UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

LESKOVAR MOTORS, INC.

and **Case Nos. 19-CA-32956**
19-CA-32957
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, LOCAL LODGE 88 **19-CA-33012**

Susannah Merritt, Esq., Counsel for the General Counsel.
Bruce Bischof, Esq., Counsel for the Respondent.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me on July 13, 2011 in Butte, Montana. The Consolidated Complaint herein, which issued on April 27, 2011 was based upon unfair labor practice charges that were filed by International Association of Machinist and Aerospace Workers, AFL-CIO, Local Lodge 88, herein called the Union, on February 16 and March 21, 2011. The Complaint alleges that Leskovar Motors, Inc., herein called the Respondent, interrogated its employees regarding their support for, and activities on behalf of, the Union, solicited employees to draft written statements expressing opposition to the Union, discontinued its policy of permitting employees to work overtime and ceased paying employees for overtime and holiday pay (as provided for in the contract between the Respondent and the Union), and ceased making contributions to the Union's Health, Welfare and Pension Plan and, instead, placed the unit employees in a new plan offered by the Montana Auto Dealers Association. It is alleged that the Respondent engaged in these activities without prior notice to the Union or affording the Union an opportunity to bargain about these issues and its effects. Finally, it is alleged that on November 15, 2010[1], Respondent withdrew its recognition of the Union as the collective bargaining representative of the unit, in violation of Section 8(a)(1)(5) of the Act.

I. Jurisdiction and Labor Organization Status

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. The Facts

A. The Unit

Since about 1990 the Union had represented the following employees employed by the Respondent:

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2010.

> All full-time and regular part-time employees employed within the parts and service department at the Butte facility; but excluding all other employees, guards and supervisors as defined in the Act.

The most recent contract between the Union and the Respondent was effective for the period July 1, 1998 to June 30, 2003. Article XXV, Term of Agreement, provides:

> This Agreement is effective July 1, 1998 and continues until June 30, 2003, when it automatically renews itself and continues in full force and effect from year to year thereafter, unless notice is given by either party to the other not less than sixty (60) days prior to June 30, 2003, or prior to June 30 of any year thereafter, that changes are desired in any or all of the provisions herein.

There is no evidence that either Respondent or the Union gave such a notice at any time.

During the relevant period, the number of unit employees has varied from two to five. Troy Buhl, a Union member and a Shop Steward, was employed by the Respondent in its parts and service department for nineteen years until April 30, 2011, when he became a business representative for the Union, and Todd Ericson has been employed by the Respondent for about thirty years as an auto technician. Sean Walsh, admitted to be a sales manager and a supervisor within the meaning of the Act was the supervisor of the department during the relevant period. Other than Buhl and Ericson, there was some turnover in the unit between early October and November 15, but as of November 15 there were five employees in the unit. Brad Sparks began working for the Respondent in October as an oil/lube technician, but left to work elsewhere on about November 5. Guy Perkins began working for the Respondent on about November 1 as a counterman, and was still employed at the time of the hearing. Loren David Johnson, who was hired in October, and Chad Johnson, who was hired in early November, were also employed in the parts and service unit on November 15. Neither one was still employed by the Respondent at the time of the hearing and neither one testified herein. Their places were taken by Michael Hoar, whose employment began on December 6, and Aaron Musgrove, whose employment began in April 2011. Therefore, on November 15, the unit consisted of Buhl, Ericson, Perkins, Loren Johnson and Chad Johnson.

B. The Interviews

In early October, Sparks went to the Respondent's facility to be interviewed for a job and was questioned by Joe Leskovar, Jr., a part owner (and now deceased). A few days later, he was called to return to the facility and met with Walsh, in his office. He testified that Walsh told him that they liked his qualifications and asked about his experience. Walsh then told him that they were a union shop, that they were negotiating with the Union, but no agreement had been reached and it was possible that the Union might strike the Respondent, and he asked him whether, if there were a strike, he would be willing to cross the picket line, and he said that he would: "He asked me if I didn't want to be represented by the Union that I could write it down on a piece of paper…I said okay, I didn't want to be represented by the Union." He testified that Walsh first raised the subject of the Union in this conversation. On October 10, the day that he began working for the Respondent, he wrote and signed a note stating: "Since being hired for employment at Leskovar, I would not like to be represented by a union." Walsh testified that he met with Sparks on about October 10, at which time he told him:

> Same thing I told all of them that I interviewed, that we were in Union negotiations at the present time. We did not have a contract. If he would like to join the Union I can provide

him with information to get in contact with them. It does not matter to us either way. It has no bearing on us hiring him. It is totally his choice to join the Union or not. And at that time he informed me that he was not interested in being contacted or joining the Union.

Hoar testified that in about November, Chad Johnson told him that there might be a job opening in the Respondent's service department and he went to the facility, spoke to Perkins, and completed a job application, which he gave to Perkins. About two weeks later, he received a message from Perkins saying that he should come to the facility as Walsh would like to speak to him. He went to the facility on December 6, met with Perkins, and he and Perkins went to speak to Walsh. Walsh told him that he was hired, and "then he asked me if I had any interest in the Union." Hoar answered, "No, no at this time…He said then he would need a piece of paper with a statement on it stating why I would not want to be with the Union. And it would need to be signed and dated." Hoar said that was fine, and Walsh gave him a piece of paper, and he wrote out the statement and gave it to Walsh. Hoar testified that at the meeting, he never said anything about not wanting a union prior to Walsh raising the subject. Perkins testified that after Walsh offered the job to Hoar, Walsh told Hoar that "he would be provided an opportunity to be contacted by the Union, and he could choose to do that or not. And I remember Mike wasn't interested in being a part of the Union."

Perkins testified that prior to beginning his employment with the Respondent on about November 1, he was called on a few occasions by Joe Leskovar, Jr. asking if he were interested in working for the company; at that time he said that he wasn't. Later, he called Joe, Jr. and said that he might be interested in working for the company and they met, with Walsh present, and Joe, Jr. offered him the position of counterperson. He testified that after he was offered the job, and accepted, Walsh: "…told me…that they were a Union shop.[2] That he had the contact information and I could get ahold of them, or they could get ahold of me, and I could talk to them about being part of the Union. And I told him I wasn't interested." He testified that Walsh did not go into detail about the Union or a possible work stoppage; he simply offered him the contact information if he wanted it. After Perkins said that he was not interested in the Union, Walsh asked him if he would put it in writing, which he did, on November 12:

To whom it may concern:

I have applied and been offered a position as service writer at Leskovar Honda. They offered me an opportunity to speak to a union representative, which I declined. I am not interested I being a member of a union at this time.

Walsh testified that he sat in on the interview with Perkins: "Joe Leskovar, Jr. did most of the interviewing," he told Perkins that they were a Union company, and that he had the right to contact the Union representatives, but Perkins "…was very direct and said he had no interest in joining or being contacted by the Union." Walsh then told him that if he felt that way it would be appropriate for him to put that in writing, which Perkins did. In an affidavit that Walsh gave to the Board on January 14, 2011, he stated that no other person was present with him when he

[2] On cross examination, he testified that Joe, Jr. said that they were a union shop and that Walsh had some information for him, and then he "deferred" to Walsh, but that it was Walsh who asked him to put the statement in writing. In his affidavit given to the Board on January 6, 2011, he stated that he was interviewed by Joe, Jr., and he is the one who Perkins told that he was not interested in the Union and it was he who asked Perkins to put in writing that he was not interested in the Union.

interviewed Perkins, Johnson, Sparks and Hoar.

Ericson attended some of the bargaining sessions that took place between the Respondent and the Union prior to November 15. He testified that he never informed the Respondent, either orally or in writing, that he no longer wanted to be represented by the Union.

Walsh testified that Loren David Johnson, who began his employment with the Respondent in October, gave him the following statement dated October 3:

> I am applying for an auto-tech job at Lescovar [sic] Honda. Having never been a member of any union, I would appreciate not being contacted by any union representative. I see no advantage to union representation; in fact I think it would be a detriment to me.

Chad Johnson did not testify because he is presently being incarcerated. However, the parties stipulated to a statement he prepared on November 12, a day or two before he began working for the Respondent:

> To whom it may concern:
>
> I have applied and been offered a job as lube technician at Leskovar Honda. They offered me an opportunity to speak to a union representative, which I declined, as I do not see the advantages of being a member of a union.

Walsh testified that he interviewed Chad Johnson, who was applying for a job, sometimes prior to November 15. Walsh raised the issue of the Union during the interview; he told him:

> The same as I told the others, that we were in negotiation with the Union, not under a union contact at that time, and if he cared to join the Union I could supply him with the information on it…And he indicated to me that he did not want to be contacted by the Union or join in the Union. And at that time I asked him if he would be willing to put that in writing for me for our documents, and he said yes.

C. Unilateral Changes

The Complaint alleges, and the Respondent admits the following allegations contained in paragraph 9:

> (a) On or about October 25, 2010, Respondent discontinued its policy if permitting its unit employees to work overtime, as provided for in Article III of the 1998 to 2003 Agreement, and ceased paying unit employees for overtime.
>
> (b) On or about November 15, 2010, Respondent ceased making contributions to the Machinists' Pension Fund and Machinists' Health and Welfare Plan on behalf of its Unit employees, and placed the Unit employees into a new medical plan offered by the Montana Auto Dealers Association on about that date.
>
> (c) On or about December 24, 2010, Respondent ceased paying Unit employees for holidays, as provided for in Article IV of the 1998 to 2003 Agreement.

The Complaint also alleges, but the Respondent did not admit:

> (d) The subjects set forth above in paragraphs 9(a) through (c) relate to wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.

Buhl testified that prior to October 25, he did not need approval from anybody in order to work overtime, and when he did work overtime he was paid for all hours over eight hours in one day at a rate of time and a half, as provided for in Article III of the Agreement, which states that, "All work performed…in excess of eight hours per day…shall be compensated at 1½ times his or her hourly rate." On October 25 he was given a document by Vicky Leskovar, part owner, with that date stating: "There will be no overtime pay in parts and service department. Only 40 hours of work will be paid." She asked Buhl to sign it, but he refused, saying that it was in violation of their contract and that she should discuss it with Mike Wardle, the Union representative. On October 29, a letter, signed by Joe Leskovar, with that date was left on Buhl's desk stating:

> As per our conversation on Tuesday, October 26, 2010 you were asked and given a written letter to sign that no overtime will be paid in the parts department. You were asked and never gave the signed letter back. There will ne NO overtime paid in your department. If there is a reason you need to work overtime you will have to get permission to do so.

Buhl's pay stubs from the Respondent establish that prior to October 25 he was paid time and a half for all hours worked over eight in any one day, and after October 25 he was not paid the premium rate for hours worked over eight in any one day. Buhl, who was on the Union's bargaining committee, and Wardle testified that in the bargaining sessions in 2010, the Respondent never bargained about changes in the contractual provisions regarding overtime work and overtime pay.

Wardle testified that in about late December, employees informed him that the Respondent was not paying them for holiday pay as provided for in Article IV of the Agreement, and the Respondent had never bargained with the Union about the subject during the 2010 negotiations. Buhl testified that sometime shortly before December 24, the unit employees were handed a note stating:

> Holiday Hours
>
> Friday, December 24th 8:30 – 2 p.m.
>
> Friday, December 31st 8:30 – 3 p.m.
>
> All employees will be scheduled to work on these days.

Buhl testified that, in the past, pursuant to the contract, if they worked on a day prior to one of the holidays specified in Article IV of the Agreement, they were paid time and a half for those hours worked. For the hours worked on December 24 and December 31, they were paid at the regular hourly rate. In addition, they were not paid holiday pay for Christmas or New Years Day as per the past practice and the contract.

In the November 15 notice that the Respondent was withdrawing recognition of the Union, the Respondent also stated that it had replaced the existing health and welfare plan with the Montana Auto Dealers Health and Welfare Plan. Wardle testified that in the bargaining that the Union and the Respondent engaged in during 2010, this change in health and welfare

coverage was one of the Respondent's proposals, but it was never agreed upon.

D. Withdrawal of Recognition

On November 15, 2010, counsel for the Respondent wrote to Wardle:

> This letter shall serve as formal notice that Leskovar Motors is unilaterally withdrawing recognition of the International Association of Machinists and Aerospace Workers, District 86, Local Lodge 88. The Withdrawal of Recognition is based on the fact that the employer can demonstrate that the Union has actually lost the support of a majority of the Bargaining Unit employees. The employer's unilateral action is taken in accordance with **Levitz Furniture Company of the Pacific, Inc. (333 NLRB 717) (2001).**
>
> As you are aware, the only labor contract signed by Leskovar Motors is dated July 1, 1998. For over 12 years, this contract has not been renewed and no successor agreements have been reached despite negotiations. The Company will be placing all employees in the Company's health insurance plan provided by the Montana Auto Dealers Association. The Company will work to ensure that there is no lapse in insurance coverage for Bargaining Unit employees.

On about November 15, the Respondent posted the following notice as well as distributing it to each unit employees:

> NOTICE TO ALL SERVICE AND SHOP EMPLOYEES
>
> On November 15, 2010 the International Association of Machinists (IPM) was notified that Leskovar Motors was formally withdrawing recognition and would no longer recognize the IPM as the collective bargaining agent or labor relations representative for employees in the service, shop or parts department.
>
> Leskovar Motors is now operating as non-union employer. Those employees that were previously covered by the IPM insurance plan will be placed in the company's insurance plan which is provided by the Montana Auto Dealers Association.

Wardle testified the contract with the Respondent that expired in 2003 has rolled over since then pursuant to Article XXV of the contract. The parties met in May, July and September in an effort to agree to a successor agreement, but were unsuccessful in doing so. By letter dated December 3, Wardle responded to the Respondent's November 15 letter, *inter alia:*

> I have received your letter dated November 15, 2010 where you claim that the Union has lost majority support at Leskovar Motors in Butte, Montana, and you will be placing all employees in the Montana Auto Dealers Association Health Insurance Plan.
>
> First of all, Leskovar Motors has unilaterally made the decision to hire additional employees in the Service and Parts Department, and then unilaterally change H/Welfare plans without negotiating these changes…
>
> Both of these unilateral changes are mandatory subjects of bargaining, a violation of Section 8(a)(5) of the National Labor Relations Act, and a violation of Article XXV of the Collective Bargaining Agreement.
>
> This letter is also the Union's request for a full and complete copy of any and all

> information that you or your client have used to determine that "the Union" has "lost the support of the majority of the Bargaining Unit employees," considering that as of the date of your letter, at least one of these newly hired employees has only been employed a couple of days, and none were employed long enough to complete the thirty (30) day period outlined in Article I of the Collective Bargaining Agreement.

The Respondent never gave Wardle the information he requested in the last paragraph of this letter. Additionally, in a telephone conversation with counsel for the Respondent on about December 1, Wardle asked him what evidence he had to support the allegation that the Union no longer had majority support among the bargaining unit employees, and he testified that counsel told him that he didn't know what evidence they had; he hadn't seen it.

III. Analysis

There are two Section 8(a)(1) allegations herein: In about October, the Respondent, by Walsh, interrogated employees regarding their support for the Union (Paragraph 7), and in about October and December, Respondent, by Walsh, solicited employees to draft written statements expressing opposition to the Union (Paragraph 9). Sparks testified that in his interview with Walsh in October, Walsh told him that they were a Union shop and that they were negotiating with the Union, but no agreement had been reached and it was possible that there would be a strike and he asked Sparks if he would be willing to cross a picket line in that situation. Walsh's testimony differs somewhat: he testified that he told Sparks that they were in negotiations with the Union, but did not have a contract; if he would like to join the Union, he would provide him with the contact information, and it was totally his choice whether to join the Union or not. Although neither Sparks nor Walsh was an obviously incredible witness, I credit the testimony of Sparks over Walsh. He was not interested in joining the Union when he was hired and he had no interest in this proceeding as he was no longer employed by the Respondent. As stated in *Quality Drywall Company,* 254 NLRB 617,621 (1981):

> Questions concerning former union membership and union preference, in the context of job application interviews, are inherently coercive, without accompanying threats, and are therefore violative of Section 8(a)(1) of the Act.

In *W.A. Sheaffer Pen Company,* 199 NLRB 242, 243 (1972), the employer attached a questionnaire to its employment application stating that it was engaged in contract negotiations and "in the event of a strike, the plant may be picketed" and asked whether the applicants would be willing to cross a picket line. The Board stated:

> The Board has never privileged the interrogation of applicants concerning their willingness to cross a picket line except in situations where a strike was in progress. That is not to say, however, that there are no situations where such interrogation of employee applicants would not be justified. We are, however, of the view that this case does not present such a situation. In the circumstances of this case, to make privileged the Respondent's use of the questionnaire 6 weeks before the expiration of the contract, and at the very outset of bargaining, would severely limit and pervert the Section 7 rights of the employee applicants.

In *Mosher Steel Company,* 220 NLRB 336 (1975), the Board stated:

> We would not quarrel with the proposition that questions about employee strike intentions are not *per* se unlawful but must be judged in light of all the relevant circumstances. Thus, where the record shows that at the time the questions were asked

> the Employer had a reasonable basis to fear an imminent strike and merely sought to ascertain the chances for keeping his business open, such inquiries are lawful. On the other hand, an employer cannot rely on unsubstantiated rumor or mere speculation as a justification for questioning employees concerning their intentions in the event a strike is called.

See also *York Division, Borg-Warner Corporation,* 229 NLRB 1149, 1150 (1977). In the instant matter, there was absolutely no evidence that the Respondent reasonably feared that a strike was imminent. The contract had expired seven years earlier and although the parties met in May, July and September without reaching an agreement, there is no evidence that the employees voted to strike, that the Union authorized a strike, or that there was any discussion of a strike. In this situation, questioning the applicants whether they would cross a picket line was premature, coercive, and unlawful. I therefore find that by asking Sparks if he would cross a picket line Respondent violated Section 8(a)(1) of the Act.

It is next alleged that in about October and December Walsh unlawfully solicited employees to draft written statements expressing opposition to the Union. Sparks testified that after he told Walsh that he would be willing to cross a picket line to get to work, Walsh asked him if he didn't want to be represented by the Union, could he write that on a piece of paper, and Sparks said that he would, and he did. Hoar went to the facility on December 5 and was told by Walsh that he was hired. Walsh asked him if he had any interest in the Union, Hoar said that he didn't, and Walsh said that he needed a signed statement to that effect from Hoar. Hoar agreed, and Walsh gave him a piece of paper, and Hoar wrote out the statement. It is alleged that the requests to Sparks and Hoar to put their opposition to Union representation in writing violate Section 8(a)(1) of the Act. Even though there is no direct evidence to establish that their responses were coerced, because the subject of their support for the Union was initially broached by Walsh, I find that his requests to put their opposition in writing violate Section 8(a)(1) of the Act.

The Respondent admits, and the evidence establishes, that on about October 25 the Respondent discontinued its policy of permitting its employees to work overtime, and ceased paying its employees for overtime as provided for in Article III of the Agreement. As the Union was, at least at that time, the collective bargaining representative of the Respondent's parts and service department employees, and the Respondent changed the contractual overtime provisions without bargaining with the Union about this subject, this change violated Section 8(a)(1)(5) of the Act.

The evidence also establishes, and the Respondent admits, that on about November 15 the Respondent ceased making contributions to the Union's Health and Welfare Plan on behalf of the unit employees and, instead, placed the unit employees in a new medical plan offered by the Montana Auto Dealers Association on about that date, and on about December 24 Respondent ceased paying its unit employees for holidays, as provided for in Article IV of the Agreement. However, as these changes took place on or after November 15, the legality of these changes depends upon the legality of the Respondent's withdrawal of recognition of the Union on November 15.

As stated above, there were five individuals employed in the unit on November 15: Buhl, Ericson, Chad Johnson, Loren David Johnson and Perkins. Buhl and Ericson never indicated any dissatisfaction with the Union to the Respondent, so the legality of Respondent's withdrawal of recognition on November 15, depends upon the effectiveness of the expressed dissatisfaction by Perkins, Chad Johnson and Loren Johnson. As neither Chad Johnson nor Loren Johnson testified, there is no evidence to refute the words contained in the statements

that they gave to the Respondent; Loren Johnson stating: "I see no advantage to union representation" and Chad Johnson stating: "I do not see the advantages of being a member of the union." Although Perkins was clearly confused about the level of participation by Joe, Jr. and Walsh in his interview, I found him to be an entirely credible witness who, after being given an opportunity to contact the Union, told the Respondent that he was not interested in joining the Union.

In *Levitz Furniture Company* of *the Pacific, Inc.,* 333 NLRB 717,725 (2001), the Board stated: "we hold that an employer may rebut the continuing presumption of an incumbent union's majority status, and unilaterally withdraw recognition, only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit." The Respondent has established that three of the five unit employees employed on November 15, Perkins, Chad Johnson and Loren Johnson notified the Respondent that they did not wish to be members of, or represented, by the Union[3]. While that, under *Levitz, supra,* would be grounds for the Respondent to lawfully withdraw recognition of the Union, the ultimate issue is whether this withdrawal was "tainted" by the Respondent's action on October 25 of unilaterally discontinuing overtime pay as provided for in the contract.

In *Olson Bodies, Inc.* 206 NLRB 779,780 (1973), the employer withdrew recognition from the union based upon a decertification petition filed by employees at a time when there were serious unremedied unfair labor practices by the employer. In finding that the withdrawal violated the Act, the Board stated:

> Serious unremedied unfair labor practices, like those Respondent committed in *Olson II,* tend to produce disaffections from a union and thus remove as a lawful basis for an employer's withdrawal of recognition the existence of a decertification petition or any other evidence of loss of union support which, in other circumstances, might be considered as providing objective considerations demonstrating a free and voluntary choice on the part of employees to withdraw their support of a labor organization.

In *Lee Lumber* & *Building Material Corp.,* 322 NLRB 175, 177 (1996), the Board stated that evidence in support of a withdrawal of recognition:

> Must be raised in a context free of unfair labor practices of the sort likely, under all the circumstances, to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself.

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[3] Counsel for the General Counsel, in her brief, argues that Chad Johnson's letter should not be counted toward the Union's lack of majority support because he disclaimed interest in Union membership rather than Union representation, citing *Grand Lodge of Ohio*, 233 NLRB 143, 144 (1977), where the Board stated that: "…expressions of antiunion sentiment…must convey an intent not to be represented by the union as distinguished from a desire not to become members…" Similarly, the Court in *Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 490 (2nd Cir. 1975), stated: "Lack of interest in union activities or a disinclination to join the union does not imply opposition to the union as bargaining representative." Although these cases seem to be on point, it appears to me that for Chad Johnson, who began working for the Respondent only a day or two prior to November 15, there is no difference between the two: he simply had no interest in the Union. Regardless, it makes no difference in the ultimate determination herein due to my finding, as discussed below, that Respondent's unfair labor practice tainted these employee disclaimers.

> Not every unfair labor practice will taint evidence of a union's loss of majority support; in cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support.

As stated by the administrative law judge in *Master Slack* Corporation, 271 NLRB 78, 84 (1984): " Stated differently, the unfair labor practices must have caused the employee disaffection here or, at least, had a 'meaningful impact' in bringing about the disaffection." In *Williams Enterprises, Inc.,* 312 NLRB 937,939 (1993), the Board "identified several factors as relevant to determining whether a causal relationship exists between unremedied unfair labor practices and the subsequent expression of employees disaffection with an incumbent union:"

> (1) The length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employees disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

The Board, in *Williams,* found that although four months has passed since the unlawful statement: "the mere passage of time would not reasonably dissipate the effects of the unfair labor practice in the circumstances of this case." In enforcing this decision, the Court, at 50 F.3d 1280, 1288 (4th Cir. 1995), stated: "a company may not avoid the duty to bargain by the loss of majority status caused by its own unfair labor practices."

The pre-withdrawal unfair labor practice herein is the unilateral discontinuance of overtime work and overtime pay as provided for in Article III of the contract. In *Priority* One *Services, Inc.,* 331 NLRB 1527 (2000), the Board stated:

> It is well settled that the real harm in an employer's unilateral implementation of terms and conditions of employment is to the union's status as bargaining representative, in effect undermining the union in the eyes of the employees ... This is so because unilateral action by an employer "detracts from the legitimacy of the collective bargaining process by impairing the union's ability to function effectively, and by giving the impression to members that a union is powerless." *Carpenter Sprinkler Corp. v. NLRB,* 605 F.2d 60, 64-65 (2d Cir. 1979)...

Applying this case law to the instant matter, I find that there is enough of a causal relationship between the unilateral change in overtime work and pay and the expression of disaffection for the Union to taint that expression. The unilateral change occurred less than three weeks before the Respondent withdrew recognition of the Union based upon the expressed disaffection with the Union by three of the five unit employees. While only three of the five unit employees (Buhl, Ericson and Loren Johnson) who were employed on November 15 were also employed on October 25, it is not unreasonable to infer that the other two, Perkins and Chad Johnson, learned of the Respondent's action upon being employed by the Respondent, and their feelings about the Union could easily have been impacted by it. As the Board stated in *Penn Tank Lines, Inc., 336* NLRB 1066, 1068 (2001): "By unilaterally changing the employees terms and conditions of employment, the Respondent 'minimized the influence of organized bargaining' and 'emphasized to the employees that there is no necessity for a collective-bargaining agent.'" By withdrawing recognition of the Union on November 15, the Respondent violated Section 8(a)(1) (5) of the Act. As the withdrawal of recognition on November 15 was unlawful, the Respondent could not lawfully unilaterally change the Pension and Health and Welfare Fund payments for the benefit of the unit employees as it did on November 15, and it could not

unilaterally change the Holiday Pay provisions of its contract with the Union, as it did on about December 24. Therefore, these unilateral changes violated Section 8(a)(1)(5) of the Act as well.

Conclusions of Law

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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

3. The Respondent violated Section 8(a)(1) of the Act by asking applicants for employment if they would be willing to cross a Union picket line.

4. The Respondent violated Section 8(a)(1) of the Act by asking applicants for employment to put in writing their opposition to becoming members of the Union.

5. The Respondent violated Section 8(a)(1)(5) of the Act on about October 25 by unilaterally discontinuining its policy, and its contractual obligation, of permitting its unit employees to work overtime and paying the employees time and a half for all time worked over eight hours in one day.

6. The Respondent violated Section 8(a)(1)(5) of the Act on about November 15 by unilaterally cease making contributions to the Union's Health and Welfare Plan on behalf of its unit employees and, instead, placed the unit employees in a medical plan offered by the Montana Auto Dealers Association.

7. The Respondent violated Section 8(a)(1)(5) of the Act on about December 24 by unilaterally cease paying its unit employees premium pay for holiday work as provided for in its contract with the Union.

8. The Respondent violated Section 8(a)(1)(5) of the Act on about November 15 by withdrawing recognition of the Union as the collective bargaining representative of its parts and service department employees.

The Remedy

Having found that the Respondent has violated Section 8(a)(1)&(5) of the Act, I recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act, including the posting of a Notice to Employees notifying them of the transgressions. I also recommend that the Respondent be ordered to rescind the unilateral changes that it made on about October 25, 2010 (overtime work and pay), November 15, 2010 (Pension and Health and Welfare), and on about December 24, 2010 (Holiday Pay). I also recommend that the Respondent be ordered to notify the Union, in writing, that it is rescinding it withdrawal of recognition dated November 15, 2010, and that it is ready and willing to bargain with the Union regarding the terms and conditions of employment for the unit employees.

Upon the foregoing findings of fact, conclusions of law and the entire record, I hereby issue the following recommended

ORDER[4]

The Respondent, Leskovar Motors, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from

(a) Interrogating employees regarding their support for the Union and their willingness to cross a Union picket line.

(b) Requesting that employees put in written form their opposition to Union membership.

(c) Unilaterally changing its overtime work and pay policy, as provided for in Article III of its contract with the Union, without first bargaining with the Union about the subject.

(d) Unilaterally cease making contributions to the Union's Pension Fund and Health and Welfare Plan as provided for in Articles XV and XXII of its contract with the Union without first bargaining with the Union about the subject.

(e) Unilaterally cease paying employees Holiday Pay as provided in Article IV of its contract with the Union without first bargaining with the Union about the subject.

(f) Withdrawing recognition from the Union unless it can establish that at the time it withdrew recognition the Union had lost the support of a majority of the unit employees, without the intervention of any unfair labor practices influencing that loss of support.

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

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

(a) Make whole its parts and service department employees for any loss of wages or other benefits they may have suffered as a result of the Respondent's unlawful unilateral actions, including changing its overtime policies and pay on about October 25, 2010, its Pension Fund and Health and Welfare Fund payments on November 15, 2010, and its Holiday Pay on December 24, 2010, in the manner set forth in *Ogle Protective Service,* 183 NLRB 682 (1970), enfd 444 F.2d 502 (6th Cir. 1971).

(b) Recognize and upon request meet and bargain in good faith with the Union as the exclusive collective bargaining representative of its service and parts department employees.

(c) 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

[4] 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.

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.

(d) Within 14 days after service by the Region, post at its facility in Butte, Montana, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the 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. 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 October 15, 2010.

(e) 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 that the Respondent has taken to comply.

Dated, Washington, D.C., August 30, 2011.

Joel P. Biblowitz
Administrative Law Judge

[5] 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 ask employees, or employment applicants, whether they support International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge 88 ("the Union") or any other labor organization and **WE WILL NOT** ask them to put their opposition to the Union in writing.

WE WILL NOT change any of the terms and conditions of employment of our service and parts department employees without notice to, and bargaining with, the Union.

WE WILL NOT withdraw recognition from the Union unless an uncoerced majority of our unit employees have indicated that they no longer wish to be represented by the Union, and **WE WILL NOT** refuse to meet and bargain with the Union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of your rights under Section 7 of the Act.

WE WILL make our parts and service department employees whole, with interest, for any loss of wages or benefits they sustained as a result of our unlawful unilateral actions, including restrictions on working overtime and overtime pay, Pension and Health and Welfare Plan changes, and Holiday Pay changes, and **WE WILL** rescind these unilateral changes.

WE WILL recognize, and on request, meet and bargain in good faith with the Union as the exclusive bargaining representative of its parts and service department employees.

LESKOVAR MOTORS, INC.
(Employer)

Dated_____ **By**_____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

915 2nd Avenue, Federal Building, Room 2948
Seattle, Washington 98174-1078
Hours: 8:15 a.m. to 4:45 p.m.
206-220-6300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 206-220-6284.