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**Dodge of Naperville, Inc. and Burke Automotive Group, Inc. d/b/a Naperville Jeep/Dodge, a Single Employer and Automobile Mechanics Local No. 701, International Association of Machinists and Aerospace Workers, AFL-CIO.** Case 13-CA-45399

January 3, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER  
AND HAYES

On August 2, 2010, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief and the Acting General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions as modified and to adopt the recommended Order as modified.<sup>2</sup>

Background

Since 1989, the Union represented a unit of mechanics at a Naperville, Illinois Chrysler dealership, which the Respondent purchased in 2003. The Respondent recognized the Union and entered into collective-bargaining agreements with it, the most recent of which expired by

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

<sup>2</sup> We modify the judge's remedy to conform to the Board's standard remedial language. Specifically, in ordering that employees be made whole for losses to wages and benefits under *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971), the judge inadvertently failed to order that employees be made whole *with interest* as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, in accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011), we modify the remedy by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis.

We modify the judge's recommended Order to conform to his unfair labor practice findings, and to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

its terms on July 31, 2009.<sup>3</sup> The Respondent also owned and operated a larger Chrysler dealership in nearby Lisle, Illinois, where, at all pertinent times, it employed approximately 14 mechanics who were not represented by a union.

On May 13, as part of the Chrysler Motors bankruptcy proceedings, Chrysler informed the Respondent that it would cancel its Dodge and Jeep franchises at Lisle. On June 19, as a result of the Respondent's efforts to keep its franchises, Chrysler permitted the Respondent to retain its Lisle operation, where it was licensed to sell more lines of vehicles, and give up the Naperville franchise instead. Chrysler conditioned the retention of the Lisle franchises on the Respondent's remodeling the Naperville facility and moving the entire merged operation from Lisle back to Naperville approximately 17 months after the closing.<sup>4</sup>

On June 20, the Respondent told the Naperville mechanics that the facility was closed and that they could apply for work at its Lisle dealership. The Respondent informed employees that the Lisle facility would be a nonunion shop and that there would be no union benefits. The Naperville mechanics started work at Lisle during the June 22-26 workweek, before the Respondent formally offered to hire them. They worked side-by-side with the Lisle mechanics servicing vehicles. The Lisle service manager supervised the combined group. On Friday, June 26, the Respondent formally offered the six Naperville mechanics work at Lisle and told them that the Lisle facility "was a nonunion store" and would "never be a union store," and that if the mechanics "ever went out on strike it would mean that [they] quit and would not be able to collect unemployment." The Respondent also stated that if the employees chose to quit instead of accepting employment under the terms being offered, it would not pay them unemployment compensation.

That same day, the Respondent withdrew recognition from the Union on the ground that the Union had lost its majority status due to the merger. As a result of the Respondent's subsequent unilateral changes to their terms and conditions of employment, the former Naperville mechanics experienced significant loss of wages and benefits, as the judge described in his decision, including discontinuance of their health insurance and pension coverage.

Discussion

We adopt the judge's conclusion that the Respondent unlawfully withdrew recognition from the Union, but we

<sup>3</sup> Dates are in 2009, unless otherwise noted.

<sup>4</sup> The status of that remodeling is not in the record.

do not rely entirely on his rationale.<sup>5</sup> In finding that the Respondent unlawfully withdrew recognition, the judge relies primarily on the parties' bargaining history. Although we agree with the judge that bargaining history is an important factor, we also agree with our dissenting colleague that bargaining history alone is not sufficient to find that the unit here continued to be an appropriate unit for bargaining. Nevertheless, we find that under the circumstances the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition.

The issue here is whether the existing unit remains appropriate in light of changed circumstances. The Board considers the traditional community-of-interest factors in determining whether the unit remains an appropriate unit for bargaining. See, e.g., *Safeway Stores*, 256 NLRB 918 (1981). The Board, however, gives significant weight to the parties' history of bargaining. Specifically, our case law holds that "'compelling circumstances' are required to overcome the significance of bargaining his-

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<sup>5</sup> We also agree with the judge that Respondents Dodge of Naperville, Inc. and Burke Automotive Group, Inc. d/b/a Naperville Jeep/Dodge constitute a single employer for purposes of the Act and are jointly and severally liable for the violations of the Act found in this decision. In so finding, we do not rely on the judge's finding that the Naperville and Lisle locations shared a parts manager.

We further adopt the judge's findings that: (1) the Respondent violated Sec. 8(a)(1) of the Act by threatening bargaining unit employees in June 2009 that they would no longer receive union benefits, that their continued employment would be in a nonunion shop, that the shop would never be unionized, and that if the unit employees engaged in a strike their employment would be terminated and they would not be able to receive unemployment compensation; (2) the Respondent violated Sec. 8(a)(3) and (1) of the Act by constructively discharging unit employees Robert Adams and Mike Marjanovich, who could not afford to work under the unilaterally imposed conditions; and (3) the Respondent violated Sec. 8(a)(5) and (1) of the Act by withdrawing recognition from the Union as explained further herein, by repudiating the collective-bargaining agreement with the Union and unilaterally changing the terms and conditions of employment of bargaining unit employees, by failing to bargain with the Union concerning the effects of its relocation of the bargaining unit, and by unreasonably delaying the provision of information sought by the Union's July 9 information request.

As to the information request, we do not adopt the judge's finding that the Respondent delayed providing the information until March 2010. Rather, we find that the Respondent provided the requested information in September when it furnished the information to the Board agent investigating this case and provided a copy to the Union. Nevertheless, we find that the 2-month delay was unreasonable and we adopt the judge's finding that the Respondent violated Sec. 8(a)(5) and (1). Contrary to his colleagues, Chairman Pearce would adopt the judge's finding.

Member Hayes joins his colleagues only as to the findings that the Respondent is a single employer; that it unlawfully threatened employees that the shop would never be unionized and that if they engaged in a strike their employment would be terminated; delayed providing requested information; and failed to bargain over the effects of the closing of the Naperville facility. He dissents from the other unfair labor practices findings as explained in his separate opinion.

tory." *ADT Security Services*, 355 NLRB No. 223, slip op. at 1 (2010), quoting *Radio Station KOMO-AM*, 324 NLRB 256, 262–263 (1997) (citing *Armco, Inc. v. NLRB*, 832 F.2d 357, 363 (6th Cir. 1987), and other cases). We find that the Respondent has not met its burden to establish that compelling circumstances are present here.

To lawfully withdraw recognition, the Respondent must show that the Union no longer enjoys a majority because the unit, which has been combined with similar employees, is no longer an appropriate unit for bargaining because it does not have a distinct identity from the larger group of employees. *Serramonte Oldsmobile*, 318 NLRB 80, 104 (1995), *enfd.* in relevant part 86 F.3d 227 (D.C. Cir. 1996). The Respondent argues that the former Naperville mechanics no longer have an identifiable community of interest separate from the Lisle mechanics because the unit employees now work side-by-side with the Lisle employees. In addition, the Naperville employees have the same supervision, terms and conditions of employment, uniforms, work assignments, skill set, training, and job functions as the Lisle employees. Typically, the above facts would be sufficient to find "compelling circumstances" because the unit employees no longer have an identity separate from the larger group. Here, however, the Respondent is able to make the above claims only because of its other unfair labor practices.

More specifically, the Respondent failed to bargain over the effects of the merger of the Lisle and Naperville operations in violation of Section 8(a)(5). As a result, the Respondent, without bargaining, made a number of unilateral changes to the Naperville mechanics' terms and conditions of employment—again in violation of Section 8(a)(5). Prior to the relocation, the unit employees enjoyed significantly different terms and conditions of employment than those of the Lisle employees, the continuation of which should have been bargained over during effects bargaining concerning the employees' transfer rights before the closing of the Naperville shop and the relocation of the employees. In determining whether an established bargaining unit retains its distinct identity, we do not consider the effects of the Respondent's unlawful, unilateral changes to the existing unit employees' terms and conditions of employment,<sup>6</sup> as giving weight to such changes would reward the employer for its unlawful conduct. See *Comar, Inc.*, 349 NLRB 342, 357–358 (2007). The obligation to bargain over the effects of the closing of the Naperville facility

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<sup>6</sup> Thus, contrary to the dissent's suggestion that our holding somehow imposes speculative contract terms on the Respondent, our holding is merely that the Respondent cannot rely on its unlawful unilateral changes in existing terms of employment in defense of its withdrawal of recognition.

entailed an obligation to bargain over the transfer of employees to the Lisle facility, including their initial wages, benefits, seniority rights, and working conditions at the new location, including whether they would have continued to work together as a distinct group and even whether they would continue to be represented.<sup>7</sup> Consequently, the Respondent's failure to engage in effects bargaining makes it impossible to assess what the terms and conditions of the Naperville employees would have been after the relocation, had the Respondent not acted unlawfully. See *Deaconess Medical Center*, 314 NLRB 677, 677 fn. 1 (1994) (finding that the employer could not rely on the fact that a consolidated group of employees shared the same wages and benefits because the shared benefits were a result of the employer's failure to bargain); *Holly Farms Corp.*, 311 NLRB 273, 279 fn. 25 (1993) (same).<sup>8</sup> We find that the Respondent's failure to

<sup>7</sup> The dissent argues that the Respondent's effects bargaining obligation is limited to "layoffs, severance pay, health insurance coverage and conversion rights, preferential hiring at other of the employer's operations, and reference letters for jobs with other employers," and does not include terms and conditions of employment at the new facility. But the cases the dissent cites for the last proposition simply hold that the union has no right to bargain concerning the terms and conditions of all employees at the new location. The obligation to bargain about preferential hiring and transfer does entail an obligation to bargain about the terms of employment of the employees so hired or transferred and that is what is at issue here. Thus, the Board has observed, "it is well settled that effects bargaining encompasses 'issues such as severance pay, seniority, pensions, health insurance, [and] job security.'" *Friedman's Express, Inc.*, 315 NLRB 971, 971 (1994). Even more specifically, the Board has explained, "Even if one were to accept the Respondent's claim that the unit ceased to exist . . . , the Company would still have an obligation to bargain over the effects of the relocation of unit work from the [old] facility to the [new] facility. That obligation includes bargaining over the relocated workers' wages, work locations, schedules, carryover of seniority, and other terms and conditions of employment at the new plant." *Comar*, supra at 354. In other words, the Respondent had an obligation to bargain about whether Naperville employees would be hired at Lisle and, if so, what their initial terms and conditions of employment would be and the dissent cites no case to the contrary. This is the obligation the Respondent did not respect. *Richmond Convalescent Hospital*, 313 NLRB 1247, 1248-1249 (1994).

The dissent suggests that the Board has declined to find unfair labor practices based on what might have resulted from effects bargaining. But *Brown Truck & Trailer Mfg. Co.*, 106 NLRB 999, 1002 (1953), did not involve an employer claiming to have shed its bargaining obligation to represented employees based on changes made in derogation of its effects bargaining obligation, but a union making the speculative claim that effects bargaining would have resulted in a sufficient number of employees of the formerly represented plant transferring to an unrepresented plant that the union would have become the representative of all the employees at the latter plant. *Cooper Thermometer Co. v. NLRB*, 376 F.2d 684, 690 (2d Cir. 1967), stands for the same inapposite proposition as the dissent itself explains.

<sup>8</sup> The dissent distinguishes *Holly Farms* and *Deaconess* on the grounds that "they do not involve fundamental changes in the nature of operations resulting in full integration of unit with nonunit employees as occurred here." But the holding in those two cases is that the Board will not look at the degree of integration, whether full or partial, if it

engage in effects bargaining and its unlawful unilateral changes have tainted the Respondent's withdrawal of recognition and made it impossible to determine whether the Naperville unit would have maintained sufficiently unique characteristics to remain an appropriate unit for bargaining.<sup>9</sup>

In light of the long history of representation, the Respondent's failure to bargain over the effects of the Naperville shutdown and relocation of employees, and the Naperville mechanics' distinct employment terms prior to the unlawful changes, the Respondent has not shown compelling circumstances permitting it to unilaterally end its bargaining relationship with the Union midterm of the existing collective-bargaining agreement.

#### AMENDED REMEDY

We amend the remedy as stated at footnote 2, above. Further, in addition to the remedy set forth by the judge, and having found that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union, we shall order that the Respondent cease and desist such conduct and, on request, bargain with the Union in the bargaining unit described below, with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document. The Respondent shall also bargain in good faith regarding the effects of the relocation of the unit employees.

For the reasons set forth in *Caterair International*, 322 NLRB 64 (1996), we find that an affirmative bargaining order is warranted in this case as a remedy for the Respondent's unlawful withdrawal of recognition. We adhere to the view that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining represen-

was the result of an unlawful failure to bargain. As the Board made clear in *Holly Farms*, "many of the factors relied on by the Respondents to support their contention that the bargaining unit no longer remained appropriate were the result of unlawful unilateral changes." 311 NLRB at 279.

<sup>9</sup> Our dissenting colleague argues that we are requiring the Respondent to bargain in an inappropriate unit. But we hold that the Respondent cannot rely on its unfair labor practices to show that the former Naperville mechanics lack a distinct community of interest. Moreover, the order in this case requires that the Respondent revoke the unilateral changes in the former Naperville employees' terms and conditions of employment. Accordingly, we find that the Respondent has failed to show compelling circumstances to overcome the parties' 20-year bargaining relationship and the distinct terms and conditions of employment of the Naperville mechanics, and thus the existing unit remains appropriate at least until the Respondent, in full compliance with its duty to bargain, integrates the two sets of employees and standardizes their terms of employment. *Abbott-Northwestern Hospital*, 274 NLRB 1063 (1985), cited in the dissent, is distinguishable because the Board did not consider the history of collective bargaining in that case and thus did not apply the standard described above.

tative of an appropriate unit of employees.” *Id.* at 68. In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Bldg. Material v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent*, *supra*, the court summarized its requirement that an affirmative bargaining order “must be justified by a reasoned analysis that includes an explicit balancing of three considerations: ‘(1) the employees’ Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act.’” *Id.* at 738.

Although we respectfully disagree with the court’s requirement for the reasons set forth in *Caterair*, *supra*, we have examined the particular facts of this case as the court requires and find that a balancing of the three factors warrants an affirmative bargaining order.<sup>10</sup>

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent’s withdrawal of recognition and resulting refusal to bargain with the Union for a successor collective-bargaining agreement, and is particularly appropriate here where the Respondent relocated employees and significantly and unlawfully changed their employment terms. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union’s continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation. It is only by restoring the status quo ante and requiring the Respondent to bargain with the Union for a reasonable period of time that the employees will be able to fairly assess for themselves the Union’s effectiveness as a bargaining representative in light of the move to the new facility and the Respondent’s unlawful unilateral changes to their employment terms.

(2) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent’s incentive to delay bargaining in the hope

of discouraging support for the Union. It also ensures that the Union will not be pressured by the Respondent’s withdrawal of recognition to achieve immediate results at the bargaining table following the Board’s resolution of its unfair labor practice charges and issuance of a cease-and-desist order. Providing this temporary period of insulated bargaining will also afford employees a fair opportunity to assess the Union’s performance in an atmosphere free of the Respondent’s unlawful conduct.

(3) As an alternative remedy, a cease-and-desist order, alone, would be inadequate to remedy the Respondent’s withdrawal of recognition and refusal to bargain with the Union because it would allow another challenge to the Union’s majority status before the employees had a reasonable time to regroup and bargain with the Respondent through their chosen representative in an effort to reach a collective-bargaining agreement. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation. For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the violations in this case. In order to provide employees with the opportunity to fairly assess for themselves the Union’s effectiveness as a bargaining representative, the bargaining order requires the Respondent to bargain with the Union for a reasonable period of time. See, e.g., *Vincent/Metro Trucking, LLC*, 355 NLRB No. 50, slip op. at 2 (2010).

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Dodge of Naperville, Inc. and Burke Automotive Group Inc. d/b/a Naperville Jeep/Dodge, a single employer, Naperville, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(d).

“(d) Telling employees that they will no longer receive union benefits, that they no longer work in a union shop, that the dealership will never be a union shop, and that they would be discharged if they went on strike.”

2. Substitute the following for paragraph 2(k).

“(k) Within 14 days after service by the Region, post at its facilities in Lisle, Illinois, and Naperville, Illinois, copies of the attached notice marked “Appendix.”<sup>23</sup> Copies of the notice, on forms provided by the Regional Director for Region 13, 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. In addition to physi-

<sup>10</sup> While Member Hayes agrees with the D.C. Circuit that a case-by-case analysis is required to determine if this remedy is appropriate, he finds that the Respondent’s withdrawal of recognition was lawful and does not join this portion of the decision.

cal posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an 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 and former unit employees employed by the Respondent at any time since June 1, 2009.”

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

Dated, Washington, D.C. January 3, 2012

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Mark Gaston Pearce, Chairman

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Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting in part.

In the wake of the Chrysler Motors bankruptcy, the Respondent lost a franchise to sell and service Chrysler vehicles in Naperville, Illinois. Rather than simply lay off its work force, the Respondent offered the six Naperville mechanics, who were represented by the Union, positions at its nearby facility in Lisle, Illinois, where it already employed 14 unrepresented mechanics to perform precisely the same work. Upon the consolidation of the two groups at Lisle, the Respondent properly determined that the Union no longer enjoyed majority status and accordingly withdrew recognition. There is no dispute that the mechanics in the combined group worked side-by-side performing the same work under the same supervision.<sup>1</sup> Further, there is no claim that the Respondent was obligated to bargain over the decision to close the Naperville facility and to relocate the mechanics

<sup>1</sup> The judge referred to the relocation as “temporary” based on Chrysler’s requirement that the Respondent move its entire merged operation back to Naperville upon a remodel of that facility. Nothing indicates that the *consolidation* was temporary, regardless of the ultimate location of the merged operation, and the judge did not find that it was. Nor did the judge find that the Naperville mechanics might be split from the Lisle mechanics in the future to somehow re-establish their identity as a discrete group. Thus, his reference to the temporary nature of the move is irrelevant to the appropriate analysis.

working there to Lisle. The Respondent failed, however, to bargain over the effects of this decision.

Under the Board’s long-established consolidation and relocation precedent, the Respondent’s refusal to recognize the Union as representative of the relocated Naperville mechanics was perfectly lawful. Their separate unit identity was extinguished, and there is no basis for finding that the Union had majority support in the larger consolidated employee group. My colleagues, however, contrive to distinguish that precedent and to impose a continuing bargaining obligation on the Respondent for the former Naperville unit employees, based on the Respondent’s effects bargaining violation.<sup>2</sup> First, they contend that any common working conditions at Lisle attributable to unilateral changes made without bargaining over the effects of the relocation must be ignored in determining whether the relocated Naperville mechanics have a continuing identifiable separate community of interests. Next, they hypothesize that the Respondent might have voluntarily negotiated an agreement in effects bargaining about other working conditions that would further distinguish the terms and conditions of employment of the relocated Naperville mechanics from those of their Lisle co-workers to such an extent that the Naperville group could be a separate appropriate bargaining unit. The majority then proceeds to presume that result and imposes a duty to bargain in what is an inappropriate fractured unit. Because today’s decision represents a distortion of Board precedent both as to statutory bargaining obligations and as to the appropriate remedy for effects bargaining violation, I respectfully dissent.<sup>3</sup>

Under well-established Board law, an employer is not obligated to continue to recognize a union as the bargaining representative of one group of its employees “when

<sup>2</sup> I agree with my colleagues that the Respondent violated Sec. 8(a)(5) by its failure to engage in effects bargaining, but only insofar as that term is understood under the law as described *infra*, and not as my colleagues expand it here. The usual remedy for an effects-bargaining violation is that provided in *Transmarine Navigation Corp.*, 170 NLRB 389, 391 (1968). In accordance with my dissent in *Kadouri International Foods*, 356 NLRB No. 148, slip op. at 1 fn. 1 (2011), I do not agree with that portion of the remedy requiring that the minimum back-pay due employees should not be less than 2 weeks’ pay, without regard to actual losses incurred, and I would limit the remedy only to those employees who were adversely affected by the Respondent’s unlawful action. Of course, my colleagues’ imposition of a continuing bargaining obligation at the Lisle facility subsumes the need for them to impose a *Transmarine* remedy.

<sup>3</sup> Since I would find that the Respondent lawfully withdrew recognition, I would also reverse the judge’s findings that the Respondent unlawfully threatened bargaining unit employees that they would no longer receive union benefits or work in a nonunion shop; constructively discharged employees; unlawfully repudiated the collective-bargaining agreement with the Union; and unlawfully made unilateral changes to unit employees’ terms and conditions of employment.

that represented group is merged with an unrepresented group in such a manner that an accretion cannot be found and the original represented group is no longer identifiable.”<sup>4</sup> The test is whether the previously represented unit retains a distinct community of interest so as to remain appropriate for bargaining.<sup>5</sup>

Applying that test here, the Respondent’s bargaining obligation ceased when the Naperville mechanics relocated to Lisle. The Naperville and Lisle mechanics have performed the same work with the same skills and training both before and after the merger. They now do so in the same facility under the same supervision. Thus, the prior bargaining history in the Naperville unit is the sole factor distinguishing the former Naperville mechanics from their colleagues in Lisle, and even the majority concedes that factor alone is not enough to establish that the Naperville mechanics retained an identity as a separate unit. Moreover, because the Naperville mechanics comprise only 6 of the 20 mechanics at Lisle, no accretion can be found and the original represented group is no longer an appropriate unit for bargaining. See *Geo. V. Hamilton*, above. Thus, requiring continued recognition of the Union as to the Naperville mechanics would contradict established unit principles by requiring the Respondent to bargain in a fractured unit that includes some but not all of the mechanics. *Abbott-Northwestern Hospital*, above, 274 NLRB at 1064.

The majority inexplicably refuses to apply these established principles in deciding this case. Instead, my colleagues issue an affirmative bargaining order for a fractured unit limited to the mechanics formerly employed at

Naperville on the basis that the Respondent failed to engage in effects bargaining, which in their view might have resulted in a continuation of a separate unit for these employees. In effect, they presume that the unit remains appropriate because, in their view, terms and conditions of employment changed as a result of the consolidation and relocation must be ignored in a community of interests analysis and, in any event, the parties theoretically could have agreed in effects bargaining to such different terms and conditions as would give the Naperville group a continuing separate identity. That rationale contradicts established principles governing bargaining obligations under the Act and cannot be reconciled with existing precedent.<sup>6</sup>

The Board lacks the authority to require bargaining in an inappropriate unit.<sup>7</sup> Yet today’s decision requires exactly that by ordering the Respondent to bargain over new terms and conditions of employment for 6 of the 20 mechanics at Lisle, with the apparent goal of undoing the functional integration of the combined group and re-establishing the Naperville cohort as a distinct unit. The Respondent’s effects bargaining obligation provides no support for this step, as that obligation is limited to such terms and conditions of employment as “layoffs, severance pay, health insurance coverage and conversion rights, preferential hiring at other of the employer’s operations, and reference letters for jobs with other employers.”<sup>8</sup> While effects bargaining in a plant relocation

<sup>4</sup> *Geo. V. Hamilton, Inc.*, 289 NLRB 1335, 1339 (1988) (finding unit with approximately 11-year bargaining history no longer an appropriate unit after consolidation with equal number of nonrepresented employees performing the same work, in the same facility, under the same supervision). Accord: *Nott Co.*, 345 NLRB 396, 400–401 (2005) (no accretion to represented unit where employer merged two equal groups of employees performing same work); *Kelly Business Furniture*, 288 NLRB 474 (1988) (finding newly certified unit no longer appropriate after employer relocated and consolidated it with larger group of unrepresented employees); *Abbott-Northwestern Hospital*, 274 NLRB 1063, 1064 (1985) (consolidation of represented unit with larger group of nonunit employees rendered bargaining unit inappropriate, and employer was not obligated to maintain separate employment terms for the formerly represented employees).

<sup>5</sup> *Abbott-Northwestern Hospital*, supra. A community-of-interest analysis involves multiple factors, including:

[A] difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and amount of working time spent away from the employment or plant situs . . . the infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and history of bargaining.

*Home Depot USA*, 331 NLRB 1289, 1290 (2000), quoting *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962).

<sup>6</sup> My colleagues rely on *Deaconess Medical Center*, 314 NLRB 677 (1994), and *Holly Farms Corp.*, 311 NLRB 273 (1993), enf. 48 F.3d 1360 (4th Cir. 1995), affd. on other grounds 517 U.S. 392 (1996), but these cases are inapposite as they do not involve fundamental changes in the nature of operations resulting in the full integration of unit with nonunit employees as occurred here. In *Deaconess*, a represented unit continued working at a separate facility under separate first-line supervision from the nonunit employees with whom the Respondent sought to accrete them. Hence, there was no integration of employees and the unit remained appropriate for bargaining. In *Holly Farms*, a bargaining unit did not lose its separate identity based merely on the respondents’ intention to merge units, as there had been no integration at the time the respondents withdrew recognition. As the Board explained, “in determining whether accretion is proper, unless there is a well-defined plan or timetable for achieving full functional integration of operations, the changed nature of the operation should be assessed at the time the withdrawal of recognition occurred.” Id. at 279 (emphasis added). There, “where at the time of the withdrawal of recognition there was no integration of operations or even detailed plans” for integration, the respondents’ refusal to bargain was unlawful. Id. Here, in contrast to *Holly Farms*, at the time of the withdrawal of recognition, Naperville was closed and the former unit had lawfully merged with the larger group at Lisle.

<sup>7</sup> *Russelton Medical Group, Inc.*, 302 NLRB 718 (1991) (an employer’s refusal to recognize an inappropriate unit does not violate the Act).

<sup>8</sup> *Allison Corp.*, 330 NLRB 1363, 1365 fn. 14 (2000); *Los Angeles Soap Co.*, 300 NLRB 289, 295 (1990) (in addition to the above, pension benefits and retraining funds are appropriate subjects of effects

situation may include bargaining over transfers to a new facility, it does not include bargaining over terms and conditions of employment at that facility if the union has not established majority status there. *Brown Truck & Trailer Mfg. Co.*<sup>9</sup> See also *Brown-McLaren Mfg. Co.*<sup>10</sup>

bargaining). See also *Yorke v. NLRB*, 709 F.2d 1138, 1143 (7th Cir. 1983) (effects bargaining “provides the Union with an opportunity to bargain in the employees’ interest for such benefits as severance pay, payments into the pension fund, preferential hiring if the employer continues operating at other plants, and reference letters with respect to other jobs.”) (citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682 (1981)), cert. denied 465 U.S. 1023 (1984).

<sup>9</sup> 106 NLRB 999 (1953). There, the respondent unlawfully failed to bargain over the effects of a plant relocation and discharged unit employees. The Board held that the respondent was required to give the union “the opportunity to bargain with respect to the contemplated move as it affected the employees, such as the placement of the [employees] in positions at [the new facility].” *Id.* at 1000. But the Board expressly declined to require the respondent to recognize the union at the new facility based on what could have happened during bargaining. *Id.* at 1002. The Board reasoned that it was possible that employees would have transferred to the new plant had the respondent bargained, but, “[w]e cannot assume . . . that, even if such agreement had been reached, [unit] employees would have transferred to [the new facility] in numbers sufficient to constitute a majority of the employee complement. . . .” *Id.* The Board ordered the respondent to bargain over the method, terms, and conditions by which the unit employees may “obtain employment” at the new facility (*id.* at 1003), but not over the actual terms of employment there. Thus, I reject as unfounded any implication in the majority opinion suggesting that the bargaining obligation found by the Board in *Brown Truck & Trailer Mfg. Co.* encompassed the terms and conditions of employment of former unit employees at the new location.

<sup>10</sup> 34 NLRB 984, 1015 (1941).

In *Holly Farms*, *supra*, 311 NLRB at 279 fn. 25, the Board indicated that the respondents were obligated to bargain over changes in pay, work locations, schedules, and other employment terms resulting from the integration of operations as effects of the integration decision. See also *Comar, Inc. (Comar I)*, 339 NLRB 903, 910–911 (2003), *enfd. mem.* 111 Fed.Appx. 1 (D.C. Cir. 2004), a case cited by the judge. There, where the respondent relocated a unit intact and there had been no integration or accretion with other employees, the unit remained appropriate for bargaining, and unilateral changes the respondent made to employment terms were unlawful. In that context, the effects bargaining obligation included negotiations over initial terms and conditions of employment at the new location. In both of those cases, however, operations had not been integrated at the time the employers withdrew recognition and they were, accordingly, under a continuing, general obligation to bargain over those topics in any event. This passing reference to effects bargaining thus was not essential to a determination that the respondents’ conduct was unlawful and as such is not persuasive authority to find that those topics are appropriate for bargaining where, as here, there has been a fundamental change in the nature of operations. Regardless, any negotiations over initial terms does not without more establish an ongoing bargaining obligation or an obligation to maintain those terms pursuant to *NLRB v. Katz*, 369 U.S. 736 (1962).

My colleagues also cite dicta from the administrative law judge in a later proceeding in *Comar (Comar II)* to contend that “the Board has explained” that

“Even if one were to accept the Respondent’s claim that the unit ceased to exist . . . , the Company would still have an obligation to bargain over the effects of the relocation of unit work from the [old] facil-

ity to the [new] facility. That obligation includes bargaining over the relocated workers’ wages, work locations, schedules, carryover of seniority, and other terms and conditions of employment at the new plant”, citing *Comar (II)*, 349 NLRB 342, 354 (2007). This dicta is inapposite. First, as explained above, in the prior proceeding (*Comar I*, *supra*), the withdrawal of recognition was found unlawful precisely because the respondent maintained the separate identity of the unit after relocating the employees. Second, unlike this case, the employer in *Comar* could not justify withdrawing recognition. Third, my colleagues omit relevant language from the passage they quote. That language reads: “Even if one were to accept the Respondent’s claim that the unit ceased to exist subsequent to the May 2001 hearing, the Company would still have an obligation to bargain over the effects of the relocation” (emphasis added). Thus, the judge was addressing the respondent’s argument that it was not obligated to engage in effects bargaining because, subsequent to the unfair labor practices proceeding in the underlying case, and approximately two years after the relocation of the unit, the unit ceased to exist. The judge was not describing an employer’s effects bargaining obligation after a lawful change in operations that results in the integration of unit with nonunit employees. The latter is what occurred here, and the distinction cogently illustrates why this case and cases such as *Comar* require different results.

My colleagues also err by basing unfair labor practice findings on what the parties “could” have bargained over and achieved during effects bargaining. First, even if the Respondent had initially continued the former Naperville mechanics’ wages and benefits, that would not establish

ity to the [new] facility. That obligation includes bargaining over the relocated workers’ wages, work locations, schedules, carryover of seniority, and other terms and conditions of employment at the new plant”,

citing *Comar (II)*, 349 NLRB 342, 354 (2007). This dicta is inapposite. First, as explained above, in the prior proceeding (*Comar I*, *supra*), the withdrawal of recognition was found unlawful precisely because the respondent maintained the separate identity of the unit after relocating the employees. Second, unlike this case, the employer in *Comar* could not justify withdrawing recognition. Third, my colleagues omit relevant language from the passage they quote. That language reads: “Even if one were to accept the Respondent’s claim that the unit ceased to exist subsequent to the May 2001 hearing, the Company would still have an obligation to bargain over the effects of the relocation” (emphasis added). Thus, the judge was addressing the respondent’s argument that it was not obligated to engage in effects bargaining because, subsequent to the unfair labor practices proceeding in the underlying case, and approximately two years after the relocation of the unit, the unit ceased to exist. The judge was not describing an employer’s effects bargaining obligation after a lawful change in operations that results in the integration of unit with nonunit employees. The latter is what occurred here, and the distinction cogently illustrates why this case and cases such as *Comar* require different results.

<sup>11</sup> My colleagues cite no precedent for their apparent view that proposals that the former Naperville technicians work under separate supervision at Lisle, or that they remain represented despite the merger, would have been mandatory subjects of bargaining. See *Electrical Workers Local 428 (Kern County Chapter NECA)*, 277 NLRB 397, 411–412 (1985) (choice of supervision is an employer’s prerogative and not a mandatory bargaining subject); *Triple A Maintenance Corp.*, 283 NLRB 44 fn. 2 (1987) (clause requiring recognition of union in citywide unit was permissive subject of bargaining).

the appropriateness of the unit, nor obligate the Respondent to maintain those terms. *Abbott-Northwestern Hospital*, above.<sup>12</sup> Second, even if the Respondent did have an effects-bargaining obligation to negotiate over proposals that could have resuscitated the unit, the mere possibility that the Respondent “could” have agreed to such terms is not a valid basis for the result my colleagues have reached. As noted above, the Board has expressly declined to find unfair labor practices based on what could have been achieved had an employer satisfied an effects-bargaining obligation. *Brown Truck & Trailer Mfg. Co.*, above.<sup>13</sup> Further, by finding unfair labor practices and imposing a general bargaining order based on what could (but very likely would not) have occurred during effects bargaining, my colleagues effectively require that the parties achieve that particular result, which is beyond our authority.<sup>14</sup>

In short, the result of a merger of operations under these circumstances is not a continuing bargaining obligation in the former unit but a possible question concerning representation in the combined unit. My colleagues’ contrary conclusion exceeds the powers conferred on this agency by the Act. Quite simply, the remedy for the Respondent’s failure to engage in effects bargaining about

<sup>12</sup> There, after merging unit employees with a larger group, the employer briefly continued the contractual terms and conditions of employment for “a small portion of a larger group . . . even though all of them performed the same tasks under common supervision at the same facility.” *Id.* at 1064. The Board recognized that it was unworkable for the respondent to have to apply different terms to different employees in the same integrated workforce. *Id.* The majority asserts that *Abbott-Northwestern* is distinguishable because “the Board did not consider the history of collective bargaining in that case and thus did not apply the standard” my colleagues have selected. In fact, the Board noted the almost 10-year bargaining history before the respondent’s lawful merger of operations and its subsequent, lawful decision to unilaterally change the employment terms of the merged employees and withdraw recognition. See *id.* at 1063. That the Board nevertheless found these actions lawful, applying the same standard I do, only underscores the extent to which the majority has again departed from precedent.

<sup>13</sup> Accord: *Cooper Thermometer Co. v. NLRB*, 376 F.2d 684, 690 (2d Cir. 1967) (ordering effects bargaining over plant relocation, including bargaining about placement of employees at new plant; but reversing the Board’s finding that, had the respondent bargained over the transfer of employees to the new plant, enough employees would have transferred to establish the union’s majority status there), *enfg.* in part 160 NLRB 1902 (1966).

<sup>14</sup> *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970) (the Board is without power to compel a party to agree to any substantive contractual provision of a collective-bargaining agreement). As the court of appeals recognized in *Cooper Thermometer*,

A sanction for refusal to bargain that would treat the guilty party as if he had agreed to what the other party demanded although the evidence shows he would have done nothing of the sort would give insufficient respect to Congress’ direction in 8(d) that the obligation to bargain “does not compel either party to agree to a proposal or require the making of a concession.”

376 F.2d at 690.

its decision to close the Naperville facility and to transfer mechanics to the Lisle facility cannot be contorted to require the Respondent to recognize and bargain with the Union for an inappropriate fractured unit consisting solely of the transferred mechanics.

Dated, Washington, D.C. January 3, 2012

Brian E. Hayes,

Member

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 fail and refuse to bargain in good faith with the Automobile Mechanics Local No. 701, International Association of Machinists and Aerospace Workers, AFL–CIO (the Union) as the exclusive collective-bargaining agent of employees in the Dodge of Naperville bargaining unit (unit employees). The Dodge of Naperville bargaining unit includes all technicians, apprentices, lube rack technicians, and semi-skilled technicians who were employed at our facility in Naperville, Illinois (Naperville facility), immediately prior to the June 2009 relocation of employees to our facility in Lisle, Illinois (Lisle facility), but excludes all office clerical employees and guards, professional employees and supervisors as defined in the Act.

WE WILL NOT withdraw recognition from the Union as the exclusive collective-bargaining agent of the unit employees due to the June 2009 relocation of operations and employees from the Naperville facility to the Lisle facility.

WE WILL NOT repudiate the most recent collective bargaining agreement that we entered into with the Union, and which covers unit employees.

WE WILL NOT tell you that you will no longer receive union benefits, that you no longer work in a union shop, that the dealership will never be a union shop, and that you will be discharged if you go on strike.

WE WILL NOT tell you that we do not recognize the Union as your collective-bargaining representative.

WE WILL NOT constructively discharge you by requiring you to work without union representation and under unilaterally changed terms and conditions of employment.

WE WILL NOT make unilateral changes, without notice to and bargaining with the Union, regarding your terms and conditions of employment.

WE WILL NOT refuse to meet and bargain in good faith with the Union with respect to the effects on the unit employees of the June 2009 relocation of operations and employees from the Naperville facility to the Lisle facility.

WE WILL NOT fail to provide and/or unreasonably delay providing, information requested by the Union that is relevant to and necessary for the Union to fulfill its role performance of its functions as the collective-bargaining representative of our unit employees.

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

WE WILL, upon request, bargain in good faith with the Union as the exclusive collective-bargaining agent of unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL apply and restore the terms and conditions of employment that were applicable to the unit employees under the most recent collective bargaining agreement covering the unit employees, until such time as we reach agreement with the Union for a new collective-bargaining agreement or a lawful impasse based on good-faith negotiations.

WE WILL revoke the unilateral changes we made to your terms and conditions of employment since our unlawful repudiation of the collective-bargaining agreement.

WE WILL make you whole for losses of wages and other benefits you suffered as a result of our failure to abide by the terms of the collective-bargaining agreement, including by reimbursing you for medical premiums, medical expenses, and other expenses you incurred as a result of such failure, with interest.

WE WILL remit all payments to health care, pension, and/or other funds, that we were required to make under the most recent collective-bargaining agreement with the Union, but which we failed to make.

WE WILL, upon request by the Union, bargain in good faith regarding the effects of the relocation of operations and employees from the Naperville facility to the Lisle facility.

WE WILL make you whole for any losses you suffered as a result of our failure and refusal to bargain with the Union regarding the effects of the relocation of operations and employees from the Naperville facility to the Lisle facility.

WE WILL, within 14 days from the date of this Order, offer Robert Adams and Mike Marjanovich full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Robert Adams and Mike Marjanovich whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

DODGE OF NAPERVILLE, INC. AND BURKE  
AUTOMOTIVE GROUP, INC. D/B/A NAPERVILLE  
JEEP/DODGE

*Richard S. Andrews, Esq.*, for the General Counsel.  
*James F. Hendricks Jr., Esq. (Ford & Harrison, LLP)*, of Chicago, Illinois, for the Respondent.  
*Sherrie E. Voyles, Esq. (Jacobs, Burns, Orlove, Stanton & Hernandez)*, of Chicago, Illinois, for the Charging Party.

#### DECISION

#### STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. I heard this case in Chicago, Illinois, on March 15 and 16, 2010. The Automobile Mechanics Local No. 701, International Association of Machinists and Aerospace Workers, AFL-CIO (the Union or Local 701), filed the original charge on July 8, 2009, and amended charges on July 28, 2009, December 28, 2009, and January 19, 2010.<sup>1</sup> The Regional Director for Region 13 of the National Labor Relations Board (the Board) filed the initial complaint on December 17, 2009, and the amended complaint (the complaint) on January 19, 2010. The complaint alleges that Dodge of Naperville, Inc., and Burke Automotive Group d/b/a Naperville Jeep/Dodge, a single employer, (referred to collectively as the Respondent) committed various violations of the National

<sup>1</sup> The first amended complaint mistakenly states that the final amended charge was filed on January 19, 2009, instead of 2010. The exhibits, see General Counsel's Exhibit Number (GC Exh.) 1(m), and the record as whole show that this is an error and that the final amended charge was filed on January 19, 2010. The timing of the charges was not raised as a defense to the allegations in the complaint.

Labor Relations Act (the Act) at the time it ceased operations at a facility where the mechanics were organized by the Union and continued operations at its nonunion facility. More specifically, the complaint alleges that the Respondent violated Section 8(a)(5) and (1): by relocating the unionized mechanics to its nonunion facility without bargaining over the effects of that relocation; by repudiating the collective-bargaining agreement covering those mechanics; by unilaterally changing mechanics' terms and conditions of employment; by withdrawing recognition from the Union; and by failing to provide the Union with requested information relating to the termination of operations at the union facility. The complaint further alleges that the Respondent constructively discharged two of the bargaining unit mechanics in violation of Section 8(a)(3) and (1) when it required them to work without union representation and union contractual benefits, and that it threatened employees in violation of Section 8(a)(1) by telling the union mechanics that after the relocation they would no longer be unionized or have union benefits, would never have a unionized store, and would be discharged if they went on strike. The Respondent filed a timely answer in which it denied committing any of the violations alleged, and also denied that Dodge of Naperville and Burke Automotive Group, Inc. are a single employer.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following finds of fact and conclusions of law.

#### FINDINGS OF FACT

##### I. JURISDICTION

Burke Automotive Group, Inc. d/b/a Naperville Jeep Dodge (referred to individually as Burke Automotive or the Lisle facility), a Delaware corporation with offices and a place of business in Lisle, Illinois,<sup>2</sup> is engaged in the operation of an automobile dealership. In conducting these business operations, Burke Automotive, annually derives gross revenue in excess of \$500,000 and purchases and receives goods valued in excess of \$50,000 directly from points outside the State of Illinois. The Respondent admits, and I find, that Burke Automotive has, at all relevant times, been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. From September 2003, until at least June 20, 2009, Dodge of Naperville, Inc. (referred to individually as Dodge of Naperville or the Naperville facility), an Illinois corporation with offices and places of business in Naperville, Illinois, was engaged in the operation of an automobile dealership. In conducting these business operations, Dodge of Naperville, annually derived gross revenue in excess of \$500,000 and purchased and received goods valued in excess of \$50,000 directly from points outside the State of Illinois. The Respondent admits, and I find, that from September 2003, until at least June 20, 2009, Dodge of Naperville has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition to each being an employer under the Act as stated

<sup>2</sup> Burke Automotive Group, Inc. d/b/a Naperville Jeep/Dodge is located in Lisle, Illinois, *not* as its name suggests, in Naperville, Illinois. Dodge of Naperville is actually located in Naperville.

above, Burke Automotive and Dodge of Naperville have, at all relevant times, collectively been a single employer<sup>3</sup> engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Burke Automotive and Dodge of Naperville admit, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

##### A. Background Facts

This case involves two car dealerships—Burke Automotive in Lisle, Illinois, and Dodge of Naperville, which is on the same street in nearby Naperville, Illinois. Both of these dealerships are in the business of selling and servicing Chrysler-manufactured vehicles. The two entities are incorporated separately, but Dodge of Naperville is a wholly-owned subsidiary of Burke Automotive. Edward Burke (Ed Burke) is the sole owner of Burke Automotive and, through that entity, is also the sole owner of Dodge of Naperville.

Ed Burke has been the president of Burke Automotive since 1987. As of May 2009, Burke Automotive was authorized by Chrysler, and licensed by the State of Illinois, to sell two brands of Chrysler vehicles—Jeep and Dodge—at the Lisle facility. Employees at the Burke Automotive facility in Lisle have, at least prior to June 2009, not been represented by a Union.

Ed Burke purchased the second dealership, Dodge of Naperville, in 2003. In 1989, prior to the purchase, mechanics at the second dealership elected to be represented by the Union and that representation continued when Ed Burke acquired the facility.<sup>4</sup> On September 22, 2005, Dodge of Naperville and the Union executed a collective-bargaining agreement that was effective, by its terms, from August 1, 2005, to July 31, 2009.

As part of Chrysler Motors bankruptcy proceedings in early 2009, the Chrysler Group obtained bankruptcy court permission to cancel its franchise agreements with a number of dealerships. When a dealership's franchise was cancelled it meant that the dealership could no longer sell new Chrysler-manufactured vehicles. Among the franchises that Chrysler selected for cancellation were the Jeep and Dodge franchises operated by Ed Burke at Burke Automotive in Lisle. Pursuant to Chrysler's selections, the bankruptcy court entered an order canceling Burke Automotive's Lisle franchises, effective June 9, 2009.<sup>5</sup>

<sup>3</sup> I find that Burke Automotive and Dodge of Naperville are a single employer under the applicable standards for the reasons set forth in the "analysis and discussion" section of this decision.

<sup>4</sup> The terms "mechanic" and "technician" are used interchangeably in the record. The Respondent admits that the unit includes: "All technicians, apprentices, lube rack technicians, and semi-skilled technicians employed by the Respondent at its Naperville, Illinois facility; but excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act." The General Counsel's unit description also makes reference to the "body shop," but it does not appear that inclusion of that reference would change the reach of the unit description. There is no dispute that as of June 19, 2009, there were six employees in the unit: Robert Adams, Donald Lein, Eddie Lopez, Mike Marjanovich, Chris Miles, and Tony Zeka.

<sup>5</sup> GC Exh. 22 (Order of the United States Bankruptcy Court for the Southern District of New York in Case No. 09-50002, Dated 6/6/09).

The franchise for Dodge of Naperville, on the other hand, was one of the franchises that Chrysler chose to continue in effect.

When, on May 13, 2009, the Chrysler Group informed Ed Burke that it had selected the Lisle franchises for cancellation, Ed Burke embarked on an effort to convince Chrysler to reverse its decision.<sup>6</sup> After numerous contacts with Chrysler officials, Ed Burke succeeded in persuading Chrysler to relent to the extent that, at some time between June 9 and 17, Chrysler told Ed Burke that instead of mandating the elimination of the Lisle franchises, it was now giving the Respondent the choice between cancellation of the franchise agreements for Lisle location and cancellation of the franchise agreement for the Naperville location. Transcript at page(s) (hereinafter Tr.) 381–382. Ed Burke chose to cancel the franchise agreement for the Naperville location where the unit employees worked in order to revive the Jeep and Dodge franchises as the Lisle location. According to Ed Burke’s testimony, if he had not chosen to resume selling new automobiles at the Lisle facility, he could have continued to sell and service new Dodge vehicles at the unionized Dodge of Naperville location.<sup>7</sup>

<sup>6</sup> The Respondent asks me to draw an adverse inference against the General Counsel based on its failure to elicit the testimony of the Chrysler Group official or officials who engaged in these negotiations. It would not be appropriate to draw such an inference since the Chrysler Group officials were not shown to be favorably disposed towards the General Counsel or the Union. *Electrical Workers Local 3 (Teknion, Inc.)*, 329 NLRB 337, 337 fn. 1 (1999) (stating that the appropriate inquiry for a judge to make, when determining whether to draw an adverse inference from a party’s failure to call a potential witness, is whether the witness may reasonably be assumed to be favorably disposed to the party); *International Automated Machines, Inc.*, 285 NLRB 1122, 1122–1123 (1987), enf. mem. 861 F.2d 720 (6th Cir. 1988) (same). If anything, the Chrysler Group officials would appear to have a commonality of interest with the Respondent, with which they share certain business objectives and business agreements.

<sup>7</sup> Ed Burke testified that the reasons he chose to retain the Lisle-based franchises instead of the Naperville-based franchises were: in Lisle he had franchises to sell both Jeep and Dodge brand vehicles whereas in Naperville he only had a franchise to sell Dodge brand vehicles; and he had more employees at the Lisle facility than at the Naperville facility. That testimony is facially plausible and I credit it.

There is a related, but separate question, regarding Ed Burke’s motivation for choosing to use Burke Automotive, rather than Dodge of Naperville, as the surviving, active, corporate entity. The record shows that Chrysler identified Dodge of Naperville as the surviving corporate entity in the documents signed on June 17 and 19. However, on June 23, the Respondent asked Chrysler to modify and re-execute those documents to identify Burke Automotive rather than Dodge of Naperville as the surviving corporate entity. Chrysler agreed, and the Respondent executed the altered paperwork on July 6, 2009. Ed Burke suggested that this was necessary because Burke Automotive was licensed by the State of Illinois to sell both Jeep vehicles and Dodge vehicles at the Lisle location, but Dodge of Naperville was only licensed to sell Dodge vehicles at the Naperville location. However, since the arrangement with Chrysler called for the Respondent to move the entire operation to the Naperville location in 17 months, it would appear that Ed Burke would be required to obtain a license to sell Jeep vehicles at the Naperville location in any event. Ed Burke conceded that the State license for a particular dealership location could be amended to authorize the sale of an additional vehicle line. I do not find it necessary to reach a determination on the question of whether

On June 17, 2009, Ed Burke signed agreements that authorized him to continue selling the Dodge and Jeep lines in Lisle, and on June 19, 2009, an official for Chrysler approved the agreements. At Chrysler’s insistence, Ed Burke agreed that in 17 months he would return the operation to the Naperville site after completing renovations there.

The Respondent denies that Ed Burke selected the Dodge of Naperville location for closure, and contends that Chrysler made that selection. In its brief, the Respondent asserts that “Mr. Burke was instructed by Chrysler to cease doing business in Naperville beginning Saturday, June 20, 2009, and to start selling at the Lisle facility.” Brief of Respondent at p. 6. That assertion is contrary to the record evidence. Even the portions of Ed Burke’s testimony that the Respondent cites as support for its assertion (Tr. 102, 344, 378) show that Chrysler did not require the Respondent to make the change. Rather Ed Burke testified that, on June 19, Chrysler told him he was “authorized,” “approved,” and given the “go ahead,” to resume operating the franchises in Lisle, and to stop selling in Naperville (Tr. 344, 378.) Even if Chrysler had directed Ed Burke to make the change, the record would still not show that Chrysler required him to implement the change immediately, or in any way prevented him from waiting to make the change until after he had given the Union notice and an opportunity to bargain. Furthermore, assuming for purposes of discussion that Chrysler directed Ed Burke to cancel the franchise for Dodge of Naperville that would not mean the Respondent had to close that dealership; according to Ed Burke’s own testimony he could use a dealership to sell and service used cars even if that dealership had no new car franchise.<sup>8</sup>

On June 20—the day after receiving final approval from Chrysler to substitute cancellation of the Naperville franchise for cancellation of the Lisle franchises—the Respondent notified the unit employees that its Naperville facility was being closed effective immediately and that it would offer employment to as many of them as possible at its Lisle facility. Subsequently, the Respondent offered employment at the Lisle facility to all six of the mechanics from the Naperville Unit, but told them they would no longer be represented by the Union and would not receive the wages and benefits provided under the Union contract. Instead, the Naperville unit mechanics would be working under the less favorable terms and conditions of employment that the Respondent was providing to the 14 non-unit mechanics already present at the Lisle facility. Two of the bargaining unit mechanics—Robert Adams and Mike Marjanovich—declined to accept employment at the Lisle facility on the terms that the Respondent was offering. Adams had been working for Dodge of Naperville in May 2004 and has been a union member for 24 years. Marjanovich began working at the Naperville facility in 1999, when it was under different ownership, and became a union member at that time.

the Respondent’s decision to use Burke Automotive, rather than the unionized Dodge of Naperville, as the surviving corporate entity was motivated by unlawful concerns.

<sup>8</sup> The record does not indicate that renovations which Chrysler was requiring at the Naperville location could not be made while used car sales and service continued there.

*B. Interrelation of Burke Automotive and Dodge of Naperville*

One of the points of contention between the parties involves the question of whether Burke Automotive in Lisle and its wholly owned subsidiary, Dodge of Naperville, are a single employer for purposes of the Act. Single-employer status is alleged by the General Counsel and denied by both Burke Automotive and Dodge of Naperville. As discussed above, Burke Automotive and Dodge of Naperville are in the same business—selling and servicing Chrysler-manufactured vehicles—and both are owned by Ed Burke.<sup>9</sup> In addition, the two corporate entities have the same two corporate officers (Ed Burke, president and Pennie Squires, secretary)<sup>10</sup> the same general manager (Sam Guzzino), the same controller (Pennie Squires), and, prior to the closure of the Naperville facility, the same parts manager (Chris Belinski).

In addition, Ray Rossi, who oversaw building maintenance and personnel matters at the Lisle facility, also oversaw building maintenance at the Naperville facility and on occasion became involved in personnel matters there. Rossi was among those officials who helped train the employees at Dodge of Naperville when Ed Burke purchased that facility in 2003. Rossi testified that his role in the training was to make sure that the Naperville facility and the Lisle facility “should be married . . . everything the same.” Both Guzzino and Rossi were present at the Naperville facility on June 20, 2009, to notify employees that the location was being closed and to help arrange to bring vehicles from that location to the Lisle facility. In addition, when a unit employee complained that the Respondent had diluted the earning opportunities for existing mechanics at the Naperville facility by hiring new mechanics, Rossi came to the Naperville location to meet with the employee about his complaint. The employee asked Rossi to “get rid of the guys you just hired,” and the two newly hired mechanics were separated from the Naperville facility later that week.

On the other hand, until June 2009, the Naperville facility had its own service manager, Russell Rochacz, who exercised day-to-day supervisory authority there, while Rossi was the service director at the Lisle facility and supervised the mechanics there. The two facilities had separate employee handbooks and, prior to June 2009, mechanics from one facility were not sent to work at the other. Each location had its own sales managers.

In addition to sharing management personnel, Burke Automotive in Lisle and Dodge of Naperville shared an accounting office. The accounting office was located at the Lisle facility, but was responsible for the accounting and payroll functions of both facilities. The same three officials—Ed Burke, Guzzino, and Squires—were authorized to sign paychecks for employees at both facilities. For purposes of reporting employee compensation to the Internal Revenue Service, the Respondent listed Burke Automotive as the employer of employees at both Burke

Automotive in Lisle and Dodge of Naperville, and used the same federal employer number for both. Burke Automotive and Dodge of Naperville also used the same state employer identification number for state payroll tax purposes. The vacation requests made by employees of both the Lisle facility and the Naperville facility came to Guzzino’s desk for his approval and then went to the shared accounting office at the Lisle location. On the other hand, Ed Burke maintained separate bank accounts for Burke Automotive and Dodge of Naperville and payroll checks for the two locations were drawn on separate accounts. Both locations were individually licensed by the State of Illinois and each had its own state sales tax identification number, and, until June 9, 2009, a unique dealer code assigned by Chrysler.

The record also shows that Burke Automotive and Dodge of Naperville shared facilities to an extent. This sharing certainly extended to the furniture, equipment, and office space used for accounting and payroll functions since there is no dispute that a single accounting department, located at the Lisle facility, performed those functions for both entities. It is also fair, based on the record here, to infer that Ed Burke, Squires, Guzzino, Rossi, and Belinski—all of whom had duties at both Burke Automotive in Lisle and Dodge of Naperville—would sometimes use furniture, phones, and other equipment at the Lisle store while addressing matters relating to the Naperville location. There was no testimony or suggestion that while these individuals were physically present at the Lisle facility they avoided all work activities relating to Dodge of Naperville, and it is facially improbable that they would. Indeed, the record shows that Squires, who was controller and corporate secretary for both the Lisle facility and the Dodge of Naperville facility, was physically present at the Lisle facility, not at the Naperville facility, while working.

The record shows that Ed Burke would often make sales/purchases between Burke Automotive in Lisle and Dodge of Naperville. The sales between Burke Automotive and Dodge of Naperville were made, as Ed Burke put it, in order to “balance inventories” between the two facilities. He testified: “[W]e would sell cars back and forth to balance inventories amongst Dodge. If the one store was heavy on Journeys but light on Caravans and the other store was vice versa, heavy on Caravans and light Journeys, I would sell Journeys to the one store and Caravans back to the other store.” (Tr. 349.)

At about the time of the alleged violations, Ed Burke began to drop any pretense of treating the two facilities as independent enterprises. Most notably, he convinced Chrysler to let him sacrifice the franchise associated with Dodge of Naperville instead of the franchises associated with the Lisle location. That action was clearly not in the interests of Dodge of Naperville as an independent entity, but was, Ed Burke decided, in the interests of the overall business enterprise. Prior to that—during the period when Burke Automotive in Lisle was stripped of its franchises—Ed Burke continued to have nonunit mechanics at Burke Automotive in Lisle perform Chrysler warranty repairs by recording those repairs as having been made by the Naperville dealership. Once Ed Burke succeeded in obtaining permission to surrender the Naperville franchise in exchange for the Lisle franchises, he assigned all of Dodge of Naper-

<sup>9</sup> As discussed above, Dodge of Naperville is wholly owned by Burke Automotive, and Burke Automotive (including Dodge of Naperville), is wholly owned by Ed Burke. As of the time of the trial in this matter, neither corporate entity had been dissolved or formally deactivated.

<sup>10</sup> These are the only corporate officers for the two entities.

ville's accounts receivable to Burke Automotive, even though Dodge of Naperville was not dissolved as a corporate entity or formally deactivated. In addition, he began using the Dodge of Naperville dealer code for the Burke Automotive facility in Lisle, and sold Dodge of Naperville's remaining inventory to the public through Burke Automotive. (Tr. 99–100, 114.) As required by Chrysler, Ed Burke agreed that after 17 months he would move his surviving Chrysler franchises from the location in Lisle to the location in Naperville after making renovations to the facility there.

The evidence also shows that the Respondent communicated with the public in ways that presented the Lisle facility and the Naperville facility as parts of the same business enterprise. For example, the Respondent's advertisements for both facilities carried not only the individual store's corporate logo, but also, next to that logo, the words "Burke Automotive Group." When the Respondent closed the Naperville facility, it posted a sign at that facility informing the public that "WE HAVE MOVED" and giving the address of the Lisle facility. In addition, the Respondent posted a sign there stating that it was "OPENING FALL 2010," and listing contact information for the Lisle store.

*C. Respondent Denies the Unit Mechanics Continued Employment at the Naperville Location and Offers Them Nonunion Work at the Lisle Location*

While the unit mechanics were working at the Naperville location, and the Respondent was complying with the collective-bargaining agreement, the unit members' benefits included a health plan with medical, dental, and vision coverage, and a pension plan. Pursuant to the contract, the Respondent did not require the unit mechanics to make any contribution towards the Respondent's costs for either of these plans. In addition, under the union contract, the unit mechanics were guaranteed a minimum of 34-paid hours per week at the hourly rate of \$29.50, provided they were present at the Naperville dealership at least 40 hours that week. This minimum hours guarantee was significant because the mechanics were not paid based on how many hours they were present, but based on how many hours they "booked"—that is, on the number of hours worth of work they were assigned and completed during a week. If not for the minimum hours guarantee, during weeks when there were not enough assignments to keep all the mechanics busy, mechanics could find themselves accumulating few paid hours, even if they were physically present at work for 40 hours or more and completed all their assignments promptly.<sup>11</sup>

On Saturday, June 20, 2009, when the unit mechanics arrived for work at the Naperville facility, Ed Burke, Guzzino, and Rossi were present, and informed the mechanics that the facility was closing and that the mechanics had to remove their toolboxes the following Monday. Ed Burke told one or more of the unit mechanics that Chrysler was requiring him to build a new facility at the Naperville site, and that he "was moving

everything down" to the Lisle facility. The unit mechanics could, he said, "come down and put in an application and he would take on as many" of the unit mechanics "as he could" at the Lisle facility. Adams, an alleged discriminatee, was one of the unit mechanics who appeared for work at the Naperville facility on June 20, and spoke with Burke. Marjanovich, the other alleged discriminatee, was not scheduled to work on June 20, but that morning Rossi contacted him by phone and stated that the Naperville facility was closed and that he should come the following Monday to retrieve his toolbox and pick up his last paycheck.<sup>12</sup> Similarly, Lein, who was also not scheduled to work on June 20, received a call from Rossi that day. Rossi stated that Lein had to remove his tools from the Naperville facility by 2 p.m. the following Monday, that he could apply for a job at the Lisle facility, and that the Lisle facility would be a nonunion shop.<sup>13</sup> Prior to these communications to the unit

<sup>12</sup> I credit Marjanovich's testimony regarding a call from Rossi on June 20, Tr. 206–207, over Rossi's testimony that he did not call any of the unit mechanics, Tr. 306. Marjanovich testified with certainty and specificity regarding the phone call with Rossi, and the subject matter of that phone call. His description of what he was told during that call was consistent with the testimony of the Respondent's own witnesses regarding what they were telling the mechanics on June 20. Marjanovich testified matter-of-factly and did not appear inclined to embellish his account to favor the General Counsel's case.

I found Rossi a less confident witness on the question of a phone call to Marjanovich, and a less than fully credible witness in general. Rossi denied making the phone call, but conceded that he had so many contacts with mechanics that he could not recall every time he talked to the Naperville mechanics or what he said when they came to work at Lisle. Tr. 319. Moreover, his testimony that he had not called any of the mechanics that day is contradicted not only by Marjanovich, but also by Lein, a current employee who also testified that he received a call from Rossi that day. In my view, Rossi repeatedly strained to deny facts favorable to the General Counsel. For example, on direct examination, he denied that he had previously seen either of the two June 23, 2009 correspondences sent to him by the Union—one in which the Union requested bargaining, and another in which it requested information. Tr. 308–309. However, upon further questioning Rossi conceded that he "might have . . . seen" the letter requesting bargaining, and was not sure if he had seen the letter requesting information, Tr. 315–316. In its brief, the Respondent concedes that Rossi received the June 23 request for information. R. Br. at p. 7. Rossi embellished his answers in some instances in order to present the Respondent's actions in the most favorable light. For example, when asked whether Ed Burke had discussed the application form, benefits, and the handbook at a June 26 meeting with the unit mechanics, Rossi responded "I'm not sure if he said anything about the handbook, but he did offer everyone a job very politely." Tr. 320. In other instances, Rossi became antagonistic in response to questions. For example, when I asked him in what capacity he was acting when he came to the Naperville store on June 20 and informed unit mechanics that the store was closing (since he was service manager at the Lisle location, not the Naperville location) his demeanor became surly and he responded, "I don't think they would get a porter to do it, you know. I'm a service manager—common sense." Tr. 322.

<sup>13</sup> Based on his demeanor and the record as a whole, I credit Lein's testimony about this conversation, Tr. 247–248, over Rossi's denial that he called Lein or any of the other unit mechanics, Tr. 306. As in the case of the phone call to Marjanovich, Lein's account of what was said by Rossi during this conversation was consistent with the testimony of the Respondent's other witnesses about what they were telling the unit

<sup>11</sup> The nonunit mechanics at the Lisle facility had no such minimum guarantee. Thus their compensation from the Respondent could fall considerably below 34 hours per week during periods when there was a shortage of work. Rossi testified that "a lot" of the Lisle mechanics resorted to taking "side jobs" to augment their employment with the Respondent. Tr. 321.

mechanics, the Respondent had not given the Union notice or an opportunity to bargain regarding the closing of the Naperville facility, the change in the unit employees' work location, or the effects of those actions.

On June 22, all of the unit mechanics came to the Naperville facility where they loaded their toolboxes onto a rental truck and removed them from that location.<sup>14</sup> The unit mechanics had not yet been told that they could continue working for the Respondent at the Lisle facility, and the mechanics did not bring their toolboxes there that day. Unit members Adams, Marjanovich, and Zeka went to the Lisle facility at about 5 p.m. on June 22 to obtain their paychecks. While they were there, Rossi gave the unit mechanics applications, benefits forms, and, in a least one case, an employment-at-will form, and asked the mechanics to complete the forms and return them to the Respondent. Rossi also provided the unit mechanics with the employee handbook used at the Lisle facility. When asked about the terms of employment, Rossi told the unit mechanics they would be coming to the Lisle facility as "new hires," would "probably" have to work "weekends and evenings," and that there would be no union benefits or 34-hour pay guarantee. Prior to this time, the Respondent had not given the Union notice or an opportunity to bargain regarding changes in the terms and conditions of employment being offered to the unit employees.

In letters dated June 22, 2009, signed by Guzzino, and sent to unit mechanics by overnight mail, the Respondent stated:

Please show up for work immediately at our facility located at 3300 Ogden Avenue, Lisle, Illinois 60532. We expect your prompt arrival. Should you not come to work we will assume that you have no interest in a job at our dealership.

On June 23, after receiving this letter, a number of the unit mechanics met with union officials Dennis Jawor (directing business representative) and Thomas Gregg (business representative) to discuss the turn of events at the Naperville facility. The union officials prepared letters for Adams and other unit mechanics to deliver to company officials the next day. These letters, signed by Jawor and addressed to Rossi's attention, made a number of requests for information and also took the position that the unit mechanics were still employees of the Naperville facility and, therefore, were still covered by the collective-bargaining agreement. The letter reads as follows:

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employees. In addition, for the reasons discussed previously, I found Rossi less than fully credible based on his demeanor and testimony. While my credibility determination regarding Lein's testimony is made independently of the fact that he is a current employee, I nevertheless note that crediting him is consistent with the Board's view that the testimony of a current employee that is adverse to his employer is "given at considerable risk of economic reprisal, including loss of employment . . . and for this reason not likely to be false." *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1977). See also *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069 fn. 2 (2004), enfd. 174 Fed. Appx. 631 (2d Cir. 2006), and *Flexsteel Industries*, 316 NLRB 745 (1995), enfd. mem. 83 F.3d 419 (5th Cir. 1996).

<sup>14</sup> The toolboxes used by the mechanics are large—for example Adams' toolbox, which was not the largest, was approximately 5-foot tall, 4-foot wide, and 2-1/2-foot deep, and about 1000 pounds in weight.

I am in receipt of your letter dated June 22, 2009, in which you advised our Local 701 members to immediately report to work at your temporary facility located at 3300 Ogden Avenue[, Lisle, Illinois].

Due to the fact that yesterday when the technicians tried to report to work they were informed by Ray Rossi that they had to fill out applications, they would be new employees and would receive no benefits, I am requesting the following information in writing before I advise my members to return to work.

1. Will the technicians from Naperville Dodge be working under the current collective bargaining agreement dated August 1, 2005 through July 31, 2009.
2. Will the company continue to contribute into the Local 701 Welfare and Pensions fund at the current contribution rate.
3. Will the Technicians be paid in accordance with the current collective bargaining agreement.
4. Will the Technicians be paid base pay in accordance with the collective bargaining agreement.
5. Will each technician have a hoist as required in the collective bargaining agreement.

Be advised that I have instructed the Technicians not to fill out any paperwork, due to the fact that they are working for the same employer under the same collective bargaining agreement and their same dealer code. The only difference is they are working in a temporary facility.

Adams reported to work on the morning of June 24, and delivered this letter to Rossi at that time.

On June 23, Jawor also sent a letter by facsimile to Rossi's attention at the Respondent's Lisle facility. That letter repeated some of the same points made in the letter that Adams had delivered to Rossi, and asked to meet and bargain "as soon as possible" over issues arising because the "bargaining unit" had "expand[ed]" The letter stated in relevant part:

It is Local 701's position that:

1. The technicians from Naperville Dodge will be working under the current collective bargaining agreement dated August 1, 2005 through July 31, 2009.
2. The company must continue to contribute into the Local 701 Welfare and Pension Funds at the current contribution rate.
3. The technicians must be paid in accordance with the current collective bargaining agreement.
4. The technicians must be paid base pay in accordance with the collective bargaining agreement.
5. Each technician must have a hoist as required by the collective bargaining agreement.

There are a number of other issues that need to be discussed when the bargaining unit expands as it has in this situation so I suggest that we meet to bargain over such matters. Please let me know when we can meet. I believe the meeting should take place as soon as possible.

On June 24, 2009, Jawor received a response from counsel for the Respondent. The Respondent's letter referenced Jawor's June 23 communication and stated, *inter alia*: "It is the position of my client that Local 701 does not represent a majority of its technicians. I would suggest that we meet at your offices at 10:00 am this Friday, June 26, to discuss these matters."

During the workweek that began on June 22, many, if not all, of the unit mechanics from the Naperville facility worked at the Lisle facility. The Naperville mechanics joined the 14 nonunit mechanics who were already working at the Lisle location. Adams and Marjanovich presented themselves for work at the Lisle store on Wednesday, June 24. Both worked at the Lisle facility on June 24, 25, and 26, without being required to complete an application or other paperwork for the Lisle facility. Although terms for their continued employment had been informally alluded to earlier, they were not told what those terms would actually be until June 26. Over the course of the 3-day period when Adams worked at the Lisle store that week, Adams accumulated a total of 15 "booked hours" of work for which he could be paid. Over the course of the same 3-day period, Marjanovich accumulated a total of 12.1 "booked hours" for his work at the Lisle location.

On Friday, June 26, Ed Burke, Guzzino, and Rossi met with mechanics who had come to the Lisle facility from the Naperville facility. Ed Burke informed the mechanics that they were all being offered employment at the Lisle facility. He told the Naperville mechanics that the Lisle facility "was a non-union store," would "never be a union store," and that if the mechanics "ever went out on strike it would mean that [they] quit and would not be able to collect unemployment."<sup>15</sup>

Regarding the terms and conditions of employment, Ed Burke told the unit mechanics that they would no longer receive what they had at the Naperville facility under the collective-bargaining agreement. They would be paid at the same hourly rate as at the Naperville facility (\$29.25 per hour), but there would be no minimum hours guarantee. Rather, like the nonunit mechanics at Lisle, the unit mechanics could now earn considerably less than 34 hours of pay a week if there were not enough assignments to keep them busy. He stated that the Respondent would not continue the unit mechanics' no-employee-contribution health insurance, but that the mechanics would be permitted to participate in the health plan in place at the Lisle store. The premiums for this health insurance would be entirely at the employee's expense. For family coverage with medical, dental, and vision insurance, the employee would have to pay premiums of between \$175 and \$200 every week. In addition, the unit employees would no longer be covered by a pension plan. Instead they would be able to make contributions to a 401(k) plan to which the Respondent would make matching contributions of no more than \$10 a week. Ed Burke told the Naperville mechanics that, contrary to what Rossi had earlier reported, they would not be treated as new hires. Instead, they

would be credited for service at the Naperville facility back to the date when the Respondent assumed control of that dealership in 2003. Any seniority accrued prior to that time would be forfeited.<sup>16</sup> Ed Burke further stated that if the employees chose to quit instead of accepting employment under the terms being offered, he would not pay them unemployment compensation. Ed Burke testified that at the meeting he wanted to make clear to the Naperville mechanics that the reason for the June 22 letter was that the Respondent needed to fill positions at the Lisle facility and could not afford to hold the employment offers open for "6 weeks."

Adams was not present for the June 26 meeting, but afterwards Guzzino and Rossi met with him. Guzzino and Rossi discussed the terms of employment that Ed Burke had described at the meeting and told Adams that the Respondent was not going to recognize the Union at the Lisle facility. They also repeated Ed Burke's warning that if a mechanic did not accept employment at the Lisle facility under those terms, the Respondent would view him as having quit and would oppose an application for unemployment insurance.

The Respondent also met with Jawor on June 26. The Respondent's attorney told Jawor that the Union no longer had majority support and that the Respondent was going to withdraw recognition. Jawor responded that the Union's representation of the Naperville mechanics should continue, and that the Union would attempt to sign up the mechanics who had been working at the Lisle facility. The Respondent's attorney stated that the company was going to pay the former Naperville mechanics the same wages and benefits as the mechanics already working at the Lisle facility. Jawor did not consent to this change in the unit members' terms. Later that day, the Respondent's attorney sent a letter to Jawor by facsimile, which stated:

Pursuant to our meeting this morning, this letter is to inform you that due to the relocation of, and merger with Burke Automotive, recognition of Local 701 at Naperville Dodge is hereby withdrawn due to lack of majority status.

The Respondent gave the Union no advance notice of the "merger" and "relocation" action referred to by the Respondent's counsel in the June 26 communication, and never offered to negotiate with the Union regarding the effects of that decision. On July 8, 2009, the Union filed the initial charge, in which it alleged that the Respondent had "unlawfully withdrawn recognition from the Union and repudiated the collective-bargaining agreement."

After the Respondent told the Naperville mechanics what their terms and conditions of employment would be at the Lisle facility, Adams and Marjanovich concluded that they would not be able to financially afford to work there. Adams and Marjanovich both testified that this was because under, the new terms, they would have to pay their own health insurance premiums and would not be guaranteed any minimum number of paid hours per week. Both men required family coverage,

<sup>15</sup> I credit Lein's testimony that Ed Burke made these statements. I considered the fact that Marjanovich, the other witness for the General Counsel who testified about the June 26 meeting, did not include these statements in his account. However, Marjanovich arrived late and missed part of the presentation.

<sup>16</sup> This affected the amount of vacation time employees accrued. For example, Lein, received 4 weeks of vacation per year while at the Naperville facility, but only 2 weeks per year after being relocated to the Lisle facility.

which the record shows would cost up to \$200 each week in premiums. Moreover, there were, Adams worried, a large number of mechanics at the Lisle facility, creating the possibility that there would not be enough work for all of them. As discussed above, during the 3-day period they were present at the Lisle store from June 24 to 26, Adams and Marjanovich accumulated only 15- and 12.1-paid hours respectively. Marjanovich testified that, between the health insurance premiums and the rescission of the minimum hours guarantee, he was concerned that his take-home pay would not be enough to cover his monthly mortgage payments.

On the morning of Monday, June 29, Adams went to the Lisle facility and told Rossi that he would not work there under the terms the Respondent was offering. Rossi responded that he “liked” Adams and was “sorry that we hadn’t come to an agreement.” Adams retrieved his tools and left the facility. Marjanovich also went to the Lisle store on the morning of June 29. He told Rossi that he could not “turn in my application and accept this employment because it would be too costly for me, a financial hardship due to the fact that I had just had a newborn son two months prior and my wife was not working at the time.” Rossi responded that he was “sorry to see [Marjanovich] go” and “wished” him “luck.”

Adams and Marjanovich both filed for unemployment compensation, and the Respondent opposed their applications.

#### *D. No Notice to Union*

The uncontradicted evidence shows that the Respondent did not give the Union notice or an opportunity to bargain over decisions affecting the terms and conditions of employment of unit employees. After Chrysler Group informed Ed Burke that he could not retain the franchises for his (nonunion) store in Lisle, but could retain the franchise for his (unionized) Dodge of Naperville store, Ed Burke embarked on an effort to convince Chrysler to revive the Lisle franchises—either in addition to, or instead of, the Naperville franchise. Ed Burke admitted that he did not give the Union notice or an opportunity to bargain about his ultimately successful effort to keep the Lisle franchises at the expense of the Naperville franchise. When Chrysler gave Ed Burke the choice between retaining either the Naperville franchise or the Lisle franchises, he did not give the Union notice or an opportunity to bargain before choosing to sacrifice the Naperville franchise at the location where the unit employees worked in order to revive the franchises at the location in Lisle.

Prior to June 20, when the Respondent informed the unit mechanics that it had closed the Naperville facility, the Respondent did not give the Union notice or an opportunity to bargain regarding that change or its effects. Similarly, the Respondent did not give the Union notice and an opportunity to bargain before the June 22 letter directing the unit employees to report to the Lisle facility or before the June 26 meeting at which it formally offered the unit mechanics employment at the Lisle facility and described the changed terms and conditions that it would provide there. Prior to June 26, when the Respondent notified the Union that “due to the relocation of, and merger with Burke Automotive, recognition of [the Union] at Naperville Dodge” was “withdrawn,” the Respondent did not give the

Union notice or an opportunity to bargain over the “relocation” and “merger” or its effects.

#### *E. Information Request*

On July 9, 2009, counsel for the Union transmitted a letter to counsel for the Respondent requesting certain information. That request read in relevant part:

[I]t is the Union’s position that Burke has unlawfully repudiated its collective-bargaining agreement with the Union as it relates to this bargaining unit. There are also numerous possible contractual violations related to the events surrounding the relocation of work to the Lisle facilities. Please provide the following information:

1. All correspondence between Burke and Chrysler (or any representatives or subsidiaries of Chrysler) related to the termination of the franchise agreement for Burke d/b/a Naperville Jeep/Dodge in Lisle, Illinois, dealer code 2358; and
2. All correspondence between Burke and Chrysler (or any representatives of subsidiaries of Chrysler) related to the ongoing franchise agreement for Burke under dealer code 45120.<sup>17</sup>

The Respondent did not answer the Union’s information request until March 4, 2010. At that time it stated that no documents existed besides those which had accompanied a position letter that the Respondent submitted to the Regional Office of the Board on September 8, 2009. The position letter to the Regional Office made no mention of the Union’s information request and in no way suggested that the attachments were responsive to the request, but the cover letter indicates that the Respondent forwarded a copy of the position letter to the Union.

#### *F. Complaint Allegations*

The complaint alleges that the Respondent violated Section 8(a)(5) and (1): since June 23, 2009, by failing and refusing to bargain with the Union concerning the effects of its temporary relocation of the unit to the Lisle facility; by failing to continue in effect the terms and conditions of the collective-bargaining agreement, repudiating that agreement, and withdrawing recognition from the Union during the effective period of the collective-bargaining agreement without the consent of the Union; and by failing to provide the Union with information, requested on July 9, 2009, that is necessary for, and relevant to, the Union’s duties as collective-bargaining representative. The complaint further alleges that the Respondent violated Section 8(a)(3) and (1) on about June 26, 2009, when it constructively discharged union mechanics Adams and Marjanovich by requiring them to work without union representation and union contractual benefits. The complaint also alleges that the Respondent threatened employees in violation of Section 8(a)(1): on June 20, 2009, when Rossi told employees, by phone, that

<sup>17</sup> Until the events at issue here, the dealer code for the Naperville franchise was 45120 and for the Lisle franchises was 2358. In June 2009, the Respondent began, with the approval of Chrysler, to use dealer code 45120 for the Lisle facility.

they would no longer be unionized upon their temporary transfer to the Lisle facility; on June 22, 2009, when Rossi told employees that they would no longer have any union benefits after their temporary transfer to the Lisle facility; on June 26, 2009, when Rossi threatened employees that they would not be receiving any union benefits; and, on about June 26, 2009, when Ed Burke told employees that they would never have a unionized store and would be discharged if they ever went on strike.

### III. ANALYSIS AND DISCUSSION

#### A. Single-Employer Question

The complaint alleges, and the General Counsel argues, that Burke Automotive and Dodge of Naperville are a single employer, and are jointly and individually liable for the unfair labor practices alleged. Whether nominally separate entities are a single employer for purposes of the Act is determined by considering four factors: (1) functional integration of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership. *Radio & Television Broadcast Technicians Local 1264 v. Broadcast Service of Mobile*, 380 U.S. 255, 256 (1965); *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1283–1284 (2001). The Board has stated that none of the four factors is controlling as single-employer status ultimately depends on all the circumstances of the case. *Richmond Convalescent Hospital*, 313 NLRB 1247, 1249 (1994). This inquiry is designed to determine whether the nominally “separate corporations are not what they appear to be, that in truth they are but divisions or departments of a single enterprise.” *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402 (1960); *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3d Cir. 1982). “‘Single-employer’ status ultimately depends on all the circumstances of the case and is characterized as an absence of an ‘arm’s-length relationship found among unintegrated companies.’” *Brown-Ferris*, supra. Viewing the facts of this case through the prism of the relevant factors, I conclude that Burke Automotive and Dodge of Naperville were operated by Ed Burke as divisions of a single enterprise rather than as separate entities with an arm’s-length relationship.

All four of the factors identified by the Board support finding that Burke Automotive and Dodge of Naperville are a single employer. The General Counsel has made an extremely strong showing of common ownership. The evidence establishes that Ed Burke is the sole owner of Burke Automotive Group and, through that entity, the sole owner of Dodge of Naperville. Not only is 100 percent of ownership common in the person of Ed Burke, but ownership is through a common corporate entity.

Regarding common management, the General Counsel also makes an extremely strong showing. Most of the same individuals hold the same high-level positions at the two entities. Ed Burke is president of Burke Automotive and also president of Dodge of Naperville. Squires is corporate secretary for Burke Automotive and also corporate secretary for Dodge of Naperville. Indeed, the record shows that there are no corporate officers who are *not* identical at the two entities. The same individual, Guzzino, is the general manager at Burke Automotive and also the general manager at Dodge of Naperville. Dur-

ing the period when the Respondent was actively doing business at both locations, Belinski was the parts manager for both. Squires, in addition to serving as corporate secretary, is controller for both Burke Automotive and Dodge of Naperville. Rossi is responsible for overseeing maintenance of the physical plant at both facilities. Rossi also has personnel responsibilities for both entities, although those responsibilities are more extensive at the Lisle facility, where he is service director. Notably, Ed Burke gave Rossi responsibility for training employees at Dodge of Naperville when the Respondent purchased it in 2003. Rossi also had personnel responsibilities when the Respondent closed that store in June 2009. In another instance, Rossi was dispatched to Dodge of Naperville to address a staffing concern raised by one of the unit mechanics.

The record does show some differences in the management of Burke Automotive and Dodge of Naperville. The service manager at Dodge of Naperville had day-to-day supervisory responsibilities there, but no responsibilities at the Lisle store. In addition, each entity had its own sales managers. Overall, however, these differences weigh lightly on the scale when compared to the multiple, and generally higher-level, instances of common management discussed above. *Pathology Institute*, 320 NLRB 1050, 1061–1062 (1996) (finding common management based on commonality at the shareholder/member and director/trustee level); see also *Sakrete of Northern California, Inc. v. NLRB*, 332 F.2d 902, 907 (9th Cir. 1964) (single-employer finding not precluded where commonality of management is only at the highest level), cert. denied 379 U.S. 961 (1965).

The evidence presented by the parties regarding centralized control of labor relations is more mixed, but on balance also favors finding that Burke Automotive and Dodge of Naperville are components of a single employer. Rossi conceded that when he trained employees at Dodge of Naperville, the Respondent’s intention was that both entities “*be married . . . everything the same.*” Guzzino, in his capacity as general manager at both Burke Automotive and Dodge of Naperville, has active control over labor relations at both. For example, he gives final approval for the vacation leave of both groups of employees. Guzzino, Ed Burke and Squires have responsibility for signing the payroll checks of employees at Burke Automotive and for signing the payroll checks of employees at Dodge of Naperville. Ed Burke sets the terms and conditions of employment received by mechanics at Burke Automotive and also signed the collective-bargaining agreement establishing the terms and conditions of the mechanics at Dodge of Naperville.

The Respondent argues, and the record shows, that the two entities did not share or exchange mechanics prior to time of the alleged violations in June 2009. Although that provides some support for the view that the labor relations were not centralized, it is not the whole story, and not the most important part of the story in this instance. During the later time period when the violations are alleged to have occurred—that is, from June 2009 forward—the Respondent’s labor relations were clearly centralized and the Respondent was treating the unit mechanics as employees of a single employer that included Dodge of Naperville and Burke Automotive. For example, shortly after closing the Naperville store, the Respondent told

the unit employees that if they did not immediately report to the Burke Automotive facility in Lisle they would be considered to have quit and would be denied unemployment compensation. This is significant because an employee does not quit a job when he or she is laid off by a current employer and subsequently refuses a new job with a separate employer. Rather, an employee quits a job when he or she declines to continue employment with the *same* employer. Not only did the Respondent make these statements treating the unit mechanics as employees of both the Naperville facility and the Lisle facility, but it acted on those statements by challenging the unemployment compensation claims of Adams and Marjanovich after they declined to work at the Lisle facility under the terms offered. In addition, the Respondent had the Naperville mechanics begin performing job duties at the Burke Automotive location in Lisle before those employees had been informed of their actual terms of employment at the Lisle facility or been formally offered continued employment there. Indeed the Respondent had unit mechanics from Naperville begin working at the Lisle facility without first obtaining applications from those mechanics. This behavior is generally more consistent with the way an employer relocates employees within its divisions, rather than with the way an employer hires from outside the company.

When, on June 26, the Respondent set forth the terms of employment for the unit mechanics relocated to the Lisle location, it credited them with seniority for their years of service at the Naperville store back to the date when the Respondent acquired that facility in 2003. The fact that the Respondent was crediting employees at Burke Automotive with years working for Dodge of Naperville is another indicator that it was treating the two facilities as a single employer with a unified labor relations system. In my view, the Respondent's actions from June 2009 forward suggest that labor relations for the two nominally separate entities had always been very centralized. However, even if one views these actions as a departure from the way the Respondent handled labor relations prior to June, the later period is the more significant one for purposes of the analysis because it was during that later period when the violations are alleged to have occurred.

In reaching the conclusion that the evidence regarding labor relations at Burke Automotive and Dodge of Naperville supports finding that the two were a single employer, I considered the evidence that each facility has its own employee handbook. However, the situation where terms and conditions of employment vary between the unionized and non-unionized components of a single employer is more the rule than the exception, see, e.g., *Illinois-American Water Co.*, 296 NLRB 715, 720 (1989), *enfd.* 933 F.2d 1368 (7th Cir. 1991), and that reality does not suggest, in this case, that such components were separate, arm's-length entities for purposes of the Act.

Lastly, the level of functional integration between Burke Automotive and Dodge of Naperville is consistent with finding them to be a single employer for purposes of the Act. As discussed above, both were wholly owned by Ed Burke, had largely identical management teams, and engaged in precisely the same business on the same road in neighboring communities. One telling piece of evidence regarding the functional integration of these two entities was given by Ed Burke under

questioning by his own attorney. Ed Burke testified that he made sales of vehicles between Burke Automotive and Dodge of Naperville in order to "balance inventories" between the two locations. The fact that Ed Burke was attempting to *balance* inventories between the two entities, rather than making arms length's transactions in which each entity considered only its individual interests, strongly suggests that Burke Automotive and Dodge of Naperville were operating as a single-integrated business enterprise. See *Emsing's Supermarket*, 284 NLRB 302, 304 (1987) (finding of single-employer status is supported by propensity to operate both companies "in such a manner that the exigencies of one would be met by the other" showing that relationship was not arm's length), *enfd.* 872 F.2d 1279 (7th Cir. 1989). Similarly, after Chrysler decided to cancel the Burke Automotive franchises, Ed Burke persuaded Chrysler to permit him to retain those franchises and, instead, sacrifice the Naperville Dodge franchise—a move that may have been in the interests of Ed Burke's overall business enterprise, but cannot be seen as being in the interests of Dodge of Naperville as an individual entity.

A high level of functional integration is also evidenced by the two entities' sharing of facilities, equipment, and personnel. Burke Automotive and Dodge of Naperville had a single accounting department, which was housed at the Burke Automotive facility in Lisle. At this centralized accounting office the two entities shared office space, equipment, furniture, and accounting personnel. *Western Union*, 224 NLRB 274, 277 (1976) (in determining single-employer status, Board considers whether there are, inter alia, combined accounting records, bank accounts, telephone numbers, offices). In addition, as discussed above, the two entities shared numerous corporate and management officials. This also meant that the two entities shared facilities and equipment because an official would sometimes perform work relating to Dodge of Naperville while physically present at the Burke Automotive facility in Lisle.

In addition to sharing facilities, equipment, and personnel, the two facilities shared the nominally separate franchise identities assigned to them by Chrysler. During the period from June 9 to 19, when Burke Automotive in Lisle temporarily lacked a franchise, the Respondent had the nonunit mechanics at the Lisle facility continue making dealer warranty repairs by reporting the repairs as having been made by Dodge of Naperville. Then, when Ed Burke succeeded in convincing Chrysler to allow him to surrender the Dodge of Naperville franchise in exchange for reviving of the Burke Automotive franchises in Lisle, Ed Burke used Burke Automotive to sell Dodge of Naperville's remaining inventory to the public, and assigned Dodge of Naperville's accounts receivable to Burke Automotive.

Around the time of the alleged violations, the already significant sharing of facilities and equipment increased greatly. On June 20, Ed Burke announced that he was "moving everything" from Dodge of Naperville to the Burke Automotive store in Lisle.<sup>18</sup> Moreover, Ed Burke promised Chrysler that in 17

<sup>18</sup> The suggestion that Ed Burke was combining the Dodge of Naperville operation with the Lisle operation, rather than simply closing the Naperville operation, is reinforced by Ed Burke's testimony that, as

months he would renovate the Dodge of Naperville facility and move his Burke Automotive operation back to the Naperville location from the Lisle facility. The Respondent did not show that before Ed Burke committed to ultimately moving the surviving Burke Automotive operation to the Dodge of Naperville location, the two entities executed lease or sale agreements or had any arm's length dealings at all regarding Burke Automotive's use of the Dodge of Naperville location. It is clear that during this period the Respondent was engaging in a global sharing of facilities and equipment between Burke Automotive and Dodge of Naperville. The two entities were not operating at "arm's length" as separate entities; rather, Ed Burke was simply drawing whatever resources he could from either entity in service of the best interests of a single-integrated business enterprise. See *Emsing's Supermarket*, 284 NLRB at 304 (that fact that two companies are being operated "in such a manner that the exigencies of one would be met by the other" supports finding single employer status).

In communications to the public, the Respondent presented Burke Automotive and Dodge of Naperville as parts of a single-integrated enterprise. The newspaper advertisements that the Respondent ran for the Lisle facility and the Naperville facility identified both dealerships as part of Burke Automotive. In June 2009, when the Respondent suspended operations at the Dodge of Naperville location, the notice to consumers that it placed at the facility did not state that Dodge of Naperville was "closed," but rather that it had "moved" to the location of Burke Automotive in Lisle. The fact that the Respondent held itself out to the public as a single-integrated business enterprise further supports finding that it was a single employer within the meaning of the Act. *Southern Interiors, Inc.*, 319 NLRB 379 (1995) (single employer status found based, inter alia, on the fact that the entities held themselves out to the public as parts of a single integrated business enterprise), enfd. mem. 107 F.3d 12 (6th Cir. 1997).<sup>19</sup>

The record does show that there are some respects in which the dealerships have not been integrated. For example, they use separate bank accounts and lines of credit. However, to the extent that this evidence provides some support for viewing the two dealerships as functionally separate, that evidence is not only out weighed, but also undercut, by the ways in which the dealerships are functionally integrated. For example, the significance of Ed Burke's maintenance of separate bank accounts

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of June 22, he needed to fill positions at the Lisle facility and therefore wanted the unit mechanics to promptly report for work there. If the Dodge of Naperville operation had been eliminated, it would not explain the rush to get the unit mechanics started working at the Lisle facility. However, if the Naperville facility's operation and workload were being relocated to the Burke Automotive facility in Lisle, it would explain why Ed Burke felt he needed to quickly increase the complement of mechanics at the Lisle facility. The view that the Dodge of Naperville operation was being merged, rather than eliminated, is also reinforced by the June 26 letter to the Union in which the Respondent itself referenced the "relocation" and the "merger" of Dodge of Naperville with Burke Automotive in Lisle.

<sup>19</sup> In addition to holding itself out to the public as a single employer, the Respondent did so in its June 26 letter to the Union—stating that it had "merged" Dodge of Naperville and Burke Automotive.

for the dealerships is reduced where, as here, the level of functional integration is such that one dealership was used to sell the other's inventory and accept assignment of the other's accounts receivable.

To summarize, consideration of the relevant factors reveals that the relationship between Burke Automotive and Dodge of Naperville is characterized by the "absence of an 'arm's-length' relationship found among unintegrated companies." *Brown-Ferris*, supra. I conclude that the two entities are a single employer for purposes of the Act.

#### B. Alleged Violations of Section 8(a)(5)

##### 1. Withdrawal of recognition

The General Counsel argues that the Respondent acted in violation of its bargaining obligations under Section 8(a)(5) and (1) of the Act by withdrawing recognition when it relocated the unit employees from the Naperville facility to the Lisle facility. The record shows that when the Respondent relocated the six unit mechanics there were already 14 nonunit mechanics working at the Lisle location. On June 24, 2009, the Respondent notified Jawor of management's position that the Union did "not represent a majority of its technicians." Subsequently, on June 26, 2009, the Respondent informed the Union in writing that the company was withdrawing recognition "due to lack of majority status" resulting from the "relocation" and "merger" of Dodge of Naperville and Burke Automotive. This withdrawal of recognition occurred during the effective period of the collective bargaining agreement, which was not set to expire until July 31, 2009.

The Respondent contends that the withdrawal of recognition was lawful because the unit mechanics were accreted into the larger nonunion work force at the Lisle facility and were no longer an appropriate unit for bargaining. The General Counsel counters that the unit retained a separate identity even after the relocation, and therefore was not accreted into the nonunion work force. For the reasons discussed below, I conclude that at the time the Respondent withdrew recognition from the Union, the unit continued to be an appropriate bargaining unit with a distinct identity and that the withdrawal of recognition violated the Act.

The Board has ruled that where there is a lengthy history of collective bargaining for a unit, an employer must continue to recognize the Union even when operational changes result in unit employees doing the same type of work on the same equipment as nonunit employees within a broader facility or group. *Radio Station KOMO-AM*, 324 NLRB 256, 262–263 (1997); *Serramonte Oldsmobile*, 318 NLRB 80, 104 (1995), enfd. in relevant part 86 F.3d 227 (D.C. Cir. 1996); *Children's Hospital*, 312 NLRB 920, 929 (1993), enfd. sub nom. *California Pacific Medical Center v. NLRB*, 87 F.3d 304 (9th Cir. 1996); see also *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 118 (D.C. Cir. 1996) ("[T]he Board places a heavy evidentiary burden on a party attempting to show that historical units are no longer appropriate. . . ."); *Armco, Inc. v. NLRB*, 832 F.2d 357, 363 (6th Cir. 1987) ("long bargaining history . . . alone suggests the appropriateness of a separate bargaining unit"). Absent "compelling circumstances," a history of meaningful bargaining is sufficient to establish the continued appropriateness of a

separate unit, even if other factors support a contrary result. See *Radio Station KOMO-AM*, 324 NLRB at 262. The bargaining unit at issue in this case is a longstanding one, having been certified in 1989, approximately 20 years before the Respondent withdrew recognition in June 2009. It has been covered by multiple, successive, collective-bargaining agreements, and the last such agreement had not reached its expiration date at the time the Respondent withdrew recognition. After the temporary relocation the unit employees continued to perform the same type of work for most of the same managers as they had before the relocation. Every member of the established unit was offered employment at the Lisle facility. In this case, the Respondent has failed to identify, much less demonstrate the existence of, any “compelling circumstances,” that would permit withdrawal of recognition based on the temporary relocation of the Naperville unit. Indeed, given that under the Respondent’s contract with Chrysler the relocation of the unit employees was to be short-lived, it is hard to imagine how circumstances justifying dissolution of the established bargaining unit could be found here based on the relocation.

The conclusion that the longstanding Naperville bargaining unit has retained its identity is further supported by the unique terms and conditions of employment to which the unit mechanics are entitled under the collective bargaining agreement. See *Mirage Casino-Hotel*, 338 NLRB 529, 532 (2002) (differences in wages and employment benefits is a factor which can support finding that employees share a community of interest); *Super K Mart Center*, 323 NLRB 582, 588 (1997) (same); *Skyline Distributors*, 319 NLRB 270, 270 fn. 2 and 278 (1995), enfd in part and remanded 99 F.3d 403 (D.C. Cir. 1996) (same); *Serramonte Oldsmobile*, 318 NLRB at 80 (same). As discussed previously, under the collective-bargaining agreement a number of the most important terms and conditions of employment for the unit employees were vastly different than, and much superior to, those applicable to the Respondent’s nonunit mechanics. The conclusion that the unit’s unique terms of employment support finding that the unit retained its identity is not affected by the fact that the Respondent unilaterally repudiated the collective-bargaining agreement and imposed nonunit wages and benefits on the unit employees at approximately the same time as it withdrew recognition. As found below, the contract repudiation, and unilateral change in wages and benefits were themselves violative of Section 8(a)(5) of the Act. Such unlawful changes by an employer are not considered when determining whether an established bargaining unit retains its distinct identity since giving weight to such changes would reward the employer for its unlawful conduct. See *Comar, Inc.*, 349 NLRB 342, 357–358 (2007); *Superior Protection, Inc.*, 341 NLRB 614, 615 fn. 5 (2004), enfd. 401 F.3d 282 (5th Cir. 2005), cert. denied 126 S.Ct. 244 (2005); *Georgia-Pacific Corp.*, 329 NLRB 67, 74–75 (1999); *Holly Farms*, 311 NLRB 273, 279 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), cert. denied in pertinent part 516 U.S. 963 (1995).

For the reasons discussed above, I conclude that the represented employees retained a sufficient community of interest distinct from the unrepresented employees to require continued recognition even after the Respondent temporarily relocated the unit employees from the Naperville facility to the Lisle facility

in June 2009. Therefore, the Respondent violated the Act when it withdrew recognition from the Union in June 2009 during the effective period of the collective-bargaining agreement.

## 2. Repudiation of the collective-bargaining agreement

The General Counsel alleges that the Respondent violated section 8(a)(5) and (1) of the Act by repudiating the collective-bargaining agreement to which it was obligated to adhere, and unilaterally changing the terms and conditions of employment of the unit employees. The evidence shows that when the Respondent relocated the unit mechanics from the Naperville store to the Lisle store, it ceased abiding by the applicable collective-bargaining agreement and unilaterally changed the terms and conditions of employment without the Union’s consent, and without affording the Union notice or an opportunity to bargain. By engaging in these activities the Respondent violated Section 8(a)(5) and (1) of the Act. See *R. Sabee Co., LLC*, 351 NLRB 1350, 1357–1358 (2007) (holding that the employer violated Section 8(a)(5) when it moved employees from one part of a single-integrated enterprise to another and repudiated the employees’ collective bargaining agreement).

The Respondent does not directly address this allegation, but presumably means to defend based on its argument that the Naperville facility and the Lisle facility are separate entities and that the Lisle facility, as a new employer for the former Naperville mechanics, was entitled to impose new terms and conditions of employment. This argument fails because, as discussed above, Dodge of Naperville and Burke Automotive in Lisle are a single employer. When that single employer relocated the unit mechanics to another facility within the same integrated business enterprise, it continued to be bound by the obligations to adhere to the collective-bargaining agreement and bargain with the Union over any changes to terms and conditions of employment of Unit employees. *R. Sabee Co.*, supra.

## 3. Bargaining over the effects of relocating the unit mechanics from Naperville to Lisle

The General Counsel alleges that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to bargain with the Union concerning the effects of the temporary relocation of the unit employees from the Naperville facility to the Lisle facility. The Board has held that an employer is required to bargain over the effects of the relocation of unit work and that obligation includes bargaining over the relocated workers’ wages, work locations, schedules, carryover of seniority, and other terms and conditions of employment at the new facility, as well as over the conditions of the transfer. See *Comar, Inc.*, 339 NLRB at 903, 913 (2003); *Sea Jet Trucking Corp.*, 327 NLRB 540, 547 (1999), enfd. mem. 221 F.3d 196 (D.C. Cir. 2000); *Holly Farms Corp.*, 311 NLRB at 279 fn. 25; *Allied Mills*, 218 NLRB 281, 286–287 (1975), enfd. mem. 543 F.2d 417 (D.C. Cir. 1976) (Table), cert. denied 431 U.S. 937 (1977); and *Cooper Thermometer Co.*, 160 NLRB 1902, 1912 (1966), enfd. 376 F.2d 684 (2d Cir. 1967). I find that by failing and refusing to bargain over the effects of relocating the unit mechanics to the Lisle facility, the Respondent violated Section 8(a)(5) and (1). See *Sea Jet*, 327 NLRB at 544; *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

The Respondent contends that it did not unlawfully fail to bargain because the relocation was not a mandatory subject of bargaining inasmuch as the relevant decisions were made by Chrysler, not the Respondent. This argument fails both as a matter of fact and a matter of law. The record evidence shows that, contrary to the Respondent's assertion, it was the Respondent itself, not Chrysler, that selected the Naperville franchise for elimination. As discussed above, Chrysler actually selected the Naperville franchise to survive and the Lisle franchises for elimination. After Ed Burke lobbied to change that decision, Chrysler gave him a *choice* between preserving either the franchise at the unionized Naperville store or the franchises at the Lisle store. At that point Ed Burke made a decision to sacrifice the Naperville franchise in order to revive the Lisle franchises. According to his own testimony, Ed Burke could have chosen, instead, to continue selling and servicing new Chrysler-made cars at Dodge of Naperville.<sup>20</sup> Ultimately, Chrysler gave Ed Burke the "go ahead" to stop selling new cars at the Naperville facility and switch over to selling new cars at the Lisle facility. The evidence shows that Chrysler did not require Ed Burke to make this change at all, much less require him to make the change without taking the time to notify and bargain with the Union.

The Respondent's contention that Chrysler was responsible for relocating the Unit employees to the Lisle facility also overlooks the fact that Ed Burke could have chosen to keep the Naperville facility open even without a new car franchise for that location. Ed Burke himself testified that when one of his dealerships ceased to have a new car franchise, he could continue to operate that dealership to sell and service used cars. Indeed, he had kept the Lisle facility open during the period when he lacked a new car franchise for it.

Even if the facts were different, the Respondent's argument would fail as a matter of law since the Respondent had an obligation to bargain over the effects of the relocation regardless of whether the decision to relocate was itself a mandatory subject of bargaining. An employer "who relocates is required to bargain in good faith with the collective-bargaining representative of the unit employees regarding the effects of the relocation on those employees, even where *decisional bargaining is not required as a mandatory subject of bargaining*." *Sea Jet Trucking Corp.*, 327 NLRB at 544 (emphasis added); see also *Holly Farms Corp.*, 311 NLRB at 278 (while the employer did not have to bargain over the decision to integrate operations, it was required to bargain about "the various ways in which the integration might affect the employment status and wages and benefits of [employees]"); *Morco Industries, Inc.*, 279 NLRB 762, 762-763 (1986) (employer was not required to bargain over decision to relocate work from one facility to another, but nevertheless was required to bargain over layoffs connected to

relocating the work). The Respondent failed to bargain over those effects as it was required to do.

The Respondent also contends that the Union failed to request, and therefore waived, effects bargaining. That contention is not persuasive. The waiver of a right under the Act will not be found in the absence of clear and unambiguous evidence to that effect. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). Waiver of the right to bargain based on a union's failure to request bargaining will not be found where the union was not given advance notice of the change and/or where the notice presented the change as a fait accompli. *Eby-Brown Co.*, 328 NLRB 496, 571-572 (1999); *Jaydon, Inc.*, 273 NLRB 1594, 1601 (1985); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017-1018 (1982), *enfd.* 722 F.2d 1120 (3d Cir. 1983); *National Car Rental System*, 252 NLRB 159 (1980); *Gratiot Community Hospital v. NLRB*, 51 F.3d 1255, 1260 (6th Cir. 1995); *Gulf States Mfg v. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983). In this case, the Respondent did not give the Union notice of its decision to relocate the unit from the Naperville facility prior to closing that facility and telling the unit employees to report to the Lisle facility. Moreover, the Respondent presented the terms of the relocation—including the lack of minimum guaranteed hours, and the reduced health insurance and retirement benefits—as a fait accompli. It did not give the Respondent advance notice of its intent to make those changes, but rather presented the changes as final and gave no indication that it was willing to bargain in good faith on the subject. Under the precedent cited above, even assuming that the Union failed to request effects bargaining, it did not waive its right to such bargaining since the Respondent did not give advance notice of the changes and presented the changes as a fait accompli.

At any rate, the record shows that the Union did, in fact, request bargaining. In his June 23, 2009 letter to the Respondent, union official Jawor discussed the closure of the Naperville store and the relocation of unit mechanics from there to the Lisle store, then asked the Respondent to "meet to bargain over" matters relating to the resulting expansion of the bargaining unit. This was just 3 days after the Respondent notified unit employees that the Naperville facility was closed and only 1 day after the Respondent advised unit employees to report for work at the Lisle facility immediately. Although the Union's letter did not use the words "effects bargaining," I conclude that, by referencing the relocation and asking to bargain over matters relating to the expansion of the bargaining unit, the Union adequately requested bargaining over the effects of the decision to relocate the unit mechanics to the Lisle facility. Certainly, the Union's request was sufficient to preclude a finding that the Union clearly and unambiguously waived effects bargaining, even assuming, contrary to my conclusion, that the Respondent had given notice sufficient to permit a finding of waiver.

The Respondent also argues that it did not refuse to bargain, but rather was barred from doing so because it could not legally bargain with a minority Union. That argument is without merit. First, as discussed above, the unit retained its distinct identity even after the Naperville mechanics were relocated to the Lisle facility. Thus the Respondent was required to bargain regard-

<sup>20</sup> The Respondent's assertion that it was Chrysler, rather than Ed Burke, that made the decision, is contradicted not only by the record evidence, but elsewhere in the Respondent's own brief, where it states: "Mr. Burke was given a choice as to which franchises and dealerships he wanted to keep. He chose to keep the Lisle dealership because it had the most employees and was licensed to sell the most franchise lines." Brief of Respondent at Page 30.

ing the Unit in which the Union had previously demonstrated majority support, not regarding a new group that included all the mechanics already present at the Lisle dealership. Second, under applicable precedent, the Respondent would still have an obligation to bargain over the effects of the relocation even if one accepts its contention that the unit ceased to exist as a result of that relocation. See, e.g., *Comar Inc.*, 349 NLRB at 354 (even if the bargaining unit had ceased to exist as a result of the relocation of unit work, the employer would still have an obligation to bargain over the effects of that relocation).

I conclude that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to bargain with the Union concerning the effects of its temporary relocation of the unit from the Naperville facility to the Lisle facility.

#### 4. Information request

On July 8, 2009, the Union filed the initial charge, in which it alleged that the Respondent had “unlawfully withdrawn recognition from the Union and repudiated the collective-bargaining agreement.” Then, on July 9, 2009, the Union made an information request to the Respondent for all correspondence between the Respondent and Chrysler regarding the termination of the franchise for the Lisle facility, and the Respondent’s ongoing franchise agreement with Chrysler. The information request suggested that this information related to the Union’s contention that the Respondent had unlawfully repudiated the collective-bargaining agreement and committed contractual violations related to the relocation. As discussed above, the Respondent did not answer the Union’s request until March 4, 2010—approximately 8 months after it was made.

An employer’s obligation to bargain in good faith under Section 8(a)(5) of the Act, includes the obligation to furnish the employees’ bargaining representative, upon request, with information relevant to and necessary for the performance of the Union’s statutory duty as the employees’ bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967). The duty requires not only that the employer provide the information, but that it do so in a timely manner. An employer’s “unreasonable delay in furnishing . . . information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all.” *Amersig Graphics, Inc.*, 334 NLRB 880, 885 (2001); see also *Britt Metal Processing*, 322 NLRB 421, 425 (1996), *affd. mem.* 134 F.3d 385 (11th Cir. 1997); *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992).

In its brief, the Respondent does not argue that the information sought was not relevant to the Union’s charge that the Respondent had unlawfully repudiated the collective bargaining agreement upon relocating the unit from the Naperville facility to the Lisle facility. I find that the information was relevant to that charge, and in particular to the Respondent’s defense that it did not relocate the unit at all, but rather was forced by Chrysler to close the Naperville store, and therefore, to terminate the employment of the unit mechanics there. In addition, the Respondent makes no attempt to justify its 8-month delay in answering the information request. The information sought was not voluminous or complex and, on its face, should have been easy to provide within a matter of days or weeks.

I find that the Respondent unreasonably delayed providing the information sought by the Union’s July 9, 2009 information request, in violation of Section 8(a)(5) and (1).

#### C. Alleged Violations of Section 8(a)(1)

The General Counsel argues that at the time the unit employees were relocated to the Lisle store, the Respondent’s officials made various statements that constituted threats in violation of Section 8(a)(1). The record shows that on June 20, 22, and 26, after turning employees away from the Naperville dealership, officials of the Respondent informed the unit mechanics that they could work at the Lisle dealership, but that: they would no longer have union benefits; the Lisle dealership was not and would never be a union facility; and that if the unit mechanics engaged in a strike it would mean that they “quit and would not be able to collect unemployment.” For the reasons discussed above, contrary to the statements of the Respondent’s officials, the unit mechanics continued to be entitled to union benefits and representation after being temporarily relocated to the Lisle facility.

The General Counsel cites caselaw holding that an employer violates Section 8(a)(1) when it tells employees who are entitled to union benefits that they will no longer receive them, *James Heavy Equipment Specialists, Inc.*, 327 NLRB 910, 913 (1999), states that the employer is not, and will never be, a union operation, *Alpine Coal Co.*, 150 NLRB 445, 449–450 (1964), and tells employees that they will be discharged if they engage in a strike, *Insta-print, Inc.*, 343 NLRB 368, 375–376 (2004), *International Total Services*, 270 NLRB 645, 649 (1984). In its brief, the Respondent contends that the evidence does not show that its officials made the allegedly threatening statements, however, it makes no substantial argument that such statements would have been lawful if they were made. Since I conclude that the Respondent’s officials made the of statements set forth above, and since those statements are violations of Section 8(a)(1) under the precedent cited by the General Counsel, I find that a violation has been established.

I find that, in June 2009, the Respondent threatened unit employees in violation of Section 8(a)(1) by telling them that they would no longer receive union benefits, that their continued employment would be in a nonunion shop, that the shop would never be unionized, and that if the unit employees engaged in a strike their employment would be terminated and they would be unable to receive unemployment compensation.

#### D. Alleged Constructive Discharges in Violation of Section 8(a)(3) and (1)

The General Counsel argues that the Respondent constructively discharged mechanics Adams and Marjanovich in violation of Section 8(a)(3) and (1). At the time of the relocation, Adams and Marjanovich had worked for the Respondent at the Naperville store for 5 and 10 years respectively. Adams had been a union member for about 24 years and Marjanovich for about 10 years. On June 26, Ed Burke informed the unit mechanics of the conditions of their post-relocation employment with the Respondent. He stated that the employees would not be represented by the Union, that the facility would never be unionized, and that the Respondent would no longer provide

them with the terms set forth under the collective-bargaining agreement. The Respondent would, he said, not honor the unit mechanics' contractual terms, such as the 34-hour weekly pay guarantee, and the provision of health insurance and a pension plan at no cost to the employee.

After the June 26 meeting, Adams and Marjanovich both decided that they could not afford to continue their employment for Respondent under the terms being offered. During the 3 days when Adams and Marjanovich had worked at the Lisle facility they had each accumulated an average of just 4 to 5 paid hours per day. Both also required family health insurance, which the Respondent was only making available at a cost to the employee of approximately \$600 to \$800 per month.<sup>21</sup> On June 29, Adams and Marjanovich both informed the Respondent that they were declining further employment given the terms it was imposing at the Lisle facility.

"[U]nder the Hobson's Choice line of cases, an employee's voluntary resignation will be considered a constructive discharge when an employer conditions the employee's continued employment on the employee's abandonment of his or her Section 7 rights and the employee quits rather than comply with the condition." *Intercon I (Zercom)*, 333 NLRB 223 (2001), citing *Hoerner Waldorf Corp.*, 227 NLRB 612 (1976). Under this constructive discharge standard, "[e]mployees who quit work as a consequence of an employer's unlawful withdrawal of recognition from their collective-bargaining representative and unilateral implementation of changes in their terms and conditions of employment have been constructively discharged." *Goodless Electric Co.*, 321 NLRB 64, 67-68 (1996), enf. denied on other grounds 124 F.3d 322 (1st Cir. 2002), citing *Evans Service Co.*, 285 NLRB 80, 81 (1987); and *Superior Sprinkler, Inc.*, 227 NLRB 204 (1976); see also *James Heavy Equipment Specialists*, 327 NLRB at 914 (an employee who quit because of the impact that his employer's unlawful actions had on his union pension was constructively discharged). In the instant case, Adams and Marjanovich resigned their employment as a consequence of the employer's unlawful withdrawal of recognition, repudiation of the collective-bargaining agreement, and unilateral imposition of nonunion terms and conditions of employment.

The Respondent contends that constructive discharge has not been established because the record does not show that either Adams or Marjanovich attempted to organize the Lisle facility for the Union during the 3 days they worked there. This argument misses the point. As discussed above, Adams and Marjanovich were already entitled to continued union representation at the Lisle facility, and the Respondent unlawfully withdrew that recognition and made unilateral changes, then required Adams and Marjanovich to accept that unlawful conduct as a condition of continued employment. Under the *Hobson's Choice* line of cases, Adams and Marjanovich were constructively discharged when they chose to resign rather than continue employment under such circumstances.

<sup>21</sup> Lein, a unit mechanic who continued to work for the Respondent, testified that he was able to avoid the health insurance premiums at the Lisle store because he had coverage through his wife's employer.

I find that the Respondent constructively discharged Adams and Marjanovich on June 29, 2009, in violation of Section 8(a)(3) and (1) of the Act.

#### CONCLUSIONS OF LAW

1. Dodge of Naperville, Inc. and Burke Automotive Group, Inc., d/b/a Naperville Jeep/Dodge constitute a single employer for purposes of the Act and are jointly and severally liable for the violations of the Act found in this decision.

2. Respondent Dodge of Naperville, Inc. and Respondent Burke Automotive Group, Inc. d/b/a Naperville Jeep/Dodge, both individually and as a single employer, are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. Automobile Mechanics Local No. 701, International Association of Machinists and Aerospace Workers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

4. The Respondent violated Section 8(a)(5) and (1) of the Act: in June 2009 by withdrawing recognition from the Union as the exclusive collective-bargaining representative of employees in the bargaining unit during the effective period of the collective bargaining agreement; in June 2009 by repudiating the collective-bargaining agreement with the Union and unilaterally changing the terms and conditions of employment of bargaining unit employees; by failing and refusing to bargain with the Union concerning the effects of its temporary relocation of the bargaining unit; and by unreasonably delaying the provision of information sought by the Union's July 9, 2009, information request.

5. The Respondent threatened bargaining unit employees in violation of Section 8(a)(1) in June 2009 by telling them that they would no longer receive Union benefits, that their continued employment would be in a non-union shop, that the shop would never be unionized, and that if the unit employees engaged in a strike their employment would be terminated and they would be unable to receive unemployment compensation.

6. The Respondent violated Section 8(a)(3) and (1) of the Act on June 29, 2009, by constructively discharging unit employees Robert Adams and Mike Marjanovich.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular, the Respondent should be required to offer Adams and Marjanovich reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of the constructive discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union and refusing to bargain in good faith, I recommend that the Respondent be ordered to meet, on request, with the Union and bargain in good faith concerning the terms and conditions of employment

for the employees in the unit and, if an understanding is reached, reduce the agreement to writing and sign it. I also recommend that the Respondent be ordered to bargain in good faith regarding the effects of the temporary relocation of the unit employees.

I recommend that the Respondent be ordered to revoke the unilateral changes the Respondent made to the terms and conditions of employment of unit employees and restore the terms and conditions that existed under the most recent collective-bargaining agreement, until such time as an agreement is reached for a new collective-bargaining agreement or good faith negotiations result in a lawful impasse. In addition, I recommend that the Respondent be ordered to make the Unit employees whole for any losses of wages, health insurance benefits, vacation pay, pension benefits, and other benefits they may have incurred as a result of the unilateral changes, as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). The Respondent should also be ordered to remit all payments it owes to health care, pension, and other funds, with interest as provided in *Merryweather Optical Co.*, 240 NLRB 1213 (1979), and to make the employees whole for any expenses they may have incurred as a result of the Respondent's failure to make such payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). In addition, the Respondent should be ordered to continue such contributions and otherwise honor the terms of the most recent collective-bargaining agreement until it negotiates in good faith with the Union to a new contract or a bona fide impasse. *Crest Beverage Co.*, 231 NLRB 116, 120 (1977).

The General Counsel urges that the Board's current practice of awarding only simple interest on backpay and other monetary awards be replaced with the practice of compounding interest. The Board has considered, and rejected, this argument for a change in its practice. *Cadence Innovation, LLC*, 353 NLRB 703, 703 fn. 1 (2009); *Rogers Corp.*, 344 NLRB 504 (2005). I am bound to follow Board precedent on the subject. See *Hebert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Lumber & Mill Employers Assn.*, 265 NLRB 199 fn. 2 (1982), enfd. 736 F.2d 507 (9th Cir. 1984), cert. denied 469 U.S. 934 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981). Therefore, the merits of the General Counsel's argument in favor of compounding interest are for the Board to consider, not me.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.<sup>22</sup>

#### ORDER

The Respondent, Dodge of Naperville, Inc. and Burke Automotive Group, Inc. d/b/a Naperville Jeep/Dodge a single employer, Lisle, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

<sup>22</sup> 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.

(a) Failing and refusing to bargain in good faith with the Automobile Mechanics Local No. 701, International Association of Machinists and Aerospace Workers, AFL-CIO (the Union) as the exclusive collective-bargaining agent of employees in the Dodge of Naperville bargaining unit (unit employees). The bargaining unit includes all technicians, apprentices, lube rack technicians, and semi-skilled technicians who were employed at the Respondent's facility in Naperville, Illinois, (the Naperville facility) immediately prior to the June 2009 relocation of employees to the Respondent's facility in Lisle, Illinois, (the Lisle facility) but excludes all office clerical employees and guards, professional employees and supervisors as defined in the Act.

(b) Withdrawing recognition from the Union as the exclusive collective-bargaining agent of the unit employees as a consequence of the June 2009 relocation of operations and employees from the Naperville facility to the Lisle facility.

(c) Repudiating the most recent collective-bargaining agreement covering the unit employees.

(d) Telling the unit employees that they no longer work in a union shop and that the dealership will never be a union shop.

(e) Telling the unit employees that it does not recognize the Union as their collective-bargaining representative.

(f) Constructively discharging unit employees by requiring them to work without union representation and under unilaterally changed terms and conditions of employment.

(g) Making unilateral changes without notice to and bargaining with the Union regarding the terms and conditions of employment of unit employees.

(h) Refusing to meet and bargain in good faith with the Union with respect to the effects on the unit employees of the June 2009 relocation of operations and employees from the Naperville facility to the Lisle facility.

(i) Failing to provide, and/or unreasonably delaying the provision of, information requested by the Union that is relevant and necessary for the Union to fulfill its role as the collective-bargaining representative of unit employees.

(j) 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) Upon request, bargain in good faith with the Union as the exclusive collective-bargaining representative of unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Apply and restore the terms and conditions of employment that were applicable to the unit employees under the most recent collective-bargaining agreement covering the unit employees, until such time as the Union and the Respondent reach agreement for a new collective-bargaining agreement or a lawful impasse based on good-faith negotiations.

(c) Revoke the unilateral changes the Respondent made to the terms and conditions of unit employees since the unlawful repudiation of the collective-bargaining agreement.

(d) Make the unit employees whole for losses of wages and other benefits they suffered as result of the Respondent's failure

to abide by the terms of the collective-bargaining agreement, including by reimbursing employees for medical premiums, medical expenses, and other expenses they incurred as a result of such failure, with interest, as provided in the remedy section of this decision.

(e) Remit all payments to health care, pension, and/or other funds, that it was required to make under the most recent collective bargaining agreement with the Union, but which it failed to make, as set forth in the remedy section of this decision.

(f) Bargain in good faith with the Union regarding the effects on unit employees of the relocation of operations and employees from the Respondent's Naperville facility to its Lisle facility.

(g) Make the unit employees whole for any losses they suffered as a result of the Respondent's failure and refusal to bargain with the Union regarding the effects of the relocation of operations and employees from the Naperville facility to the Lisle facility.

(h) Within 14 days from the date of the Board's Order, offer Robert Adams and Mike Marjanovich full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(i) Make Robert Adams and Mike Marjanovich whole for any loss of earnings and other benefits suffered as a result of their being constructively discharged, with interest, in the manner set forth in the remedy section of the decision.

(j) 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.

(k) Within 14 days after service by the Region, post at its facilities in Lisle, Illinois, and Naperville, Illinois, copies of the attached notice marked "Appendix."<sup>23</sup> Copies of the notice, on forms provided by the Regional Director for Region 13, 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 and former unit employees employed by the Respondent at any time since June 1, 2009.

<sup>23</sup> 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."

(l) 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 2, 2010

#### 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 fail and refuse to bargain in good faith with the Automobile Mechanics Local No. 701, International Association of Machinists and Aerospace Workers, AFL-CIO (the Union) as the exclusive collective-bargaining agent of employees in the Dodge of Naperville bargaining unit (unit employees). The Dodge of Naperville bargaining unit includes all technicians, apprentices, lube rack technicians, and semi-skilled technicians who were employed at our facility in Naperville, Illinois, (Naperville facility) immediately prior to the June 2009 relocation of employees to our facility in Lisle, Illinois, (Lisle facility) but excludes all office clerical employees and guards, professional employees and supervisors as defined in the Act.

WE WILL NOT withdraw recognition from the Union as the exclusive collective-bargaining agent of the unit employees due to the June 2009 relocation of operations and employees from the Naperville facility to the Lisle facility.

WE WILL NOT repudiate the most recent collective-bargaining agreement that we entered into with the Union, and which covers unit employees.

WE WILL NOT tell unit employees that they no longer work in a union shop and that the dealership will never be a union shop.

WE WILL NOT tell unit employees that we do not recognize the Union as their collective-bargaining representative.

WE WILL NOT constructively discharge unit employees by requiring them to work without union representation and under unilaterally changed terms and conditions of employment.

WE WILL NOT make unilateral changes, without notice to and bargaining with the Union, regarding the terms and conditions of employment of unit employees.

WE WILL NOT refuse to meet and bargain in good faith with the Union with respect to the effects on the unit employees of the June 2009 relocation of operations and employees from the Naperville facility to the Lisle facility.

WE WILL NOT fail to provide and/or unreasonably delay providing, information requested by the Union that is relevant to

and necessary for the Union to fulfill its role as the collective-bargaining representative of unit employees.

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

WE WILL, upon request, bargain in good faith with the Union as the exclusive collective-bargaining representative of unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL apply and restore the terms and conditions of employment that were applicable to the unit employees under the most recent collective-bargaining agreement covering the unit employees, until such time as we reach agreement with the Union for a new collective-bargaining agreement or a lawful impasse based on good-faith negotiations.

WE WILL revoke the unilateral changes we made to the terms and conditions of unit employees since the unlawful repudiation of the collective-bargaining agreement.

WE WILL make the unit employees whole for losses of wages and other benefits they suffered as a result of our failure to abide by the terms of the collective-bargaining agreement, including by reimbursing employees for medical premiums, medical expenses, and other expenses they incurred as a result of such failure, with interest.

WE WILL remit all payments to health care, pension, and/or other funds, that we were required to make under the most recent collective-bargaining agreement with the Union, but which we failed to make.

WE WILL, upon request by the Union, bargain in good faith regarding the effects on unit employees of the relocation of operations and employees from the Naperville facility to the Lisle facility.

WE WILL make the unit employees whole for any losses they suffered as a result of our failure and refusal to bargain with the Union regarding the effects of the relocation of operations and employees from the Naperville facility to the Lisle facility.

WE WILL, within 14 days from the date of this Order, offer Robert Adams and Mike Marjanovich full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Robert Adams and Mike Marjanovich whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

DODGE OF NAPERVILLE, INC. AND BURKE  
AUTOMOTIVE GROUP, INC. D/B/A NAPERVILLE  
JEEP/DODGE