

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

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

August 25, 2011

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND PEARCE

On July 1, 2008, Administrative Law Judge Jay R. Pollack issued a decision in this case, finding that the Respondent committed multiple violations of Section 8(a)(1) of the Act during a union organizational campaign among its automotive technicians. The judge also dismissed several 8(a)(1) complaint allegations, an 8(a)(3) refusal-to-hire allegation, and an 8(a)(3) discharge allegation.

On April 20, 2009, the two sitting members of the National Labor Relations Board issued a Decision and Order Remanding, which adopted the 8(a)(1) violations found by the judge, as well as his dismissal of other 8(a)(1) allegations and the 8(a)(3) refusal-to-hire allegation.¹ In section 1 of its Decision, the Board found additional 8(a)(1) violations that had been alleged in the complaint but were not addressed by the judge, and in section 2 the Board remanded to the judge for further consideration certain other 8(a)(1) allegations that he had failed to address. The Board in section 2 also remanded to the judge for further consideration his finding that the Respondent did not violate Section 8(a)(3) by discharging employee Patrick Rocha. Finally, in light of the additional violations found by the Board and any further violations the judge might find on remand, the Board instructed the judge to reconsider whether a *Gissel*² bargaining order, which he had denied in his initial decision, was appropriate. 353 NLRB at 1298-1299. If so, the judge was directed to reconsider several 8(a)(5) allegations that he had dismissed, which were dependent on the issuance of a *Gissel* bargaining order. *Id.* at 1299 fn. 18.

¹ *Stevens Creek Chrysler Jeep Dodge ("Stevens I")*, 353 NLRB 1294. The Board adopted the judge's 8(a)(1) findings to which exceptions were filed. There were several other 8(a)(1) violations found by the judge to which no exceptions were filed. See fns. 3 and 8 of *Stevens I*, 353 NLRB at 1294-1295.

² *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

On July 29, 2009, the judge issued the attached supplemental decision finding additional violations of Section 8(a)(1). The judge reaffirmed his dismissal of the allegation that Patrick Rocha was discharged in violation of Section 8(a)(3), his denial of a *Gissel* bargaining order, and his dismissal of the 8(a)(5) allegations that were dependent on that order. The General Counsel and Charging Party Unions filed exceptions and supporting briefs to the supplemental decision, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has carefully considered the judge's initial decision and the record in light of the exceptions and briefs pertaining to that decision, and has decided to affirm the judge's rulings, findings, and conclusions and to adopt his recommended Order to the extent and for the reasons stated in *Stevens I*, which is incorporated herein by reference. See, e.g., *Turtle Bay Resorts*, 355 NLRB No. 147 (2010). The Board also affirms the remand order contained in *Stevens I* for the reasons stated therein.

The Board has also considered the judge's Supplemental Decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions except as specifically set forth below, and to adopt the recommended Order as modified and set forth in full below.³

We adopt the judge's supplemental findings on remand that the Respondent violated Section 8(a)(1) of the Act by interrogating Patrick Rocha during his hiring interview as to whether Rocha was a union member, and by threatening employee Alque Baybayan that Baybayan's wage rate would decrease if employees selected the Union as their bargaining representative.⁴ For the reasons set forth by the judge in his Supplemental Decision, we agree that the Respondent did not violate Section 8(a)(1)

³ In addition to ordering the traditional posting of the Board's remedial notice in all places where notices to employees are customarily posted, the judge ordered in his supplemental decision that the notice be posted electronically on the Respondent's internet/intranet site.

On May 13, 2010, the Board issued a notice and invitation to file briefs to the parties and interested amici in this case and several other cases regarding whether Board-ordered remedial notices should be posted electronically. The Charging Party Unions filed a brief.

Subsequently, in *J. Picini Flooring*, 356 NLRB No. 9 (2010), the Board held that respondents are required to post notices electronically if they regularly communicate with their employees or members by such means. Accordingly, we shall include this remedial provision in the modified Order. We shall also substitute a new notice that conforms with the violations set forth in the Order as modified.

The Charging Parties have requested a public reading of the Board's notice. We deny this request, finding that the remedies we are ordering are sufficient to effectuate the policies of the Act.

⁴ No exceptions were filed to these findings.

by threatening employees with plant closure during a May 11, 2007 shop meeting.

Contrary to the judge, however, we find that the Respondent's discharge of Patrick Rocha violated Section 8(a)(3) and (1). Further, based on this 8(a)(3) finding, the additional 8(a)(1) violations found by the judge on remand, and the violations found in *Stevens I*, we conclude that a *Gissel* bargaining order is necessary to remedy the Respondent's unlawful conduct. Finally, in light of the *Gissel* bargaining obligation, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally eliminating the position of a unit employee and by refusing to provide the Union with requested information necessary to prepare for collective bargaining.

I. THE DISCHARGE OF PATRICK ROCHA

As set forth more fully in *Stevens I*, the Respondent is an automobile dealership that commenced operations in December 2006. Rocha was among the initial group of automotive technicians the Respondent hired. Rocha was interviewed by the Respondent's parts and service director, Chris Nickerson, who recognized Rocha from their employment at another area dealership and asked him whether he was a still a union member.⁵

Soon after the Respondent opened, the technicians began a union organizing campaign that culminated with the filing of an election petition on May 16, 2007.⁶ The Respondent learned of the organizing activity on March 2, after a group of technicians, including Rocha, returned to work after a lunchtime meeting with a union representative at a local restaurant.

Later on March 2, Service Manager James Garcia separately summoned several technicians to his office and asked whether they had attended the luncheon and signed authorization cards. During his office interrogation of employee Michael Lane, Garcia uttered several threats, one of which pertained to Rocha. Garcia told Lane that if he found out employees, and Rocha in particular, had organized the March 2 union luncheon, he would "blow them out."⁷ For the reasons explained below, we find that Garcia carried out this threat by discharging Rocha on March 6.

As discussed in *Stevens I*, the judge found that the General Counsel satisfied his initial burden under *Wright*

*Line*⁸ of showing that Rocha's discharge was unlawfully motivated. He found that the Respondent knew that Rocha had engaged in union activity by attending the March 2 meeting, and was motivated by union animus in discharging Rocha, as evidenced by Garcia's threat to "blow [him] out" if he discovered Rocha had organized that meeting. 353 NLRB at 1297. The judge further found, however, that the Respondent successfully met its *Wright Line* rebuttal burden by showing that it would have discharged Rocha regardless of his union activities. Specifically, the judge found that soon after Rocha was hired, he exhibited attendance problems by leaving work early and taking extended lunches, which resulted in his continued failure to work a required 40-hour week. The judge further found that, after several documented counseling sessions in February about this behavior and Rocha's low productivity, followed by a final warning issued to him on February 26, the Respondent decided on February 27 to discharge him but delayed implementing that decision until March 6. The judge concluded, therefore, that Rocha was lawfully discharged for "attendance and productivity issues" rather than for union activities.

In *Stevens I*, adopted by reference here, the Board found that the judge's analysis of the *Wright Line* defense was deficient in several significant respects. The Board observed that the judge's findings rested almost entirely on the testimony of the Respondent's officials, mainly Garcia, without any discussion or apparent consideration of countervailing evidence. 353 NLRB at 1297. First, the Board referenced the unaddressed testimony of Rocha suggesting that the Respondent contributed to his attendance and productivity problems by failing to assign him a sufficient number of repair orders on a daily basis, that Rocha complained to Garcia about this lack of work, that Garcia acknowledged those complaints, and that Rocha's early departures were approved. Id. Second, the Board noted that the judge failed to address Rocha's testimony that Garcia never counseled him or issued him a final warning on February 26. Id. at 1298. Third, the Board cited written statements by the Respondent's owner and its legal counsel, omitted from the judge's analysis, indicating that the decision to discharge Rocha was made on March 5 or 6, *after* the Respondent learned of his March 2 union activity. Id. Finally, the Board noted that the judge's finding that the Respondent decided to terminate Rocha on February 27 was at odds with Garcia's statement to employee Lane on March 2 that he "*would* blow [Rocha] out" (emphasis

⁵ As referenced above, there are no exceptions to the judge's finding in his supplemental decision that Nickerson's question about Rocha's union membership violated Sec. 8(a)(1).

⁶ All dates are in 2007 unless otherwise indicated.

⁷ In *Stevens I*, there were no exceptions to the judge's findings that Garcia's March 2 interrogations and threats violated Sec. 8(a)(1). See 353 NLRB at 1294-1295 and fn. 8.

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

added) if Garcia discovered that it was Rocha who had organized the March 2 union meeting.⁹

Accordingly, without passing on the merits of the 8(a)(3) discharge allegation or the ultimate validity of the judge's prior findings, the Board remanded the issue to the judge for further analysis. The Board instructed the judge to make explicit and reasoned credibility determinations resolving the discrepant testimony of Rocha and the Respondent's witnesses concerning whether Rocha had ever been counseled, was given a final warning on February 26, complained about a lack of work, and left work early only when he had no work. The Board also directed the judge to reconsider his finding that the Respondent decided on February 27 to discharge Rocha, in light of written statements and Garcia's March 2 threat suggesting a later date.

In his supplemental decision on remand, the judge tersely affirmed his dismissal of the discharge allegation, including his finding that the Respondent decided to discharge Rocha before March 2. With respect to the date of the discharge decision, the judge's analysis, in its entirety, consisted of the following:

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

This analysis fails to respond to the detailed instructions in *Stevens I*. Further, having independently evaluated the record evidence, we find, contrary to the judge, that the Respondent decided to discharge Rocha after, not before, it learned of his March 2 union activities. This finding, as explained more fully below, is fatal to the Respondent's *Wright Line* defense and establishes that Rocha's discharge violated Section 8(a)(3).

As the Board discussed in *Stevens I* (353 NLRB at 1298), the date when the Respondent decided to discharge Rocha is "critical" to determining, under *Wright*

Line, whether his discharge was unlawfully motivated by the Respondent's animus against his union activities. If, as the judge found, the decision was made on February 27, the discharge could not have been unlawfully motivated by Rocha's union activities, which the Respondent did not learn of until March 2.

As set forth above, the judge cited two evidentiary bases in his Supplemental Decision—the "testimony of Garcia" and unspecified "documentary evidence"—that "convince[d] him that the Respondent decided before March 2 to discharge Rocha." We find that Garcia's testimony is the only evidence that supports the judge's decision, and we reject that testimony.

Garcia testified that, based on a final warning given to Rocha on February 26 and Rocha's late arrival to work on February 27, he decided that day, with the approval of the Respondent's owner, Mathew Zaheri, to discharge Rocha. Garcia testified further that he intended to implement the decision on March 2 (a Friday), but delayed the termination until the following week because he had to attend to a Chrysler factory representative who visited the dealership unexpectedly on March 2 to discuss warranty claims. Although the judge did not explicitly credit this testimony, he must have implicitly credited it in order to find that the Respondent decided before March 2 to discharge Rocha, because no other evidence exists to support that finding.

It is well settled that the "Board is reluctant to overturn the credibility findings of an Administrative Law Judge," *Bralco Metals, Inc.*, 227 NLRB 973, 973 (1977), and "only in rare cases" will it do so. *E.S. Sutton Realty Co.*, 336 NLRB 405, 405 fn. 2 (2001). This is particularly true when credibility findings are based on a judge's assessment of the demeanor of a witness. *V & W Castings*, 231 NLRB 912, 913 (1977). However, the "Board has consistently held that 'where credibility resolutions are not based primarily upon demeanor . . . the Board itself may proceed to an independent evaluation of credibility.'" *J.N. Ceazan Co.*, 246 NLRB 637, 638 fn. 6 (1979) (quoting *Electrical Workers Local 38*, 221 NLRB 1073, 1074 (1975)). Further, even demeanor based credibility findings are not dispositive when the testimony is inconsistent with "the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *E.S. Sutton Realty*, supra at 407 fn. 9 (quoting *Humes Electric, Inc.*, 263 NLRB 1238 (1982)).

Applying these principles, we find that the judge's credibility finding with respect to Garcia's testimony must be reversed. First, that credibility finding does not appear to be primarily based on demeanor. The judge gave no indication, in either of his decisions, that he re-

⁹ In light of the judge's finding that the Respondent's decision to discharge Rocha predated its discovery of his union activities, the Board also noted that it did not understand the basis for the judge's finding that the General Counsel had established his initial *Wright Line* case. *Id.* at 1298 fn. 16.

lied on Garcia's demeanor in crediting his testimony. Although the judge generally referenced demeanor,¹⁰ he did not specifically refer to Garcia's demeanor or that of any other witness. See *El Rancho Market*, 235 NLRB 468, 470 (1978) (reversing judge's credibility findings where, although the judge generally referred to demeanor, it did "not appear that . . . [the findings] were based on his observations of the witnesses' testimonial demeanor"). Further, by simply citing the "testimony of Garcia" in conclusory terms, without any supporting basis for his finding that the discharge decision predated March 2, the judge disregarded the Board's instructions on remand to reanalyze Rocha's discharge by making clear credibility determinations and explaining the basis for those determinations. *Stevens I*, 353 NLRB at 1298–1299. Because the judge failed to heed those instructions, we are unable to determine the basis on which Garcia was credited. Because we cannot conclude that the judge credited Garcia primarily based on demeanor, we have "proceed[ed] with an independent evaluation" of the record de novo. *Canteen Corp.*, 202 NLRB 767, 769 (1973); see also *El Rancho Market*, supra at 470. Having done so, we find that the weight of the record evidence shows, contrary to Garcia's assertion, that the Respondent decided to discharge Rocha after March 2.

The fact of a post-March 2 discharge decision is established most clearly by the written statements, mentioned above, of the Respondent's owner and its legal counsel during the investigatory stage of the proceeding. Owner Mathew Zaheri stated that Rocha arrived late to work on February 27, left early on March 1 and 2, and "[o]n the following Monday, 3/5 he did not come in or call and the decision to terminate him was made" (GC Exh. 38) (emphasis added). Similarly, in a precomplaint position statement submitted to the investigating Board agent, the Respondent's attorney summarized the February counseling sessions with Rocha regarding his work performance and attendance, and concluded that "[n]o correction of the problems was evident on March 6, 2007, including an early departure. Accordingly, Rocha was terminated on March 6, 2007" (GC Exh. 34).

In his supplemental decision, the judge concluded that these two statements did not "contradict" his initial decision and that he remained "convince[d]" by the "documentary evidence" that the Respondent decided before March 2 to discharge Rocha. We cannot discern the basis for this conclusion. Zaheri's statement and the attorney's position statement constitute the only documentary record evidence addressing the date on which the Re-

spondent decided to discharge Rocha, and neither statement supports the judge's finding that the decision predated March 2. To the contrary, both statements explicitly contradict that conclusion, stating plainly that the decision was made either on March 5, according to Zaheri, or March 6, according to the Respondent's attorney.

That the discharge decision was not made before March 2 is further supported by Garcia's March 2 statement to Lane after learning of the employees' lunchtime union meeting. Garcia threatened Lane that he "would blow [Rocha] out" if he found that Rocha had organized the meeting. In response to the Board's observation in its remand decision that the conditional language of this threat appeared "at odds" with a February 27 discharge decision (353 NLRB at 1298), the judge stated in his Supplemental Decision that the "blow out" threat was made "under circumstances where Rocha was going to be discharged in any event." We think Garcia's threat demonstrates precisely the opposite: that the discharge decision had not been made as of the March 2 union meeting and would not have been made had Garcia determined that someone besides Rocha had organized the meeting.

Additional record evidence (and the absence of certain evidence), not addressed by the judge, also undermines his finding of a February 27 discharge decision. First, Zaheri's written statement cites, as reasons for Rocha's discharge, his early departure on March 2 and his no show on March 5. However, these actions would have been irrelevant had the Respondent decided before March 2 to discharge him. Second, as to Garcia's claim that he was prevented from executing the February 27 discharge decision on March 2 due to an unexpected visit by a Chrysler representative, the Respondent provided no evidence documenting this visit, and Garcia was equivocal regarding the visit's duration, testifying first that it lasted "most of the morning" but later describing the visit as lasting the "morning and most of the afternoon, okay, early afternoon" (Tr. 1060). Moreover, however long the visit may have lasted, it did not prevent Garcia from individually interrogating several employees concerning their lunch with the union representative. Thus, even if we assume that the visit took place as claimed, the Respondent has not established convincingly that the Chrysler representative's visit left Garcia no time to summon Rocha and hand him his termination check. Finally, it is noteworthy that no termination check was prepared on March 2, Garcia's purported planned date for Rocha's discharge. Instead, the check was drafted on March 5, further suggesting that the discharge decision was not made until after the Respondent had learned of

¹⁰ See *Stevens I*, 353 NLRB at 1300 fn. 2, and fn. 1 of the judge's supplemental decision.

the Union meeting, unlawfully interrogated employees, and threatened to retaliate against Rocha.

Accordingly, we reject Garcia's testimony that the Respondent decided on February 27 to discharge Rocha and find, instead, that the decision was made on March 5 or 6, as clearly indicated by all the evidence discussed above.

In light of this finding, we further find that the Respondent has failed to establish its defense under *Wright Line* that it discharged Rocha for reasons other than his protected union activities on March 2. As discussed in *Stevens I* (353 NLRB at 1298), the Respondent's defense rested "critical[ly]" on Garcia's testimony that the decision to discharge Rocha was made before he engaged in those union activities. That testimony having been rejected as not credible, the Respondent's *Wright Line* defense fails as pretextual. Well-established precedent holds that when a respondent's asserted reasons for a discharge are found to be pretextual, the respondent has failed to show that it would have taken the same action, absent the employee's protected conduct. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982)); see also *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007).

This principle applies notwithstanding that there may have been legitimate reasons on which the Respondent could have relied in deciding to discharge an employee. *Metropolitan Transportation Services*, supra. Here, even assuming that Rocha had productivity and attendance problems as set forth in the counseling and separation reports entered into evidence, this evidence merely establishes that there were legitimate reasons for discharging him. It does not establish that the Respondent relied on those reasons, rather than Rocha's union activity, when terminating him. For example, in *Humes Electric*, supra, the Board found that the respondent had had "legitimate concerns" about employee Devers' productivity for weeks before discharging him on August 12, the day after learning of his union activities. The respondent claimed that it had decided on August 6 to discharge Devers on August 7, and then "deferred the discharge until August 12" for administrative reasons and because Devers was out sick on August 7 and 8. The Board rejected this explanation as "incredible" and concluded that the discharge was unlawfully based on Devers' intervening union activity. 263 NLRB at 1240.

As in *Humes Electric*, we have rejected as incredible the Respondent's claim that it decided to discharge Rocha on February 27 but, due to intervening events, deferred the discharge decision until March 6. Whatever Rocha's performance deficiencies, the Respondent took

no action to discharge him until learning of his union activity on March 2. Moreover, the Respondent's discredited attempt to backdate the discharge decision further suggests that its asserted reasons for the discharge were pretexts, as it shows that the Respondent itself did not believe that Rocha's attendance and performance issues, which were nothing new, adequately explained a discharge coming hard on the heels of the March 2 discovery of his union activities. See *Metropolitan Transportation Services*, supra, 351 NLRB at 660. In sum, the General Counsel's *Wright Line* case is compelling, and the fact that the Respondent tried to backdate the decision only bolsters the inference, which we draw, that the proffered reasons for the discharge were pretextual and the true reason was an unlawful one the Respondent wished to conceal. *Id.* (citing *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995)). We conclude that it was the discovery of Rocha's union activities and the Respondent's animus against those activities that motivated Rocha's discharge, in violation of Section 8(a)(3) and (1).

II. THE GISSEL BARGAINING ORDER

The judge found that the violations committed by the Respondent did not warrant a bargaining order, noting, "[s]ignificantly, [that] . . . no employee lost employment as a result of the Respondent's unfair labor practices." Having reversed the judge and found that Rocha was unlawfully discharged, we find that our traditional remedies cannot alone erase the coercive effects of his discharge and the other violations committed by the Respondent, and that a bargaining order is therefore necessary.

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court identified two categories of employer misconduct that may warrant imposition of a bargaining order: "category I" cases involving outrageous and pervasive unfair labor practices that make a fair election impossible, and "category II" cases involving less extraordinary and less pervasive unfair labor practices, but which nonetheless have a tendency to undermine majority union support, once expressed through authorization cards, and render the possibility of a fair election slight. *Id.* at 614; *California Gas Transport*, 347 NLRB 1314, 1323 (2006).¹¹

This case meets the standard for a category II bargaining order. In reaching this conclusion, we have examined the "seriousness of the violations and the pervasive

¹¹ There is no exception to the judge's finding in his supplemental decision that the Union obtained signed authorization cards from a majority of unit employees. The record shows that at least 9 of 13 unit employees, including Rocha, signed authorization cards.

nature of the conduct, considering such factors as the number of employees directly affected by the violations, the size of the unit, the extent of the dissemination among employees, and the identity and position of the individuals committing the unfair labor practices.” *Abramson, LLC*, 345 NLRB 171, 176 (2005) (citing *Garvey Marine, Inc.*, 328 NLRB 991, 993 (1999), *enfd.* 245 F.3d 819 (D.C. Cir. 2001) (footnotes omitted)).

The Respondent’s unfair labor practices, by their nature and extent, had a strong tendency to undermine the Union’s majority support, especially in a unit as small as the 13 employees here. Beginning immediately with the opening of its new dealership, the Respondent was intent to keep the Union out, telling two employees during initial hiring interviews that if they held current union membership, they were required, as a condition of employment, to renounce it by obtaining withdrawal cards. The Board has recognized that, where an employer violates the Act by taking similar preventative measures to “keep [a] [u]nion out” of its workplace, a bargaining order is appropriate. *Bridgeway Oldsmobile*, 281 NLRB 1246, 1246 (1986), *enfd.* 933 F.2d 1015 (9th Cir. 1991).

Once it realized that these preventive antiunion steps had not been successful, and that its employees were seeking union representation, the Respondent reacted swiftly and severely. Immediately upon learning of the organizing campaign on March 2, Garcia summoned employee Lane to his office and threatened (1) that “heads would roll[1]” and employees would “get in trouble” and possibly lose their jobs if the dealership was picketed or organized; (2) that if Rocha or another employee had organized the March 2 union meeting, he [Garcia] would “blow them out”; and (3) that Zaheri would close the dealership if employees selected the Union to represent them. Threats of job loss and plant closure are “hallmark” violations, long considered by the Board to warrant a remedial bargaining order because their coercive effect tends to “destroy election conditions, and to persist for longer periods of time than other unfair labor practices.” *Evergreen America Corp.*, 348 NLRB 178, 180 (2006) (citing, *inter alia*, *Gissel*, *supra*, 395 U.S. at 611 fn. 31), *enfd.* 531 F.3d 321 (4th Cir. 2008).

The Respondent then discharged Rocha, whom it perceived to be the leader of the organizing effort. This, too, is a “hallmark” violation, perhaps the most flagrant, “because no event can have more crippling consequences to the exercise of Section 7 rights than the loss of work.” *Mid-East Consolidation Warehouse*, 247 NLRB 552, 560 (1980). In *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212–213 (2d Cir. 1980), the seminal case defining “hallmark violations,” the Second Circuit Court of Appeals

noted, in enforcing the Board’s Order, that the discharge of an active union adherent would likely “have a lasting inhibitive effect on a substantial percentage of the work force,” and would remain in employees’ memories for a long time.

The Respondent committed a third hallmark violation later in the organizing campaign by awarding eight employees wage increases on May 14. Grants of wage increases have long been held to be a substantial indication that a bargaining order is warranted because they have “a particularly longlasting effect on employees and are difficult to remedy by traditional means not only because of their significance to the employees, but also because the Board’s traditional remedies do not require a respondent to withdraw the benefits from the employees.” *Evergreen America*, *supra*, 348 NLRB at 180 (quoting *Gerig’s Dump Trucking*, 320 NLRB 1017, 1018 (1996)); see also *Pembrook Management*, 296 NLRB 1226, 1228 (1989) (discussing cases in which bargaining orders were given based solely on the grant of wage increases).

In addition to these hallmark violations, we also rely on the coercive impact of the Respondent’s other violations. These included interrogations, a wage-cut threat, creating the impression of surveillance, and requiring (as discussed above) that employees withdraw their union membership as a condition of employment. On March 2, when Garcia summoned Lane to his office and threatened him with loss of jobs and closure of the facility if employees succeeded in their organizing efforts, Garcia also interrogated Lane as to whether he attended the union meeting that day and signed an authorization card. Similarly, parts and service director Nickerson telephoned Lane on March 5 and asked him who was behind the organizing drive.

Three other employees were also summoned individually to Garcia’s office on March 2 or 5 and questioned as to whether they attended the union meeting and signed cards. Additionally, Garcia prefaced his interrogations of two of these employees by creating the impression that the Respondent was surveilling employees’ union activities, telling them that he already knew about the March 2 union meeting and that cards had been distributed. Garcia also threatened one of the employees during the interrogation that his pay would be cut if employees selected the Union.

The Respondent’s unlawful conduct persisted. Two months later, Owner Zaheri interrogated employees and created the impression that their union activities remained under surveillance when, following a May 9 union meeting, Zaheri asked employees during a May 11 shop meeting who paid for pizza at their May 9 meeting.

These violations, particularly the interrogations and impressions of surveillance, accentuated the coercive effect of the hallmark violations by serving as a continuing warning of the dangers attendant to union adherence. By indicating to employees that their union activities were being monitored, and by probing their individual support for the Union, the Respondent conveyed the unmistakable message that support for the Union would not be tolerated and that employees risked the same fate as Rocha if they persisted in seeking union representation.

The gravity and coercive impact of all the violations are heightened by the relatively small size of the unit (13 employees) and by the involvement of the Respondent's highest management officials. See, e.g., *Traction Wholesale Center Co.*, 328 NLRB 1058, 1076–1078 (1999), *enfd.* 216 F.3d 92, 107–108 (D.C. Cir. 2000) (enforcing bargaining order in light of magnitude of employer's unlawful conduct, small unit of 20 employees, and involvement of employer's owners). All of the unit employees were subjected to the interrogations and the impression of surveillance, more than half of the unit employees were granted the hallmark wage increases, and all of the employees were plainly aware of the hallmark discharge of Rocha. These violations were magnified by the fact that the perpetrators were Respondent's three highest management officials. Zaheri, the owner, authorized Rocha's discharge and the wage increases, and personally interrogated employees and created the impression that he was surveilling their organizing efforts. Service Manager Garcia, the third ranked official, interrogated employees, created the impression of surveillance, threatened Lane with plant closure and job loss, and implemented his threat to "blow out" Rocha.¹² As the Board has consistently emphasized, "[w]hen the highest level of management conveys the employer's antiunion stance by its direct involvement in unfair labor practices, it is especially coercive of Section 7 rights and the employees witnessing these events are unlikely to forget them." *California Gas Transport*, *supra* at 1324 (quoting *Michael's Printing, Inc.*, 337 NLRB 860, 861 (2002), *enfd.* 85 Fed. Appx. 614 (9th Cir. 2004)).

In light of the violations found herein, we conclude that the possibility of erasing the effects of the Respondent's unfair labor practices and of ensuring a fair election by the use of traditional remedies is slight. Requiring the Respondent to refrain from unlawful conduct in the future, to reinstate Rocha with backpay, and to post a notice, although remedially necessary, would not, in our

¹² Parts and Service Director Nickerson, the second in command, although less active than Zaheri and Garcia, interrogated Rocha in his job interview by asking him if he was still a union member, and interrogated Lane on March 5 by asking who was behind the organizing drive.

view, be sufficient to dispel the coercive atmosphere that this Respondent has labored so assiduously to create.

In deciding that a bargaining order is necessary and appropriate, we have duly considered the Section 7 rights of all employees involved. As the Board has stated previously, "the *Gissel* opinion itself reflects a careful balancing of the employees' Section 7 rights 'to bargain collectively' and 'to refrain from' such activity." *Mercedes Benz of Orland Park*, 333 NLRB 1017, 1019 (2001). The rights of the Respondent's employees favoring unionization, which were expressed through authorization cards, are protected by the bargaining order. The rights of those employees who may be opposed to the Union are safeguarded by their access to the Board's decertification procedure under Section 9(c)(1) of the Act, following a reasonable period of time to allow the collective-bargaining relationship a fair chance to succeed.¹³

III. THE 8(A)(5) ALLEGATIONS

The Union achieved majority status on March 2, based on signed authorization cards received from 9 of the 13 unit employees, and requested recognition from the Respondent on May 16. Therefore, the Respondent's bargaining obligation commenced as of May 16. See *Traction Wholesale Center*, *supra*, 328 NLRB at 1077; compare *California Gas Transport*, *supra* at 1326–1327 (when no demand for recognition is made, the bargaining obligation commences as of the time a respondent initiates its campaign of unfair labor practices, if, as of that date, the union had obtained majority status).

On August 20, 2007, 3 months after the Respondent's bargaining obligation attached, the Union requested a list of unit employees, their wage rates, dates of hire, classifications, personnel policies, and fringe benefits. This information was clearly relevant and necessary to the Union's role as the employees' bargaining representative, and the Respondent violated Section 8(a)(5) and (1) by failing to provide the information.

After the bargaining obligation attached on May 16, the Respondent was foreclosed from making unilateral changes to the unit employees' terms and conditions of employment. *Parts Depot, Inc.*, 332 NLRB 670, 674 (2000). Accordingly, by unilaterally eliminating the lube technician job of Steve Rother on October 15, 2007,

¹³ In its Answering Brief to the General Counsel's and Union's Briefs in support of their exceptions to Judge Pollack's Supplemental Decision, the Respondent does not contend that changed circumstances between the time of the unfair labor practices and the issuance of a *Gissel* order make such a remedy unnecessary. Thus, the passage of time and any intervening turnover of employees and management—matters which have concerned some courts in addressing the Board's *Gissel* orders—are not at issue in this case.

without bargaining with the Union about the decision and its effects, the Respondent violated Section 8(a)(5) and (1) as alleged in the complaint.

The Respondent argues that it did not violate Section 8(a)(5) by eliminating Rother's lube technician position because it was not a bargaining unit position and because his work was absorbed by the unit service technicians. We reject both arguments. Rother testified (Tr. 587–588; 593–594) that he worked alongside other service technicians in the bargaining unit, and that the work that he performed—oil changes, tire rotations, and brake inspections—was also performed by other service technicians. Rother's testimony was corroborated by Service Technician Rick Avelar (Tr. 403–408) and was not contradicted by other witnesses. Further, by asserting that Rother's work was absorbed by other unit technicians after Rother's position was eliminated, the Respondent essentially concedes that the work he performed was bargaining unit work. And because the unit work that Rother performed was necessarily lost by the elimination of his position, we find no merit in the Respondent's argument that the absorption of his work by other unit employees precludes the finding of an 8(a)(5) violation. See *Kansas AFL-CIO*, 341 NLRB 1015, 1025–1026 (2004).¹⁴

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(3) and (1) by discharging Patrick Rocha because he engaged in protected union activity, we shall order the Respondent to offer him full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. Having found that the Respondent violated Section 8(a)(5) and (1) by unilaterally eliminating the lube technician position held by Steve Rother and consequently terminating his employment, we shall order the Respondent to rescind its unlawful unilateral elimination of that position and to offer Rother full reinstatement to his former job of lube technician, without prejudice to his seniority or any other rights or privileges previously enjoyed. We shall further order the Respondent to make Rocha and Rother whole for any loss of earnings and other benefits suffered as a

result of the Respondent's unlawful conduct. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). The Respondent shall also be required to remove from its files any and all references to Rocha's unlawful discharge and the unlawful elimination of Rother's lube technician position, and to notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.

The Respondent will be ordered, on request by the Union, to bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. *Raven Government Services*, 331 NLRB 651 (2000); *Nicholas County Health Care Center*, 331 NLRB 970 (2000). The Respondent will also be ordered to provide the Union, in a timely manner, the information requested by the Union on August 20, 2007.

ORDER

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

1. Cease and desist from

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

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

(c) Threatening employees with plant closure, wage decreases, and job loss because of their support of the Union.

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

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

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

(g) Discharging employees for engaging in protected union activities.

(h) Refusing to recognize and bargain in good faith with Machinists District Lodge 190, Machinists Automotive Local 1101, International Association of Machinists and Aerospace Workers of America, AFL-CIO, as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

¹⁴ The cases cited by the Respondent—*Wire Products Mfg. Co.*, 328 NLRB 855 (1999), *Geiger Ready-Mix*, 323 NLRB 507 (1997), and *Kohler Co.*, 292 NLRB 716 (1989)—do not support a different conclusion.

All full-time and regular part-time mechanics/technicians employed by the Respondent at its San Jose, California facility; excluding service writers, all managerial and administrative employees, salespersons, office clerical employees, all other employees, guards, and supervisors as defined in the Act.

(i) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant to and necessary for the Union’s performance of its statutory functions as the unit employees’ exclusive collective-bargaining representative.

(j) Eliminating bargaining unit positions without giving prior notice to the Union and affording it an opportunity to bargain regarding the decision and its effects.

(k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unlawful unilateral elimination of the lube technician position.

(b) Within 14 days from the date of this Order, offer Patrick Rocha full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Within 14 days from the date of this Order, offer Steve Rother full reinstatement to his former job of lube technician, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(d) Make Patrick Rocha and Steve Rother whole for any loss of earnings and other benefits suffered as a result of the discrimination against Rocha and the unilateral elimination of Rother’s position, in the manner set forth in the amended remedy section of this supplemental decision and order.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Patrick Rocha and the unlawful elimination of Rother’s lube technician position, and within 3 days thereafter, notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.

(f) Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative, retroactive to May 16, 2007, of employees in the above-described appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(g) Provide the Union in a timely manner the information that it requested on August 20, 2007.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its San Jose, California facilities copies of the attached Notice marked “Appendix.”¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 7, 2006.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken a comply.

Dated, Washington, D.C. August 25, 2011

Wilma B. Liebman, Chairman

Craig Becker, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

¹⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you about your union activities or the union activities of your fellow employees.

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

WE WILL NOT threaten you with plant closure, wage decreases, or job loss in order to discourage your union activity.

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

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

WE WILL NOT create the impression that we are spying on your union activities.

WE WILL NOT discharge you for engaging in protected union activities.

WE WILL NOT refuse to recognize and bargain with Machinists District Lodge 190, Machinists Automotive Local 1101, International Association of Machinists and Aerospace Workers of America, AFL-CIO, as the exclusive collective-bargaining representative for the following group of our employees:

All full-time and regular part-time mechanics/technicians employed by us at our San Jose, California facility; excluding service writers, all managerial and administrative employees, salespersons, office clerical employees, all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT refuse to furnish the Union with information it requested that is relevant and necessary for it to perform its function as your collective-bargaining representative.

WE WILL NOT eliminate bargaining unit positions without giving prior notice to the Union and affording it an opportunity to bargain regarding the decision and its effects.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above, which are guaranteed you by Section 7 of the Act.

WE WILL rescind our unlawful unilateral elimination of Steve Rother's lube technician position.

WE WILL, within 14 days from the date of the Board's Order, offer Patrick Rocha full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, offer Steve Rother full reinstatement to his former job of lube technician, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Patrick Rocha and Steve Rother whole for any loss of earnings and other benefits resulting from the unlawful actions against them, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Patrick Rocha and the unlawful elimination of Steve Rother's lube technician position, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful actions will not be used against them in any way.

WE WILL recognize and bargain collectively and in good faith with the Union as the collective-bargaining representative of employees in the unit described above and, if an understanding is reached, embody that understanding in a signed contract.

WE WILL provide the Union in a timely manner the information that it requested on August 20, 2007.

STEVENS CREEK CHRYSLER JEEP DODGE, INC.

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

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

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

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I issued my original decision in this case on July 1, 2008. On April 20, 2009, the Board issued its Decision and Order Remanding. The

Board found violations of coercive interrogation, creating the impression of surveillance, unlawfully requiring employees to execute union withdrawal cards, threatening plant closure, threatening not to hire employees because of their union affiliation, and granting wage increases to discourage union activities. In addition, the Board remanded the case to me to decide issues regarding the interrogation and discharge of employee Patrick Rocha; the March 2 pay cut threat by Service Manager James Garcia; the May 11 plant closure threat by owner Matthew Zaheri, and the unilateral change and refusal to provide information allegations. Further, the Board ordered that I address the remedial relief sought by the Union.

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

I. FINDINGS—INTERROGATION AND DISCHARGE

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

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

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

Rocha was discharged for attendance and productivity issues. Garcia testified that he counseled Rocha on February 12, 19, and 26 about his attendance problems. Rocha was late on February 27. According to Garcia, he contacted Zaheri and recommended discharge. Zaheri approved the discharge. Garcia testified that he intended to discharge Rocha on March 2—

the end of the pay period—but was delayed due to the unexpected arrival of a Chrysler factory representative. Rocha clocked out early on March 2. Garcia gave instructions to prepare Rocha's final check on Monday morning, March 5. The check gives Rocha credit for 8 hours on March 5. Garcia could not find Rocha after the check had been prepared so he terminated the employee on March 6. Rocha was discharged when he reported for work on March 6. Rocha's separation notice states "Patrick's inability to get the work done correctly and on time" and "left early without permission did not advise anybody that he left."

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

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

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

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

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

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

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

II. ANALYSIS AND CONCLUSIONS

A. *The Request for a Bargaining Order*

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

In determining the propriety of a bargaining order, the Board examines the seriousness of the violations and the pervasive nature of the conduct, considering such factors as the number of employees directly affected by the violations, the size of the unit, the extent of the dissemination among employees, and the identity and position of the individuals committing the unfair labor practices. *Intermet Stevensville*, 350 NLRB 1350 (2007), citing *Abramson, LLC*, 345 NLRB 171, 176 (2005) (citing *Garvey Marine, Inc.*, 328 NLRB 991, 993 (1999), *enfd.* 245 F.3d 819 (D.C. Cir. 2001)). Accord: *Holly Farms Corp.*, 311 NLRB 273, 281 (1993), *enfd.* 48 F.3d 1360 (4th Cir. 1995), *cert. denied* in pertinent part 516 U.S. 963 (1995). A *Gissel* bargaining order, however, is an extraordinary remedy. The preferred route is to order traditional remedies for the unfair labor practices and to hold an election, once the atmosphere has been cleansed by the remedies ordered. *Hialeah Hospital*, 343 NLRB 391, 395 (2004) (citing *Aqua Cool*, 332 NLRB 95, 97 (2000)).

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

In *Hialeah Hospital*, the Board found that the case fell into the second category of *Gissel* cases. Thus, the Board considered both the extensiveness of the employer's unfair labor practices and their likelihood of recurrence in determining whether a bargaining order is appropriate. *Id.* at 614. The Board cited *Desert Aggregates*, 340 NLRB 289, 294–295 (2003), in which

it found that traditional remedies were adequate to redress the employer's discriminatory layoff of two union supporters and its solicitation and promise to remedy employee grievances in spite of the unit's small size of 11 employees. Similarly, in *Aqua Cool*, *supra* at 97, the Board found that a bargaining order was not warranted in a unit of eight employees where the unfair labor practices committed by the employer included only a single hallmark violation. Likewise in *Burlington Times, Inc.*, 328 NLRB 750, 752 (1999), the Board declined to issue a bargaining order where an employer threatened to close the plant, made noneconomic grants of benefits, promised to improve wages and other benefits, and solicited grievances in a unit of 11 employees.

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

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

B. *The Union's Remedial Requests*

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

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

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By unlawfully interrogating employees Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

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

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

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

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

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

10. Respondent did not otherwise violate the Act.

THE REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

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

1. Cease and desist from

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

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

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

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

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

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

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its San Jose, California facilities copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced, or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the attached notice to all current employees and former employees employed by the Respondent at any time since March 2, 2007. The notice shall also be posted on Respondent's internet/intranet cite for the same period of time.

(b) Within 21 days after service by the Region, file with the Regional Director, a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply.

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

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate employees about their union activities or the union activities of fellow employees.

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

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

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

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

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

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

STEVENS CREEK CHRYSLER JEEP DODGE, INC.