In Section 1, we have found that the Respondent committed additional violations of Section 8(a)(1) by interrogating employees and creating the impression that their union activities were under surveillance.

In section 2, we have found that the judge failed to address several 8(a)(1) allegations that require threshold

¹³ Garcia generally denied that such permission was given (Tr. 1082), but Rocha testified that it was Frontella whom Rocha notified when he left early (Tr. 318). Frontella did not contradict Rocha's testimony.

¹⁴ In considering Rocha's testimony, the judge should also address the General Counsel's following arguments in response to Nickerson's testimony:

(1) a mechanic cannot possibly cost the Respondent money by clocking out early when there is no assigned work to do, because they are not paid for this nonwork time; and

(2) Rocha did not cost the Respondent money by leaving work early without finishing repair orders 51029, 51558, 52156 and 52129, because, as Rocha explained, his failure to finish the repairs on the days in question was due to a lack of parts which the Respondent had to order. (The General Counsel further asserts that Rocha's failure to complete order 50799 on time was due to Rocha's inability to diagnose the problem, not attendance.)

¹⁵ The General Counsel argues that the counseling and separation reports support Rocha's testimony that he was never counseled by Garcia, as evidenced by the absence of notation in either report that Rocha was given a final warning on February 26, and the absence of any reference in the separation report of the February 12 counseling session, which Garcia asserted was the main counseling session. The judge should address this argument on remand.

¹⁶ If, as the judge found, the Respondent made the decision to discharge Rocha on February 27, before learning of his March 2 union activities, we do not understand the basis for his finding that the General Counsel established a "prima facie showing" of an 8(a)(3) violation.

¹⁷ The reference in this position statement to "an early unauthorized departure" as a reason for Rocha's discharge is reiterated in Rocha's separation report (GC Exh. 15) and in the Respondent's letter to the state unemployment agency in connection with Rocha's application for benefits (GC Exh. 31). In light of Rocha's testimony that March 2, was the only day on which he left early without authorization, these documents are significant to the issue of when the discharge decision was made.

credibility determinations, findings, and analysis. We have also found, in section 2, that it is necessary to remand to the judge the 8(a)(3) discharge allegation pertaining to Patrick Rocha. In assessing this 8(a)(3) allegation, the judge shall consider the additional evidence cited above, and the record as a whole, and shall make credibility findings, and issue findings of fact and conclusions of law. We shall sever these allegations from the remaining complaint allegations that we have ruled on today.

Further, in light of the violations that we have found in section 1, and after the judge determines whether the remanded allegations discussed in section 2 warrant finding any additional violations, the judge should reevaluate the appropriateness of a *Gissel* bargaining order. In addressing this remedial issue, the judge should decide the preliminary question of whether the Union obtained authorization card support from a majority of employees in an appropriate unit. See, e.g., *Evergreen America Corp.*, 348 NLRB 178, 179 (2006).¹⁸

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Stevens Creek Chrysler Jeep Dodge, Inc., San Jose, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(b) and reletter the subsequent paragraphs.

“(b) Creating the impression of surveillance of employees’ union activities.”

2. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the complaint allegations pertaining to the interrogation and discharge of Patrick Rocha, the March 2 pay cut threat by Service Manager James Garcia, the May 11 plant closure threat by Owner Mathew Zaheri, and the unilateral change and refusal to provide information are severed and remanded to the judge for consideration of the matters discussed in section 2 and footnote 18 of this decision.

IT IS FURTHER ORDERED that the judge shall make the credibility determinations and factual findings necessary

¹⁸ Having determined that a *Gissel* bargaining order was not appropriate, the judge dismissed derivative 8(a)(5) allegations that the Respondent unilaterally eliminated a bargaining unit position and failed to provide the Union requested information that was relevant and necessary for collective bargaining. The necessity to reconsider these allegations is dependent on the outcome of the judge’s reconsideration of the *Gissel* bargaining order issue. Accordingly, these 8(a)(5) allegations shall also be severed and remanded.

The judge is also invited on remand to address the appropriateness of the remedial relief sought by the Charging Party. See fn. 5, above.

to resolve those issues, and that he shall prepare and serve on the parties a supplemental decision setting forth those determinations and findings, conclusions of law, and a recommended Order based on those determinations, findings, and conclusions. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board’s Rules and Regulations shall be applicable.

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 create the impression of surveillance of employees’ union activities.

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

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

STEVENS CREEK CHRYSLER JEEP DODGE, INC.

David B. Reeves, Atty. and Cecily A. Vix, Atty., for the General Counsel.

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

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

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at San Francisco, California, on November 6–9, 14, 19–20, and 26–27, 2007. On April 2, 2007, Machinists District Lodge 190, Machinists Local Lodge 1101, International Association of Machinists and Aerospace Workers, AFL–CIO (the Union) filed the original charge in Case 20–CA–33367 alleging that Stevens Creek Chrysler Jeep Dodge, Inc. (the Respondent) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (the Act). On May 3, the Union filed the first amended charge alleging that Respondent had violated Sections 8(a)(1) and (3) of the Act.¹ A second amended charge was filed on June 12, and on August 14, a third amended charge was filed. The Union filed the charge in Case 20–CA–33562 on August 29. The Union filed the charge in Case 20–CA–33603 on September 27. The charge in Case 20–CA–33655 was filed on October 18, 2007. The Regional Director for Region 20 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent in Case 20–CA–33367 on August 24, 2007. The consolidated complaint in Cases 20–CA–33367 and 20–CA–33562 issued on October 10, 2007. An amended consolidated complaint (complaint) issued in Cases 20–CA–33367, 20–CA–33562, 20–CA–33603, and 20–CA–33655 on October 29, 2007. The complaint alleges that Respondent unlawfully discharged employee Patrick Rocha, Sr., and refused to hire employee Mark Higgins for their union membership or activities. Further, General Counsel alleges that Respondent interrogated employees about their union activities, threatened to close its business, threatened to discharge employees, created the impression that employee union activities were under surveillance, solicited grievances, and promised increased benefits in order to discourage union activities. The complaint alleges that a bargaining order is necessary to remedy these unfair labor practices. Finally the complaint alleges that Respondent unilaterally laid off an employee without bargaining with the Union after the bargaining obligation arose. Respondent filed timely answers to the complaints, denying all wrongdoing.

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, and having considered the posthearing briefs of the parties, I make the following.²

¹ All dates are in 2007 unless otherwise indicated.

² 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 Co.*, 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.

FINDINGS OF FACT

I. JURISDICTION

Respondent is a California corporation with an office and principal place of business located in San Jose, California, where it is engaged in the business of the sale and service of automobiles. During the past 12 months, Respondent received gross revenues in excess of \$500,000. During the same period of time, Respondent purchased and received goods and services valued in excess of \$5000 from outside the State of California. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Respondent began operating its car dealership in San Jose, California, in December 2006. Respondent hired only two of the mechanics plus the service manager employed by its predecessor Chris' Dodge World. The mechanics at Chris' Dodge World had been represented by the Union. In December 2006, employee Rick Avelar met with Richard Breckenridge, business representative for the Union, and signed a union authorization card. In January 2007 Breckenridge met with employee Jeff Wells who signed a union authorization card.

On March 2, Breckenridge held a meeting at a local restaurant with a group of nine mechanics from the dealership. Breckenridge told the employees of the benefits of unionization. Breckenridge explained that the union authorization cards would be used to represent the employees, to make a demand for recognition, to petition the Board for an election, and to prove that the employees were part of an ongoing organizing campaign. Employees Michael Lane, Patrick Rocha, Gilbert Bumagat, Paul Seefeld, Manuel Blanco, Alque Baybayan, and Stephen Rother signed authorization cards. Avelar and Wells had previously signed authorization cards. The cards state:

I, the undersigned, an employee of (print company name) _____ hereby authorize the International Association of Machinists and Aerospace workers (IAM) to act as my collective bargaining agent with the company for wages, hours and working conditions.

Avelar testified that on December 7, 2006, right after he was offered employment, Service Manager Mike Frontella told Avelar that he needed to obtain a union withdrawal card in order to work for Respondent. Avelar obtained a withdrawal card and gave it to Frontella on his first day of work. Frontella made a photocopy of the withdrawal card and returned it to Avelar. When Wells went to work on December 11, Frontella asked if he had a union withdrawal card. Wells obtained a withdrawal card and gave it to Chris Nickerson, parts and service director. Nickerson made a photocopy of the card and returned it to Wells. On or about January 15, before employee Paul Seefeld began work for Respondent, Frontella told him that Respondent required a withdrawal card before an employee could start work. Frontella testified that he simply informed

applicants that they could sign a union withdrawal card, available at the union hall, to protect their union membership. Frontella denied that he told any applicant that Respondent required a union withdrawal card.

After the union meeting of March 2, 2007, employee Ron Adamson questioned Michael Lane about the union meeting. Adamson, who opposed the Union, left the shop floor but returned and told Lane that James Garcia, service manager, wanted to speak with Lane. According to Lane, Garcia asked Lane who went to lunch and if there had been a union meeting. Garcia asked if Lane had signed a union card, who had signed cards, and who the organizers were. Lane refused to answer these questions. Garcia responded that everyone was going to get in trouble, or fired, and that heads would roll if he tried to organize the shop. According to Lane, Garcia said that if Respondent were picketed, a lot of people would get in trouble and possibly lose their jobs and that heads would roll. Garcia further threatened that he would "run the shop with three people if he had to shut it down." According to Lane, Mathew Zaheri, Respondent's owner, would be extremely upset if he found out Lane was organizing for the Union. Garcia threatened that Zaheri would never let the shop be Union and that he would shut the doors.

While Lane was in Garcia's office, the phone rang and Garcia answered it stating "Chris, I am talking to Mike Lane, trying to get information about this meeting." Garcia stated that if he found out employees and Rocha organized the meeting he would "blow them out."

Employee Paul Seefeld was also summoned to Garcia's office and questioned about the lunch meeting. Garcia asked Seefeld if he attended the lunch, if the union representative was present, and whether he had signed a union card. Garcia also called employee Manuel Blanco into his office and asked Blanco if he had attended the meeting. Garcia asked whether the union representative was present and whether Blanco had signed anything.

On March 5, Garcia called Baybayan into his office and demanded to know if he went to lunch with the Union on March 2 and if he had signed a union card. Baybayan answered that he had signed a card and Garcia said that the Union would cause a pay cut.

General Counsel contends that on March 5, Garcia approached Wells at his stall and asked if there had been a union meeting and told him that he had caused a lot of problems. Garcia said that the luncheon had caused a lot of commotion with management and created problems in the shop. This evidence is contained in a pretrial affidavit given by Wells during the investigation by the Region. However, at trial Wells testified that his affidavit was untrue. Wells further testified that he, Lane, and Avelar had conspired to give testimony to help the Union's case and to help the case of employee Patrick Rocha. I do not credit Wells' testimony that Lane and Avelar agreed to testify falsely. However, I did not find Wells to be a credible witness and do not credit his pretrial affidavit either.

On March 5, Nickerson called Lane on his cell phone and asked if Lane knew who was behind the union organizing effort.

On March 8 or 9, Mark Higgins a former employee of Chris' Dodge World went to the dealership and asked Garcia for a job. Higgins, a relative of Breckenridge, had previously applied for work with Respondent. According to Higgins, Garcia said that he was going to hire him but now he could not. Higgins asked if he was blackballed due to Breckenridge and Garcia answered, "yes, pretty much."

General Counsel contends, based on a pretrial affidavit from employee Gilbert Bumagat that Garcia questioned Bumagat about the union meeting and told Bumagat that the Union was going to cause a pay cut. However, at trial Bumagat disavowed his pretrial affidavit. I place no reliance on Bumagat's testimony.

In April, Garcia asked Blanco whether he had attended a lunch and who was there. Blanco answered that Breckenridge was there and Garcia responded by telling Blanco not to get involved in things. Garcia told Blanco to remember that it was a nonunion shop.

Zaheri held approximately three meetings in which the Union was discussed.³ At the first of these meetings, in early May, Zaheri brought out blue prints for a new service department and said that he was going to build a new shop. At this meeting Zaheri stated that he had paid for the training of the employees and that he had made an investment in his technicians and proclaimed, "I own you." Zaheri made a statement to the effect that if employees did not do their jobs correctly they would be replaced.

At another meeting on May 11, Zaheri mentioned a union meeting of May 9, and questioned who had paid for the pizza. Zaheri stated that he did not know why people wanted to make him out as a monster and why they wanted to destroy the business. He stated that it would cost him \$100,000 to defend the charges and prove that he had done nothing wrong. Zaheri said "don't let some outside people influence you." Finally, he invited employees to talk to him and that he would gladly discuss anything.

In early April, Garcia told Avelar that Wells was going to give Zaheri a chance and that Wells was done with the Union. In late May, Garcia told Avelar that Seefeld was done with the Union and that Seefeld was not going to attend any more union meetings.

On May 16, the Union filed a petition in Case 32-RC-5505 seeking to represent Respondent's mechanics. That same date, the Union sent Respondent a letter requesting that Respondent recognize and bargain with the Union as the exclusive representative of the employees.

Respondent implemented wage raises for its employees effective May 14. Mechanics Adamson, Wells, and Avelar received a \$1-an-hour raise. Employees Ring and Blanco received a \$2-per-hour raise and employees Seefeld and Erick Gonzales received a 75-cents-per-hour raise. Only these employees received a raise and there were no subsequent raises.

³ On April 2, 2007, the Union filed the original charge in Case 20-CA-33367 alleging that Respondent committed certain violations of Sec. 8(a)(3) and (1) of the Act. On May 3, the Union filed the first amended charge.

Garcia testified that the employees were reviewed at this time because employee Dave Ring had another job offer. According to Garcia, Ring needed a \$2-per-hour raise in order to stay with Respondent. Garcia took the matter to Zaheri who allegedly told Garcia to review all the employees at that time. Garcia performed evaluations of all the mechanics.

At the hearing, Garcia testified that he informed the employees upon their hire that they would be reviewed after 90 days of employment. However, in his pretrial affidavit, Garcia testified that he told employees that they would receive a review once a year, after 6 months. Employees Avelar, Baybayan, Bumagat, and Lane all testified that they were not told of a raise or review when hired. Eight employees were given raises; however, none had worked 6 months at the time of the raises.

Employee Patrick Rocha was terminated on March 6, 2 working days after he attended the union meeting of March 2. Rocha testified that when he was hired in December 2006, Nickerson asked him whether he was still a union member. Rocha answered that he was on a withdrawal card from the Union. According to Rocha, Nickerson told him that the shop would be nonunion.

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 8 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 6-hour day on 11 occasions and took more than an hour lunch on 9 days. On 4 days, Rocha took more than a 2-hour lunch. During that same 30-day period, Rocha left work early on 29 days.

Mark Higgins worked at Respondent's predecessor. It is undisputed that he was a good technician. Zaheri testified that he did not hire Higgins in December 2006 because he was advised by Frontella that Higgins was not a team player and did not work well with others. Parts Manager Juan Robles also advised Zaheri that no one in the parts department wanted to work with Higgins. Robles recommended that Higgins not be hired. Also Controller Jean Hanicke recommended that Higgins not be hired. The evidence that Higgins had issues in the parts department was corroborated.

Higgins again sought work with Respondent in March 2007. Garcia wanted to hire Higgins. Garcia told Zaheri that he believed he could work with Higgins. However, Zaheri would not approve the hire based on the information he had received in December 2006. Zaheri told Garcia that he did not believe Higgins would change.

Higgins testified that Garcia told him, "Well, I was going to hire you, but we cannot hire you at this time." Higgins asked if he was blackballed because his cousin was Richard Breckenridge and Garcia replied, "Pretty much, so." Garcia denies this.

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.

B. Analysis and Conclusions

1. Preemployment conduct

I find that Frontella told Avelar that he needed to obtain a union withdrawal card in order to work for Respondent. Avelar obtained a withdrawal card and gave it to Frontella on his first day of work. Frontella made a photocopy of the withdrawal card and returned it to Avelar. When Wells went to work on December 11, Frontella asked if he had a union withdrawal card. On or about January 15, before Seefeld began work for Respondent, Frontella told him that Respondent required a withdrawal card before an employee could start work. Soliciting and requiring employees holding union membership to withdraw their union membership violates Section 8(a)(1) of the Act. *Bridgeway Oldsmobile*, 281 NLRB 1246, enfd. mem. *NLRB v. Bridgeway Oldsmobile*, 933 F.2d 1015 (9th Cir. 1991). Accordingly, I find Respondent violated Section 8(a)(1) by requiring Avelar and Seefeld to withdraw from the Union.

2. Alleged threat of plant closure and job loss

I find that Garcia told Lane that everyone was going to get in trouble, or fired, and that heads would roll if he tried to organize the shop. Garcia said that if Respondent were picketed, a lot of people would get in trouble and possibly lose their jobs and that heads would roll. Garcia further threatened that he would "run the shop with three people if he had to shut it down." Garcia threatened that Zaheri would never let the shop be Union and that he would shut the doors. While Lane was in Garcia's office, the phone rang and Garcia answered it stating, "Chris, I am talking to Mike Lane, trying to get information about this meeting." Garcia stated that if he found out employees and Rocha organized the meeting he would "blow them out." Such conduct restrains and coerces employees in the exercise of the right to select a bargaining representative of their own choice. See *Winges Co.*, 263 NLRB 152 (1982); *A & A Ornamental Iron, Inc.*, 259 NLRB 1019 (1982). See also *San Souci Restaurant*, 235 NLRB 604 (1978); *Bell Burglar Alarms, Inc.*, 245 NLRB 990 (1979). Accordingly, I find that Respondent violated Section 8(a)(1) by these threats.

A threat of termination in retaliation for engaging in protected activity is the ultimate threat an employer can convey to an employee. *Central Valley Meat Co.*, 346 NLRB 1078 (2006). During Garcia's March 2 interrogation of Lane, Garcia's statement he would "blow out" Rocha if he was behind the union organizing was a direct threat of termination in retaliation for union activities. Accordingly, I find Respondent violated Section 8(a)(1) of the Act.

3. The interrogation

Interrogation of employees is not unlawful per se. In determining whether or not an interrogation violates Section 8(a)(1) of the Act, the Board looks at whether under all the circumstances the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Rossmore House*, 269 NLRB 1176 (1984); *Sunnyvale Medical Clinic*, 277 NLRB 1217(1985). Some of the factors used by the Board under its totality of the circumstances approach have been: the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. *Shen Automotive*, 321 NLRB 586, 592 (1996).

On March 2 and 5, Service Director Garcia called employees Blanco, Lane, and Seefeld into his office for individual questioning about the meeting of March 2. Garcia asked who was at the meeting for the Union and whether the employees had signed union authorization cards. Garcia similarly questioned Baybayan about the meeting. Garcia continued to question Blanco and Seefeld throughout the spring.

Here, I find that the interrogations by Garcia tended to interfere with and restrain employees in their organizing activities. First, the interrogation took place in the office of Service Director Garcia. This took place immediately after Respondent had knowledge of the fledgling organizing effort. The interrogation of Lane took place during a meeting at which Garcia said that if Respondent were picketed, a lot of people would get in trouble and possibly lose their jobs and that heads would roll. Garcia further threatened that he would "run the shop with three people if he had to shut it down." Garcia threatened that Zaheri would never let the shop be Union and that he would shut the doors. While on the phone with Nickerson, Garcia stated that if he found out employees and Rocha organized the meeting he would "blow them out." Under these circumstances, employees would reasonably conclude that union activities would lead to adverse action by Garcia and Respondent. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act.

General Counsel contends that Garcia gave the impression of surveillance when he told employees that he knew of the union lunch. While I found that Garcia unlawfully interrogated employees, I do not find that he gave the impression of surveillance.

4. The alleged solicitation of grievances

The Board has held that, in the absence of a previous practice of doing so, the solicitation of grievances by an employer during an organizational campaign violates the Act when the employer promises to remedy those grievances. See *Center Construction Co.*, 345 NLRB 729 (2005), enfd. in part, denied in part 482 F.3d 425 (6th Cir. 2007). The solicitation of griev-

ances alone is not unlawful but it raises an inference that the employer is promising to remedy the grievances. *Uarco, Inc.*, 216 NLRB 1, 2 (1974).

The record shows that Zaheri invited employees to come to his office to discuss anything. However, Zaheri had an open door policy. Further Zaheri did not offer to remedy grievances. Accordingly, I do not find a violation of the Act.

5. Promise of benefits

General Counsel contends that Zaheri unlawfully promised benefits to employees by displaying the blue prints for the new shop at a meeting in early May. I find that the planned new shop and Zaheri's investment therein, was unconnected to the Union's organizational drive. I further find that presentation of this plan to the employees was unconnected to the union organizing. I find that a reasonable employee would not believe that the proposed new shop was designed to obtain employee withdrawal from union activities. Accordingly, I do not find that presentation of the blue prints violated the Act.

6. Threats of termination —Threat to Higgins

It is a violation of Section 8(a)(1) for an employer to tell an applicant for employment that it would not hire a person affiliated with the union. *J & R Roofing Co.*, 350 NLRB 694 (2007); *T.C. Broome Construction Co.*, 347 NLRB 656 (2006). Garcia told Higgins, "Well, I was going to hire you, but we cannot hire you at this time." Higgins asked if he was blackballed because his cousin was Richard Breckenridge and Garcia replied, "Pretty much, so." Although the statement originated with Higgins, I find that Garcia acquiescence in the accusation by Higgins amounted to an unlawful threat. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act.

7. The pay raises

In *Capital EMI Music, Inc.*, 311 NLRB 997, 1012 (1993), the Board stated the test with respect to the announcement and/or grant of benefits:

The law on this point is clear, to promise or grant benefits to employees in order to dissuade them from supporting a union violates Section 8(a)(1) of the Act. See e.g., *Mack's Supermarkets*, 288 NLRB 1082 at 1099 (1988). The announcement and/or grant of wages or other benefits increases is legally permissible if it can be shown that an employer was following its past practice regarding such increases or that the increases were planned and settled upon before the advent of union activity.

In his pretrial affidavit Garcia testified that he told employees that they would receive a salary review after 6 months. Employees Avelar, Baybayan, Bumagat, and Lane all testified that they were not told of a raise or review when hired. Eight employees were given raises; however, none had worked 6 months at the time of the raises. No raises were given thereafter. Respondent has a defense to the raise given to employee Ring that it had to give him a raise in order to meet an offer by another dealership. However, that defense does not cover the other raises. Under these circumstances, Respondent has not shown that the pay increases were pursuant to a past practice or were planned and settled upon before the advent of the union

activity. Accordingly, I find that Respondent has violated Section 8(a)(1) of the Act.

8. The discharge of Patrick Rocha

Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must show, by a preponderance of the evidence, that protected conduct was a motivating factor in the employer's adverse action. The General Counsel meets this initial burden by demonstrating that the employee engaged in protected activity, the employer knew of that activity, and the employer harbored animus against the protected activity. The burden of persuasion then shifts to the employer to show that it would have taken the same adverse action in the absence of the protected activity. *United Rentals*, 350 NLRB 951 (2007) (citing *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004)). The employer's burden on rebuttal is not met by a showing merely that it had a legitimate reason for its action. Rather, the employer "must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984).

It has long been held that there are five principal elements that constitute a prima facie case insofar as Section 8(a)(3) and (1) are concerned. The first is that the employee alleged to be unlawfully disciplined must have engaged in union or protected activities. The second is that the employer knew about those protected activities. Third, there must be evidence that the employer harbored animus against those individuals because of such activities. Fourth, the employer must discriminate in terms of employment. Finally, the discipline must usually be connected to the protected activity in terms of timing. See e.g. *Goodyear Tire & Rubber Co.*, 312 NLRB 674 (1993).

I find that General Counsel has made a prima facie showing that Respondent was motivated by Rocha's union activities in discharging the employee. Rocha attended the union lunch of March 2. Garcia learned that Rocha had been at the meeting. Garcia threatened to "blow out" Rocha. Rocha was discharged shortly thereafter.

The burden of persuasion then shifts to Respondent to show that it would have taken the same action in the absence of the protected activity. Garcia counseled Rocha on February 12, 19, and 26, about his attendance problems. Rocha was late on February 27. Garcia contacted Zaheri and recommended discharge. Zaheri approved the discharge. Garcia 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 8 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 spoke to Rocha in January 2007 about his late arrivals, his long lunches, and early departures. Frontella spoke to

Garcia about Rocha's attendance the second week of February. He further also spoke to Rocha about diagnostic issues.

In the period from January 22 to March 2, 2007 (30 working days), Rocha worked less than a 6-hour day on 11 occasions and took more than an hour lunch on 9 days. On 4 days, Rocha took more than a 2-hour lunch. During that same 30-day period, Rocha left work early on 29 days. Nickerson credibly testified that Rocha cost the dealership time and money by clocking out early.

Based on the facts, I find that Respondent has shown that Rocha would have been discharged even in the absence of his union activities.

9. The failure to hire Mark Higgins

In *FES*, 331 NLRB 9, 12 (2000), the Board set forth the following test for a refusal to hire case:

To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity. In sum, the issue of whether the alleged discriminatees would have been hired but for the discrimination against them must be litigated at the hearing on the merits.

If the General Counsel meets his burden and the respondent fails to show that it would have made the same hiring decisions even in the absence of union activity or affiliation, then a violation of Section 8(a)(3) has been established. The appropriate remedy for such a violation is a cease-and-desist order, and an order to offer the discriminatees immediate reinstatement to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions, and to make them whole for losses sustained by reason of the discrimination against them.

In the instant case, I find that General Counsel has established a prima facie case that Higgins was not hired because of his union affiliation: Respondent was hiring at the time and Garcia wanted to hire Higgins. Higgins was a skilled mechanic. Garcia answered affirmatively when Higgins accused the Respondent

of blackballing him because of his relationship to Breckenridge, the union agent. The burden shifts to Respondent to show that it would not have hired Higgins even in the absence of his union activity or affiliation.

In the instant case, prior to any union activity, Zaheri chose not to hire Higgins based on the recommendations he received from Frontella, Robles, and Hanicke. The evidence that Higgins had issues in the parts department was corroborated. When Garcia sought to hire Higgins, Zaheri based on the prior recommendations would not approve the hiring. Zaheri told Garcia that he did not believe Higgins could change. Accordingly, I find that Respondent has met its burden of showing that Higgins would not have been hired even in the absence of his union affiliation.

C. The Request for a Bargaining Order

Under *Gissel*, *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), 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. 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 Stevensville*, 350 NLRB 1349 (2007), citing *Abramson, LLC*, 345 NLRB 171, 176 (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)).

Respondent committed several violations of Section 8(a)(1), including requiring employees to withdraw their union membership, threatening plant closure 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*, *supra*. 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. *Gissel* 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*, 332 NLRB 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.

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

9. Respondent did not otherwise violate the Act.

Remedy

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

[Recommended Order omitted from publication.]