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

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

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO

GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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I. STATEMENT OF THE CASE AND ISSUES PRESENTED

Administrative Law Judge George Carson II (the ALJ) issued his Decision in these cases on March 18, 2011, reported at JD(ATL)-06-11. This case involves allegations that Contemporary Cars, Inc. d/b/a Mercedes-Benz of Orlando (Respondent MBO) and AutoNation, Inc. (Respondent AutoNation), referred to collectively herein as Respondents: committed independent violations of Section 8(a)(1) of the Act during and after a successful campaign by International Association of Machinists and Aerospace Workers, AFL-CIO (the Union) to organize the service technicians employed by Respondent MBO; laid off / discharged service technician Anthony Roberts on December 8, 2008, shortly before the representation election won by the Union on December 16, 2008, in violation of Section 8(a)(1) and (3) of the Act; laid off service technicians Juan Cazorla, Larry Puzon, Tumeshwar "John" Persaud and David Poppo in early April 2009, in violation of Section 8(a)(1)(3) and (5) of the Act; issued a counseling to employee Dean Catalano in October 2009, in violation of Section 8(a)(1) and (3) of the Act; unilaterally changed certain terms of employment of unit employees, in violation of Section 8(a)(1) and (5) of the Act; and failed and refused to provide the Union with information relevant to bargaining an initial collective-bargaining agreement, in violation of Section 8(a)(1) and (5) of the Act.

In a related matter, Cases 12-CA-26377 and 12-RC-9344, Respondent MBO is testing the certification of the Union as representative of the unit of its service technicians. *Mercedes-Benz of Orlando*, 355 NLRB No. 113 (2010).

The ALJ found that Respondents violated: Section 8(a)(1) of the Act by certain statements to employees and by maintaining an overbroad no solicitation rule; violated Section 8(a)(1) and (3) of the Act by laying off / discharging Anthony Roberts on December 8, 2008; and violated Section 8(a)(1) and (5) of the Act by laying off service technicians Juan Cazorla, Larry Puzon, Tumeshwar "John" Persaud and David Poppo in early April 2009, making certain unilateral changes in terms of employment in 2009, and refusing to furnish information

requested by the Union for bargaining of an initial collective-bargaining agreement. Respondents filed exceptions to the ALJ's findings of unfair labor practices. General Counsel is submitting a separate answering brief to Respondents' exceptions.

General Counsel respectfully submits this brief in support of General Counsel's cross-exceptions to the ALJ's Decision. The main issues addressed in General Counsel's cross-exceptions are:

> 1. Should the Board order a nationwide remedy for the overly broad no solicitation rule the ALJ found to have violated Section 8(a)(1) of the Act?
>
> 2. Did Respondents violate Section 8(a)(1) of the Act by threatening employees with loss of jobs or discharge if they selected the union as their collective-bargaining representative or engaged in union activities?
>
> 3. Did Respondents violate Section 8(a)(1) of the Act by interrogating technician James Weiss about the union sympathies of other employees, and as to whether an employee had voted in a secret ballot election conducted by the Board on December 16, 2008, the date of the election?
>
> 4.. Did Respondents violate Section 8(a)(1) and (3) of the Act by laying off service technicians Juan Cazorla, David Poppo, Tumeshwar "John" Persaud and Larry Puzon?
>
> 5. Did Respondents violate Section 8(a)(1) and (3) of the Act by issuing a documented coaching to service technician Dean Catalano?

II. THE ALJ INADVERTENTLY MISSTATED THE CORRECT LEGAL NAME OF RESPONDENT MBO: CROSS-EXCEPTION 1

The ALJ incorrectly referred to Contemporary Cars, Inc. d/b/a Mercedes-Benz of Orlando (herein called Respondent MBO) as Contemporary Cars, Inc. d/b/a Mercedes-Benz of Orlando**, Inc.** (emphasis added). [ALJD, cover page of Order Transferring Proceeding to the NLRB, case caption; p. 1, case caption; p. 2, ln. 5; p. 35, ln. 27; Notice to Employees, p. 2, ln. 26-27; Affidavit of Service of ALJD, case caption][1] The record is clear that the correct legal

[1] The following references will be used throughout this document:
[ALJD p. __, ln.__] = ALJD page and line numbers
[TR __] = transcript page number
[GC Ex __] = General Counsel's exhibit number
[R Ex __] = Respondents' exhibit number

name of Respondent MBO is Contemporary Cars, Inc. d/b/a Mercedes-Benz of Orlando. [See GC Ex 1(uu), 1(dddd), 4(a) and 4(b)]

III. THE ALJ IMPROPERLY FAILED TO RECOMMEND A NATIONWIDE REMEDY CONCERNING RESPONDENTS' OVERLY BROAD NO SOLICITATION RULE: CROSS-EXCEPTION 2

The ALJ correctly held that Respondent MBO and AutoNation, Inc., herein called Respondent AutoNation, and herein collectively called Respondents, constitute a single employer. [ALJD, p. 2, ln. 39-40] The ALJ further correctly found that "[i]t is undisputed that the AutoNation Associate Handbook states: '[W]e prohibit solicitation by an associate of another associate while either of you is on company property.'" [ALJD, p. 5, ln. 19-20] The ALJ also found that "[t]he Respondents offered no business justification for the foregoing prohibition against solicitation on employees' own time such as during breaks or lunch." [ALJD, p. 5, ln. 21-22]

As a remedy for Respondents' violation of Section 8(a)(1) of the Act, the ALJ properly stated that Respondents must rescind the unlawfully broad rule. [ALJD, p. 34, ln. 37-38] The ALJ noted that the General Counsel requested the imposition of a "nationwide remedy" with regard to the overly broad rule in the AutoNation Associate Handbook. [ALJD, p. 34, ln. 50-51] The ALJ then stated "[m]y recommended order directs recession [sic] of that rule." [ALJD, p. 34, ln. 51-52] However, the ALJ erred by failing to recommend that the Board order a remedy rescinding the overly broad rule at all of their AutoNation dealerships throughout the United States.

The record establishes that Respondent AutoNation has approximately 250 franchises throughout the United States. [TR 56; GC Ex 9] In addition, it is undisputed that the overly broad no-solicitation rule contained in AutoNation's handbook is in effect at all of the AutoNation dealerships and is applicable to all employees in those dealerships. [TR 72; GC Ex 54, 55, 56 and 173] Thus, it is appropriate to impose a nationwide remedy for this violation requiring

Respondents to rescind their overly broad no-solicitation policy in all of their dealerships throughout the United States, and to physically and electronically post a Board "Notice to Employees" in each of those dealerships. Where an unlawful rule or policy like Respondents' no solicitation rule is maintained on a corporate-wide basis, a corporate-wide remedy is appropriate. *Fresh & Easy Neighborhood Market*, 356 NLRB No. 85, slip op. at 1, fn.1 (2011); *Cintas Corp.*, 344 NLRB 943, 944 (2005), enfd. 482 F.3d 463, 468 (D.C. Cir. 2007).

IV. RESPONDENTS VIOLATED SECTION 8(a)(1) OF THE ACT BY THREATENING EMPLOYEES WITH LOSS OF JOBS OR DISCHARGE IF THEY SELECTED THE UNION AS THEIR COLLECTIVE-BARGAINING REPRESENTATIVE OR ENGAGED IN UNION ACTIVITIES: CROSS-EXCEPTIONS 3, 4, 5 AND 6

The ALJ recommended the dismissal of allegations that Respondents, by vice president and assistant general counsel Brian Davis,[2] violated Section 8(a)(1) of the Act as alleged in paragraphs 23(b) and 24(a) of the Complaint, by threatening employees with job loss and discharge if they engaged in union activities on or about dates in November 2008. [ALJD, p. 12, ln. 6-44] However, the ALJ mischaracterized Davis' testimony and incorrectly found that there was an "absence of corroborative testimony establishing that Davis couched his remarks in terms relating to the organizational campaign rather than current economic circumstances." [ALJD, p. 12, ln. 41-43]

Starting on October 9, 2008, Davis visited Respondent MBO's premises "very regularly" and frequently for the purpose of "educating" the employees about the Union after Respondents got notice of the representation petition in Case 12-RC-9344 on about October 6, 2008. [TR 72-73, 77-78] Davis conducted group meetings with employees for this purpose at least once per

[2] Davis assumed those positions on October 31, 2008, in the midst of Respondents' campaign against the Union at Respondent MBO, but retained his duties in his prior position as Respondent AutoNation's senior counsel and director of labor relations. [TR 49-50] Because Davis is an attorney, as a professional courtesy he was not named in the Complaint, which only refers to him as Respondents' unnamed agent. General Counsel provided Respondents with notice of the alleged unfair labor practices involving Davis. [TR 13-14]

week until the election on December 16, 2008.[3] [TR 83-87, 268-270] Davis ultimately admitted that at the meetings he made it clear that Respondents were very much against the employees being represented by the Union. [TR 87]

In addition, during the period from the filing of the representation petition on October 3, 2008, until the election on December 16, 2008, Respondents regularly distributed anti-union literature to Respondent MBO employees and showed them an anti-union videotape. [GC 65(a) to (l); TR 82-83]

Davis admits that the purpose of the meeting he held (which he states occurred around November 20, 2008), was to redirect employees' focus from the "divisiveness at the dealership and the destruction that this campaign was creating among relationships." [TR 978-980]

Although the ALJ viewed Davis' testimony with skepticism, he relied on Davis' testimony and found that at the meeting Davis told the employees:

> "Look around you. Take a look at the people next to you. There's a good chance that person may not be here in six months….[T]here's only one person in this room whose job is safe, and that's this man right here," pointing to Berryhill. Davis continued, stating, "This is serious business, okay. This is not about a union campaign. This is about an industry on the verge of collapse."

[ALJD p. 12, ln. 34-44]

However, Davis actually testified as follows:

> I looked around. It was fairly quiet. I looked at everybody in the room. I was quiet, and I said, "Look around you. Take a look at the people next to you. There's a good chance that person may not be here in six months." I said, "there's only one person in this room whose job is safe, and that's this man right here." I don't even think I named him. I think I pointed to him. He was standing right next to me. This is serious business, okay. This is not about a union campaign. This is about an industry on the verge of collapse.

[TR 984]

Thus, the ALJ mischaracterized Davis' testimony by finding that at the meeting Davis

[3] Davis had no dealings with Respondent MBO in 2007 and it appears that he had no dealings with Respondent MBO until early October 2008, when he learned that the Union had filed the petition in Case 12-RC-9344 seeking to represent Respondent MBO's service technicians. [TR 72, 93-94]

told the employees:

> …This is serious business, okay. This is not about a union campaign. This is about an industry on the verge of collapse.

As set forth in the official transcript, those words are not quoted. Those words are merely commentary about the meeting by Davis, rather than part of the statement Davis made to employees at the meeting.

In relating the events of the meeting Davis, an experienced attorney, was careful to insert the words "I said" before the statements he actually made to employees. There is no such preface to the last three sentences quoted by the ALJ. The portion of Davis' testimony immediately following the quote and immediately preceding those last three sentences is obviously a comment rather than a recitation of what Davis said at the meeting, and the last three sentences were a continuation of that comment.[4] Thus, Davis' testimony establishes only that he said the following to the employees at the meeting:

> "Look around you. Take a look at the people next to you. There's a good chance that person may not be here in six months…There's only one person in this room whose job is safe, and that's this man right here."

[TR 984] Davis' statement threatened employees that nobody had job security except general manager Berryhill and that there was good chance that everyone in the room except Berryhill might not be employed at Respondent MBO in six months. Thus, Davis threatened mass layoffs within the next six months.

Although Davis talked generally about layoffs at the dealership and trouble in the industry, in fact Respondent MBO did not lay off any service technicians until December 8, 2008, and there is no evidence that there had been any decisions to layoff service technicians at Respondent MBO as of the time Davis spoke at the meeting. The fact that other AutoNation

[4] The comment starts: "I don't think I named him. I think I pointed to him. He was standing right next to me." [TR 984] It is also telling that in his earlier testimony about his statements at the same meeting, Davis only referenced the "take a look around" comment, and did not claim to have told employees that this was not about the union campaign. [TR 979, 981]

dealerships, such as the nearby AutoNation Pontiac/GMC dealership, may have laid off employees or closed does not establish that Respondent MBO was in such deep economic trouble. Although General Motors and Chrysler were in serious financial trouble in late 2008 [TR 980], there is no evidence that Mercedes-Benz dealerships like Respondent MBO were in the same survival mode as domestic dealerships operated by Respondent AutoNation.[5] Davis' exaggerated dire prediction that only the general manager's job was safe was made during the midst of Respondents' anti-union campaign during which it committed numerous other unfair labor practices. Davis effectively threatened employees with mass layoffs at Respondent MBO unless they got on board with Respondents and stopped the divisiveness and "destruction" which he blamed on the Union. In these circumstances, Davis' statements constituted a threat of job loss or discharge if the employees selected the Union which was not based on objective facts, and therefore violated Section 8(a)(1) of the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

Contrary to the ALJ's finding, service technicians Persaud, Poppo, Meyer, Weiss, Cazorla and Roberts, substantially corroborated each other in testifying that Davis' remarks were made in terms relating to the organizational campaign. The ALJ apparently failed to consider the testimony of Cazorla and Persaud in this regard, as it was not discussed in his Decision, and he gave short shrift to Roberts' testimony about this meeting.

Poppo had the most detailed recall of this meeting of any witness, including Davis. He testified that Davis told employees to look around because this was the third time that they had had a Union drive there and this was going to end, and that there weren't going to be any more because Respondents were going to put an end to this, once and for all. Davis stated "we are going to find out who's bringing this upon us and they are going to be finding a job somewhere

[5] See Point VI below regarding the relative economic strength of Respondent AutoNation's premium luxury car segment, including Respondent MBO, and the near total absence of layoffs among service technicians employed at Respondent AutoNation's premium luxury car dealerships in Florida.

else." Davis then told employees to look around and waited about 30 seconds, while there was dead silence and employees looked at each other. Davis said "some of the faces you see here, three months from now aren't going to be here; they are going to be gone; they will be working somewhere else." Davis again told employees to look around and waited about another 30 seconds, while everything was very quiet in the room. Davis then said "some of the faces you see here, six months from now are not going to be here." Davis said "we are going to put an end to this." Davis stated that he and general manager Berryhill were going to come out with a plan and that employees could "get on board." [ALJD, p. 12, ln. 21-23; TR 436-437, 465, 471-473]

Meyer similarly testified that Davis told the employees that no one's job was safe except Berryhill's; that Respondents would fix the problems at the dealership; and that if employees did not "get on board" with Respondents, their jobs were not safe. Davis told employees "take a look around the room, some of the faces you see will not be working here in six months." [ALJD, p. 12, ln. 23-24; TR 349-350]

Roberts testified similarly. He recalled that Davis paced around and appeared very aggravated. Davis said that he now knew what the problems were at the dealership and that he was going to fix them; that the Union was not going to be able to do anything; and he told employees to look around at the people beside them, because most likely some of them were not going to be there anymore. Davis pointed at Berryhill and said that Berryhill was the only one in the room whose job was safe. Davis said that there were going to be many changes for employees and that they were either part of the solution or part of the problem, and if they were

part of the problem they could just get up and leave.[6] [ALJD, p. 12, ln. 24-25; TR 898-899, 939-940]

Persaud testified that, at a meeting in October 2008,[7] Davis told employees to look around the room, because half of the guys there were not going to be there either before or after the election. Persaud testified that Davis said that those employees who did not support Respondents and the "troublemakers" would lose their jobs; and during the Union campaign everything would be suspended and there would be no raises or anything like that. Persaud also testified that Davis told the employees that another dealership was going through negotiations and that he would drag it on as long as possible, and that Respondents did not want the Union there and did not need a third party telling them what to do. [TR 590-591, 601] Weiss similarly testified that Davis told employees to take a good look around, because some of the faces they saw there were going to change; some of the faces they saw there were not going to be working there much longer, and that the only person's job who was safe in the room was Bob Berryhill's, and that it would be years before anyone saw a contract. [ALJD, p. 12, ln. 24-25; TR 661-662]

Cazorla testified that Davis told employees to take a good look at the faces around them because he could guarantee that, in a couple of months, employees were not going to see those faces there anymore. Davis also told employees that Respondents would not negotiate a contract with the Union. [TR 845, 864, 866-867, 879] The ALJ failed to discuss this testimony from Cazorla in his Decision.

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[6] An employer violates Section 8(a)(1) of the Act by telling employees to quit in retaliation for engaging in protected activity. *Equipment Trucking Co., Inc.*, 336 NLRB 277 (2001); *Eby-Brown Company L.P.*, 328 NLRB 496 (1999). The ALJ failed to discuss this testimony from Roberts in his Decision, except to mention that like Weiss, Roberts testified that only Berryhill's job was safe, and that although Roberts professed ignorance of the closure of a nearby AutoNation Pontiac/GMC dealership, he did not contradict the testimony of Respondent MBO's service sales manager Menendez that the meeting occurred shortly after that dealership had closed, and that human resources manager Bobbie Bonavia was crying because she had not been able to place all of the employees who had lost their jobs (because the Pontiac/GMC dealership closed). [ALJD, p. 12, ln. 27-32]

Thus, all of these employees linked Davis' prediction of loss of jobs with the union organizing effort. In particular, the corroborative testimony of Meyer and Poppo that Davis told employees that if they did not "get on board" with Respondents their jobs would be in jeopardy obviously means that employees must abandon their organizing efforts in order to "get on board." Roberts' recollection that Davis told employees that they were either part of the solution or part of the problem, and if they were part of the problem they could just get up and leave, is very similar to that of Meyer and Poppo, as is Persaud's recollection that Davis said that employees who did not support the company and troublemakers would lose their jobs. Cazorla and Weiss corroborate each other's testimony that Davis made a statement to the effect that unionization was futile in connection with his prediction of numerous layoffs or discharges. In addition, the ALJ did not specifically discredit the testimony of any of General Counsel's witnesses about this meeting, and expressed skepticism as to Davis' credibility.

Moreover, for the reasons set forth above alone, General Counsel submits that Davis' testimony, as properly characterized, establishes that he unlawfully threatened employees with loss of jobs and discharge because of their union activities. Accordingly, General Counsel respectfully urges the Board to reverse the ALJ's recommended dismissal of paragraphs 23(b) and 24(a) of the Consolidated Complaint and grant General Counsel's cross-exceptions 3 through 6.

V. RESPONDENTS VIOLATED SECTION 8(a)(1) OF THE ACT BY INTERROGATING EMPLOYEE JAMES WEISS ABOUT THE UNION SYMPATHIES OF OTHER EMPLOYEES AND ABOUT WHETHER OTHER EMPLOYEES HAD VOTED: CROSS-EXCEPTIONS 7 AND 8

The ALJ credited technician Weiss' testimony that on the morning of December 16, 2008, before the election, vice president and assistant general counsel Davis asked Weiss how he thought Cazorla, Puzon and Poppo would vote, and that during the secret ballot election

[7] It is obvious from the content of the meeting he described that Persaud testified about the same November 2008 meeting as Poppo, Meyer, Weiss, Cazorla and Roberts, and that Persaud mistakenly recalled that the meeting occurred in October.

conducted by the Board that day, Davis asked Weiss who Weiss had seen going to vote. The ALJ specifically credited Weiss over Davis. However, the ALJ improperly determined that Davis' interrogation of Weiss was not coercive and did not violate the Act as alleged in paragraph 31(a) of the Complaint because Weiss had been providing Respondents with information (about the union activities and sympathies of other employees) for two months. [ALJD, p. 15, ln. 31-41]

As the election day approached, in early December 2008, Davis, Respondent AutoNation human resources director Bonavia and Respondent MBO general manager Berryhill tallied up the numbers of employees who were probable yes and probable no votes. [TR 1542-1546] Berryhill thought the Union would lose the election by one or two votes. [TR 1545]

Technician Weiss' credited testimony establishes that on the morning of the election (in Case 12-RC-9344), December 16, 2008, before the election started vice president and assistant general counsel Davis approached him in his work area and spoke to him, one-on-one, for about 30 minutes. Davis pointedly questioned Weiss, asking how Weiss thought technicians Cazorla, Council and Puzon would vote in the Board election. Weiss replied that he didn't know about Cazorla or Puzon, and that Council was going to vote "for the company." Davis said he needed to speak to Cazorla and Puzon more to try to persuade them to vote no, and that he also needed to speak to Poppo that morning because he was concerned that Poppo was changing his mind back and forth. Davis asked whether technician Scott Tate was at the facility and Weiss told him it was Tate's day off. Davis told Weiss to call him (Davis) or general manager Bob Berryhill during the election.[8] [TR 678-679, 764]

Weiss called Berryhill during the election and Davis answered and asked whether technician Scott Tate was at the dealership and Weiss replied that he was not. Davis instructed Weiss to call Tate and make sure he was on his way there. Weiss' work bay was right beside

[8] The election in Case 12-RC-9344 was conducted at Respondent MBO's premises on December 16, 2008, from 1:00 p.m. to 2:30 p.m. [GC 61]

the door leading to the election poll. Weiss then called Tate as instructed, found out that Tate was 10 minutes away, and reported this back to Berryhill, and then reported to management when Tate arrived at the dealership. [TR 680-681]. Davis obviously considered Tate a no vote. Berryhill admitted that he considered Tate a no vote. [TR 1546]

The ALJ did not specifically discuss paragraph 31(b) of the Complaint, alleging that Davis interrogated employees about whether employees had voted in the secret ballot election conducted by the Board, other than to find that Weiss could not know whether any employee he observed going up the stairs was going to vote or going upstairs for another purpose. [ALJD, p.15, ln. 42-46]

In determining whether an interrogation is coercive, the Board considers the totality of the circumstances, including (1) the background, (2) the nature of the information sought, (3) the identity of the questioner, and (4) the place and method of interrogation. *Rossmore House*, 269 NLRB 1176, 1178, fn.20 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985). Technician Weiss was questioned by Davis, a high-ranking corporate official. Most importantly, the nature of the information sought by Davis makes his interrogation of Weiss coercive, notwithstanding the fact that Weiss had previously voluntarily given Respondents information about employees' union sympathies. Cf. *Rossmore House*, 269 NLRB at 1178 (interrogation of an open union supporter about **his own** union sympathies found not coercive). Thus, Davis asked Weiss how employees Cazorla, Puzon and Council intended to vote in the Board's secret ballot election being conducted that day. The mere fact that an employee is a widely known adherent or opponent of a union does not validate otherwise coercive interrogation. *Beverly California Corp.*, 326 NLRB 153, 157 (1998), enfd. in pert. part 227 F.3d 817 (7th Cir. 2000); *Frances House, Inc.*, 322 NLRB 516, 522 (1996). Although Weiss may have volunteered information about union sympathies of employees to management during the course of the campaign, as an employee he had the Section 7 right to stop providing that information at any time, and Davis' interrogation of Weiss

on the day of the election as to how three other employees would cast their ballots was coercive and violated Section 8(a)(1) of the Act.

In addition, Davis coercively interrogated technician Weiss by asking him to inform Respondents whether technician Tate, whom Respondents believed to be an opponent of the Union, showed up at the dealership on the day of the election in order to vote, and by asking Weiss to call Tate to make sure he got to the dealership to vote. The ALJ found no unfair labor practice because Weiss was not in a position to tell Davis with certainty whether or not Tate had voted. However, the focus must be on the exchange between Davis and Weiss, rather than on Weiss' ability to provide accurate information to Davis. By asking Weiss on the day of the election where expected no-voter Tate was, and, upon learning that Tate was not yet at the dealership, asking Weiss to call Tate and make sure he was on his way to the dealership and to report back to management on his efforts, Davis coercively interrogated Weiss as to whether Tate had voted, in violation of Section 8(a)(1) of the Act.

VI. RESPONDENTS VIOLATED SECTION 8(a)(1) AND (3) OF THE ACT BY LAYING OFF JUAN CAZORLA, DAVID POPPO, TUMESHWAR "JOHN" PERSAUD AND LARRY PUZON BECAUSE OF THEIR UNION ACTIVITIES AND SYMPATHIES: CROSS-EXCEPTIONS 9, 10, 11, 12 AND 13

The ALJ correctly held that the General Counsel established a prima facie case "and carried the burden of proving that union activity was a substantial and motivating factor for Respondents' layoffs on April 2, 2009, of Juan Cazorla and, on April 3, 2009, of David Poppo, Tumeshwar "John" Persaud and Larry Puzon.[9] [ALJD, p. 27, ln. 7-8] However, the ALJ improperly held that Respondents met their *Wright Line*[10] burden and that these four alleged discriminatees would have been discharged even in the absence of their union activities."

[9] Although the ALJ characterized these actions as discharges, Respondents assert that they were economically motivated, and they are therefore more properly characterized as layoffs. The ALJ correctly found that Respondents violated Section 8(a)(1) and (5) of the Act by laying off these four employees without giving the Union notice or an opportunity to bargain.

[10] *Wright Line, A Division of Wright Line, Inc*., 251 NLRB 1083 (1980), enfd. 662 F.2d 899(1st Cir. 1981), cert. denied 445 U.S. 989 (1982).

[ALJD, p. 27, ln. 44-48] Respondent's *Wright Line* defense must be considered in the context of the following facts supporting the prima facie case.

Juan Cazorla worked for Respondent MBO from 1996 until about 1999, at which time he quit. He was rehired and worked from June 4, 2001 through April 2, 2009, the date of his discharge. Cazorla obtained a B+ skill level rating in 2007 and was a master certified technician. He worked on the gold team under team leader Andre Grobler throughout his employment until December 2008, when Rex Strong replaced Grobler as team leader. Cazorla worked under Strong during the remainder of his employment. He was never supervised by team leaders Bruce Makin or Alex Aviles and never worked by their side. [TR 834, 853, 855-856, 878]

Cazorla had only received two minor disciplines during his employment, one in 1996 because he was with Grobler when Grobler left a food wrapper in the customer's car, and the other, the day after Grobler cursed him out regarding an incident with a car, when Grobler warned him for failing to put the vehicle mileage on a repair order. [TR 843-844, 852, 862] Cazorla testified that Respondent MBO never told him that his work performance was poor, that he needed to improve, or that he failed to meet performance goals. In fact, because his production was so good, Cazorla had the highest target hours on his team. [TR 853][11] Cazorla twice received "C technician of the year" awards, and he also received roadside awards for outstanding service and dedication. [TR 853-854, 870] General manager Berryhill testified that on May 23, 2008, he issued a memo to Cazorla stating that his flat rate pay had been increased because of his loyalty and the value he brought to the shop through his dedication and commitment. [TR 208-209; GC Ex 139]

David Poppo worked at Respondent MBO from August 2001 to April 3, 2009. Poppo was a B+ skill level technician at the time of his layoff and had been so for about two years. He

[11] In June 2008, Grobler refused to grant Cazorla's request to be sent to training school for transmissions. Cazorla performed online training at home, with no reimbursement from Respondents. [TR 871, 876-877]

had been a master certified systems technician for three to five years. Poppo has a degree in automotive technology. At the time of Poppo's layoff, Strong had been his team leader on the gold team since December 2008, and Grobler was his previous team leader. [TR 425-427, 453] On May 23, 2008, Berryhill issued a memo to Poppo stating that his flat rate pay had been increased on the same basis as Cazorla's pay was increased that day. [TR 208-209; GC Ex 138]

Tumeshwar "John" Persaud was employed at Respondent MBO from December 15, 1997 to April 3, 2009. Persaud was a B+ skill level technician and a Mercedes-Benz master certified technician at the time of his discharge. Until December 2008, Manbahal was his team leader and afterwards Makin became his team leader. [TR 586, 595]

Larry Puzon was employed at Respondent MBO from August 2003 until April 3, 2009. In Puzon's evaluation of December 2007, he was promoted from a C to a B skill level technician. Puzon is a master certified systems technician and has a degree in automotive technology. Strong was Puzon's team leader on the gold team from mid-December 2008 until Puzon's layoff. Grobler was Puzon's team leader immediately prior to Strong. [TR 487-488, 503-504]

Cazorla attended union meetings starting in July 2008, and signed a union card on July 8, 2008. [TR 837-839, 847, 868; GC Ex 158] Poppo signed a union authorization card on August 5, 2008. [TR 427-428; GC Ex 159] Persaud attended union meetings and signed a union authorization card on August 8, 2008. [TR 586-587; GC Ex 160] Puzon attended union meetings starting in August 2008, including meetings attended by Strong and Aviles, who subsequently became team leaders (and statutory supervisors). [ALJD, p. 25, ln. 28-30] Puzon signed a union authorization card on August 5, 2008, and told his co-workers that he supported the union. [TR 489-491, 517; GC Ex 161]

The ALJ found that, in late July and August 2008, team leader Grobler created the impression that Cazorla's attendance at union meetings was under surveillance, in violation of Section 8(a)(1) of the Act. [ALJD, p. 7, ln. 3-4; p. 25, ln. 14-16; TR 839-840] The ALJ also found that on several dates in October, November and December, team leader Grobler

unlawfully interrogated Puzon as to whether he had been to a union meeting, in violation of Section 8(a)(1) of the Act, and that on each occasion Puzon denied it. [ALJD, p. 8, ln. 5-10; TR 496-498]

Notwithstanding the union activities of Cazorla, Poppo, Persaud and Puzon, and the fact that none of them signed the anti-union petition that Weiss distributed, as discussed above in Point V, as the election approached Respondents were uncertain about the union sympathies of Cazorla, Poppo and Puzon. Respondents believed that Persaud opposed the Union. The ALJ found that, in early December 2008, Respondent AutoNation vice-president Davis coercively interrogated Persaud about his union sympathies, in violation of Section 8(a)(1) of the Act. [ALJD, p. 13, ln. 5-12] Moreover, although not alleged as a separate unfair labor practice, in late November or early December 2008, general manager Berryhill approached Persaud and technician Ken Council. Council said, "Hey Bob, you know you got my vote, right?" Berryhill replied "yeah, but I don't hear John saying that." Persaud said "yeah, yeah, you got it." Persaud testified that he did not intend to vote against the Union, but he made that statement to Berryhill because he did not want to get fired. [TR 589-590; ALJD, p. 25, ln. 20-21]

As noted above, the ALJ found that on the morning of December 16, 2008, before the election, vice president and assistant general counsel Davis asked Weiss how he thought Cazorla and Puzon would vote, and Davis replied that he (Davis) needed to speak to Cazorla and Puzon some more to persuade them to vote no, and that he also needed to speak to Poppo, whose preference went back and forth. [ALJD, p. 15, ln. 31-41; TR 678-679, 764] Thus, as the election date approached, Respondents kept especially careful tabs on the union sympathies of the technicians, especially those whose sympathies were not definitely known to Respondents.

Respondents tried to convince Cazorla to oppose the Union by soliciting his grievances concerning team leader Grobler in October 2008. After Cazorla initially complained at a meeting, Davis went to his work area and asked for more details about his situation with Grobler. [ALJD, p. 15, ln. 2-4; TR 843-844, 862] In the period before the December 2008

election, many technicians were unhappy with 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, 439-441, 541-542, 835-837, 908-909, 1509, 1513-1515; GC Ex 83, 175(a), 175(b), 175(c)] The ALJ found that on December 9, 2010, a week before the election, Respondents announced the demotions of Grobler and Manbahal in order to redress the grievances of Cazorla and other employees that Respondents had solicited, in order to induce the employees to abandon their support for the Union, in violation of Section 8(a)(1) of the Act. [ALJD, p. 14, ln. 26-50; pg. 15, ln. 11-18; TR 355, 441-442, 498]

Berryhill admitted that Respondents tallied probable votes of each service technician for purposes of predicting the election result. Berryhill said that Respondents believed they would win (i.e. the Union would lose) the election by one or two votes. [TR 1544-1545] Berryhill admitted that Respondents expected that at least Persaud and Cazorla would vote against the Union. [ALJD, p. 25, ln. 21-22; TR 1545-1546]

As discussed above, on the morning of December 16, 2008, before the election, Davis interrogated Weiss as to how Cazorla, Puzon and Ken Council would vote. Weiss was unsure as to Cazorla and Puzon, and Davis said he was also unsure as to Poppo. [ALJD, p. 15, ln. 31-41; TR 678-679, 764]

At the meeting they held right after the election with the employees, Davis and Berryhill expressed disappointment with the results. Davis was upset and accused the employees of a lack of trustworthiness. [ALJD, p. 16, ln. 1-5]

In about mid-January 2009, Poppo was elected as a Union shop steward and started wearing a Union shop steward badge on his shirt at work. [ALJD p. 25, ln. 24-25; TR 445-446]

Also in January 2009, Cazorla wore a Union pin to work on his uniform once or twice. Thereafter, Cazorla found his uniform in the trash twice and in the toilet once. Cazorla advised Union steward Catalano about this problem and also that Respondent MBO service manager Maia Menendez had been mean to him and given him dirty looks since Respondents demoted her friend Grobler from his team leader position. [TR 847-848, 868]

On or about March 26, 2009, Cazorla and steward Catalano met with parts director and acting service director Charles Miller in Miller's office. Miller knew that Catalano was a Union steward. [TR 1323] Cazorla told Miller about the issues with his uniforms and Menendez. Miller replied that he would talk to Menendez and would investigate the uniform incidents, but did not think that he would be able to discover who put Cazorla's shirts in the trash and toilet. Miller told Cazorla to put everything in writing. [ALJD, p. 25, ln.16-18]

On March 31, 2009, Poppo met with Respondent MBO general manager Berryhill, who told him that Respondents did not recognize the Union without a contract. [ALJD, p. 21, ln. 1-2; TR 448]

On the morning of April 2, 2009, Cazorla gave Miller his written grievances about his uniforms being trashed and Menendez's treatment of him. [TR 848-849, 869, 874; GC Ex 170(a)-(f)] Catalano corroborated Cazorla's testimony in this regard. [TR 546-549]

Cazorla worked until 5:15 p.m. on April 2, 2009. At that time, team leader Strong told Cazorla that they had to go to MBO general manager Berryhill's office. Cazorla asked why. Strong said that he could not tell him much, but that it was not good. Cazorla and Strong then met with Berryhill and Miller in Berryhill's office. Berryhill told Cazorla that he was probably aware of the economic situation Respondents were in and that they were going to have to let him go. Berryhill said that Cazorla was compared to other technicians and he was ranked low. [TR 850-851, 870]

After the meeting with Berryhill, Strong told Cazorla that there was nothing he could do, and that he tried to persuade management to pick someone else to let go, but they were not hearing it. Strong told Cazorla that when he became a team leader in December 2008, Respondents asked him to pick two technicians to let go, that he did so, and that Cazorla was not one of them. Strong was crying and reiterated that he really tried to persuade Respondents not to lay off Cazorla. Strong told Cazorla that Respondents used some sort of computer program that had all his statistics together and had also spoken with service advisors regarding

the decision. [TR 851] Respondents did not call Strong to testify. Aviles was the only team leader called to testify by Respondents.

On April 3, 2009, Respondents laid off Poppo, Persaud and Puzon. All three of them reported to work at 8:00 a.m. After 20 minutes, team leader Strong told Poppo to go to Berryhill's office. Present were Berryhill, Miller and Strong. Berryhill told Poppo that things were slow and they needed to make changes. Berryhill said that Respondents had done a point scale evaluation involving different categories and that Poppo was one of the lowest on the scale, so that they had to let him go. Poppo asked "do I get to see this evaluation" because he had never heard of MBO having such an evaluation. Berryhill replied "absolutely not." Berryhill told Poppo that he was a professional and that he would be fine. [TR 451-453][12]

Respondents never told Poppo that his performance was not up to standard except for a single occasion three years earlier, when Poppo was told to stay with a tough job a little longer before going to his foreman for ideas. Respondents never told Poppo that if his performance failed to improve he would be disciplined. [TR 453-454] Strong had not evaluated him, Makin and Aviles were never his team leaders, and Aviles had only supervised him on a very limited basis. [TR 462-463, 484]

At approximately 10:00 a.m. on April 3, 2009, Persaud was called to Berryhill's office and met with managers Berryhill and Miller. Berryhill told Persaud that he was a good worker, but that because of the economy he had to let Persaud go. [TR 594]

Respondents never told Persaud that he was failing to meet production standards or that his performance needed to improve. Persaud never worked with Aviles and only worked with Strong years earlier in about 2000, 2001 or 2002. Persaud explained that Makin was not in a position to evaluate his work performance because he was Persaud's team leader for only a few

[12] Berryhill acknowledged that, although at least one of the alleged discriminatees asked to see his performance appraisal conducted in March 2009, Berryhill did not show the appraisals to any of them. [TR 176]

months, and that former team leader Manbahal was the only person in a position to properly evaluate his work performance. [TR 594, 612-613]

At 11:30 a.m. on April 3, 2009, team leader Strong told Puzon that Berryhill wanted to see him in his office. Strong told Puzon he couldn't do anything and had nothing to do with "it." Puzon asked Strong "I'm next right?" Strong did not reply. At the meeting in Berryhill's office were Berryhill, Miller and Strong. Berryhill told Puzon, "sorry I have to let you go; business is slow." Puzon asked Berryhill "Why me? I still produce 80-90 billed hours of work every two weeks." Berryhill only replied that he could not afford to have people standing around and doing nothing. [TR 501-503]

Respondents never told Puzon that he was not performing up to the company's standards, never told him that he was not properly repairing cars and never told him that if his performance did not improve he would be disciplined or discharged. [TR 504, 519] Puzon's earnings were climbing at the time he was discharged. Thus, in 2006, he earned about $52,000; in 2007, he earned about $55,000; in 2008, he earned almost $60,000; and during the first three (3) months of 2009, he earned about $16,000, a rate of about $64,000 per year. [TR 524]

After the layoffs on April 3, 2009, Berryhill and Miller held a meeting with the remaining technicians to discuss the layoffs of Cazorla, Poppo, Persaud and Puzon. Berryhill said that there wasn't enough work in the shop to keep everyone busy so MBO let four technicians go. Berryhill said that there were no more plans to "fire" any more employees. Catalano asked if those technicians would be called back if more work became available. Berryhill replied that it was not AutoNation policy to call employees back and that Respondents did not consider

this a layoff. [TR 378, 550-551][13]

Notwithstanding that AutoNation has previously made efforts to place laid-off employees into other AutoNation dealerships, Respondents never sought to accommodate any of the alleged discriminatees into other AutoNation dealerships. [TR 192-194] However, service cashier Brenda Kipp, and parts advisor Jamie Bartlett, were employed by MBO after they were laid off from AutoNation Chrysler dealerships in 2008. [TR 193; 1595][14]

As the ALJ found, the evidence establishes a prima facie case that Respondents laid off Cazorla, Poppo, Persaud and Puzon because of their union activities. Although not discussed by the ALJ, it is evident that the prima facie case shows that Respondents were motivated to lay off Cazorla, Poppo, Persaud and Puzon because Respondents believed them to be no votes, or voters who were on the fence, and, in Respondents' view, they lacked trustworthiness and betrayed the company by voting for the Union. All four of these technicians were the objects of unlawful statements made by Respondents' managers and supervisors, as set forth in detail above. As demonstrated above in Point IV, Respondents made threats of discharge of union supporters in November 2008, vowing that union supporters would be discharged some months after the election.

Respondents held out hope that these four employees would vote against the Union, as shown by Davis' election morning interrogation of Weiss concerning Poppo, Cazorla and Puzon.

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[13]Although the ALJ largely discredited the testimony of technician Weiss, he did not discuss Weiss' testimony as follows: In about mid-May 2009, Weiss called AutoNation vice president and assistant general counsel Davis and said that Cazorla had told him that the Union might get him his job back. Weiss asked whether that was true. Davis said "no that's not true… first they have to prove we fired him for other reasons, and they don't have any proof." Davis told Weiss that Cazorla would never work for AutoNation again and that he was not eligible for rehire. [TR 710-711, 799, 823] In late June 2009, Weiss stopped at the MBO dealership to ask Berryhill for a recommendation, and Berryhill asked Weiss how Cazorla was doing. Weiss replied that Cazorla was not doing well and that he had lost his house. Berryhill replied "that's what you get for voting in a Union." [TR 714]

[14] In addition, Respondents did not recall any of the alleged discriminatees notwithstanding that the following four technicians resigned after April 2009: Paul Chan, May 22, 2009 [TR 1497, 1589]; Eric Price, August 2010 [TR 1498, 1589]; Ryan Rizzo, October 20, 2010 [TR 1498, 1589]; and James Wasiejko, June 2010 [TR 386, 1589], and Respondents instead hired two new trainees and rehired technicians Scott Tate and Menchung Wong, who had previously quit. Furthermore, Respondents did not recall any of the alleged discriminatees notwithstanding the addition of Sunday work for technicians at MBO in October 2010. [TR 198; GC Ex 125]

As Berryhill admitted, Respondents had tallied up yes and no votes, and were counting on at least Persaud and Cazorla as no votes. In addition, Davis was clearly counting on Persaud, based on his earlier interrogation of Persaud. It is apparent from Davis' immediate adverse reaction to the election results that he concluded that these four employees had voted for the Union.

The ALJ correctly found that "[i]nsofar as Aviles was an active participant in the organizational campaign for some period prior to his appointment as a team leader, I find that the Respondent had knowledge of the union activities of the four technicians laid off in April." [ALJD, p. 25, ln. 32-34] Moreover, Cazorla and Poppo openly supported the Union after the election, by Cazorla wearing a union pin and grieving to management with steward Catalano, and by Poppo becoming a known shop steward. Respondents continued to demonstrate anti-union animus after the election, particularly by committing numerous violations of Section 8(a)(5) of the Act, as found by the ALJ.

In sum, based on the above facts, the ALJ correctly held that the General Counsel established a prima facie case showing that Respondents' decision to lay off Cazorla, Poppo, Persaud and Puzon was motivated by their union activities. [ALJD, p. 27, ln. 6-8]

In attempting to rebut the General Counsel's prima facie case, Respondents proffered inconsistent and shifting reasons for these layoffs. The record demonstrates that Respondents' alleged justifications are pretextual and indicative of Respondents' true intent to discriminate based on union activities, in violation of Section 8(a)(1) and (3) of the Act.

Respondents' first defense is that economic conditions required them to lay off service technicians, and they contend that all of Respondent AutoNation's dealerships, including Respondent MBO, suffered substantial revenue losses because of reduced new car sales impacted by the overall decline in the automotive industry. Respondents contend that the loss in revenues required them to lay-off numerous employees. Although Davis testified that Respondent AutoNation discharged thousands of employees nationwide, he was unable to say how many service technicians were let go. [TR 1092-1093]

Although Respondent AutoNation may have closed one or more auto dealerships in 2008, those were dealers of domestic vehicles, rather than foreign models like Mercedes-Benz. [TR 193] Technician Ben Wu, who Respondents called as their witness, testified that the AutoNation dealerships that closed were all domestic car dealerships. [TR 1181]

The first page of AutoNation's 2008 annual report, under the heading "Operating Segments," shows that, prior to the third quarter of 2008, AutoNation had one operating segment. However, as of the third quarter of 2008, AutoNation now has three (3) operating segments: domestic, import and premium luxury. That arrangement remained the same throughout 2009. The premium luxury segment sells new vehicles manufactured primarily by Mercedes, BMW and Lexus. Thus, Respondent MBO falls under the premium luxury segment. [GC Ex 13 and 14]

Page 2 of AutoNation's 2008 annual report, in the last paragraph under the heading "Business Strategy," states that AutoNation is focusing its store mix more towards import and premium luxury brands. Thus, in 1999, approximately 60% of AutoNation's new vehicle revenues were attributable to its domestic franchises, while 40% were attributable to import and premium luxury franchises. By contrast, in 2008, approximately 70% of its new vehicle revenues were generated by import and premium luxury franchises and approximately 30% were generated by domestic franchises. In 2009, approximately 71% of its new vehicle revenues were generated by import and premium luxury franchises and approximately 29% were generated by domestic franchises. Respondent AutoNation is focused on improving its brand portfolio by selling underperforming stores, which are primarily domestic, and expects to continue to increase the mix of import and premium luxury stores. Accordingly, the fact that Respondent AutoNation closed domestic dealerships in 2008, around the time of the Union campaign, simply reflects a business strategy of selling its domestic franchises and focusing on acquiring more import and luxury dealerships. General manager Berryhill testified that Respondent AutoNation is opening a new Mercedes-Benz dealership in Sanford, Florida (near

Maitland, where Respondent MBO is located), and that service manager Bullock no longer works at MBO because he is helping with the opening of the new dealership. [TR 1578]

Respondents contend that they discharged service technicians because AutoNation instructed its dealerships to lay off employees and cut expenses. [TR 279-284; GC Ex 69] However, Respondents did not achieve any significant cost savings by laying off service technicians because service technicians are compensated on a commissioned, revenue-producing flat rate basis, which means that they are paid by the job, not by the hour, and when they are not working, they do not get paid. [ALJD, p. 3, ln. 23-27; TR 333, 931] Indeed, Respondent MBO's controller, Collie Clark, stated that the technicians are revenue producers, meaning they do not get paid unless they work on a car. [TR 1200] Clark confirmed that the lay-off of a service technician does not directly increase the service gross profit of Respondent MBO because if technicians are not working, Respondents do not have to pay them. [TR 1251, 1257]

Moreover, the numerous e-mails that Respondent AutoNation managers exchanged amongst their managers and with Respondent MBO managers show that the focus of Respondents' employee headcount reduction was not on service technicians, but rather on hourly employees who cost the company money if they have no work to perform. [GC Ex 99-114 and 147-149; see especially GC Ex 102-105, 107, 111, 113, 147 and 149] None of those exhibits refer to the reduction of service technicians by Respondents.

Significantly, an e-mail dated July 5, 2008, from Respondent AutoNation's Florida region manager DeVita states that Respondent AutoNation's regional hiring freeze applied to all positions, except commissioned sales associates and 100% flat rate technicians, like the service technicians in the instant matter. [GC Ex 100] This supports a finding that Respondents did not have a legitimate economic basis for discharging service technicians, inasmuch as there were no significant monetary savings achieved.

Another e-mail, dated January 14, 2009, is additional strong evidence that Respondents' defense is baseless. [GC Ex 111] That document shows that, of the 62 AutoNation stores in the Florida region, only one other store (Autoway Chevrolet) eliminated or planned to eliminate an experienced service technician, a second store (Maroone Ford of Margate) eliminated a service technician trainee position, and a third store (Autoway Ford/Lincoln Mercury) eliminated a service technician team leader position. [GC Ex 111] None of those three stores were premium luxury segment stores, like Respondent MBO. Rather, they all sold domestic vehicles, the industry segment most adversely impacted by the economic downturn. Thus, layoffs of service technicians by Respondents in Florida were rare, and there were no other instances involving premium luxury segment stores.

Respondents assert that the overall decline in the automotive industry caused Respondent AutoNation to suffer substantial revenue losses because of reduced new car sales and that the impact was so severe it caused Respondent MBO to permanently layoff service technicians. However, despite the adverse economic impact to Respondent AutoNation's overall operations, Respondent MBO was the only one of the 11 AutoNation premium luxury stores in the Florida region (including seven Mercedes-Benz dealerships, three Lexus dealerships and one Porsche dealership) that eliminated any service technician positions. [TR 337, 443, 592, 846, 867, 1185; GC Ex 111]

Berryhill claimed that in late 2008 and early 2009, any savings to the dealership was critical to keep the business afloat and that was why he removed coffee and soda machines and eliminated free ice cream, the latter item which he estimated cost about $100 per week. [TR 1548, 1580-1581] However, Berryhill admitted that from December 8 to December 22, 2008, Respondent MBO gave demoted team leaders Grobler and Manbahal costly two-week paid

leaves of absence that coincided with the NLRB election.[15] [TR 1549-1550, 1553] The fact that Berryhill received a $38,950 salary increase from 2008 to 2009 further belies Respondents' economic defense. [GC Ex 137]

Berryhill admitted that the layoffs of the service technicians did not save Respondents much money because they are paid on a commissioned flat rate basis, and are not paid unless they are actually working. He acknowledged that after the layoffs of service technicians in December 2008 and April 2009, Respondent MBO's fixed costs remained essentially the same. [TR 1576-1578] Based on the above evidence the ALJ's finding that "the reduction in-force in April 2009 was dictated by economic circumstances" is not supported by Respondents' admissions or the record as a whole. [ALJD, p. 24, ln. 51]

After realizing at trial that Respondents' economic defense did not justify the layoffs of service technicians, general manager Berryhill provided a shifting defense and said that Respondents' intent was not to save money, but to save the quality of the jobs of the remaining service technicians so they would not leave Respondent MBO because they did not have sufficient work and income. [ALJD, p. 24, ln. 38-43]

In selecting Cazorla, Poppo, Persaud and Puzon, Respondents claimed that they were the ones with the poorest work performance. Respondents rely on performance appraisals of all Respondent MBO technicians on which Cazorla, Poppo, Persaud and Puzon were the lowest rated technicians. However, Respondents' defense does not withstand scrutiny.

Even assuming, for the sake of argument, that Respondent MBO had a legitimate need to lay off service technicians, Respondents' selection of Cazorla, Poppo, Persaud and Puzon reveals their unlawful motives. In this regard, MBO controller Clark admitted that the most productive technicians who produce good quality work are the busiest and, thus, the highest

[15] Respondent MBO's payroll records show that in 2008, Grobler earned $92,727.05 and that Manbahal earned $94,896.19. [GC Ex 137] Thus, Respondent MBO paid Grobler approximately $3,565 and paid Manbahal about $3,650, for a total of over $7,200 for those two weeks of paid vacation.

earning technicians. Page 4 of Respondent AutoNation's 2008 annual report and page 3 of the 2009 annual report, under the heading "managing employee productivity and compensation," state that AutoNation's "goals are to improve employee productivity, to reward and retain high-performing employees..." [GC Ex 13 and 14] Based on record testimony, the ALJ found that "the faster and more experienced technicians typically receive the most work." [ALJD, p. 3, ln. 24-25] Clark admitted that because they typically get the most work, those faster and more experienced technicians are not likely to quit. [TR 1259]

In view of Clark's testimony and Respondent AutoNation's policy, the best method to measure the productivity of Respondent MBO's technicians is to review their number of work hours sold (turned) and the sales revenues that they generated. Indeed, in December 2008, Respondents considered that factor in their decisions to lay off alignment technician Ted Crossland and tire technician Edward Frias. Berryhill admitted that, pursuant to Respondents' February 6, 2009 position statement [GC Ex 69], in December 2008, Respondents laid off Crossland instead of alignment technician Jorge Amaya, at least in part, because Amaya had better productivity numbers by booking more hours than Crossland. 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. Berryhill stated that Guevara was a better technician than Frias and Amaya was a better technician than Crossland. As the ALJ pointed out, Berryhill's assessment of Guevara and Amaya as better technicians is reflected in their productivity numbers. [ALJD, p. 22, ln. 20-29; TR 1557-1560; GC Ex 69]

However, Berryhill admitted that in deciding to discharge Cazorla, Poppo, Persaud and Puzon in April 2009, Respondents did not even consider how many booked hours they had or the sales revenues they had produced. [TR 1568-1569] Accordingly, Respondents did not consider the productivity levels of the technicians in conducting their March 2009 performance evaluations that led to the discharges of Cazorla, Poppo, Persaud and Puzon.

The 2008 productivity levels of the technicians shows that in 2008, Persaud booked more hours than three other technicians and had more total sales than six other technicians.[16] [GC 132] Further review shows that in 2008, Cazorla, Poppo and Puzon booked more hours than 12 other technicians and had more total sales than 10 other technicians. In addition, during the first three months of 2009, Cazorla, Poppo, Persaud and Puzon all booked more hours than five other technicians and had more total sales than eight other technicians. [GC 132] Consequently, it is evident that Respondents' motivation for laying off Cazorla, Poppo, Persaud and Puzon was not a legitimate business-related reason, but rather was motivated by those technicians' union activities and Respondents' union animus against them because it believed they betrayed Respondents by voting for the Union.

Technicians Calderon, Chan, and Colon consistently had among the lowest productivity numbers of all the technicians. Respondents knew that none of these three employees supported the Union. Aviles said that in early December 2008, Colon was openly against the Union. [TR 1372-1373] Weiss noted that Colon and Calderon signed an anti-Union petition that he gave to Davis. [TR 675; GC Ex 130 and 132] Berryhill admitted that he figured Calderon (Happy) and Chan as no votes. [TR 1545-1546]

Team leader Alex Aviles testified that before Respondents implemented the March 2009 performance appraisal process to select service technicians for layoff, Respondents asked him to select the names of two service technicians for layoff, and that one of those he picked was Fenaughty. [TR 1377] The productivity numbers show that, in 2008, Fenaughty sold less hours and had lower total sales than Cazorla, Poppo and Puzon. [GC Ex 132] As noted above, it is undisputed that team leader Strong told Cazorla that when he became a team leader in December 2008, Respondents asked him to pick two technicians to let go, that he did so, and that Cazorla was not one of them, and that Strong tried to persuade Respondents not to let

[16] In 2008, Cazorla, Poppo, Persaud and Puzon sold more hours than: Chan, Colon, and Wasiejko, and had more total sales than Calderon, Chan, Colon, Guerinaud, Jose Guevara, and Wasiejko.

Cazorla go, to no avail.[17] [TR 851] Respondents' decision to abandon the method of allowing each team leader to select two technicians from his team for discharge is suspect and raises the inference that Respondents sought to better target the discriminatees.

Berryhill admitted that, in January and February 2009, Respondent MBO did not conduct the regularly scheduled performance appraisals of technicians, and that Respondent MBO had never previously utilized the performance appraisal form that was used in March 2009 to determine which technicians would be laid off. [TR 1569-1570]

Davis testified that in order to select the technicians who would be laid off in April 2009, he and Bonavia provided Respondent MBO with a performance appraisal form that Respondent AutoNation had used at Mercedes-Benz of Pembroke Pines, where the Union held an unsuccessful campaign in early 2008. Davis said that Respondent MBO team leaders then customized the performance appraisal form in a way that had never been used before by any AutoNation dealerships. [TR 1093-1094] Based on Davis' testimony, it appears that Respondents sought to impose a different set of standards for their dealerships where employees are organizing or are represented by a union, as compared to those where employees were not seeking union representation.

Respondents did not consider simply taking the most recent evaluations of each employee on the various teams in order to determine who to select for discharge. [TR 1099] Such a method would have been an objective and legitimate way to select technicians for discharge. However, that would not have given Respondents the ability to manipulate the outcome in order to insure that technicians were punished for their union activities.

Service manager Miller claimed that Respondents did not use the prior evaluation system because it did not provide a full picture of the technicians' abilities. [TR 1312] Miller

[17] When Cazorla asked Strong for his opinion about unions, Strong replied that he was neutral, but that unions were good in their aspects. [TR 839] Thus, Strong did not display union animus and served as an unbiased evaluator of Cazorla's skills and work performance.

testified that during the layoff selection process team leaders did not consider prior evaluations and that the appraisal period only covered recent months because most of the team leaders had only been in place since December 2008.[18] [TR 1315]

Until March 2009, Respondents had not identified any problem with the existing evaluation system. Thus, the change followed the employees' selection of the Union to represent them. Berryhill admitted that, in departments other than the service department, Respondent MBO did not use unique performance appraisals. [TR 1574] Respondents' specially created evaluation system for Respondent MBO's layoffs in April 2009 is further evidence of their unlawful motivation.

Miller testified that Aviles, who had only been a team leader for about three months as of March 2009, created the form that was used to conduct the performance evaluations, and that the team leaders scored the performances of the technicians on their respective teams. [TR 1313] Aviles, who initially went to some union meetings and therefore had information regarding employees' union sympathies, was promoted in December 2008, and said that since his promotion, he has opposed the Union and appeared in an anti-union video production. [TR 1374-1375, 1553; GC Ex 183] Based on the employment histories of Cazorla, Poppo, Persaud and Puzon, it is clear that Aviles, Strong and Makin were not in a position to properly evaluate their work performance and skill sets.

In addition, the performance appraisal process was extremely subjective and easily lent itself to manipulation. In this regard, since Aviles admittedly was biased against the Union, it is reasonable to conclude that the Union sentiments of the technicians that he appraised was a factor that he considered. Accordingly, the whole performance appraisal process was tainted.

Aviles testified that the only documents that the team leaders reviewed specific to each

[18] In contrast, Miller testified that, in December 2008, Respondents laid-off MBO employees in the parts department and relied exclusively on those employees' prior performance evaluations. [TR 1303-1305]

technician were “Netstar” documents concerning training. [TR 1385] A review of the five sections of the performance appraisals reveals the subjective nature of the process. [R Ex 40] In particular, Miller and Aviles said that when evaluating service technicians in the first section of the appraisal form entitled “Attitude and Personal Characteristics,” the team leaders did not review any documents specific to each service technician. Miller and Aviles testified that team leaders used their subjective judgment in this section. [TR 1316, 1385]

Aviles was not sure if team leaders reviewed any documents specific to each service technician when evaluating service technicians in the second section of the appraisal form entitled “Attendance.” In addition, Miller testified that Respondent MBO has no written policies that define how many employee absences are considered excessive. [TR 1317, 1386-1387]

Miller and Aviles further testified that when evaluating service technicians in the third section of the appraisal form entitled “Teamwork, Cooperation and Dependability,” the team leaders did not review any documents specific to each service technician, and there are no written policies that define the satisfactory level of performance in the area of teamwork, cooperation and dependability. [TR 1318, 1387-1388]

Miller and Aviles also conceded that when evaluating service technicians in the fourth section of the appraisal form entitled “Job Performance,” the team leaders did not review any documents specific to each service technician. Miller asserted that team leaders tried to make sure that each technician met the criteria to be classified at their assigned skill level rating. Aviles noted that team leaders based their ratings of technicians on their memory of experiences. [TR 1319, 1388-1389]

Miller also admitted, as to the fifth section of the appraisal form, entitled “Training and Development,” that there are no written policies that define the satisfactory level of a service technician’s performance in the area of training and development. [TR 1321]

In sum, the record shows that the subjective factors contained within the performance appraisals, which were specially crafted to select which technicians to discharge, are highly

subjective and can easily be manipulated in order to discriminate based on union activities. Respondents' failure to use objective criteria for their layoff selections is evidence that their defense is pretextual, and is an attempt to mask their true motive of discriminating against Cazorla, Poppo, Persaud and Puzon because of their union sympathies and activities.[19]

In addition, Respondents rated the performance appraisals of the discriminatees more harshly than other technicians and, thus, engaged in disparate treatment. In this regard, in Section I ("Attitude and Personal Characteristics") of Poppo's performance appraisal, Respondents wrote a note stating "shirt always tucked out." [R Ex 40 (Poppo)] The team leaders gave Poppo a rating of "6" out of "10" in the dress code subsection.

In contrast, Aviles wrote a note in the same section of Vega's performance appraisal stating "needs improvement on communicating with ASMs [service advisors] and uniform appearance." [R Ex 40 (Vega)] Aviles noted that Vega always had his shirt tucked out because he is a "heavy guy." [TR 1399] The team leaders gave Vega a rating of "7" out of "10" in the subsection dealing with adherence to proper dress code. Thus, despite the criticisms of Poppo and Vega being identical, Respondents gave Poppo a lower rating. Poppo's appraisal contained no other negative comments. Yet, Respondents rated him as one of the four lowest technicians.

In addition, a review of R Ex 41, which is the one-page overall appraisal rating of all the technicians, discloses that in Section I ("Attitude and Personal Characteristics") Union shop steward Poppo received the lowest percentage (45%) of all technicians, and in the subsection of attitude received the second lowest rating ("3") of all technicians. [R Ex 40] However, Respondents presented no evidence showing that Poppo's attitude was a concern. To the contrary, as noted above, on May 23, 2008, Respondents presented Poppo with a flat rate pay

[19] The ineffective and arbitrary nature of the performance appraisals is underscored by the fact that all three of the current diagnostic technicians at MBO (Grobler, Santiago and Meyer) scored in the bottom 10 of the group of 29 technicians. [R Ex 41] Yet, Grobler, Santiago and Meyer are MBO's only diagnostic technicians, which is the highest skill level attainable. [TR 1363]

increase because of the loyalty he demonstrated and the value he brought to the shop, both through his dedication and commitment to the store and customers. [GC Ex 138]

By comparison, in the same attitude subsection of Section I of the appraisal, where Respondents rated Poppo a "3," Respondents rated Eric Price a "5," even though there is a negative comment in that section stating that Price has a "short fuse." [R Ex 40 (Price)] Aviles admitted that technicians expressed concerns that they were scared of Price because of his temper. [TR 1393-1394] Furthermore, in the same subsection of Section I of the appraisal, Respondents rated technician Ian Rumbelow, who Respondents knew did not support the Union [TR 162, 1546], a "5," even though there is a negative comment in that section stating that Rumbelow made some inappropriate comments about employees. [R Ex 40 (Rumbelow)] Hence, where Price's appraisal has a negative comment, he received a "5," where Rumbelow's appraisal has a negative comment he received a "5" and where in the same section of Poppo's appraisal there is no comment, he received a rating of "3." Respondents clearly rated the appraisals of the discriminatees in a disparate and subjective fashion.[20]

R Ex 41 also shows that, in Section V ("Training and Development") of the appraisal, Puzon received the lowest percentage (50%) of all technicians and in the subsection concerning level of participation in training classes received a low rating of "4." However, Respondents presented no evidence showing that they ever had a problem with Puzon's level of training. In fact, Puzon's appraisal does not contain any negative comments at all. [R Ex 40 (Puzon)] Nevertheless, Respondents still rated Puzon as one of the four lowest technicians.

By comparison, in the same subsection of Section V of the appraisal where Respondents rated Puzon a "4," they rated Price a "7" even though there is a negative comment in that section stating that Price "has slowed down on self training in the last 15 months."

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[20] In late September 2010, Berryhill told Meyer that Tate had a terrible attitude problem. [TR 388] However, in the attitude subsection of Section I of his appraisal, Respondents rated Tate an "8." Berryhill said that Tate told him that he did not support the Union. [TR 162] Berryhill wrote in his journal notes

Moreover, Respondents rated Menchung Wong, who signed the anti-union petition circulated by Weiss and expressed anti-Union sentiments, a "6," even though there is a negative comment in that section stating that Wong does not utilize the technical assistance center (TAC) search or the diagnostic trees. [TR 1396; R Ex 40 (Wong)] Thus, Price's appraisal has a negative comment and he received a "7," Wong's appraisal has a negative comment and he received a "6," and Puzon received no comment and received only a "4."

Further, in Section II ("Attendance") of Cazorla's performance appraisal, Respondents wrote a note stating "?medical." [R Ex 40 (Cazorla)] The team leaders then proceeded to give Cazorla a rating of "5" out of "10" in the excessive absences subsection. In contrast, in the same subsection of Section II of the appraisal, Respondents rated Weiss, who expressed anti-Union sentiments, a "6" even though there is an almost identical comment in his Section II. Cazorla's appraisal contains no other comments, but Respondents rated him as one of the four lowest scoring technicians.

There are further examples in the record of Respondents' disparate treatment of the discriminatees in rating their performance appraisals. However, the above examples suffice to show that Respondents discriminated against the laid off employees because of their union sympathies and activities.

Respondents also revealed their anti-union motives with regard to the number of technicians selected for discharge. Berryhill admitted that he had the discretion to determine how many technicians to lay off in April 2009. He testified that in January 2009, when he claims he started thinking about laying off technicians, he thought about laying off six technicians and, by March 2009, he had decided to only lay off four technicians. Interestingly, Berryhill testified that if MBO laid off more technicians than necessary, it could consider bringing some of them back to work. [TR 1565] Berryhill admitted that in deciding on the number of service

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that, on September 26, 2008, Tate told him that he had heard conversations about the Union, but did not want any part of it. [TR 1517; GC Ex 175(d)]

technicians to lay off in April 2009, he reviewed the overall service department numbers, but did not consider the individual service technicians' hours. [TR 1564-1566] In addition, Berryhill did not consult with controller Clark regarding the number of technicians to be discharged. [TR 1253] Thus, Respondents not only failed to consider objective reasons for the layoff selections, but also for the decision as to whether or how many to lay off.

Berryhill denied that in January 2009, Respondent MBO only anticipated laying off two service technicians. However, an e-mail dated January 14, 2009, from Julie Staub to Bobbie Bonavia regarding Florida region headcount reports states that in the following 30 days, Respondent MBO planned to eliminate one counter parts person and two service technicians. [GC 111] Berryhill claimed that he did not recall informing Respondent AutoNation of such a plan, and that he did not know where they received that information. [TR 1567-1568] However, Berryhill admits that he is required to discuss all employee discharges (Berryhill used this word interchangeably with "layoffs") with DeVita, AutoNation Florida market 4 manager. [TR 1556] Thus, it is likely that Respondent AutoNation received the information contained in GC Ex 111 from Berryhill. Respondents failed to explain their reasons for the abrupt changes from two to six to four service technician layoffs.

Respondents have a practice and procedure in place for attempting to accommodate employees who are laid off because of rightsizing effects. [GC Ex 95 (Open Positions Listing, two pages before tab "8"), GC Ex 91 and 92 (AutoNation letters dated May 14, 2009 and June 5, 2009)] In this regard, Davis asserted that "when you have good employees, you find places for them." [TR 1100] Respondents apparently considered Cazorla, Poppo, Persaud and Puzon to be good employees, as demonstrated by the fact that they remain eligible for rehire, yet made no attempts to seek accommodations for them. [TR 192-194]

Further evidence of Respondents' anti-union motivation is the fact that they did not consider seniority in their discharge decision, as they had done in the past when laying off Respondent MBO's best, but least senior, parts employee, Doug Huff. [ALJD, p. 21, ln. 39-46;

TR 906-907] Indeed, an e-mail dated November 18, 2008, from Bibi Bickram to DeVita and Bonavia regarding "rightsizing" makes reference to the acronym "LIFO," which stands for "last in, first out." [GC Ex 108] Bonavia admitted that "LIFO" was one of the methods Respondent AutoNation used for employee reduction. [TR 304] Thus, the ALJ incorrectly found that "[t]he Respondents do not use seniority as a factor" concerning the selection of employees for permanent lay-off. [ALJD, p. 27, ln. 12]

Cazorla, Poppo, Persaud and Puzon had greater seniority than known Union opponents Patrick Fenaughty, Ben Wu, Julius Maisch and Menchung Wong, some of whom also had lower productivity than Cazorla, Poppo, Persaud and Puzon. In addition, Cazorla, Poppo and Persaud had greater seniority than known Union opponents Dennis Czencz and Scott Tate, one of whom also had lower productivity than Cazorla, Poppo and Persaud. [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 Union rumors to Berryhill on September 23, 2008, and that Tate told Berryhill on September 26, 2008, that he wanted no part of the Union. [TR 162,1504, 1517; GC Ex 174, 175(d)]

Moreover, Respondents' treatment of commissioned sales employees was contrary to their belated claim that they discharged technicians because they wanted to make sure the remaining employees had sufficient work to make a living. Thus, Clark testified that, during a sales decline in early 2008, Respondents allowed sales associates to leave the job on their own when they were not able to make enough money (rather than laying off the least productive salespersons so the remainder could earn more). [TR 1197-1199]

Respondents asserted that Meyer, Catalano and Wasiejko were the most open Union supporters in the shop, implying that if they held anti-union motives they would have discharged those technicians rather than Cazorla, Poppo, Persaud and Puzon. However, 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); *Great Atlantic & Pacific Tea Co*., 210 NLRB 593 (1974).

Respondents further showed their anti-union motivations by failing to recall Cazorla, Poppo, Persaud or Puzon even though they claim the employment of those technicians was terminated for economic reasons and they were eligible for rehire. Berryhill acknowledged that since their layoffs, Respondents have not notified any of the alleged discriminatees that there were service technician jobs available at MBO. [TR 1588, 1591] Contrary to their treatment of the alleged discriminatees, Respondents have hired new technicians at MBO, and also rehired technicians who had clearly expressed anti-union sentiments and had quit under circumstances that called into question their rehire status. Thus, 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 terrible attitude and was always in his office complaining about the Union. [TR 388] Respondents rehired Wong after he quit even though they 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 1583-1585; GC 54, par. 13] Respondents rehired Tate in October 2010 even though, after Berryhill convinced him not to quit, he quit without notice, contrary to AutoNation policy against considering employees eligible for reemployment if they have resigned without reasonable notice. [TR 1586; GC Ex 54, par. 14]

Moreover, the fact that in October 2010, Respondents hired two new technicians at Respondent MBO at a time when the average number of hours worked by technicians is lower than in past years, directly contradicts their assertion that they were required to discharge

Cazorla, Poppo, Persaud and Puzon in 2009 so the remaining technicians would have enough hours to earn a living and would, therefore, remain on the job at MBO. [TR 1260]

In summary, contrary to the ALJ's finding, Respondents have failed to meet their burden of establishing that they would have laid off Cazorla, Poppo, Persaud or Puzon even if those employees had not engaged in union activities. [ALJD, p. 27, ln. 47-48] Respondents' unexplained and illogical subjective reasons for laying off flat rate commission service technicians and for selecting Cazorla, Poppo, Persaud and Puzon for layoff, their creation of a new evaluation system for the specific purpose of deciding who should be selected, and the disparate implementation of that system against the alleged discriminatees further establishes that Respondents' actions were unlawfully motivated. The reasons proffered by Respondents for their discriminatory action are clearly pretextual and, therefore, indicative of illegal motivation. *Active Transportation*, 296 NLRB 431 (1989). Furthermore, it is well-settled that when a false reason is advanced "one may infer that there is another reason (an unlawful reason)" for the employer's action. *Associated Services for the Blind*, 299 NLRB 1150, 1152 (1990); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 62 LRRM 2401 (9th Cir. 1966). Accordingly, General Counsel submits that the ALJ erred by failing to find that Respondents' layoffs of Cazorla, Poppo, Persaud and Puzon violated Section 8(a)(1) and (3) of the Act and respectfully urges the Board to grant General Counsel's cross exceptions.

VII. RESPONDENTS VIOLATED SECTION 8(a)(1) AND (3) OF THE ACT BY ISSUING A DOCUMENTED COACHING TO DEAN CATALANO BECAUSE OF HIS UNION AND PROTECTED CONCERTED ACTIVITIES: CROSS-EXCEPTIONS 14, 15 and 16

Service technician Dean Catalano attended about 15 or 16 union meetings, the first one of which was in July 2008. [TR 538] In February 2009, Catalano was elected as Union shop steward. [ALJD, p. 3, ln. 30; TR 545]

Catalano testified that, in September 2009, Bill Kennedy, parts employee, used the bathroom without washing his hands, and then used the soda and ice machine in the employee break room. When Kennedy took a cup from the soda machine, Catalano suggested to

Kennedy that he should wash his hands. Afterwards, Catalano spoke to technician Fabian Santos about the incident. A few days later, Santos told Catalano that Kennedy used the bathroom without washing his hands again. Catalano and Santos decided to contact the Orange County Health Department. Santos went online and obtained the telephone number for the Health Department. Later during lunch, Catalano, Santos, Will Gomez, window tinter, and Rich Ulbrik, parts employee, spoke about the bathroom incident, while manager Maia Menendez was present. After lunch, Catalano called Menendez to his bay and told her about Kennedy not washing his hands after using the bathroom. Catalano then gave Menendez the telephone number for the Health Department. Menendez later told Catalano that she had called the Health Department and left a message. [ALJD p. 29, ln. 3-11; TR 553-555]

Technician Meyer testified that in September 2009, service manager Bullock asked him who had put a note on the break room ice machine stating "contaminated, do not use." Meyer replied that it was not him. Meyer then told Bullock that he heard Bill Kennedy, former parts employee, went to the bathroom without washing his hands and reached into the ice machine, prompting someone to put the note on the ice machine. Meyer further testified that parts department employees, where Kennedy worked, would use their shirt to grab the door handle if Kennedy previously touched it. [TR 381]

Meyer said that in late September 2009 or early October 2009, Catalano raised an issue at a larger Wednesday team meeting, where present were Bullock and Menendez. During the team meeting, Catalano asked if Respondent MBO could get someone from the Health Department to conduct an education session about washing hands, communicable disease and general hygiene. Bullock and Menendez thought it was a good idea and Menendez scheduled the session. [ALJD p. 29, ln. 13-16; TR 382]

The ALJ found that on October 2, 2009, Catalano participated in one of two meetings of employees at the MBO dealership that was conducted by a representative from the Health Department. [ALJD p. 29, ln. 18-27] The meeting was held in the conference room of the sales department. Catalano noted that there were about 30 employees present at the meeting,

including Meyer. Menendez was the only manager present at meeting. Catalano was an elected Union steward at the time of the meeting and he wears a Union button on his work uniform. At the meeting, the Health Department representative gave a presentation on the H1N1 virus. At the close of the meeting the Health Department representative asked for questions and Catalano complained that she had not addressed their problem at the dealership with employees failing to wash their hands after using the bathroom (having bowel movements and urinating). The ALJ found that Catalano stated that this was not the meeting the employees wanted; the representative said Catalano should raise his concern with management; and Catalano replied that this was what they got.

Catalano testified that he was not rude to the Health Department representative, did not use profanity and did not raise his voice at her. [TR 555-556, 584] Service technician Meyer corroborates the testimony of Catalano. [TR 383-384]

One or two days later, Bibi Bickram, Respondent AutoNation human resources specialist, questioned Meyer about the meeting in Bullock's office. Bickram asked Meyer if Catalano was rude during the Health Department meeting. Meyer replied that Catalano was not rude and did not use profanity. Meyer explained to Bickram that the Health Department representative did not appear to understand what the problem was or what Catalano was saying. Meyer told Bickram that the manager who contacted the Health Department apparently did not convey the proper message about the topic to be discussed at the meeting. [TR 385-386]

On October 13, 2009, Bullock and Makin issued Catalano a written discipline notice ("documented coaching") dated October 13, 2009. [ALJD p. 29, ln. 20-33; GC Ex 93] The notice states that during the Health Department presentation Catalano told the presenter that the information she shared was good, but it was not what he had asked management to address, and that Catalano wanted to talk about employees who use the bathroom and do not wash their hands; that the presenter told Catalano to speak to his manager; and that Catalano insisted that she address the situation with the group. The notice further states that after

speaking to several employees who attended the session, Catalano's behavior was perceived as being rude, antagonistic and persistent toward the guest speaker." [GC Ex 93] The notice stated that Catalano is expected to conduct himself in a manner that is courteous, respectful and polite to all "associates, managers, customers and guests of the dealership" and states, "Behavior that reduces the harmony and compatibility of the team is not acceptable and will not be tolerated."[21] [ALJD p. 29, ln. 29-33; GC Ex 93]

Catalano denied that he was rude or antagonistic with the Health Department representative as claimed on the written discipline. He signed the discipline to acknowledge receipt of the document. [TR 557-558, 584]

The ALJ erroneously concluded that Catalano lost the protection of the Act by engaging in discourteous and impolite conduct at the meeting when he told the Health Department representative that "this (the meeting) is what" he got from management. [ALJD, p. 29, ln. 46-47]

The record evidence conclusively establishes that Catalano engaged in protected activity, that his activity was not such as to forfeit the protections of the Act and that Respondents considered this protected activity in disciplining Catalano on October 13, 2009. Catalano's complaints were clearly concerted, especially in view of his status as a Union steward, and for the mutual aid and protection of himself and his fellow employees.
The Board has also held that an employee who raises safety (i.e., health) issues with his employer is engaged in concerted activity that is protected by Section 7 of the Act. *Talsol Corp*., 317 NLRB 290, 316-317 (1995). See also *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *Daniel Construction Co*., 277 NLRB 795 (1985).

Catalano engaged in union activity as a Union shop steward, and also engaged in concerted activity for other mutual aid or protection, by concertedly complaining to management

[21] Catalano then wrote a letter to the Health Department dated October 13, 2009. [GC Ex 171] The Health Department replied by letter, dated October 21, 2009, stating that it had provided MBO with a video containing information regarding the health issues raised by Catalano. Respondent MBO did not show the video to employees. [TR 558-560, 575; GC Ex 172]

about a group concern involving a health condition on the job pursuant to his conversations with technician Santos and employees Gomez and Ulbrik, and pursuant to his joint effort with Santos to get a Health Department speaker. Catalano's behavior at the meeting was in furtherance of the Section 7 union and protected concerted complaints about health conditions on the job.

Respondents warned Catalano that they would not tolerate the alleged rude and inappropriate behavior he engaged in during the course of his union and protected concerted activities at the Health Department meeting.

Respondents emphasize that the "documented coaching" discipline issued to Catalano was a less severe form of discipline because it did not become a part of his permanent employee record. However, the "documented coaching" still constitutes discipline because on its face it states that it will be retained in a local file by Catalano's manager, and that similar conduct will not be tolerated.

An employer violates the Act by discharging or disciplining an employee engaged in a protected concerted activity unless, in the course of that protest, the employee engages in opprobrious conduct, costing him or her the Act's protection. In assessing the conduct, the Board assesses four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices. *Atlantic Steel Co.*, 245 NLRB 814, 816-817 (1979); *Felix Industries*, 331 NLRB 144, 144-146 (2000).

Consideration of these factors leads to the conclusion that Catalano's October 2, 2009 conduct does not come close to that which would forfeit the Act's protection. This is established by the testimony of Catalano, Meyer and Menendez, and by Respondents' documentation of Catalano's conduct. [GC Ex 141]

First, the place of discussion weighs in Catalano's favor. The encounter with the Health Department representative occurred in a non-work area and did not cause any disruption.

Second, the subject matter of the discussion, weighs heavily in favor of finding that Catalano did not lose the protection of the Act. The subject of the discussion was the health

and personal hygiene concerns affecting all employees at the MBO dealership. The concerted efforts of Catalano, Santos and other employees to promote proper personnel hygiene among the work force was intended to protect employees' health.

Third, the nature of Catalano's "outburst" also weighs heavily in favor of finding that Catalano did not lose the protection of the Act. Merely speaking loudly, raising one's voice, or using intemperate remarks while engaging in protected concerted activity generally will not deprive an employee of the Act's protection. *Alton H. Piester, LLC.*, 353 NLRB 369, 374 (2008); *Firch Baking Co.*, 232 NLRB 772 (1977). There is no evidence or contention that Catalano used profanity or directed a derogatory remark to the Health Department representative. It is undisputed that he waited until the end of the presentation and responded to the representative's invitation to ask questions. He merely voiced his displeasure with management in response to the representative's suggestion that he make his complaint about the subject of the presentation to management, by stating that he had done so and this (i.e. the presentation on the flu) is what he got. In addition, manager Menendez admits that the Health Department representative who made the swine flu presentation at the dealership did not complain to her about Catalano's behavior during the meeting. [TR 1143-1144]

Even if Catalano was "rude, antagonistic and persistent" as Respondents alleged in the October 13, 2009 disciplinary notice, his comments were merely a plea for Respondents to present the employees with training concerning diseases that could be spread from failing to exercise proper personal hygiene in the workplace. Contrary to the ALJ's finding and contrary to Respondents' assessment, Catalano's behavior was not aggressive or hostile. This is established both by the recitation of facts on the disciplinary notice, and by the testimony of Catalano and Meyer.

Fourth, Catalano's "outburst" was not provoked by Respondents' unfair labor practices, and that factor weighs neither for nor against finding a violation of the Act.

In summary, the analysis of the *Atlantic Steel* factors establishes that Respondents violated Section 8(a)(1) and (3) of the Act by issuing a documented coaching to Catalano on October 13, 2009, and General Counsel respectfully urges the Board to grant the cross-exceptions.

VIII. RESPONDENTS REDUCED SERVICE TECHNICIANS' BOOK HOURS FROM 4.2 TO 2.3, RATHER THAN TO 2.8, WHEN PERFORMING FLEX B PRE-PAID MAINTENANCE SERVICES: CROSS-EXCEPTION 17

Service technician Brad Meyer testified that Mercedes-Benz vehicles have factory recommended maintenance service schedules. In 2005 or 2006, AutoNation began offering customers pre-paid maintenance packages for Mercedes-Benz vehicles, also referred to as AON services. Under the AON maintenance package, MBO technicians perform flex A and flex B services, in alternating fashion, about every 10,000 miles on vehicles. [TR 366, 370]

Until February 2009, Respondent 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. In January 2009, team leader Aviles told Meyer that he and parts manager Miller had discussed changing the structure of the AON service because Respondent AutoNation was not paying Respondent MBO the full amount for the service and MBO did not want to continue absorbing that loss. Shortly before February 1, 2009, Respondent MBO team leaders gave technicians a document showing the new AutoNation pre-paid maintenance service pay scale (book times). [GC Ex 155] The team leaders told technicians that the new pay scale would be effective on February 1, 2009. The new pay scale shows that Respondent MBO 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 4.2 hours, including 1 hour for a brake flush, to **2.3** hours, which includes the brake flush, for a total reduction of 1.9 hours. [GC Ex 155; TR 371, 373, 376] Accordingly, General Counsel's Cross-Exception 18 should be granted.

IX. CONCLUSION

Counsel for the General Counsel submits that, for the reasons set forth herein, the ALJ erred by: 1) inadvertently referring to Respondent MBO by an incorrect corporate legal name; 2) failing to issue a nationwide remedy concerning Respondents' overly broad rule prohibiting all solicitation on company property; 3) recommending dismissal of the allegation that Respondents violated Section 8(a)(1) of the Act by threatening employees with loss of jobs or discharge if they selected the Union as their collective-bargaining representative or engaged in union activities; 4) recommending dismissal of the allegation that Respondents violated Section 8(a)(1) of the Act by Brian Davis' coercive interrogation of James Weiss about the union sympathies of other employees and about whether other employees had voted; 5) recommending dismissal of the allegation that Respondents violated Section 8(a)(1) and (3) of the Act by discharging Juan Cazorla, David Poppo, Tumeshwar "John" Persaud and Larry Puzon because of their union activities and sympathies; 6) recommending dismissal of the allegation that Respondents violated Section 8(a)(1) and (3) of the Act by issuing a documented coaching to Dean Catalano because of his union and protected concerted activities; and 8) stating that Respondents reduced from 4.2 to 2.8, rather than 2.3, the service technicians' book hours when performing flex B pre-paid maintenance services.

Accordingly, Counsel for the General Counsel respectfully requests that the Board reverse the ALJ's findings of fact and conclusions of law and modify them in accordance with the General Counsel's cross-exceptions. Counsel for the General Counsel also respectfully requests that the Board issue an appropriate remedy and Order redressing the violations

alleged in the Consolidated Complaint, and issue any and all other remedies which the Board deems just and proper.

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

Respectfully submitted,

/s/ Rafael Aybar
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CERTIFICATE OF SERVICE

I hereby certify that **GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** 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, was electronically filed and served by electronic mail as set forth below on the 16th day of May 2011.

By electronic filing at www.nlrb.gov to:

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