

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

CONTEMPORARY CARS, INC.
d/b/a MERCEDES-BENZ OF ORLANDO
and AUTONATION, INC.
SINGLE AND JOINT EMPLOYERS

and

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO

CASES 12-CA-26126
12-CA-26233
12-CA-26306
12-CA-26354
12-CA-26386
12-CA-26552

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

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I. STATEMENT OF THE CASE AND INTRODUCTION

Contemporary Cars, Inc. d/b/a Mercedes-Benz of Orlando (Respondent MBO) operates a Mercedes-Benz dealership in Maitland, Florida, and is owned by AutoNation, Inc., which owns car dealerships located throughout the United States. (Respondent AutoNation). (ALJD 2).¹ (Respondent MBO and Respondent AutoNation are referred to collectively as Respondents). In addition to vehicle sales, Respondent MBO repairs and services new and used vehicles. During the summer of 2008, Respondent MBO employed approximately 37 service technicians. (ALJD 2).

Clarence “Bob” Berryhill is the general manager of Respondent MBO, and he reports to Respondent AutoNation Florida market manager Pete DeVita, who preceded Berryhill as general manager of Respondent MBO. (Tr. 131-132, 336-337). Art Bullock, service director, and Charles Miller, parts director, report to Berryhill. (Tr. 131-132, 336-337). Miller served as acting service director in Bullock’s absence in 2008 and 2009. (ALJD 2; Tr. 131, 336-337, 1269-1271; GC Ex 2). Collie Clark, the controller for Respondent MBO, reports to Ron Eberhardt, Respondent AutoNation’s vice president of finance for the Florida region. (ALJD 2; Tr. 1183-1185). Brian Davis is Respondent AutoNation’s vice-president and assistant general counsel. (ALJD 2; Tr. 53). Davis reports to John Ferrando, general counsel, executive vice-president, and corporate secretary, who reports to Mike Jackson, chief executive officer and chairman of the Board of Directors, and to Mike Maroone, president and chief operating officer of Respondent AutoNation. (Tr. 53).

Respondent MBO has three service technician teams (green, gold and red), each with one (1) team leader and two (2) service advisors. (ALJD 3; Tr. 336). Team leaders report to

¹ As used herein, ALJD refers to the Administrative Law Judge’s Decision, the numbers following “ALJD” refer to the page number, or the page and line number, of the Administrative Law Judge’s Decision. For example “ALJD 4:44—5:5” refers to page 4, line 44 through page 5, line 5 of the ALJD. The numbers following “Tr.” refer to the transcript page numbers. In addition “GC Ex.” refers to General Counsel’s exhibits, “J Ex.” refers to Joint exhibits, “R Ex.” refers to Respondent’s exhibits, and “R. Br.” refers to Respondents’ Brief in Support of Exceptions.

service director Bullock. (ALJD 6; Tr. 336). The team leaders until December 9, 2008 were Bruce Makin (red), Andre Grobler (gold) and Oudit Manbahal (green), and thereafter were Makin (green), Alex Aviles (red) and Rex Strong (gold). (ALJD 3; Tr. 677).

Respondent MBO rates technicians based on their skill level, from highest to lowest, as follows: diagnostic, A, B+, B, C, D (trainee). (ALJD 3; Tr. 334-335). Technicians are compensated on a flat rate (flag system) basis, in which they are paid by the job (piece rate), not by the hour. (ALJD 3). Each job has an industry standard "book time" attached to it, which times are found in widely accepted automotive industry books. (Tr. 333). The work schedule of the technicians is Monday through Friday from 8:00 a.m. to 5:30 p.m. and every third Saturday from 8:00 a.m. to 5:00 p.m., with the following Monday off from work. (Tr. 333-334, 370).

In June or July 2008, Union representatives David Porter and Javier Almazan started an organizing campaign among the service technicians employed by Respondent MBO and held meetings with the technicians. (Tr. 312-315). Service technicians Anthony Roberts, Juan Cazorla, David Poppo, Tumeshwar "John" Persaud and Larry Puzon attended most of the Union meetings and all signed Union authorization cards in July and August 2008. (Tr. 312-315; GC Ex. 158-162). On October 3, 2008, the Union filed a representation petition in Case 12-RC-9344, seeking to represent Respondent MBO's service technicians. (Tr. 76, GC Ex 58).

Between October 10, 2008, and December 16, 2008, the date of the NLRB election in Case 12-RC-9344, Respondents conducted about 10 weekly group meetings about the Union with employees. (Tr. 84, 972). During the election campaign, Respondents also distributed anti-Union literature and showed an anti-Union video. (Tr. 80-81; GC Ex 65(a)-(l)).

Respondents made it clear during the course of their campaign that they opposed union representation of their employees. (Tr. 87).

On November 14, 2008, a Decision and Direction of Election issued in Case 12-RC-9344, and Respondents filed a timely request for review. Respondents' request for review was denied by the two-member Board on December 15, 2008, and on December 16, 2008, a secret-

ballot election was held to determine whether the unit of service technicians wished to be represented by the Union. (ALJD 3). The Union won the election, and on February 11, 2009, the Regional Director, Region 12 certified the Union. (ALJD 3; GC Ex 61, 62 and 64).

After the Union's initial certification, Respondent MBO refused to bargain with the Union for the purpose of testing the validity of the certification in the U.S. Court of Appeals. (ALJD 3). On June 12, 2009, the Union filed a "test of certification" unfair labor practice charge in Case 12-CA-26377. Following the issuance of a complaint and motion for summary judgment, on August 28, 2009, the two-member Board issued a Decision and Order, reported at 354 NLRB No. 72, finding that Respondent MBO violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union. Thereafter, in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), the Supreme Court invalidated all two-member quorum Board decisions. On August 23, 2010, the properly constituted Board issued a new Decision and Order, reported at 355 NLRB No. 113, setting aside its August 28, 2009, decision, affirming the denial of Respondent MBO's request for review in the representation case, finding that Respondent MBO violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union, and reconfirming the certification of the Union in these cases, but deeming the certification to have issued as of the date of the new decision, August 23, 2010, instead of February 11, 2009, for the purpose of future proceedings. (ALJD 3; GC Ex 4(a) and 4(b)).

On March 31, 2010, a Consolidated Complaint and Notice of Hearing issued in Cases 12-CA-26126, 12-CA-26233, 12-CA-26306, 12-CA-26354 and 12-CA-26552, based on charges filed by the Union against Respondents. (ALJD 1; GC Ex 1(uu)). On June 8, 2010, an Order Further Consolidating Cases and Amendment to Consolidated Complaint (Amended Complaint) issued. (ALJD 1; GC Ex 1(fff)). A hearing was held before Administrative Law Judge George Carson (the ALJ) on November 8, 9 and 10, 2010, as well as on November 30, and December 1 and 2, 2010, in Orlando, Florida. (ALJD 1). The ALJ issued his Decision and Recommended Order on March 18, 2011.

The ALJ found that Respondents violated Section 8(a)(1) and (3) of the Act by discharging technician Anthony Roberts because he engaged in union activity. (ALJD 24:9-11, 34:20-21). The ALJ also concluded that Respondents violated Section 8(a)(1) and (5) of the Act by unilaterally laying off Juan Cazorla, Larry Puzon, David Poppo and Tumeshwar Persaud, unilaterally suspending skill level reviews and thereby denying promotions to employees who would have been promoted if those reviews had occurred, unilaterally reducing the specified hours for performing prepaid maintenance work (and thereby causing a loss of earnings to service technicians), and by failing and refusing to provide the Union with requested relevant information regarding bargaining unit employees. (ALJD 31:10-11, 32:37-39, 33:23-25, 34:3-5, 34:23-29). Finally, the ALJ determined that Respondents violated Section 8(a)(1) of the Act by maintaining an overly broad no-solicitation rule, creating the impression of surveillance, interrogating employees, soliciting grievances and implying that they would remedy the grievances, informing employees that certain of their grievances had been remedied, and by informing employees that Respondents would not recognize the Union until there was a contract. (ALJD 5:29-30, 7:16-18, 8:9-10, 10:36-37, 13:11-12, 15:15-17, 21:6-8, 34:10-18).

Respondents filed exceptions to these findings and to the ALJ's recommended Order and Notice to Employees. This brief constitutes General Counsel's answer to Respondents' exceptions.²

Section II of this brief demonstrates that, contrary to Respondents' exceptions, the ALJ correctly found that Respondents violated Section 8(a)(1) of the Act as set forth in the ALJD. Section III addresses Respondents' contention that the ALJ erred when he concluded that Respondents discharged employee Anthony Roberts in violation of Section 8(a)(3) of the Act. Section IV addresses Respondents' assertion that the ALJ erred by concluding that Respondents violated Section 8(a)(5) of the Act by unilaterally laying off employees and by

² General Counsel is filing cross-exceptions and a separate brief in support thereof simultaneously with this answering brief.

ordering that the laid-off employees be reinstated and made whole. Section V addresses Respondents' assertion that the ALJ erred by finding that Respondents violated the Act by unilaterally suspending employee skill reviews, unilaterally changing the compensation paid to employees for performing certain work, and by refusing to provide the Union with relevant requested information. Finally, Section VI concludes this brief.

II. RESPONDENTS VIOLATED SECTION 8(a)(1) OF THE ACT AS FOUND BY THE ALJ. (RESPONSE TO ISSUE TO BE RESOLVED I).

A. Respondents' violated Section 8(a)(1) of the Act by maintaining an overly broad no-solicitation rule in its employee handbook.

In their Brief in Support of Exceptions, Respondents admit that their no-solicitation rule is overly broad as written, but argue that the rule is lawful as applied. (R. Br. 6-7). The rule, which is in effect and applicable to all employees at all of AutoNation's dealerships throughout the United States, states in relevant part:

we prohibit solicitation by an associate of another associate while either of you is on company property.

(ALJD 5; Tr. 70-72, 306; GC Ex. 54-56 and 173).

Although an employer may restrict solicitation to the working time of the employee doing the soliciting and the employee being solicited, a rule is presumptively invalid if it prohibits solicitation on the employees' own time. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). An employer work rule that prohibits employee solicitation and/or distribution on "company time" or "company property" without further explanation is presumptively invalid because "[t]he expression 'company time' does not clearly convey to employees that they may solicit on breaks, lunch, and before and after work." *Laidlaw Transit Inc.*, 315 NLRB 79, 82 (1994); *Our Way*, 268 NLRB 394 (1983). Moreover, in the absence of special circumstances, an employer may not prohibit solicitation by employees in any areas of the workplace, even work areas, during non-working time. *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979); *Cardinal Home*

Products, Inc., 338 NLRB 1004, 1005-1006 (2003); *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615, 617-621 (1962).

On its face, Respondents' rule prohibits all solicitation on company property regardless of time or place. Thus, the rule prohibits employees from soliciting even if the employee doing the soliciting and the employee being solicited are on non-working time in a non-work area. Furthermore, the rule prohibits employees who are on non-working time from soliciting anywhere on company property, and there is no evidence of special circumstances that justify a restriction on solicitation during non-working time in work areas, particularly the areas where service department employees work (where the customers normally are not allowed for safety and liability reasons). Cf. *NLRB v. Baptist Hospital*, supra (justifying a prohibition against employee solicitation in immediate patient care areas of a hospital); *Marshall Field & Co.*, 98 NLRB 88 (1952), enfd. 200 F.2d 375 (7th Cir. 1953) (justifying a prohibition against employee solicitation on the selling floor of a department store). Accordingly, Respondents violated Section 8(a)(1) of the Act by its maintaining and distributing the overly broad no-solicitation policy in its employee handbook.

Although the ALJ found that there was no evidence that Respondents enforced the rule, the ALJ correctly held that the mere maintenance of Respondents' no-solicitation rule chills employees' exercise of their Section 7 rights. (ALJD 5, 34). See *Alaska Pulp Corp.*, 300 NLRB 232, 234 (1990), enfd. 944 F.2d 909 (9th Cir. 1991); *Brunswick Corp.*, 282 NLRB 794, 795 (1987). Thus, the ALJ's conclusions that Respondents violated Section 8(a)(1) of the Act by maintaining an overly broad no-solicitation policy should be affirmed and Respondents' exceptions to the contrary should be denied.³

³ The General Counsel is excepting to the ALJ's failure to order that Respondents post a nationwide Notice to Employees to remedy this violation.

B. Respondents violated Section 8(a)(1) of the Act by unlawfully creating the impression of surveillance and interrogating employees as found by the ALJ.

Respondents except to the ALJ's findings and conclusions that team leader Andre Grobler created the impression that employees' union activities were under surveillance in July and August 2008, and interrogated employees about their Union activities from October through December 2008. (ALJD 5-6, 7-8; R. Br. 8). Respondents argue that there is no credible evidence to support the ALJ's findings, but that even if the interrogations occurred, the conduct was *de minimis* and non-coercive. (R. Br. 8).

The record evidence establishes, and the ALJ correctly found, that in late July 2008, team leader Grobler said to technician Juan Cazorla, "Why are you in such a rush? Oh, I guess you got that meeting to go to," as Cazorla was preparing to leave for the day to go to a Union meeting. (ALJD 5; Tr. 839-840). Similarly, on a second occasion, in August 2008, also at the end of the work day, Grobler told Cazorla "you better rush, you have that meeting to go to." (ALJD 5; Tr. 839-841).

As found by the ALJ, and as supported by the record evidence, on October 10, 2008, technician Larry Puzon attended a meeting held by Respondent vice president and assistant general counsel Brian Davis. (ALJD 7-8; Tr. 491-492, 495). Following the meeting, team leader Grobler asked Puzon if he had gone to a union meeting. (ALJD 7-8; Tr. 496-498). Grobler asked Puzon similar questions following each meeting Davis held with employees to discuss the Union. (ALJD 7-8; Tr. 499-498). Each time, Puzon told Grobler that he had never been to a Union meeting, even though he had. (ALJD 7-8; Tr. 496-498).

Respondents challenge the ALJ's decision to credit technicians Cazorla and Puzon, but failed to even call Grobler as a witness to deny the allegations. The Board will only overrule an ALJ's credibility determinations if the clear preponderance of all the evidence establishes that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Here, Respondents have failed to demonstrate that the ALJ's decision to credit Cazorla and Puzon was incorrect, and the ALJ's decision to credit Cazorla and Puzon regarding

conversations with Grobler, an admitted supervisor and agent of Respondents, should be affirmed.

An employer who creates the impression that employees' protected/concerted activities are under surveillance violates Section 8(a)(1) of the Act. *Promedica Health Systems, Inc.*, 343 NLRB 1351, 1352 (2004). The test for determining whether an employer has created the impression that its employees' union activities have been placed under surveillance is whether the employees would reasonably assume from the employer's statements or conduct that their union activities had been placed under surveillance. *Stevens Creek Chrysler Dodge*, 353 NLRB 1294, 1295-1296 (2009); *Donaldson Bros.*, 341 NLRB 958, 961 (2004); *Sam's Club*, 342 NLRB 620 (2004); *U.S. Coachworks, Inc.*, 334 NLRB 955, 958 (2001). 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, at 257 (1993); *Mountaineer Steel, Inc.*, 326 NLRB 787 (1988).

Similarly, in determining if questioning an employee about that employee's union activity violates the Act, the Board considers "whether under all the circumstances the interrogation [of an employee] reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Bloomfield Health Care Center*, 352 NLRB 252, at 252 (2008), quoting *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), *enfd. sub. nom. HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Among the factors that may be considered in making such an analysis are the identity of the questioner, the place and method of the interrogation, the background of the questioning and the nature of the information sought, and whether the employee is an open union supporter. *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB at 1295.

It is clear that Grobler created the impression that Respondents were engaged in surveillance of Cazorla's union activities by asking him twice whether he was rushing to "that meeting," when on at least one occasion Cazorla was in fact on his way to a Union meeting. Grobler's pointed queries to Cazorla left the clear impression that Respondents were monitoring

the union activities of Cazorla and other employees, in violation of Section 8(a)(1) of the Act. Furthermore, as the ALJ correctly concluded, Grobler's repeated interrogation of Puzon following meetings held by Davis where Respondents discussed the Union, was coercive and violated Section 8(a)(1) of the Act. (ALJD 8). Thus, Respondents' exceptions should be denied and the ALJ's findings that Respondents, by team leader Grobler, created the impression of surveillance of employees' union activities and interrogated employees about their union activities should be affirmed.

C. Respondents violated Section 8(a)(1) of the Act when general manager Berryhill solicited grievances and impliedly promised to remedy those grievances.

On September 23, 2008, Respondent MBO general manager Berryhill learned that there were ongoing rumors of employee discussions concerning the Union. (ALJD 6; Tr. 1499-1500; GC Ex 174). On September 24, 2008, Respondent AutoNation Florida market manager DeVita, instructed Berryhill to meet with the technicians to find out what was going on. (ALJD 6; Tr. 1505-1506, 1510-1511; GC Ex 174). As Berryhill admitted and as revealed by notes he wrote in his journal, beginning on September 25, 2008, Berryhill and service manager Bullock met individually with Anthony Roberts and other technicians. (ALJD 6; Tr. 1506-1512; GC Ex 174 and 175(a)-(e)).⁴ The credited testimony of technician Roberts establishes that during his meeting with managers Berryhill and Bullock, Berryhill told him "we hear there's a Union drive going on again," and asked Roberts whether he or other technicians were having any trouble that Respondents could help with. (ALJD 6; Tr. 889-891). Roberts said that he could use more money or a skill level change, and Berryhill replied that there was a wage freeze at the time. (ALJD 6; Tr. 889-890).

After speaking with Roberts, Berryhill had technician Brad Meyer summoned to his office. (Tr. 889-891). Meyer's credited testimony establishes that Berryhill informed Meyer that

⁴ Respondents admit in their answers to paragraph 12 of the Amended Complaint that Berryhill solicited employees' grievances, but deny that he impliedly promised to remedy them in order to induce employees to abandon their support for the Union. (Tr. 1507; GC Ex 1(jjj) and 1(kkk)).

Respondents had heard rumors of union activity, and that Berryhill asked Meyer if he had heard anything about it. (ALJD 6; Tr. 339-342). Berryhill went on to ask if there were any employee complaints or issues that he thought Respondents needed to address. (ALJD 6; Tr. 339-342). Meyer mentioned problems with the service advisors and problems with the parts department, and Berryhill assured him that Respondents were working on those things and making progress. (ALJD 6; Tr. 339-342).

Technician David Poppo, whose testimony regarding this meeting was credited by the ALJ, testified that in September 2008, he too met with general manager Berryhill and service manager Bullock in Berryhill's office, at which time Berryhill told Poppo that there were unhappy technicians and asked if there was anything management could correct. (ALJD 6; 429-431). Poppo told Berryhill that he believed that trainees Fenaughty and Wu should have been promoted to technician status and given technician pay. (ALJD 6; 429-431). Berryhill said that Respondents would see what they could do. (Tr. 429-431). During the course of the meeting, Berryhill asked Poppo if he had heard anything about the Union, and Poppo replied that he had heard a little. (ALJD 6; Tr. 1517-15818; GC Ex. 174).

Berryhill also met with technician Happy Calderon and, as correctly found by the ALJ, asked Calderon if he had heard anything about a union. (ALJD 6; Tr. 1514-1515; GC 174).

Respondents argue that the ALJ "erroneously discredited Berryhill by virtue of 'his failure to admit his earlier knowledge of the campaign and action he took.'" (ALJD 4; R. Br. 11-12). However, the record supports the ALJ's finding that Berryhill's initial testimony that he learned of the union organizational campaign on October 4, 2008, is contrary to the notes contained in his personal notebook, which establish that Berryhill actually learned of the union campaign on or about September 23. Thus, when Berryhill was called as a witness and questioned by Counsel for the General Counsel pursuant to Rule 611(c) of the Federal Rules of Evidence, he initially testified that he was unaware of the union organizing campaign until the Saturday before the Monday on which he received a copy of the representation petition by fax, when Respondent

MBO's Parts Manager Chris Moreo called Berryhill and told him that he thought there was union activity. (Tr. 137-139). As noted above, the Union filed the representation petition in Case 12-RC-9344 on October 3, 2008, a Friday. (Tr. 76, GC Ex 58). Thus, the Monday on which Berryhill testified he received the representation petition by fax must have been Monday, October 6, and the Saturday before that Monday was October 4, 2008.

Berryhill went on to testify that although he knew that employees had discussed the Union from time to time in 2008 and for the preceding 12 years, he was unaware of any prior specific organizing activity in 2008 and he denied that he had any prior one-on-one conversations with employees in 2008 about the possibility of organizing. (ALJD 4; Tr. 137-139). However, as the ALJ found, the record, including Berryhill's own journal notes and credited employee witness testimony, establishes that on September 23, 2008, about ten days before the petition was filed, Berryhill knew that employees were discussing the Union and further establishes that he spoke to employees about the Union campaign prior to October 4, 2008. (ALJD 6; Tr. 339-342, 429-431, 889-890, 1512-1521; GC Ex 174 and 175(a)-(e)). The ALJ's credibility resolutions regarding Berryhill should be affirmed.

Section 8(a)(1) of the Act prohibits employers from soliciting employee grievances in a manner that interferes with, restrains, or coerces employees in the exercise of Section 7 rights. *American Red Cross Missouri-Illinois*, 347 NLRB 347, 351 (2006). That manner includes the implied or explicit promise during a union organizing drive to correct the solicited grievances: "it is not the solicitation of grievances itself that is coercive and violative of Section 8(a)(1), but the promise to correct grievances ... that is unlawful." *Uarco, Inc.*, 216 NLRB 1, 2 (1974). See also, *Amptech, Inc.*, 342 NLRB 1131, 1137 (2004), *enfd.* 165 Fed. Appx. 435 (6th Cir. 2006) ("The solicitation of grievances alone is not unlawful, but it raises an inference that the employer is promising to remedy the grievances."); *Capitol EMI Music*, 311 NLRB 997, 1007 (1993), *enfd.* 23 F.3d 399 (4th Cir. 1994); *Blue Grass Industries*, 287 NLRB 274 fn. 4 (1987) ("The solicitation

of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances.”).

As found by the ALJ and as admitted by Respondents, the evidence establishes that during the meetings Berryhill held with Roberts, Meyer, Poppo and other technicians, he solicited employee grievances on behalf of Respondents. (ALJD 7; R. Br. 9). The solicitation of grievances occurred during a union organizing campaign of which Respondents were well aware. Indeed, Berryhill specifically told the technicians that he heard about the union rumors, he wanted to know their concerns, and he would look into the issues they raised. For example, Berryhill asked Poppo if there was anything Respondents could correct, which suggests that Berryhill intended to address Poppo’s grievances if possible. Berryhill assured Meyer that Respondents were looking into his concerns regarding the speed of the service advisors and parts problems. Berryhill’s statements to these employees indicated that Respondents were addressing or intended to address employee grievances. Through these conversations, which Berryhill initiated at the direction of DeVita in direct response to the union rumors, Respondent solicited employee grievances and impliedly promised to remedy them in order to induce employees to abandon their support for the Union, in violation of Section 8(a)(1) of the Act.

Respondents argue that Berryhill’s meetings merely represented the continuation of a past practice and policy of soliciting grievances, and that Berryhill did not promise to remedy specific grievances. An employer who has a past policy and practice of soliciting employees’ grievances may continue such a practice during an organizational campaign” without an inference being drawn that the solicitations are an implicit promise to remedy the grievances. *Wal-Mart, Inc.*, 339 NLRB 1187 (2003). However, “an employer cannot rely on past practice to justify solicitation of grievances where the employer ‘significantly alters its past manner and methods of solicitation.’” *Id.* at 1187, quoting *Carbonneau Industries*, 228 NLRB 597, 598 (1977). The meetings Berryhill held with each technician individually were significantly different from the monthly small group TAP meetings held by Respondents in the past. Rather,

Berryhill was reacting to rumors that employees were engaging in union organizing activities and sought to discourage employees from engaging in those activities by soliciting and impliedly promising to remedy their grievances. Under these circumstances a “past practice” defense is unavailing. In any event, without regard to the similarity of the new solicitations to past ones, “it must be borne in mind that the issue is not whether there has been a change in method of solicitation, but rather whether the instant solicitation implicitly promised a benefit.” *American Red Cross*, supra at 352. That is what Respondents did in this case.

Respondents’ reliance on *Airport 2000 Concessions LLC*, 346 NLRB 958 (2006), is misplaced. In that case, in response to a complaint about health benefits, the employer told one employee only that it might be able to provide better benefits later, and although the employer told a second employee that it would look into more holidays, the employer then told that employee it would not grant any additional holidays. *Id.* at 960. *Airport 2000 Concessions* is distinguishable because in the instant case Respondents informed employees that they either were addressing, or would try to address, certain complaints raised by employees Meyer and Poppo in response to Respondents’ solicitation of grievances.

The ALJ’s findings and conclusions regarding the solicitation of grievances and implied promise to remedy those grievances should be affirmed and Respondent’s exceptions should be denied.

D. The ALJ correctly found that Respondent violated Section 8(a)(1) of the Act when Davis solicited grievances and impliedly promised to remedy those grievances and interrogated employees.

The ALJ’s finding that vice president and assistant general counsel Davis unlawfully solicited grievances and impliedly promised to remedy them is fully supported by the record and the law. (ALJD 10). On or about October 15 or 16, 2010, in the midst of Respondents’ anti-union campaign, Davis held a meeting with MBO service employees and informed them that he knew there were some problems at the dealership and that he was the only who could do anything about the issues. (Tr. 894-896). An employee in the parts department stated that

when employees brought up issues (in the past) they were ignored or the problems were not fixed. (ALJD 10; Tr. 348). Another employee explained that she had been retaliated against for complaining about an incident, and that management's attitude was either shut up or leave. (ALJD 10; Tr. 894-896). Davis replied that they were finally starting to get somewhere and that employees could call or talk to him at any time. (ALJD 10; Tr. 894-896).

Davis' pronouncement that he that he was the only who could do anything about employees' issues constituted a solicitation of employee grievances and generated the employees' complaints about Respondents' past failure to address their concerns. Davis' response that they were finally getting somewhere and that employees could call him strongly implied that if employees called him he would take care of their problems. Thus, Respondents solicited employee grievances and impliedly promised to remedy them in the midst of the anti-union campaign, less than two weeks after the representation petition was filed, in order to induce employees to abandon their support for the Union.

As found by the ALJ, in early December 2008, Davis came to technician Tumeshwar "John" Persaud's work area and asked Persaud how he felt about the upcoming election. Persaud replied "I think the company is going to learn I think we have a good chance." (ALJD 12-13; Tr. 588). Davis then smiled and walked away. (ALJD 12-13; Tr. 588). Respondents suggest that Persaud should be discredited and because Davis "firmly denied engaging in interrogation . . ." (R. Br. 13). However, Davis only denied that he interrogated technicians Meyer and Weiss and he did not deny the conversation with Persaud. (Tr. 1029, 1053-1054). There is no basis to overturn the ALJ's credibility findings. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

As the ALJ explained, in early December 2008, about two weeks before the December 16, 2008, representation election, when Respondent AutoNation's vice president and assistant general counsel Davis asked technician Persaud what he thought about the election, Davis placed Persaud in the position of either having to reveal his own stance on the Union by

refusing to answer, or having to tell Davis his perception of other employees' union sympathies. (ALJD 13). The ALJ correctly found that the questioning of Persaud, who was not an open union supporter, by Davis, a high ranking official of Respondents who was at Respondent MBO's facility for the express purpose of conducting the anti-union campaign, was coercive and violated Section 8(a)(1) of the Act. (ALJD 13).

Respondents' exceptions to the ALJ's findings that Respondents violated the Act by soliciting and impliedly promising to remedy grievances and by interrogating employees should be denied, and the ALJ's findings and conclusions in these respects should be affirmed.

E. The ALJ correctly found that Respondents violated the Act by telling employees that their grievances had been adjusted by the demotion of Manbahal and Grobler from their team leader positions, in order to induce the employees to abandon support for the Union, in violation of Section 8(a)(1) of the Act.

The undisputed evidence demonstrates that in the period before the December 2008 election many technicians were unhappy working under team leaders Grobler on the gold team and Manbahal on the green team, and made complaints to that effect to management. (Tr. 356, 440-441, 541-542, 835-837, 908-909, 1508-1509, 1513-1515; GC Ex 83, 175(a), 175(b), 175(c); R. Br. 13-14). Respondents waited until just before the election to redress these complaints.

On about December 9, 2008, just one week before the election, general manager Berryhill, acting service manager Miller, and team leader Makin held a meeting with 30 to 35 technicians, parts employees and service advisors in the middle of the shop. Berryhill stated, "as we told you, we were going to fix some of the problems in the dealership and some complaints that we received from employees." (ALJD 14; Tr. 355-356). Berryhill went on to tell the employees that this was "the beginning of fixing the problems that you guys brought in." (ALJD 14; Tr. 498-499). Berryhill told the technicians that Grobler and Manbahal were no longer team leaders and that Aviles and Strong were the new team leaders. The ALJ specifically credited the testimony of technicians Meyer and Puzon regarding the statements made by Berryhill regarding the demotions of Grobler and Manbahal. (ALJD 14). Respondents have offered no basis for overturning the ALJ's credibility resolutions regarding the statements

general manager Berryhill made to the employees regarding the demotions of Manbahal and Grobler.

Although the ALJ discredited much of technician James Weiss' testimony, he credited Weiss' testimony that Davis told Weiss that the demotions of Grobler and Manbahal were as a result of the suggestion box and conversations with technician Cazorla. (ALJD 15; Tr. 677-678, 819-820). Respondents have not demonstrated any basis to overturn the ALJ's decision to credit Weiss in this regard.

Thus, the record fully supports the ALJ's conclusion that Respondents told the technicians that their grievances had been adjusted by the demotion of Grobler and Manbahal from their team leader positions in order to induce employees to abandon their support for the Union, in violation of Section 8(a)(1) of the Act. Thus, ALJ's findings and conclusions regarding these violations should be affirmed and Respondents' exceptions denied.

III. RESPONDENTS VIOLATED SECTION 8(A)(1) AND (3) OF THE ACT BY LAYING OFF/DISCHARGING TECHNICIAN ANTHONY ROBERTS BECAUSE OF HIS UNION MEMBERSHIP AND ACTIVITIES. (RESPONSE TO ISSUES TO BE RESOLVED II AND III).

A. The discharge of Anthony Roberts

Anthony Roberts was employed by Respondent MBO from May 20, 2002 through December 8, 2008. Roberts began as a C skill level technician, and progressed to a B+ technician. (Tr. 881-883). At the time of his discharge, Roberts was a master certified technician, and his wage rate was \$23.40 per flat rate hour. (ALJD 21; Tr. 881-883). He worked on the red team, and Makin was his team leader for about the last two years of his employment. (Tr. 881-883).

When he started work for Respondent MBO, Roberts already had 20 years experience as an auto mechanic and five years experience repairing Mercedes-Benz vehicles. (Tr. 887). During his employment by Respondent MBO, Roberts took over 20 training classes and he was

up to date on his training at the time he was discharged.⁵ (Tr. 883). In addition to his regular service technician work, Roberts also had substantial experience performing tire technician work for Respondent MBO. (Tr. 883-884, 911-913).

In about June 2008, Roberts attended his first Union meeting and, on July 8, 2008, Roberts signed a Union authorization card. (ALJD 21; Tr. 884-885; GC Ex 162). Roberts attended approximately six Union meetings, about one per month from July through December 2008, two of which were attended by Alex Aviles before Respondent promoted Aviles to team leader and Aviles became Respondent's supervisor and agent, at about the same time as Respondent discharged Roberts. (Tr. 884-886). Also in July 2008, Roberts began speaking with other employees about the Union and invited at least one employee to attend a union meeting. (ALJD 21; Tr. 886-888, 891). Respondents' managers and supervisors including Berryhill, Bullock, Makin, and Manbahal were in the area at times during some of these conversations and may have overheard them. (Tr. 886-888, 927).

On September 25, 2008, general manager Berryhill and service director Art Bullock met with Roberts in Berryhill's office, where Berryhill solicited grievances from Roberts and impliedly promised to remedy them to induce employees to abandon their support for the Union. (ALJD 6-7, 21-22; Tr. 889-891; Tr. 1511-1512; GC Ex 174 and 175(a)-(e)). Significantly, as is noted in Berryhill's journal, Roberts was the first technician called in to speak to Berryhill about the Union after Respondent heard the "union rumors." (ALJD 6-7, 21-22; Tr. 889-891; Tr. 1511-1512; GC Ex 174 and 175(a)-(e)). This demonstrates that Berryhill believed that Roberts was behind the Union campaign and that if he could resolve Roberts' grievances, Respondents could nip the Union's campaign in the bud.

Furthermore, the ALJ credited technician Weiss' testimony that he informed Berryhill that Roberts was one of the technicians who started the Union, and that later Berryhill told Weiss

⁵ GC Ex 140 lists the numerous training courses that Roberts took during his employment with Respondent MBO. (Tr. 209, 532).

that Roberts was “one of the key guys who started the Union” and referred to Roberts as a troublemaker. (ALJD 9, 21-22; Tr. 653-654, 810). Respondents have failed to establish by a preponderance of the evidence that the ALJ’s decision to credit Weiss was in error. See *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

On December 8, 2008, Roberts was discharged at a meeting with general manager Berryhill and acting service manager Miller, in Berryhill’s office. (ALJD 21; Tr. 902). Berryhill told Roberts that Respondents were downsizing and that he was permanently laid off. When Roberts asked why, Berryhill replied “we’re just downsizing.” (ALJD 21; Tr. 902). Roberts told Berryhill that he had only been written up once and had seniority over half the shop. (ALJD 21; 902-904, 935). Berryhill said he was just laying people off. (Tr. 902-904, 935). Roberts informed Berryhill that when former parts employee, Doug Huff, was laid off in 2004, technicians were told that the last one hired would be the first one let go or fired. (ALJD 21; 902-904, 935). Berryhill stated that whoever told him that was lying. (ALJD 21; Tr. 902-904, 935).

B. The General Counsel established that Respondents were motivated to discharge Roberts because of his union activities.

Under *Wright Line*, the General Counsel has the burden of proving that an employee engaged in union activities, that Respondent was aware of such activities, that the employee was discharged, and that the decision to discharge was motivated, at least in part, by antiunion animus. *Wright Line*, 251 NLRB 1083 (1980) *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Once the General Counsel has established its burden, the respondent must show that it would have taken the same action in the absence of protected conduct. *Peter Vitalie Co.*, 310 NLRB 865, 871 (1993); *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996); *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

Contrary to Respondents’ argument, the credited record evidence reveals that Respondents knew of Roberts’ support for the Union. As set forth above, Roberts was a

supporter of the Union from the outset of its campaign until he was fired. Respondents apparently heard rumors of union meetings in July and August 2008, as demonstrated by team leader Grobler's comments to technician Cazorla at that time. (ALJD 5-6). The rumors had reached a higher level of management by September 24, when, as described above, Respondent AutoNation Florida region manager DeVita instructed Respondent MBO general manager Berryhill to meet with the technicians to find out what was going on regarding union organizing. (ALJD 6). Starting with his meeting with Roberts on September 25, Berryhill attempted to nip the union effort in the bud by interrogating employees, soliciting grievances and impliedly promising to remedy those grievances, even before the Union filed a petition. (ALJD 6-7). Berryhill's perception of Roberts as a leading Union adherent is revealed by the fact that Roberts was the first employee he called to his office in an effort to convince the technicians that management would take care of their grievances and that they did not need a union. (ALJD 6). Furthermore, Weiss told Berryhill that Roberts was one of the technicians who started the Union and Berryhill considered Roberts to be a troublemaker. (ALJD 9, 21-22).

Respondents' animus toward the Union and its employees' union activity is amply established by the many Section 8(a)(1) violations Respondents committed in response to the organizing campaign. Thus, Respondents' response to the 2008 union campaign included numerous Section 8(a)(1) violations, as found by the ALJ. (ALJD 34).⁶ In addition, the timing of Roberts' discharge, just eight days before the election, further establishes Respondents' anti-union motive. See *Bally's Atlantic City*, 355 NLRB No. 218, at 14 (2010) citing *Masland Industries*, 311 NLRB 184, 197 (1993).

In sum, contrary to Respondents' argument, the General Counsel has established that Respondents harbored animus toward employees' Union activity; Roberts was involved in

⁶ In addition, Respondents' union animus has been exhibited by its post-election unfair labor practices as set forth in the Board's decision in Case 12-CA-26377, reported at 355 NLRB No. 113 (2010), finding that Respondent MBO violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union. (GC Ex 4(b)).

activity on behalf of the Union; Respondents were aware of Roberts Union activity; and anti-union animus motivated Respondents to discharge Roberts. Thus, General Counsel has established a strong prima facie case showing that Respondents discharged Roberts because of his union activities, in violation of Section 8(a)(1) and (3) of the Act.

C. Respondents failed to show that Roberts would have been selected for discharge in the absence of his union activities.

Having established a prima facie case, the burden shifts to Respondents to show that they would have discharged Roberts even in the absence of his union activities. Respondents failed to meet this burden. Respondents contend that they discharged Roberts because they wanted to give the other service technicians the ability to make a decent living and avoid losing better technicians, who may have decided to look for employment elsewhere once there was not enough work to go around. (ALJD 22; GC Ex 69). Berryhill asserts that he spoke with service director Bullock and team leader Bruce Makin about a candidate or two for layoff. (ALJD 22-23; Tr. 1439). Berryhill claims that Bullock and Makin, neither of whom testified, informed him that Roberts had shown no interest in furthering his diagnostic skills and had the least potential.⁷ (ALJD 22-23; Tr. 116, 166-169). On page 3 of its February 6, 2009 position statement in these cases, Respondents stated:

(t)he decision was made to discharge Roberts because it was determined that his skill set was least well-suited for the modern automobile services that the dealership provides. While Roberts was able to do many manual tasks, he did not demonstrate the ability or willingness to learn how to perform higher-end diagnosis of vehicles, which makes up the vast majority of service in Mercedes-Benz vehicles.

⁷ In drawing an adverse inference and concluding that if Makin and Bullock had testified their testimony would have shown that Respondent was motivated by anti-union animus when it discharged Roberts, the ALJ essentially discredited Berryhill's testimony regarding Respondents reasons for selecting Roberts for layoff. Respondents have not shown by a preponderance of the evidence that the ALJ's credibility resolution regarding Berryhill's testimony is wrong. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Other than Berryhill's testimony, Respondents offered no other evidence to explain why Roberts was selected for layoff, rather than another technician. In the absence of any credible lawful explanation for the selection of Roberts, the only conclusion to be drawn is that Roberts was selected for layoff because of his Union activity.

(ALJD 22; GC Ex 69).

Although Respondents assert that Roberts had the least skill, the record evidence revealed that there were other technicians with lower skill level ratings than Roberts. Thus, Roberts had a higher skill level rating than 9 other technicians. (ALJD 22; GC Ex. 118). Furthermore, in contrast to the statement purportedly made by Bullock to Berryhill regarding Roberts' diagnostic skills, Bullock's most recent evaluation of Roberts indicates that Roberts was "on target" with regard to his skills, and contains no indication that his skills were insufficient or that he lacked interest.⁸ (ALJD 22; R Ex. 7). Moreover, Berryhill conceded that he did not know if there were technicians who had taken fewer training courses than Roberts. (Tr. 1562).⁹

Alignment technician Ted Crossland and tire technician Edward Frias were discharged at the same time as Roberts. (ALJD 22). Respondents selected Crossland for discharge instead of alignment technician Amaya, at least in part, because Amaya had better productivity numbers, booked more hours, and had fewer callbacks than Crossland. (ALJD 22; GC Ex 69). Likewise, Respondents discharged Frias instead of tire technician Jose Guevara, at least in part, because Guevara had better productivity and booked more hours than Frias. (ALJD 22; GC Ex. 69). Frias also had faulty tire installations and failed to confirm tire size. (ALJD 22). Yet, Respondents chose to discharge Roberts despite the fact that he sold more hours than 19 of the other technicians, an alignment technician and both tire technicians. (ALJD 22; GC Ex. 132). Berryhill stated that Guevara was a better technician than Frias and Amaya was a better technician than Crossland. (ALJD 22). Thus, Respondents laid off the least productive

⁸ The mere fact that technician Meyer testified that he has better diagnostic skills than Roberts is insufficient to show that Roberts had a problem with his diagnostic skills or that his skills were not strong compared to other technicians. Similarly, the statement on Roberts' evaluation indicating that he should **continue** to develop his electrical diagnostic skills does not establish that his skills were inadequate. In fact, it tends to undermine Respondents' argument that Roberts was not interested in improving his skills because the statement suggests that Roberts was in fact actively improving his diagnostic skill set.

⁹ Roberts stated that he was up to date on all his training. (Tr. 883). GC Ex 140 is a list showing the numerous training courses that Roberts took during his employment with Respondent MBO. (Tr. 209, 532).

employees in the cases of Frias and Crossland, but Respondents chose to layoff Roberts, who Berryhill had singled out as a troublemaker because of his union activities, even though he was more productive than 19 other technicians.

An e-mail dated November 18, 2008, from Respondent AutoNation Human Resources Specialist Bibi Bickram to Florida Market Manager DeVita and Florida Region Human Resources Director Bobbie Bonavia regarding “rightsizing” makes reference to the acronym “LIFO,” which stands for “last in, first out.” (GC Ex 108). Bonavia testified that “LIFO” was one of the methods AutoNation used for employee reduction. (Tr. 304). Despite Bickram’s email and the fact that the fact that former parts employee Doug Huff had been laid off by Respondent MBO in the past because he had the least seniority, Respondents did not consider seniority when they decided to select Roberts for layoff. Roberts had more seniority than 14 other service technicians. (ALJD 24; GC Ex. 118). The technicians over whom Roberts had seniority included technicians Fenaughty, Wu, Czencz, Maisch, Tate and Wong, some of whom also had lower productivity than Roberts. (GC Ex 118, 132). Czencz, Maisch and Tate told Berryhill they did not support the Union, and Berryhill’s journal notes reveal that Wong reported rumors about the Union to Berryhill on September 23, 2008, and that Tate told Berryhill on September 26, 2008, that he wanted no part of the Union. (Tr. 155-156; GC Ex 174, 175(d)). Thus, if Respondents had relied on seniority and/or productivity to select a service technician for layoff in December 2008, they likely would have selected one of the aforementioned technicians who they knew were opposed to the Union.

On December 9, 2008, Respondent MBO general manager Bob Berryhill held a meeting with employees to discuss the discharges of Roberts, Crossland and Frias. Berryhill asserted that the technicians were let go because of hard economic times and that, as long as the economy stayed the same, there would be no more need to let anybody else go. (Tr. 670-671). However, Respondents’ rationale for the discharge of Roberts was not always the same. Thus, a few days after December 8, 2008, technician Brad Meyer asked Berryhill why Respondents

had discharged Roberts, and Berryhill used the expression “what have you done for me lately” in explaining the reason he selected Roberts for discharge. (Tr. 360).

As discussed above, and as found by the ALJ, Respondents decided which tire and alignment technicians to layoff by comparing them to other technicians. (ALJD 23). However, Respondent did not bother to compare Roberts to other service technicians. To the extent that Respondents assert that they did compare Roberts to other technicians by claiming that they determined that Roberts’ skill set had the least upside, this is a subjective measure, rather than an objective measure such as seniority, which is discussed in Bickram’s aforementioned e-mail, or sales and productivity, which Respondents used to compare tire technicians Guevara and Frias, and alignment technicians Amaya and Crossland.

If Respondents selected a service technician for layoff in December 2008 by using an objective basis such as seniority, sales or productivity, they would have selected someone other than Roberts.¹⁰ Moreover, even considering the alleged criteria of the technicians’ “skill sets,” Roberts’ productivity numbers and performance evaluation establishes that he did not have a problem with his diagnostic skills or job performance.

The ALJ properly drew an adverse inference regarding the failure of Respondents to present Makin and Bullock as witnesses, concluding that their testimony would establish that

¹⁰ Respondents argue that the ALJ erred by finding that Respondent had a “last in, first out” layoff selection policy based on hearsay testimony. (R. Br. 21-22). However, Roberts’ testimony regarding what he was told by service director Art Bullock, who is a supervisor within the meaning of Section 2(11) of the Act, is admissible as an admission against interest pursuant to Rule 801(d)(2) of the Federal Rules of Evidence.

Respondents were motivated by anti-union animus when Roberts was selected for layoff.¹¹ (ALJD 23). The ALJ's decision to draw an adverse inference regarding the failure of Makin and Bullock to testify indicates that the ALJ discredited Berryhill's testimony regarding the reasons that Roberts was selected for layoff. Without the testimony of Berryhill, Respondents are unable to establish a legitimate non-discriminatory reason for selecting Roberts for layoff. The reasons proffered by Respondents for their discriminatory action are therefore pretextual and indicative of illegal motivation. *Active Transportation*, 296 NLRB 431 (1989). When a false reason is advanced "the circumstances warrant the inference that the true motive is an unlawful one that the respondent desires to conceal." *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 62 LRRM 2401 (9th Cir. 1966); *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

Respondents assert that other technicians who supported the Union more openly than Roberts would have been more logical choices for discharge if Respondents were motivated to make the selection based on union activities. However, the credited evidence shows that Respondents viewed Roberts as a leading union adherent and a troublemaker. Moreover, Board law is clear that an employer need not discharge every union adherent in order to make its point. See *Flite Chief, Inc.*, 229 NLRB 968 (1977), citing *Great Atlantic & Pacific Tea Co.*, 210 NLRB 593 (1974).

In sum, Respondents failed to meet their burden of establishing that they would have discharged Roberts even if he had not engaged in union activities, and General Counsel has

¹¹ Respondents further showed their anti-union motive by failing to recall Roberts to work even though they claim he was let go for economic reasons and was eligible for rehire. Thus, Respondents have hired new technicians, and also rehired technicians who had expressed anti-union sentiments and had quit under circumstances that called into question their rehire status. In October 2010, Respondents hired two new trainees and rehired technicians Wong and Tate. Respondents rehired Tate even though Berryhill admitted to Meyer that Tate had a bad attitude and was always in his office complaining about the Union. (Tr. 388-389). Respondents rehired Wong after he quit even though it had information that he had been involved in a romantic relationship with a manager before he quit in April 2010, contrary to AutoNation policy. (Tr. 1583-1586; GC 54, par. 13). Moreover, the fact that Respondents hired two new technicians in October 2010, when the average number of hours worked by technicians was lower than in past years, contradicts their assertion that they were required to discharge Roberts in 2008 so the remaining technicians would have enough hours to earn a living and would therefore remain on the job at Respondent MBO. (Tr. 1260, 1335).

established that Respondents' discharge of Roberts violated Section 8(a)(1) and (3) of the Act. The ALJ's findings and conclusions should be affirmed in this regard, and Respondent exceptions should be denied.

IV. RESPONDENTS VIOLATED SECTION 8(A)(1) AND (5) OF THE ACT BY LAYING OFF TECHNICIANS JUAN CAZORLA, DAVID POPPO, TUMESHWAR "JOHN" PERSAUD AND LARRY PUZON WITHOUT BARGAINING WITH THE UNION. (RESPONSE TO ISSUES TO BE RESOLVED III).

A. Respondents' bargaining obligation attached as of December 16, 2008.

In its Brief in Support of Exceptions, Respondents argue that they had no duty to recognize and bargain with the Union until August 23, 2010. As mentioned above, the Union was initially certified as the employees' exclusive collective-bargaining representative on February 11, 2009, following a secret ballot election on December 16, 2008. Respondent refused to recognize and bargain with the Union, and the Union filed an unfair labor practice charge in Case 12-CA-26377. Following the issuance of a complaint and the filing of a motion for summary judgment, on August 28, 2009, the two-member Board issued a Decision and Order, reported at 354 NLRB No. 72, finding that MBO violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union. Thereafter, in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), the Supreme Court invalidated all two-member quorum Board decisions.

Then, on August 23, 2010, the properly constituted Board issued a new Decision and Order, reported at 355 NLRB No. 113. The Board set aside its August 28, 2009, decision, and, after considering the pre-election representation issues raised by Respondent, affirmed the decision to deny Respondent MBO's request for review in the representation proceeding. The Board further found that the timing of the representation election (on December 16, 2008) was not affected by the two-member Board's decision on the request for review, and the decision of the Regional Director to open and count the ballots was, at worst, harmless error that did not affect the tally of ballots. Thus, the Board determined that the election was properly held and the tally of ballots is a reliable expression of the employees' free choice. The Board found that

the Regional Director's certification of representative based on the election was valid, but deemed the certification to have issued as of August 23, 2010, instead of February 11, 2009, for the purpose of future proceedings.¹² In addition, the Board found that Respondent MBO violated Section 8(a)(1) and (5) of the Act by failing and refusing to recognize and bargain with the Union, and reconfirming the certification of the Union in these cases. (ALJD 3; GC Ex 4(a) and 4(b)).

Respondents argue that the two-member Board did not have authority to deny its request for review of the Decision and Direction of Election in the representation case and that the Board should have declined to act on the request for review until such time as there was a properly constituted Board. Respondents argue that had the Board declined to act on its request for review, the ballots would have been impounded following the election, and would have remained impounded until August 23, 2010, pursuant to Rule 102.67(b) of the Board's Rules and Regulations. Thus, Respondents' argument continues, its bargaining obligation could not have arisen until August 23, 2010, the date it contends the ballots should have been opened and counted.

However, the Board has already considered and rejected Respondents' argument that they were not obligated to bargain with the Union before August 23, 2010. On June 18, 2010, Respondents filed a Motion for Partial Summary Judgment with the Board seeking the dismissal

¹² As the Board noted there was a postelection proceeding involving challenges to ballots affecting the results of the election in Case 12-RC-9344. The ballots were counted on December 16, 2008, following the election, and a Tally of Ballots was issued showing 16 votes for the Union, 14 against the Union, and three determinative challenged ballots. (GC 62). Respondent MBO took the position that challenged voters Anthony Roberts, Edward Frias, and Ted Crossland, all of whom had been discharged and were alleged as discriminatees in the unfair labor practice charge in Case 12-CA-26126 at that time, were ineligible to vote and the Union took the position that they all had been unlawfully discharged and were eligible to vote. On January 15, 2009, the Regional Director issued a supplemental decision directing that the three determinative challenged ballots be opened and counted, noting that the three challenged voters had waived the secrecy of their ballots. (GC 63). Thereafter, on February 10, 2009, the challenged ballots were opened and counted in the presence of the parties, and all three challenged ballots were cast for the Union. Thus, the Union won the election and on February 11, 2009, the Regional Director issued a Certification of Representative. (GC 64). No party sought review of the Regional Director's supplemental decision and the Board gave the postelection proceeding preclusive effect. *Mercedes-Benz of Orlando*, 355 NLRB No. 113, fn.3.

of the portion of the complaint herein alleging that Respondents violated Section 8(a)(5) of the Act. In that motion, Respondents argued that the ruling in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) “nullified” the two-member Board’s denial of Respondents’ request for review and by implication rendered that decision a “nullity.” (GC Ex. 000). Respondents asserted that the bargaining obligation was “obliterated,” and contended that there was no bargaining obligation “retroactive to the representation election.” (GC Ex. 000). Respondents requested that the Board grant partial summary judgment with regard to the allegations that they violated Section 8(a)(1) and (5) of the Act by laying off employees and implementing unilateral changes without bargaining with the Union. On June 25, 2010, General Counsel filed an opposition to Respondents’ motion with the Board.

On August 27, 2010, the Board issued an Order denying Respondents’ Motion for Partial Summary Judgment. (GC Ex. sss). In its August 27, 2010, Order the Board noted that in its August 23, 2010, Decision and Order in Case 12-CA-26377, reported at 355 NLRB No. 113 (2010), it had found that “the election was properly held, the tally of ballots is a reliable expression of the employees’ free choice, and the Regional Director’s certification of representation based thereon was valid.” (GC Ex. sss). The Board found that Respondents had failed to establish that they are entitled to a judgment as a matter of law. (GC Ex. sss). In denying Respondents’ motion, the Board effectively concluded that Respondents’ bargaining obligation attached at the time of the election, rather than on August 23, 2010, for the purposes of this proceeding, because if there had been no bargaining obligation as a matter of law, the Board would have granted Respondents’ motion.¹³

¹³ On September 15, 2010, Respondents filed a Motion for Reconsideration with the Board, seeking reconsideration of the Board’s August 27, 2010, denial of their Motion for Partial Summary Judgment. On September 20, 2010, General Counsel filed an opposition to Respondent’s motion for reconsideration with the Board. On November 23, 2010, the Board denied Respondents’ motion for reconsideration inasmuch as Respondents had not demonstrated extraordinary circumstances warranting reconsideration under Section 102.48(d)(1) of the Board’s Rules and Regulations.

There is no basis for the Board to now reconsider its decision to reject Respondents' argument that it had no bargaining obligation prior to August 23, 2010. Accordingly, the ALJ's finding that Respondents were obligated to bargain since December 16, 2008, the date of the election, should be affirmed.¹⁴

Even if the Board decides to revisit Respondents' arguments, the facts and Board law demonstrate that the ALJ reached the proper conclusion regarding Respondents' bargaining obligation. Respondents assert that *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974) and its progeny are inapposite to the facts of this case. In *Mike O'Connor Chevrolet*, the Board stated:

The Board has long held that, absent compelling economic considerations for doing so, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made. And where the final determination on the objections results in the certification of a representative, the Board had held the employer to have violated Section 8(a)(5) and (1) for having made such unilateral changes. Such changes have the effect of bypassing, undercutting, and undermining the union's status as the statutory representative of the employees in the event a certification is issued. To hold otherwise would allow an employer to box the union in on future bargaining positions by implementing changes of policy and practice during the period when objections or determinative challenges to the election are pending. Accordingly, since we have already determined in this case the union should be certified, we find, contrary to the administrative law judge, that Respondent was not free to make changes in terms and conditions of employment during the pendency of postelection objections and challenges without first consulting with the union.

209 NLRB 701, 703 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975). Thus, *Mike O'Connor Chevrolet* makes clear that where objections or determinative challenges are resolved in favor of the union, the bargaining obligation attaches on the date of the election, not on the date that the Board issues a final certification. See also *The Celotex Corporation*, 259 NLRB 1186 (1982); *Howard Plating Industries*, 230 NLRB 178 (1977). Thus, an employer acts at its peril when it makes unilateral changes while objections or challenges remain unresolved.

¹⁴ As pointed out by the ALJ, if the Board had intended by its August 23, 2010, Decision and Order, to signify that there was no bargaining obligation prior to August 23, 2010, it would have expressly done so, rather than stating that August 23, 2010 would be the certification date for purposes of future proceedings. (ALJD 30).

Respondents argue that the ballots should not have been opened and counted until August 23, 2010. The ballots were opened and counted on December 16, 2008, and the three determinative challenged ballots were opened and counted on February 10, 2009, pursuant to the Regional Director's supplemental decision.¹⁵ The Union won the election, and Respondents then knew conclusively that a majority of the employees in the unit found appropriate by the Regional Director had selected the Union as their exclusive collective-bargaining representative.¹⁶ The Regional Director of Region 12 issued a certification of representative to the Union on February 11, 2009.

Assuming for the sake of argument that Respondents' assertion that the ballots in this case should not have been opened and counted until August 23, 2010 was correct, this case would be similar to a situation where there are determinative challenged ballots which are sealed until resolved.

In *Han-Dee Pak, Inc.*, the Board concluded that the administrative law judge erred by dismissing allegations that the employer violated Section 8(a)(5) of the Act by changing employee job classifications and rates of pay in April 1978, while determinative challenged ballots remained unresolved. 249 NLRB 725 (1980). The Board noted that because the employer had not established that there were compelling economic circumstances, it "acted at its peril in making such changes after the election, but before the outcome of the election had been determined." *Id.* at 725 citing *Mike O'Connor Chevrolet*, supra. The Board sustained the challenges to certain ballots and remanded the representation case to the Regional Director to

¹⁵ See footnote 11, supra.

¹⁶ Even as of December 16, 2008, when there were three determinative challenged ballots, it was apparent that Respondents believed, with good reason, that the Union had won the election. As the ALJ found, Berryhill and Davis both expressed their disappointment to the employees in a meeting they held right after the election, at which Davis admittedly was upset and made comments about (the employees' lack of) trustworthiness. (ALJD 16:1-4). After the count on December 16, 2008, the Union was ahead by two votes and Respondent MBO took the position that challenged voters Roberts, Frias and Crossland were ineligible because they had been discharged for cause. If that position was upheld it would necessarily lose the election. Moreover, Respondents knew Roberts was a strong supporter of the Union, and likely surmised that not only Roberts, but also Frias and Crossland voted for the Union because all three were named as alleged discriminatees in the Union's unfair labor practice charge in Case 12-CA-26126.

open and count other challenged ballots and to either issue a certification of representative or conduct a second election. In *Han-Dee Pak, Inc. (Han-Dee Pak II)*, 253 NLRB 898 (1980), citing *Mike O'Connor Chevrolet*, supra, the Board concluded that the employer violated Section 8(a)(5) of the Act “by making unilateral changes in job classifications and rates of pay of bargaining unit employees after a representation election had been conducted, but prior to the determination of the outcome of that election.”

Thus, from the date of an election in which there are determinative challenged ballots until the challenged ballots are resolved and, if appropriate, opened and counted, the results of the election are unknown. If the challenges are resolved in favor of the union, the bargaining obligation attaches as of the date of the election, regardless of how long it takes to resolve the challenged ballots.

Here, because the employees selected the Union as their representative, the bargaining obligation attached as of the date of the election, the same as would have occurred if there had been determinative challenged ballots that were not resolved until August 23, 2010. In fact, however, the election results were final on February 10, 2009. Respondents acted at their peril when they made changes to the bargaining unit employees' terms and conditions of employment without bargaining with the Union. To hold otherwise would allow Respondents, who knew that the Union won the election, to undermine the Union's majority status and allow Respondents to cause the harm that the Board was trying to prevent in *Mike O'Connor Chevrolet* by “box[ing] the union in on future bargaining positions by implementing changes of policy and practice...” 209 NLRB 701, 703 (1974).

B. Respondents' bargaining obligation was not excused by compelling economic considerations. Respondents violated Section 8(a)(1) and (5) of the Act by unilaterally laying off technicians Cazorla, Persaud, Poppo and Puzon.

Respondents laid off technician Juan Cazorla on April 2, 2009, and technicians David Poppo, Tumeshwar “John” Persaud and Larry Puzon on April 3, 2009, claiming that they needed to cut the MBO service technician work force for economic reasons, and selected the

four lowest rated service technicians.¹⁷ (ALJD 24-25; Tr. 451-453, 501-503, 594, 850-851, 870). General manager Berryhill asserted that the intent of the layoffs was not to save money, but to save the remaining technicians by increasing their workloads. (ALJD 24; Tr. 1580-1581). Respondents admit that they did not notify or bargain with the Union about the layoffs. (ALJD 30-31; Tr. 318-320; GC Exs. 1(dddd), 1(eeee)).

It is well settled that an employer violates Section 8(a)(1) and (5) of the Act by unilaterally changing the wages, hours, and other terms and conditions of employment of represented employees, which are mandatory subjects of bargaining, without first providing their bargaining representative with notice and a meaningful opportunity to bargain about the change. *NLRB v. Katz*, 369 U.S. 736 (1962). Mandatory subjects of bargaining include those matters that are “plainly germane to the ‘working environment’” and “not among those ‘managerial decisions which lie at the core of entrepreneurial control.’” *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979). The decision to lay off employees for economic reasons is clearly a mandatory subject of bargaining. Thus, absent a showing that bargaining was excused and its unilateral change was privileged, an employer must provide notice to and bargain with the union representing its employees concerning both the layoff decision and the effects of that decision. *Caterpillar, Inc.*, 255 NLRB No. 91 (2010), citing *Pan American Grain Co.*, 351 NLRB 1412 (2007); *Tri-Tech Services*, 340 NLRB 894, 895 (2003).

The ALJ rejected Respondents’ argument that their failure to notify and bargain with the Union prior to the April 2009 layoffs of Juan Cazorla, Larry Puzon, John Persaud and David Poppo was excused by “compelling circumstances.” (ALJD 30-31). In reaching his conclusion, the ALJ relied on *Uniserv*, 351 NLRB 1361 (2007). (ALJD 30). Respondents argue that in *Uniserv* the administrative law judge, whose rulings, findings and conclusions were affirmed by

¹⁷ Respondents filed an exception to the ALJ’s finding that Respondents knew that Cazorla, Persaud, Poppo and Puzon were engaged in Union activity. (ALJD 25; R. Exception XXXV). Respondents did not specifically address this exception in their Brief in Support. The ALJ’s finding is amply supported by the record evidence and the ALJ’s credibility resolutions. Respondents’ exception should be denied and the ALJ’s finding affirmed.

the Board, used the wrong standard. Respondents argue that *RBE Electronics* and *Bottom Line Enterprises*, stand for the proposition that while negotiations for a collective-bargaining agreement are ongoing, an employer may not implement unilateral changes absent an overall impasse, even if it gives the union notice and an opportunity to bargain over a particular change prior to implementation. See *RBE Electronics*, 320 NLRB 80, 81 (1995), citing *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). An exception to this rule is where an employer faces an economic exigency. See *Id.* Respondents argue that because they were not engaged in negotiations with the Union at the time of the layoffs, they were not required to establish that the layoffs were necessitated by an economic exigency. Rather, Respondents argue that they need only establish that the employees were laid off in response to “compelling economic circumstances,” and that compelling economic circumstances do not rise to the level of an “economic exigency” and need not be unforeseeable.

Respondents also argue that the ALJ erred when he relied on *Angelica Healthcare Services Group*, 284 NLRB 844 (1987) to find the economic exigency must be unforeseen. (ALJD 30-31). Respondents contend that *Angelica* is not good law because it relies on *Van Dorn Plastic Machinery Co.*, 265 NLRB 864 (1982), which was remanded by the Sixth Circuit and reconsidered by the Board in *Van Dorn Plastic Machinery Co. (Van Dorn II)*, 286 NLRB 1233 (1987).

Notwithstanding Respondents’ assertion that the ALJ erroneously relied on *Angelica*, *Angelica* has been cited with approval by the Board in *Hankins Lumber*, 316 NLRB 837, 838 (1995), *RBE Electronics*, 320 NLRB 80, 81 (1995), and numerous other cases. In *Hankins Lumber*, the employer unilaterally laid off unit employees before bargaining with a newly certified union. 316 NLRB 837 (1995). The Board found that the employer violated Section 8(a)(1) and (5) of the Act because it failed to prove that bargaining over the layoffs was excused by compelling economic circumstances. *Id.* at 838. In reaching its conclusion, the Board explained that compelling economic considerations are defined “as only those extraordinary

events which are ‘an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.’” See *Hankins Lumber*, 316 NLRB 837 (1995). Compelling economic circumstances excusing bargaining can only present when an employer faces an extraordinary event. *Alpha Associates*, 344 NLRB 782, 785-786 (2005), enfd. 195 Fed. Appx. 138 (4th Cir. 2006); *Lapeer Foundry and Machine, Inc.*, 289 NLRB 952 (1988); *Angelica Healthcare Services*, supra.

Furthermore, the ALJ properly relied on *Uniserv*, 351 NLRB 1361, 1369 (2007), to conclude that a drop in business is not a compelling economic circumstance excusing Respondents’ bargaining obligation. (ALJD 30-31). In *RBE Electronics*, 302 NLRB 80, 81 (1995), the Board explained:

there are certain compelling economic considerations that the Board has long recognized as excusing bargaining entirely . . . the Board has limited its definition of these considerations to “extraordinary events which are ‘an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.’”

quoting *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995), quoting *Angelica Healthcare Services*, 284 NLRB 844, 852-853 (1987). It is clear that “compelling economic circumstances” and economic exigencies are defined the same by the Board, that the standard articulated in *Uniserv* is the standard applied by the Board to cases such as this, and that a drop in business is not a compelling economic circumstance.

Respondents’ terminations of the employment of Cazorla, Poppo, Persaud and Puzon in April 2009 were, whether characterized as layoffs or discharges, economically based. Thus, these actions were mandatory subjects of bargaining under established Board precedent. Respondents’ decision to lay off these employees was based on their purported need to reduce their work force because of lack of work. Yet, Respondents failed to give the Union any notice or opportunity to bargain. Respondents thus precluded the Union from bargaining over the layoff decision, the number of technicians to be laid off, the method of selection and the criteria for layoff, and the effects of its layoff decisions.

Because there is no doubt that Respondents undertook unilateral action and refused to bargain with the Union on the layoffs and because that subject was a mandatory subject of bargaining, it falls to Respondents to prove that their unilateral actions were privileged. Respondents rely on their financial condition as a defense to the layoffs. To prevail with this argument, Respondents must show that their decision to layoff the employees was required because of compelling economic circumstances, or economic exigencies.

There is no merit to Respondents' contention that compelling or extraordinary circumstances justified their unilateral actions. Respondents experienced declining sales and service revenue for several months. (ALJD 31; Tr. 120-1204). Respondent MBO knew, as of at least late June 2008, that its parent corporation, Respondent AutoNation, had directed dealerships to cut back on staff. (GC Exs. 96-105). Respondents presented evidence that eight months later, in February 2009, service director Bullock informed the team leaders that they should identify technicians for possible layoff. (ALJD 31; Tr. 1342-1343). Another month later, in March 2009, Respondents developed a plan for assessing and determining which technicians to layoff. (Tr. 1344-1347). Finally, in April 2009, Respondents laid off technicians Cazorla, Puzon, Persaud and Poppo. (ALJD 31; Tr. 1376-1377). Obviously, given the ten month period between late June 2008, when Respondent AutoNation first notified Respondent MBO that dealerships should cut back on staff, and early April 2009, when the layoffs took place, time was not of the essence. Moreover, even after directing team leaders to select technicians for layoff in February 2009, Respondents did not lay off the technicians until April 2009, which would have been ample time to give the Union notice and an opportunity to bargain. It is apparent from Respondents' conduct that immediate action in the form of layoffs was not required to improve their financial situation. As correctly found by the ALJ, the layoffs and the economic circumstances leading to the layoffs were not unforeseen. (ALJD 30-31).

In fact, Respondent MBO general manager Berryhill admitted that Respondents did not save a significant amount of money by laying off the four technicians. (Tr. 1581). Rather,

Respondents contend that the layoffs were intended to provide the remaining technicians with more work opportunities. Respondents presented no evidence that any remaining technician was about to quit because of lack of work. Thus, there is no evidence that the possibility of technicians quitting for lack of work was a compelling circumstance excusing Respondents from bargaining with the Union.

In summary, the ALJ correctly found that Respondents violated Section 8(a)(1) and (5) of the Act by unilaterally laying off Cazorla, Persaud, Poppo and Puzon in April 2009, and Respondents' exceptions to these findings should be denied.

C. The ALJ properly ordered that technicians Cazorla, Persaud, Poppo and Puzon be reinstated with backpay.

Respondents, relying on *Sundstrand Heat Transfer, Inc. v. NLRB*, 538 F.2d 1257 (7th Cir. 1976), argue that the ALJ inappropriately awarded backpay as part of the remedy. Respondents' argument is without merit. However, in *Lapeer Foundry and Machine, Inc.*, the Board determined that the employer violated Section 8(a)(5) of the Act by laying off employees for non-discriminatory economic reasons. 289 NLRB 952 (1988). Having found that the employer violated the Act by unilaterally laying off employees for economic reasons, the Board concluded that the appropriate remedy included reinstatement and backpay. See *Id.* at 955; See also *Uniserv*, 351 NLRB 1361 (2007); *Alpha Associates*, 344 NLRB 782, 787 (2005), *enfd.* 195 Fed. Appx. 138 (4th Cir. 2006). Thus, the award of backpay and reinstatement are the Board's standard remedies in cases where an employer violates Section 8(a)(5) of the Act by unilaterally laying off employees. The ALJ's decision to Order that Cazorla, Persaud, Poppo, and Puzon be reinstated and made whole should be affirmed and Respondents' exceptions to the contrary should be denied.

V. RESPONDENTS VIOLATED SECTION 8(A)(1) AND (5) OF THE ACT BY UNILATERALLY SUSPENDING EMPLOYEES' SKILL LEVEL PERFORMANCE REVIEWS AND WAGE INCREASES AND UNILATERALLY REDUCING EMPLOYEE WAGES FOR PERFORMING PREPAID MAINTENANCE WORK, AND BY REFUSING TO PROVIDE THE UNION WITH THE RELEVANT INFORMATION IT REQUESTED. (RESPONSE TO ISSUE TO BE RESOLVED IV).

A. Respondents violated Section 8(a)(1) and (5) of the Act by unilaterally suspending employees' skill level performance reviews and accompanying wage increases.

Although Respondents argue that there is no evidence that technicians were given reviews on a set schedule, pursuant to Respondent MBO's standard policy, team leaders are supposed to regularly conduct skill level performance reviews of technicians twice per year, and the skill level ratings determine the technicians' wage rates. (ALJD 31; Tr. 184-185; GC Ex 86). Respondent MBO regularly considered technicians for promotions and skill rate increases when it conducts their skill level reviews. (ALJD 31-32; Tr. 188).

However, as found by the ALJ, general manager Berryhill admitted that skill level reviews were suspended and not resumed until late summer 2009. (ALJD 31). Team leader Aviles told employees in January 2009, that Respondents would not be performing skill level reviews because of the pending negotiations. (ALJD 31-32; Tr. 379-380, 1410). With the exception of Brad Meyer, who had a skill review performed in May 2009, the only technician skill level reviews that Respondents conducted in 2009 were around late summer 2009, when four other technicians' skill levels were increased. (ALJD 32; Tr. 186-187).

Union agent David Porter testified that Respondents never notified the Union of their intent to discontinue or suspend performing skill level reviews, and accompanying wage rate increases, for technicians, or sought to bargain with the Union about that decision or the effects of that decision. (Tr. 320). At the hearing, Respondents' counsel admitted that Respondents did not consult with the Union regarding the suspension of skilled performance reviews and wage increases. (Tr. 318-319).

In *NLRB v. Katz*, supra at 742-743, the Supreme Court stated that the duty to bargain collectively as set forth in Section 8(a)(5) of the Act is defined by Section 8(d) as the duty to "meet ... and confer in good faith with respect to wages, hours, and other terms and conditions

of employment.” The Court held that “an employer's unilateral change in conditions of employment under negotiation is ... a violation of Section 8(a)(5)” of the Act. Accordingly, an employer may not change matters related to wages, hours, or terms and conditions of employment without first affording the employees’ bargaining representative a reasonable and meaningful opportunity to discuss the proposed changes.

Since Respondents did not conduct skill level reviews of technicians from January 2009 through August 2009 (with the exception of Meyer’s May review), and therefore never increased wages based on skill rate reviews during that period, the evidence establishes that Respondents changed unit employees’ terms and conditions of employment following the December 16, 2008, election without giving the Union notice or an opportunity to bargain, in violation of Section 8(a)(1) and (5) of the Act. The ALJ’s findings and conclusions regarding the unilateral suspension of skill rate reviews should be affirmed and Respondents’ exceptions denied.

B. Respondents violated Section 8(a)(1) and (5) of the Act by unilaterally reducing employees’ wages when performing pre-paid maintenance work.

Mercedes-Benz vehicles have factory recommended maintenance service schedules. (Tr. 366-367). In 2005 or 2006, Respondents began offering customers pre-paid maintenance packages for Mercedes-Benz vehicles, also referred to as AON services. (Tr. 370-371). Under the AON maintenance package, technicians perform flex A and flex B services, in alternating fashion, about every 10,000 miles on vehicles. Respondents maintain a checklist of tasks for the flex A and flex B services. (GC Ex 153; Tr. 366, 369-370).

Prior to February 2009, MBO paid technicians 1.2 hours (book time) for performing flex A services and 4.2 hours for performing flex B services, including a brake flush. (ALJD 32; Tr. 376-377). In January 2009, team leader Aviles told technician Meyer that he and acting service manager Miller had been discussing changing the structure of the AON service because Respondent AutoNation was not paying Respondent MBO the full amount for the service and Respondent MBO did not want to continue absorbing that loss. (ALJD 33; Tr. 373). Around

February 1, 2009, team leaders gave technicians a document showing the new AutoNation pre-paid maintenance service pay scale (book times). (ALJD 33; Tr. 373-374; GC Ex 155). The team leaders told technicians that, effective on February 1, 2009, the new pay scale would be in effect. (GC Ex. 155). In the new pay scale Respondents reduced the flex A service book time from 1.2 hours to 1.1 hours, for a total reduction of .1 hours, and reduced the flex B service book time from 3.2 hours, plus 1 hour for a brake flush (or 4.2 hour) to 2.3 hours, which includes the brake flush, for a total reduction of 1.9 hours.. (ALJD 33; GC Ex. 155; Tr. 371, 373-374, 376).¹⁸

Respondents argue that the change to the book time paid for Flex A and Flex B service merely corrected a mistake. Respondents contend that prior to the change, technicians were being paid to perform AON Flex A and Flex B services at the Mercedes-Benz warranty rate, despite the fact that more work was required for the Mercedes-Benz warranty rate than was required on the AON Flex A and Flex B service. Respondents assert that they merely adjusted the payment to technicians to reflect the work done. Regardless of how the change is characterized, or the reasons for the change, the facts demonstrate that following the election, on February 1, 2009, Respondents reduced the unit technicians' book times for performing Flex A and Flex B services under AutoNation's pre-paid maintenance package program. The fact remains that after the technicians selected the Union as their collective- bargaining representative, Respondents had an obligation to provide the Union with notice and an opportunity to bargain about any changes affecting the terms and conditions of employment of bargaining unit employees. Respondents chose to ignore their bargaining obligations and unilaterally decided to lower the book times they paid the technicians for performing services under the AutoNation pre-paid maintenance package. Therefore, as correctly found by the ALJ,

¹⁸ In his decision, the ALJ found that Respondents reduced the Flex B service from 4.2 paid hours to 2.8 paid hours, rather than to 2.3 paid hours. General Counsel is filing a cross-exception concerning this apparently inadvertent error.

Respondents violated Section 8(a)(1) and (5) of the Act by unilaterally reducing the book hours paid to technicians for performing Flex A and Flex B service. (ALJD 32-34).

C. Respondents violated Section 8(a)(1) and (5) of the Act by refusing to provide the Union with the relevant information it requested.

Respondents excepted to the ALJ's finding that they violated the Act by failing and refusing to provide the Union with information, but did not address the ALJ's findings and conclusions to this effect in their Brief in Support of Exceptions, other than to assert that they were not obligated to provide the information because there was no bargaining obligation prior to August 23, 2010. As the ALJ correctly found, the Union sent a letter, dated April 17, 2009, to Respondents requesting certain information needed and relevant to negotiating an initial collective-bargaining agreement. (ALJD 33; Tr. 324; GC Ex 87). On June 4, 2009, Respondents notified the Union by letter that they were refusing to provide the Union with the requested information. (ALJD 33; GC Ex 88). On September 3, 2009, the Union sent a second letter requesting the same information. (ALJD 33; GC Ex 89). By letter dated September 11, 2009, Respondents again refused to provide the Union with the requested information. (ALJD 33; GC Ex 90). Thus, it is undisputed that the Union requested relevant information from Respondents, and that Respondents refused to provide any of the information on the basis that they are contesting the Union's certification. (GC Ex 88 and 90).

As found by the ALJ, Respondents cannot excuse their failure to comply with the Union's April 17, 2009, information request on the basis that Respondent MBO is engaged in litigation to test the validity of the Union's certification as bargaining representative. (ALJD 34). It is well settled that collateral litigation does not suspend the duty to bargain. *United Cerebral Palsy of New York City, Inc.*, 343 NLRB 1 (2004), citing *Dresser Industries*, 252 NLRB 631, 632 (1980), enfd. as modified 654 F.2d 944 (4th Cir. 1981). The duty to bargain encompasses the duty to provide relevant information. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956). Thus, Respondents are obligated to comply

with the Union's information request, notwithstanding the test of certification. *Palmetto Sash & Door Company, Inc.*, 260 NLRB 278 (1982); *L.F. Strassheim Co.*, 171 NLRB 916 (1968).

Consequently, Respondents violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide the Union with the requested information, and Respondents' exceptions should be denied.

VI. CONCLUSION

In summary, the evidence fully supports the ALJ's factual findings and conclusions that Respondents violated the Act. Counsel for the General Counsel contends that Respondents' exceptions are without merit and respectfully requests that they be denied in their entirety.

DATED at Tampa, Florida, this 16th day of May, 2011.

Respectfully submitted,

/s/ Christopher C. Zerby
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, General Counsel's Answering Brief to Respondent's Exceptions in Contemporary Cars, Inc. d/b/a Mercedes-Benz of Orlando and AutoNation, Inc., Cases 12-CA-26126, 12-CA-26233, 12-CA-26306, 12-CA-26354, 12-CA-26386 and 12-CA-26552 has been electronically filed with the Office of the Executive Secretary, National Labor Relations Board and served by electronic mail on May 16, 2011 as follows:

By electronic filing:

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Executive Secretary
National Labor Relations Board
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