UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AUTO NATION, INC. AND
VILLAGE MOTORS, LLC D/B/A
LIBERTYVILLE TOYOTA

And **13-CA-063676**

AUTOMOBILE MECHANICS' LOCAL NO. 701, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO

COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Libertyville Toyota suspended and discharged car painter Jose Huerta due to his support for the organizing campaign of Machinists Local 701 in violation of Section 8(a)(3), and not due to its asserted reasons that Huerta lost his driver's license and then abandoned his job. Respondent's discriminatory motive for taking these actions definitively was established by both its disparate treatment of Huerta in comparison to other service department employees who previously lost their driver's licenses, as well as the pretext of Respondent's stated reason for discharging Huerta.

However, the Judge here did not even evaluate the actual evidence introduced at the hearing regarding Respondent's lenient approach to employees who previously lost their licenses, in comparison to its treatment of Huerta. Instead, the ALJ applied his own, novel legal standard to the issue of disparate treatment—whether Respondent's actions towards Huerta constituted a "substantial" or "suitable" accommodation. That approach constituted an error in law, since the Board standard for evaluating disparate treatment evidence long has been comparing an employer's treatment of a discriminatee with other employees who previously

engaged in the same or similar conduct. The Judge did not conduct this evaluation in his decision.

In addition, the ALJ did not properly evaluate the legal issue of whether Respondent's asserted reason for discharging Huerta—job abandonment—was a pretext. The decision contains two errors in this regard. First, the Judge mistakenly held that Huerta did not reasonably conclude he was discharged, even though he received not one, but two, letters authorized by Respondent advising him his employment could not and would not be continued due to the loss of his driver's license. The first letter stated that Huerta's Motor Vehicle Report showing his license had been suspended "would prevent 2280-Libertyville Toyota from…continuing your current employment." The second letter stated to Huerta that a "continuation of employment…will not be made at this time." The signatory on both letters was "2280—Libertyville Toyota." Inexplicably, the ALJ found that Huerta logically could not have concluded Libertyville Toyota terminated him from these letters, but instead should have confronted his supervisors and questioned them as to why he got them. Like many other discriminatees in prior Board cases, Huerta reasonably concluded here that his employer discharged him and the ALJ's conclusion was erroneous.

Second, the Judge completely disregarded Respondent's conduct leading up to Huerta's termination, specifically the admitted failure of any Respondent supervisor to contact Huerta before deciding he had abandoned his job. In this regard, the ALJ failed to apply Board precedent holding that the burden of resolving confusion or ambiguity about an employee's job status falls on the employer, not the employee. Furthermore, the Judge ignored Board law that an employer is obligated to show it made attempts to confirm with an employee the lack of intent to return to work prior to discharging the employee for job abandonment. Because Respondent

here admittedly did not do so, it could not refute the pretext of its reason for terminating Huerta, and thereby could not sustain its *Wright Line* burden of showing it would have discharged him absent his Union activity.

Accordingly, pursuant to Section 102.46 of the Board's Rules and Regulations, the Acting General Counsel, through his attorney Charles Muhl, files this Brief in Support of Exceptions to the August 16, 2012, ALJ Decision. The Acting General Counsel respectfully requests that the Board reject the Judge's proposed order and instead find that Respondent unlawfully suspended and terminated Jose Huerta in violation of Section 8(a)(3) due to his support for Machinists Local 701 during an organizing campaign.

This brief is organized into sections summarizing the Judge's decision, then setting forth Counsel for the Acting General Counsel's legal arguments, including that the ALJ erred by holding that Respondent did not engage in disparate treatment of Jose Huerta due to his Union activity and erred by finding Respondent's asserted reason for terminating Huerta was not a pretext. The brief concludes with an additional legal argument as to why special remedies are appropriate in this case, given the impact that Respondent's discharge of Huerta had on the Union's organizing campaign and Auto Nation, Inc.'s recidivism with respect to committing unfair labor practices in response to union organizing campaigns at its dealerships located throughout the country.[1]

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[1] In this Brief in Support of Exceptions, the Administrative Law Judge will be referred to as "the ALJ" or "the Judge"; Auto Nation, Inc. and Village Motors, LLC, the companies doing business as Libertyville Toyota, will be referred to as "Respondent"; and the National Labor Relations Board will be referred to as "the Board". Citations to the ALJ's Decision will be referred to as "ALJD" followed by the page and line numbers specifically referenced. With respect to the record developed in this case, citations to pages in the transcript will be designated as "Tr." followed by the page number. The Acting General Counsel's exhibits will be designated as "GC" followed by the exhibit number. Respondent's exhibits will be designated as "R" followed by the exhibit number.

I. THE ALJ'S DECISION

The Complaint in this case alleged Respondent committed numerous violations of Section 8(a)(1) during an August 23, 2011, meeting with service department technicians called after the dealership learned of the employees' union organizing campaign. It also alleged Respondent violated Section 8(a)(3) by suspending and terminating Jose Huerta, one of the principal employee supporters of the campaign, almost immediately after the meeting at which Respondent committed those unfair labor practices.

The *Wright Line* standard applicable to the Section 8(a)(3) allegations requires Counsel for the Acting General Counsel to establish, by a preponderance of the evidence, that Huerta's protected activity was a motivating factor in Respondent's suspension and discharge of him. *Wright Line*, 251 NLRB 1083, 1089 (1980); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401-402 (1983). To meet this initial burden, the Acting General Counsel must show that Huerta engaged in union activity, Respondent knew of the union activity, and the suspension and discharge were motivated—at least in part—by that activity. *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984). A discriminatory motive is shown where an employer's proffered explanation for the adverse action is a pretext. *Wright Line*, 251 NLRB at 1088, fn12. Evidence of pretext includes the employer's disparate treatment of the alleged discriminatee, *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999), as well as offering a non-discriminatory explanation that simply is false, *Cincinnati Truck Center*, 315 NLRB 554, 556-57 (1994). After Counsel for the Acting General Counsel meets his initial burden, as was done here, the burden then shifts to Respondent to present evidence that it would have taken the same actions against Huerta in the absence of his union activity. *United Rentals*, 350 NLRB 951, 951-52 (2007); *Wright Line*, 251 NLRB at 1089. Respondent's burden on rebuttal is not met by showing merely

that it had a legitimate reason for its action. Rather, it "must demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984).

In this case, Judge Shamwell properly concluded that Respondent repeatedly violated Section 8(a)(1) at the August 23 meeting with employees when senior Auto Nation officials Brian Davis and Jonathan Andrews threatened to blacklist as well as demote employees if they selected the Union to represent them; told employees it would be futile to select the Union; and impliedly promised employees a wage increase if they did not select the Union. (ALJD pp. 42-51) Based in part on this unlawful conduct, the ALJ also properly found that the Acting General Counsel met his initial *Wright Line* burden with respect to Respondent's suspension and discharge of Huerta. (ALJD p. 53, lns 11-28) Specifically, the Judge found that Huerta was an active supporter of the Union cause (ALJD p. 53, lns 15-16); dealership management suspected Huerta's involvement in the Union's organizing campaign as early as August 15 and had that suspicion confirmed by an anonymous phone caller on August 23 (ALJD p. 53, lns 11-15); and Respondent's animus towards the Union's organizing campaign and Huerta's involvement in it was demonstrated by the multiple Section 8(a)(1) violations arising out of the August 23 meeting (ALJD p. 53, lns 20-28).

From there, however, the Judge improperly concluded that Respondent met its shifting *Wright Line* burden of demonstrating by a preponderance of the evidence that it suspended and discharged Huerta for purely business reasons, and not due to its hostility towards his Union activity and support. As noted above, this conclusion was erroneous as a matter of law because of the Judge's improper evaluation of disparate treatment and the pretext of Respondent's

contention that Huerta abandoned his job. A proper legal evaluation of the evidence presented establishes that Respondent did not meet its *Wright Line* burden.

II. THE JUDGE ERRED BY CONCLUDING THAT RESPONDENT DID NOT TREAT JOSE HUERTA DISPARATELY IN COMPARISON TO OTHER EMPLOYEES WHO PREVIOUSLY LOST THEIR DRIVER'S LICENSES. (Exceptions 1-7)

Disparate treatment evidence long has been a cornerstone piece to proving under *Wright Line* the pretext of an employer's reason for discharging an employee. This case is no different. At the hearing, Counsel for the Acting General Counsel introduced numerous examples of Respondent's previous, standard method of dealing with employees who lost their driver's licenses. These examples showed that Respondent accommodated the employees, and allowed them to continue working, by eliminating their driving duties, rather than suspending them and then discharging them as it did Huerta. Yet, in his legal analysis regarding Huerta's suspension and discharge, the Judge simply did not evaluate this evidence at all. The ALJ sidestepped it entirely by improperly addressing only whether Respondent had given Huerta a "suitable" or "substantial" accommodation. The Judge asked and answered the wrong question. Disparate treatment required an analysis of whether Huerta received the same or similar accommodation that was given to other employees who lost their driver's licenses in the past, not whether Respondent, as a subjective matter, gave him a substantial or suitable accommodation. Accordingly, the Judge's decision cannot stand.

A. The Judge's Evaluation of Disparate Treatment Using a "Substantial/Suitable Accommodation" Was Incorrect as a Matter of Law. (Exceptions 5 and 6)

Rather than evaluate the Acting General Counsel's disparate treatment evidence, the Judge instead explained his view that Respondent provided a "substantial" and "suitable" accommodation to Huerta. (ALJD p. 54, lns 25-41; p. 55, lns 1-12) He based this finding on the fact that Respondent did not immediately terminate Huerta upon learning that he had lost his driver's license, even though Huerta had not reported it to management; tacked on two additional days to his original suspension, corresponding with a scheduled court appearance, before he had to report back on the status of his license; and let him report back on his license status prior to when his license had been definitively reinstated. However, whether or not this constituted a "substantial" or "suitable" accommodation is irrelevant to the legal question presented here. The question that needed to be answered by the Judge was whether this accommodation was different from how Respondent handled employees in the past who lost their driver's licenses. Ironically, the Judge's own description of Respondent's alleged accommodation to Huerta answers that question and plainly establishes that it was not the same or as substantial as the prior accommodations made by the dealership to other employees.

In case after case, the Board has adhered to the definition of disparate treatment as treating a discriminatee differently/more harshly than other employees who engaged in the same or similar conduct in the past. See, e.g., *Carpenters Health & Welfare Fund*, 327 NLRB 262, 265-66 (1998) (disparate treatment established where employer offered no evidence that it previously discharged other employees, as it had the discriminatee, for violating telephone policy); *Woodlands Health Center*, 325 NLRB 351, 362-64 (1998) (disparate treatment shown where other employees who engaged in similar or worse conduct where treated more leniently by

employer); *Ellicott Development Sq.*, 320 NLRB 762, 773-76 (1996) (disparate treatment analysis is whether employer treated other employees more leniently than a discriminatee who engaged in the same or similar conduct); *U.S. Gypsum Co.*, 259 NLRB 1105, 1105-07 (1982) (General Counsel's burden is to show a pattern of treatment by an employer "clearly at odds" with the treatment of the discriminatee). Yet nowhere in the decision in this case does the Judge conduct this legal analysis. The ALJ does not discuss how Respondent treated other employees who lost their driver's licenses.[2] The Judge does not detail how the Acting General Counsel's evidence showed that roughly one in four employees lost their driver's licenses in the past seven years, but were permitted by Respondent to continue working. The ALJ does not compare Respondent's treatment of Huerta to this past practice for employees who lost their driver's licenses.

Instead, the Judge gave his own, subjective analysis as to whether Respondent had provided a "substantial" or "suitable" accommodation to Huerta, by solely looking at Respondent's conduct towards Huerta in isolation. The ALJ concluded that Respondent "chose to accommodate Huerta in a way [it] thought fit and appropriate for the circumstances." (ALJD p. 55, lns 7-9) Even if this was accurate, it is irrelevant. Board precedent does not require the Judge to decide whether the accommodation provided was "substantial," "suitable," or "fit and appropriate for the circumstances." Rather, the proper legal analysis that should have been completed here is whether Respondent treated Huerta differently than other employees who likewise had lost their driver's licenses. Because the ALJ did not do so, the Board should apply

[2] The ALJ discussed comparables briefly at ALJD p. 8, fn 14, when detailing the testimony of supervisor Dave Borre, but does not address any of the Acting General Counsel's documentary evidence regarding disparate treatment in the decision.

the correct legal standard here, find that the evidence established Respondent treated Huerta more harshly than other employees who lost their licenses, and conclude that this disparate treatment proved Respondent's discriminatory motive for suspending and discharging Huerta due to his support for the Union's organizing campaign.

B. The Judge Did Not Evaluate the Acting General Counsel's Evidence of Disparate Treatment. (Exceptions 5 and 7)

Inappropriately framing the legal question on disparate treatment enabled the ALJ to ignore, in its entirety, the evidence establishing Respondent's past accommodations to employees who lost their driver's licenses. The Acting General Counsel introduced a plethora of Respondent's own documents establishing definitively that the dealership treated other employees who lost their driver's licenses more leniently than it did Huerta. This ignored evidence showed a lengthy pattern of accommodations to employees that involved rescinding any driving duties the employees had once they lost their licenses. Respondent accomplished this by either having the employee execute a non-driving waiver relinquishing all driving duties or by transferring the employee to a non-driving position. In contrast, it is undisputed that Respondent's accommodation to Huerta, as described fully by the Judge, did not include taking away his extremely limited driving duties or moving him to another position where he did not have to drive. Respondent never offered Huerta an accommodation that would have permitted him to continue working, as it previously did on a glut of occasions to other employees not involved in the Union's organizing campaign.

The parties agree, and the Judge found, that Respondent has in place at Libertyville Toyota a "Vehicle Usage Safety Requirements" policy contained in the Auto Nation 2011 Associate Handbook. (ALJD p. 51, lns 33-35, R 1) That policy requires employees who drive

customer vehicles to "[p]ossess a valid driver's license for the state of residency and the type of motor vehicle driven…" (GC 5, p. 1) The policy also requires employees to notify their direct supervisor immediately of any "criminal vehicular conviction within the past one year" and "current suspension, revocation, expiration or cancellation of driving privileges." (GC 5, p. 1) The failure to comply with this policy subjects an employee to disciplinary action, up to and including termination. (ALJD p. 52, lns 9-16; GC 5)

Despite the clear requirements in the policy, supervisors at Libertyville Toyota, including General Manager Taso Theodorou and his subordinate, Service Department Director David Borre, repeatedly made exceptions for employees in driving positions who had their driver's licenses suspended. This included numerous occasions when employees made a "conscious decision" not to report the loss of their licenses to management. (ALJD p. 52, ln 30) These continuous accommodations are demonstrated by Respondent's own documents, including 1) non-driving waivers given to employees (GC 6); Respondent's self-prepared summary chart detailing numerous employees who had flunked their MVRs, but were permitted to continue working (GC 7); a time off request form approved by Theodorou for an employee in lieu of a suspension (GC 9); and annual MVR screening reports showing that exceptions were made for other employees due to job tenure similar to Huerta's 15-year career (GC 10).

In total, this evidence, ignored by the ALJ in his legal analysis regarding disparate treatment, concretely establishes the forgiving attitude that Libertyville Toyota took to employees having their licenses suspended. No less than 11 employees in a department of roughly 40 failed their motor vehicle report because they did not have a valid driver's license from 2005 to 2011 but continued working. Like Huerta, these employees could not have reported their lost licenses to management, since the annual motor vehicle report was run

automatically by Auto Nation on an employee's hiring date anniversary. Ten employees were given non-driving waivers, signed off on by both Theodorou and Borre, including at least one after Huerta was terminated.

In his decision, the ALJ accepts the claim of Respondent, through Theodorou, that the General Manager always suspended employees immediately when he learned that they had lost their driver's licenses. If it actually were the case that it always did this, Respondent could have introduced documentary evidence at the hearing of the alleged suspensions issued by Theodorou during his tenure. However, it did not do so. Instead, the Acting General Counsel's documentary evidence demonstrated that Respondent did not always immediately suspend an employee who lost a driver's license, with two examples extremely close in time to Huerta's suspension. First, employee James Boehart, a technician who failed his annual MVR screening on August 3, 2011, was not suspended. (Tr. 210; GC 7) Theodorou was aware of all such annual MVR failures, including Boehart's, yet the employee remained "Active" due to the fact that he was approved to take four days of vacation to get his license situation resolved. (GC 7 and 9) Second, following Huerta's suspension and discharge, Theodorou again made an immediate accommodation to another employee, Sales Associate Ivan Jasso. Theodorou executed a non-driving waiver for Jasso on October 24, 2011. (GC 6, p. 1)

Beyond this, even employees who Respondent immediately suspended ultimately were given reprieves and permitted to continue working. The most concrete example of this disparate treatment is former porter Enrique Tovar who, like Huerta, worked for 15 years at the dealership. (Tr. 201) Unlike Huerta, though, driving was the entirety of Tovar's job duties. As a porter, Tovar was responsible for driving customers to and from their homes while their cars were repaired, picking up car parts, and moving cars around the dealership. (Tr. 202) Tovar lost his

license, failed to report it, and then flunked his annual MVR in October 2007; the dealership gave him a non-driving waiver in December 2007. (GC 6, p. 3, GC 7) Tovar passed his MVR the next year, then lost his license again, failed to report again, and flunked again in October 2009; Respondent gave him a second non-driving waiver. (GC 6, p. 2; GC 7) Every year thereafter, Tovar has failed his annual MVR, including in October of 2011 after Huerta had been suspended and discharged by the Respondent. (Tr. 202; GC 7) Tovar did not report the fact that he lacked a driver's license to Borre in October 2011. (Tr. 203) He could not have reported the earlier failures either, since they were a part of the dealership's annual MVR screening. Ultimately, Theodorou and Borre moved Tovar to the Parts Warehouse where he would have no driving responsibilities, the third accommodation made to him during his job tenure. (Tr. 201, 205; GC 6, pp. 2-3, GC 7) The dealership accommodated Tovar, at least in part, because Tovar was "a long-term employee." (Tr. 205) But long-term employee Huerta received no such accommodation, even once—because he was responsible for Union organizing.

Like Tovar, employee George Gutierrez also was given an accommodation due to his job tenure. Respondent's records of annual MVR screenings for March 2009 show that Gutierrez failed his screening. (GC 10, p. 4). The dealership responded with "[e]xception made due to tenure. MVR waiver signed. Associate to detail cars only. No driving." *Id*. Again, because he failed the annual MVR screening which is automatically run by Auto Nation in the employee's anniversary month, Gutierrez could not have reported his lack of driver's license to the dealership. This exception for Gutierrez was continued in both 2010 and 2011. (GC 10, see reports for March 2010 and 2011.)

Borre likewise signed off on non-driving waivers to multiple employees who were in driving positions, including Casey Britton (mechanic who drove off lot), Mario Lopez (detailer

who had to pull vehicles into the shop from the dealership parking lot), and Luis Cruz (technician moved to the parts warehouse). (Tr. 206-209; GC 6, pp. 4-6) Libertyville Toyota provided such waivers going all the way back to at least November 2005. (GC 6, pp. 7-10) Of course, they did not offer such a waiver to Huerta, despite the fact that his driving duties could only be described as minimal compared to Lopez's and far less substantial than Tovar's.

The summary chart prepared and submitted by Auto Nation Vice President Brian Davis during the Board's investigation of the Machinists' charge and introduced at the hearing confirms the dealership's lenient approach to enforcing the driver's license policy. (GC 7) The chart demonstrates that Matthew Culpeper worked for two additional years after first failing an MVR in 2006, and another year after again failing in 2010. It also shows that Mere Tellez failed his MVR in 2008, but continued working for three years. Employee Rogaciano Rogel was permitted to work an additional year after first failing his MVR in January 2007. Russell Ball worked for five years after first failing the MVR in 2006. Adrian Basich, a supervisor and Theodorou's predecessor, failed his MVR in three consecutive years from 2004 to 2006, before Respondent offered him a non-driving waiver. (GC 7 and GC 6, p. 10) Employee Marcin Kaleta was permitted to work another year after failing his MVR in 2005.

Finally, technician Guadalupe Montoya also was accommodated on two occasions, after his license was suspended twice back in 2003 and 2004 for three to six months each. (Tr. 111, 134) He reported these suspensions to then Service Director Ben Mannella (whose position Borre now occupies), and Mannella told him it was ok, he could keep his job, but he could not drive on the dealership site or leave the lot with any car that was not his. *Id*. Montoya was not disciplined for these two losses of his license. (Tr. 111)

Despite the overabundance of exceptions to the driver's license requirement, neither Theodorou nor Borre offered such an accommodation to Huerta at any point prior to either suspending him or terminating him for job abandonment. The ALJ's own detailed description of the "suitable" accommodations Respondent gave to Huerta do not include a non-driving waiver, transfer to another position with no driving responsibilities, or other method of eliminating his driving duties. (ALJD p. 54, lns 25-41, p. 55, lns 1-2) It only consisted of not terminating Huerta immediately, extending his unpaid suspension two days so he could attend a court hearing, and not requiring him to have his license restored before reporting back. The bottom line is Respondent did not give him the same accommodation as it had other drivers.

Based upon Board precedent, the proper inference for the ALJ to draw here was that Respondent treated Huerta differently than many other employees who also had their drivers' licenses suspended, because it had learned that he was one of the employees behind the Union's organizing campaign. The Board's decision *Golden State Food Corp.*, 340 NLRB 382, 384-86 (2003) is particularly instructive in this regard. In that case, a warehouse and distribution company suspended and then terminated one of its drivers for failing to have a valid Commercial Driver's License in the state in which he was employed, contrary to the company's licensing requirements. In finding the suspension unlawful, the Board noted the company's failure to demonstrate that it had ever disciplined any other employee for having a CDL from the wrong state. The Board then concluded that the discharge of the employee likewise was unlawful, as a "continuation of its plan to 'get' him because of his union activities." *Id*. at 385. While the Board agreed with the ALJ's conclusion that the employee's lack of a proper license "may well have justified discipline," it concluded that the employer in the past had demonstrated a "lackadaisical attitude towards its employees' driving records." *Id*. at 385-86. This evidence

established that the employer simply seized on the employee's failure to meet its licensing requirements as a pretext to discharge the employee. This case involves the same lackadaisical attitude of Libertyville Toyota towards its driver's license requirement, until Union supporter Huerta's license was suspended. Accordingly, the situation with respect to Huerta should produce the same result as in *Golden State,* a finding that he was unlawfully suspended and discharged.

Based upon the described evidence and Board precedent, the Judge should have concluded that Respondent's disparate treatment of Jose Huerta established its discriminatory motive in suspending and discharging him. Respondent strictly enforced its license requirement with Huerta to squash the burgeoning Union organizing campaign. Instead, the ALJ chose not to address the Acting General Counsel's evidence of disparate treatment at all in his legal analysis. That evidence warranted the finding that Respondent did not meet its *Wright Line* burden of showing it would have suspended and discharged Huerta absent his union support.

III. THE JUDGE INCORRECTLY RULED AS A MATTER OF LAW THAT RESPONDENT'S JUSTIFICATION OF JOB ABANDONMENT FOR DISCHARGING HUERTA WAS NOT A PRETEXT. (Exceptions 3-4, 8-10)

The ALJ compounded the legal error on disparate treatment with his evaluation on the question of whether Respondent's stated justification for terminating Huerta—job abandonment—was a pretext. The legal conclusion was erroneous in two manners. First, the Judge erred in finding that Huerta could not have reasonably concluded he was discharged, despite getting not one but two letters from "2280—Libertyville Toyota" telling him his employment could not be continued due to his suspended driver's license. Second, and as required by Board precedent, the Judge failed to assign the burden of communicating about the

confusion concerning Huerta's job status on Respondent, instead of Huerta; this led to the ALJ's accordant failure to conduct any evaluation of the conduct of Respondent's supervisors before they discharged Huerta for job abandonment. It is undisputed that no supervisor contacted Huerta to determine what had occurred during his suspension prior to terminating him for job abandonment, thereby establishing the pretext of that stated reason. Accordingly, the Board should not adopt the Judge's decision.

A. The Judge Erred By Holding that Huerta Did Not Reasonably Conclude Respondent Terminated Him. (Exceptions 8-9)

The fact of discharge does not depend on the use of formal words of firing. *North American Dismantling Corp.* 331 NLRB 1557, 1557 (2000) (employees reasonably concluded they had been conditionally discharged when supervisor told them they should leave and find another job if they would not accept lower wage scale), citing *Hale Mfg. Co.*, 228 NLRB 10, 13 (1977) (employee reasonably concluded he had been terminated after supervisor told him he did not need to pay for a stamp so that his paycheck could be mailed to him); see also *Apex Cleaning Service*, 304 NLRB 983, 983 fn. 2, 986 (1991) (employees reasonably thought they were discharged after supervisor confiscated keys necessary to their work and ordered them off the premises under threat of arrest); *Ridgeway Trucking Co.*, 243 NLRB 1048, 1049 (1979) (ordering employees to leave the premises if they did not intend to work). A discharge has occurred if the words or action of the employer "would logically lead a prudent person to believe his [or her] tenure has been terminated." *Id*., citing *NLRB v. Trumbull Asphalt Co.*, 327 F.2d 841, 843 (8th Cir. 1964). In making the determination concerning whether an employee reasonably concluded he or she was discharged, the employer's failure to dispel an employee's reasonable conclusion is a factor. *Id*. at 1558.

In this case and accepting the facts as the ALJ found them, the Judge erroneously held as a matter of law that Huerta did not reasonably conclude he had been discharged by the dealership. The ALJ's decision details how Huerta received two letters from Auto Nation contractor Sterling Infosystems, Inc. almost immediately after Respondent suspended him. (ALJD p. 5, lns 31-35; p. 6, lns 1-25) The first letter included a copy of a report showing that his driver's license had been suspended and stated that the information in that report "would prevent 2280-Libertyville Toyota from…continuing your current employment." (GC 2) The letter further stated that, if he did not dispute that his license had been suspended within five days, "we will assume that you no longer wish to pursue employment with us" and was signed "2280-Libertyville Toyota." The second letter, sent after the expiration of the five days, stated that a "continuation of employment…will not be made at this time." (GC 3) The only party identified on the letters was "Libertyville Toyota," not Sterling.

Despite this evidence, the Judge incorrectly ruled that Huerta "should have gone back to" his immediate supervisor, Dave Borre, after receiving the Sterling letters, because he "should have recognized" that they were form letters which had not come from Theodorou or Borre. (ALJD p. 55, lns 26-33) Both letters advised Huerta that his employment would not be continued as a result of the enclosed report showing his license had been suspended. Huerta did not dispute that his license had been suspended, so he had no need to contact anyone to contest the report. The signatory on both letters was "Libertyville Toyota," not Sterling. Based upon these facts, Huerta reasonably concluded he was discharged and would have no reason to contact his supervisors. Even Barbara Sauvain, Vice President of Operations Integration for Sterling, ultimately conceded that the second letter would give the impression to a current employee, as it did to Huerta, that his or her employment had ended. (Tr. 229-31) The totality of these facts is

far more conclusive in demonstrating the logic of Huerta's belief that he had been terminated than a supervisor indicating he would mail an employee his paycheck, which the Board, in *Hale Mfg.*, supra, found sufficient to demonstrate an employee's reasonable conclusion he was discharged.

Moreover, the Judge inexplicably states that Huerta's reasons for not getting in touch with his supervisors on or before September 14 were "not articulated on the record." (ALJD p. 55, lns 43-44) Huerta did explain the reason, and it was quite simple. He thought he was discharged. (ALJD p. 5, lns 31-35; p. 6, lns 1-25) An employee in Huerta's situation who logically believed he had been discharged had no reason to contact Theodorou or Borre, or to show up at the dealership on September 14 to discuss his license situation. It makes no difference, as the Judge relies on, that Huerta and Borre previously had "got along well" together. Respondent had never before sent Huerta two letters telling him he was discharged.

In addition, the ALJ even seems to take offense to Huerta, through Machinists Local 701, filing an unfair labor practice charge to challenge his suspension and termination and then filing an unemployment benefits claim with the State of Illinois and "taking it upon himself to declare himself discharged." (ALJD p. 55, lns 43-47) In the first place, filing a ULP charge is protected conduct under the Act, not "unwise" or "illogical" when you have been suspended and discharged almost immediately after your employer learned of the Union organizing campaign you supported. In the second place, Huerta did not file for unemployment benefits and thereby declare himself discharged. That is putting the cart before the horse. Huerta reasonably thought he was discharged after receiving the letters attributed to "Libertyville Toyota" and, as a result of those letters, filed for unemployment benefits. Filing for unemployment benefits when an

individual has been terminated is not "unwise" or "illogical" either, since it is another legal right an employee has and a method to replace lost income due to the loss of employment.

For all these reasons, the ALJ's conclusion that Jose Huerta did not reasonably conclude he was discharged by Respondent is an error as a matter of law.

B. The Judge Erred by Failing to Apply Board Law Requiring Respondent to Demonstrate It Attempted to Contact Huerta Before Terminating Him for Job Abandonment. (Exceptions 8, 10)

By focusing solely on and criticizing Huerta's conduct, the ALJ did not address the actions of his superiors, Theodorou and Borre, during the period of time from when they suspended him on August 26 and when they terminated him on September 21. Even a cursory review of these facts establishes that the supervisors had clear reason to believe that Huerta thought he had been discharged. After his suspension, Huerta unexpectedly filed for unemployment benefits and also unexpectedly did not report back to Respondent on September 14. Nonetheless, Theodorou and Borre avoided contacting him to resolve the confusion and instead waited until sufficient time had passed so that they could terminate him for job abandonment. Where an employer does not contact or attempt to contact an employee prior to terminating the employee for job abandonment, the Board, unlike the ALJ, has ascribed a discriminatory motive to the discharge. Moreover, the Judge inappropriately placed the burden of resolving the ambiguity in this situation on Huerta, when Board precedent required him to place it upon Respondent. It was Theodorou and Borre who were legally responsible for contacting Huerta before they terminated him for job abandonment. It is undisputed that neither of them did so. Thus, the ALJ erred by concluding that Respondent's stated reason for discharging Huerta was not a pretext.

Board precedent makes clear in case after case that, prior to terminating an employee for job abandonment, an employer must contact the employee to confirm that the employee indeed does not intend to return to work. The Board's decision in *Fresh & Easy Neighborhood Market, Inc.*, 356 NLRB No. 85, slip op. at *25-*27 (January 31, 2011) sets forth the steps an employer should take to terminate lawfully an employee for job abandonment. In that case, an employee was absent from work for four shifts without calling in, thereby violating the employer's no-call/no-show policy and making the employee eligible for termination. Rather than immediately terminating this employee for job abandonment, the employer instead made unsuccessful efforts to reach the employee. See also *Cobb Mechanical Contractors*, 356 NLRB No. 96, slip op. at *2, fn. 3 (Feb. 15, 2011) (finding employer's refusal-to-hire a union supporter lawful and that employer met its *Wright Line* burden by showing "it twice tried in good faith to phone him about employment but received a message that [the employee's] phone was disconnected"); *Banktek West, Inc.*, 344 NLRB 886, 891, 893 (2005) (finding termination for job abandonment a pretext and unlawful where employer tried once unsuccessfully to call employee, but then made no other attempt to do so before sending discharge letter); *Hale Mfg.*, supra (no supervisor or any authorized representative of the employer ever called any of the employees to ask that they return, establishing discriminatory motive).

Moreover, the Board definitively has assigned the burden of resolving any confusion about job abandonment on the employer, not the employee, as stated in *Apex Cleaning Service*:

> The employees in this case reasonably believed that they had been discharged under an application of the standard set forth in *Ridgeway Trucking Co.*, 243 NLRB 1048 (1979), enfd. 622 F.2d 1222 (5th Cir. 1980). In this regard, see *Brunswick Hospital Center*, 265 NLRB 803, 810 (1982), in which the Board affirmed the following statement in the judge's decision: In determining whether or not a striker has been discharged, the events must be

> viewed through the striker's eyes and not as the employer would have viewed them. The test to be used is whether the acts reasonably led the strikers to believe they were discharged. ***If those acts created a climate of ambiguity and confusion which reasonably caused strikers to believe that they had been discharged or, at the very least, that their employment status was questionable because of their strike activity, the burden of the results of that ambiguity must fall on the employer.***

304 NLRB at 983, fn. 2 (emphasis added).

In this case, Respondent supervisors Theodorou and Borre admittedly did not contact Huerta in any manner prior to terminating him for job abandonment. They deliberately failed to contact him despite the ambiguity and confusion caused by their knowledge that Huerta had filed for unemployment compensation and then did not report back to them as expected on September 14. Board precedent makes the resulting legal conclusion clear. Respondent's lack of contact was caused by its desire to seize the moment and terminate Huerta due to his Union support, meaning its stated justification of job abandonment for the discharge is a pretext.

That ambiguity and confusion were present here was not disputed. Both Theodorou and Borre admitted at the hearing to being surprised by Huerta's unemployment compensation filing. Theodorou stated that he learned of Huerta's unemployment claim on September 4, he was involved in handling such claims, and he found Huerta's claim to be "very odd" and something that the dealership needed to follow up on. (Tr. 316, 346-47) Borre likewise was "shocked" when he learned of Huerta's unemployment compensation claim. (Tr. 390, 392) That collective surprise undoubtedly was due to the fact that workers who have lost their jobs are the ones who file for unemployment benefits. Finding Huerta's conduct to be very odd and shocking is a clear acknowledgment that the unemployment compensation claim demonstrated confusion and/or an ambiguity about Huerta's conduct. Nonetheless, despite the shocking and very odd claim,

neither Theodorou nor Borre called Huerta to ask him why he filed for unemployment or why he thought he had been terminated. Then Theodorou and Borre were presented with a second unexpected event indicating confusion on Huerta's part regarding his employment status, when Huerta did not report back to them on September 14 as initially planned. Once again, neither supervisor tried to contact him, even though the failure to report confirmed that the initial unemployment compensation claim was indicative of Huerta thinking Respondent had discharged him.

When did Respondent finally contact Huerta? Not until weeks after it had terminated Huerta due to job abandonment. When Borre did get around to making the call, he did not ask Huerta why he filed an unemployment claim. He did not ask him why Huerta did not call Borre prior to September 14. He did not ask Huerta why he did not report to the dealership on the 14th. He did not ask him if he had gotten his driver's license situation rectified. He did not ask him if he ever intended to come back to work. He did not notify Huerta that he had been terminated for job abandonment on September 21, even though Respondent never sent Huerta a written confirmation that it had done so. No, Borre called Huerta weeks after the September 14 call-back date simply to tell him he needed to come in to pick up his tools and vacation pay, as well as to drop off his uniforms. Those questions were not asked because Respondent had what it wanted—the Union supporter gone.

As prior Board cases dictate, the burden of clarifying the confusion and ambiguity regarding Huerta's filing of the unemployment benefits claim and his failure thereafter to report on September 14 was on the Respondent here. The Judge concluded that Respondent lawfully discharged Huerta for job abandonment not by analyzing Respondent's actions leading to the termination, but instead by improperly focusing on Huerta's conduct. The ALJ erred by placing

the burden of contact on Huerta and then chastising him for not calling Borre after he received the termination letters. Board law places the burden of contact here on the dealership. The admitted fact that no supervisor contacted Huerta prior to terminating him for "job abandonment" on September 21 proves that Respondent's stated justification was a pretext and its motivation for letting Huerta go unlawful. Theodorou and Borre did not want to give Huerta any opportunity to explain what had occurred. Rather, they wanted to take advantage of an unexpected opportunity to discharge him, which could have been ruined by contacting Huerta.

Accordingly, and for all the reasons stated above, the ALJ erred as a matter of law in his legal conclusions regarding disparate treatment and pretext. Respondent treated Huerta differently than other employees by suspending and discharging him for losing his license. Its claim that Huerta abandoned his job is false, since no one at the dealership ever confirmed this with Huerta before terminating him. These proper legal conclusions prevent Respondent from meeting its *Wright Line* burden of showing it would have discharged Huerta absent his Union activity. *Wright Line*, 251 NLRB at 1090-91.[3]

IV. SPECIAL REMEDIES ARE WARRANTED BECAUSE RESPONDENT'S UNLAWFUL CONDUCT ENDED THE UNION ORGANIZING CAMPAIGN AT LIBERTYVILLE TOYOTA AND BECAUSE OF AUTO NATION'S REPEATED UNLAWFUL CONDUCT IN RESPONSE TO ORGANIZING CAMPAIGNS AT ITS DEALERSHIPS. (Exception 11)

The Complaint in this case seeks special remedies requiring Respondent to post the Settlement Agreement and Notice to Employees; read the Notice to Employees; and provide Machinists Local 701 with notice of, and equal time and facilities for the Union to respond to,

[3] Because Respondent's stated justification of job abandonment is a pretext, the ALJ's reliance on the fact that Respondent checked a box on the termination Disciplinary Action Form indicating that Huerta was eligible for rehire does not alter the result. Respondent was seizing on the opportunity it was presented with to rid itself of a principal Union supporter and, knowing it was doing so, would not be inclined to indicate that Huerta was not eligible to be rehired, lest it be used to support a showing of discriminatory motive.

any employer address to employees about union representation. These special remedies are warranted given the impact that Respondent's unlawful conduct had on employees' organizing activity at Libertyville Toyota, which ceased following Huerta's suspension. In addition, the special remedies are needed because of Auto Nation's recidivist unfair labor practices in response to organizing activity by its employees, which, if left uncorrected, will continue nationwide. Because of his recommendation to dismiss the Complaint allegations regarding Huerta's suspension and discharge, the ALJ did not address or award these special remedies. That likewise constituted an error at law.

It cannot be reasonably denied that all employee organizing activity ceased after the August 23 captive audience meeting as well as Huerta's suspension and discharge. Prior to that time, employee attendance at the three Union meetings increased from about nine people at the start to 16 at the next two. (Tr. 54) Overall, about 20 technicians expressed support for the campaign as it progressed. (Tr. 53) However, after Respondent suspended and then terminated Huerta, all Union organizing activity and discussion about the Union by other employees ceased. (Tr. 110, 143) Service Technician Guadalupe Montoya testified that nobody, including him, wanted anything to do with it because of fear that they too would lose their jobs. (Tr. 110) Technician Mere Tellez stated that he was scared after Huerta's suspension with worry that he too could suffer the same fate. (Tr. 143) Thus, Respondent's unlawful conduct caused the end of employee organizing activity. The notice reading and access remedies are appropriate because of the severe negative impact on employee free choice, as evidenced by the nature of the unfair labor practices committed as well as the actual impact evidence introduced at the hearing. See, e.g., *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995) (numerous unlawful captive audience meetings warranted special remedies including equal time); *Monfort of Colorado*, 298

NLRB 73, 86 (1990) (equal time among special remedies necessary because of, among other factors, the many supervisors involved in the unlawful conduct, including the employer president).

In addition, Auto Nation already has been found to have committed a multitude of unfair labor practices in response to employee organizing under circumstances nearly identical to those in this case. In *Mercedes-Benz of Orlando, Inc.*, Case 12-CA-26126, 2011 WL 970447, slip op. at *10, lns 21-36,; p. 13, lns 5-12, and p. 34, lns 10-39 (March 18, 2011), an Administrative Law Judge of the Board concluded that Auto Nation and its dealership committed violations astonishingly similar to those committed here, including numerous Section 8(a)(1) violations and the 8(a)(3) discharge of an employee identified as one of the leading union supporters behind the organizing campaign. In that case much like this one, Auto Nation learned of employees' union organizing and sent Brian Davis to the dealership to hold a captive audience meeting. Davis also spoke to numerous technicians outside of the meeting in an attempt to dissuade them from supporting the Union. Ultimately, the Judge found that Auto Nation violated the Act by maintaining an unlawfully broad rule prohibiting all solicitation on company property, by creating the impression that employees' union activities were under surveillance, by coercively interrogating employees regarding their knowledge of employee union activity, their union activities, and their union sympathies, by soliciting employee grievances and implying that they would be remedied in order to dissuade them from supporting the union, by informing employees that their grievances with regard to team leaders had been adjusted by the demotion of the team leaders in order to dissuade them from supporting the union, and by informing employees that the Respondents would not recognize the union until there was a contract. The violations concerning solicitation of grievances and interrogation of employees about their union

sympathies were committed by Davis himself during his visits to the dealership. The Judge also concluded that Auto Nation unlawfully discharged Anthony Roberts after supervisors learned he was one of the main union supporters. Auto Nation's propensity to violate the Act in numerous manners once it learns of employees' organizing activities warrants the special remedies in this case. See, e.g., *U.S. Services Industries*, 319 NLRB 231, 231 (1995) (special remedy required after third Board case documenting employer's unlawful response to its employees' organizing efforts); S.*E. Nichols, Inc.*, 284 NLRB 556, 559-60 (1987) (special remedies warranted in case where employer was recidivist who "continued to engage in obdurate flouting of the Act").

Machinists Local 701 has no chance of reviving the organizing activity of employees who initially supported the Union at Libertyville Toyota by traditional remedies alone. Ordering special remedies here will reverse the negative impact of Respondent's unfair labor practices by sending the message to employees that they are protected from unlawful conduct of the dealership in response to their Union activity and the Union will have a chance to make its case to employees using the same amount of time that Auto Nation does. As a result, the requested remedies are warranted here.

V. CONCLUSION

Based upon the foregoing, Counsel for the Acting General Counsel respectfully requests that the Board find merit to the Exceptions to the Decision of the Administrative Law Judge, conclude that Respondent suspended and discharged Jose Huerta for his Union activity and support in violation of Section 8(a)(3), and provide all the requested remedies to the Union and to Huerta for Respondent's unlawful conduct.

DATED at Chicago, Illinois, this 27th day of September, 2012.

Respectfully submitted,

/s Charles J. Muhl

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **BRIEF IN SUPPORT OF COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** was electronically filed with the Office of the Executive Secretary of the National Labor Relations Board on September 27, 2012, and true and correct copies of the document have been served on the parties in the manner indicated below on that same date.

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