

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

VILLAGE MOTORS, LLC D/B/A)
LIBERTYVILLE TOYOTA,)
)
Respondent,)
)
and)
)
AUTOMOBILE MECHANICS' LOCAL NO.)
701, INTERNATIONAL ASSOCIATION OF)
MACHINISTS & AEROSPACE WORKERS,)
AFL-CIO,)
)
Charging Party.)
_____)

CASE NO. 13-CA-63676

**RESPONDENT'S BRIEF IN SUPPORT OF
EXCEPTIONS TO THE ALJ'S DECISION**

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I. STATEMENT OF THE CASE

A. Preliminary Statement

Respondent agrees with the portion of the decision of the Administrative Law Judge (“ALJ”) dealing with the §8(a)(3) discharge allegation. Although the ALJ assumed animus to be established for the *Wright Line* analysis (noting that he believed such a nexus to be “rather tenuous,”) he ultimately found that Respondent’s termination decision was lawful. However, for the reasons set forth within the attached Exceptions and as set forth within this Supporting Brief, Respondent asserts that that the decision with respect to the four §8(a)(1) allegations misapplies all legal standards to the relevant facts presented. Specifically, Respondent respectfully submits that the ALJ erred with regard to his findings that it:

- * promised employees raises for rejecting the Union,
- * threatened employees with demotions for selection of the Union,
- * threatened employees with blacklisting for selection of the Union, and
- * told employees that selecting the Union would be futile because the Union could never achieve a CBA.

Except for the 8(a)(3) discharge claim (which was correctly decided by ALJ Shamwell), the entirety of the underlying Complaint centered on a single group meeting, conducted by Respondent’s representatives on August 23, 2011.

Also, this case is unlike most involving 8(a)(1) allegations because there is minimal dispute over the actual words spoken by Respondent’s representatives during that August 23 meeting. As revealed at the Hearing, a surreptitious recording of the August 23 meeting was made by a union supporter. Subsequently, Counsel for General Counsel provided a transcript of the recording during the first week of Hearing. The Employer retained a Court Reporter to

prepare a certified transcript of the recording produced. It was also entered into evidence. In addition to the tape recording and the transcripts, which the ALJ had a chance to review, Respondent also presented three technicians at the hearing who testified specifically about attending the August 23 meeting. They all described what they heard and what they did not hear. Even with unrefuted evidence that no express or direct threats or promises were made, as listed at Paragraph V of the underlying Complaint, the ALJ relied on his impressions of what meeting attendees might have perceived from the undisputed words used during the meeting. This attempted extrapolation by the ALJ, to reach a conclusion that there were implied threats and promises made, is not supported by the actual words used and the totality of the meeting's messages.

The undisputed facts show that Respondent utilized a casual, back-and-forth meeting style to educate employees on the realities of NLRB elections and bargaining with unions. The ALJ did not find that Respondent made any direct threats or quid pro quo promises of any kind. Instead, the ALJ's discussion and findings appear to impose a standard on comments made by Respondent's speakers that is not supported by relevant Board precedent. Despite the question-and-answer approach facilitated by the Respondent at the meeting, the ALJ appears to have created an artificial nexus between spoken words and the implied meaning of those words to employees.

It is a long-established Board standard that Counsel for General Counsel bears the burden to prove each Complaint allegation by making a persuasive record with evidence presented. (Case Handling Manual § 10380.4). Counsel for the General Counsel needed to demonstrate, by a preponderance of evidence presented, that alleged violations actually occurred. Moreover, Counsel for the General Counsel must be held to a standard of strict proof with regard to the

specific allegations made in the Complaint that were ultimately sustained by the ALJ. *See V.R.J. Smith Construction Co., Inc.*, 545 F.2d 187 (D.C. Cir. 1976). Counsel for General Counsel did not meet that burden. The ALJ did not find direct threats or promises; but misapplied Board precedent to find that Respondent implicitly violated the Act while expressing its §8(c) rights. The ALJ's attempt to find threats and promises – where the actual words do not warrant such findings – must be overturned.

B. Procedural Overview

The Complaint in this matter was issued on December 12, 2011, and Amended on January 10, 2012. Respondent's Answer was timely filed on January 24, 2012. Although the Region docketed this case on a "fast track" basis because it claimed it was trying to prove a "nip in the bud" situation, the employee it claimed to have been terminated in a discriminatory manner was found to have been discharged for legitimate reasons. The matter was heard in Chicago before the Honorable Earl E. Shamwell, Jr., Administrative Law Judge (hereinafter, "ALJ") from January 26, 2012 through January 27, and again from March 6 through March 7. On August 16, 2012, the ALJ issued his decision ("ALJD") in this case, finding in favor of Respondent as to paragraphs VI and VIII of the Complaint. Respondent asserts that in so finding, the ALJD was supported by proper findings of fact and conclusions of law.

As set forth within their Exceptions 1-25 and as further briefed herein, however, Respondent takes exception to all adverse findings (including those pertaining to Complaint paragraphs V and VII) on the basis that they are not supported by the record evidence as a whole, and for other reasons as specified herein.

C. Factual Overview

1. The Taso Theodorou Meetings

Village Motors LLC d/b/a Libertyville Toyota (hereinafter “Libertyville,” the “Dealership”, the “Company”, or “Respondent”) is a traditional retail automobile dealership, selling, leasing and servicing new and used vehicles in Libertyville, Illinois, from which it services Toyota and other vehicles. AutoNation, Inc. (hereinafter “AutoNation”) is a national corporation, established for the primary purpose of owning and operating automotive dealerships throughout the U.S. (ALJD, p.2 line 16).¹

Record testimony established that after learning of an organizing campaign, Taso Theodorou, the Dealership’s General Manager, conducted small group meetings with Fixed Operations employees in the Service Department area on April 17, 18, and 19, 2011. (ALJD, p. 16, lines 12-14; Tr. 324). To ensure compliance with applicable National Labor Relations Act (“Act”) standards and restrictions, AutoNation Vice President and Associate General Counsel Brian Davis (“Davis”) provided Theodorou with a one-page meeting outline for use in the meetings. The main message behind Theodorou’s short meetings was to suggest that employees get educated before making a decision. Theodorou expressed his opinion that employees should “get all the information you possibly can” and to “educate” themselves before signing any (legal) documents offered by the union. (ALJD, p. 16, lines 15-30; Tr. 325, 327, R. Ex. 9).

As Counsel for the General Counsel conceded at the Hearing, Theodorou’s meetings failed to draw a single Unfair Labor Practice Charge, nor were any of his comments called into question within the instant Complaint. (ALJD p. 16, lines 12-30, fn.31; Tr. 324).

¹ AutoNation was not named in the original Complaint, but was added to the style of the Amended Complaint. The ALJ noted that the testimony established that AutoNation was the parent corporation of Libertyville, which he treated as a single Respondent for purposes of this case only. (ALJD, p. 2, fn. 3).

2. The August 23, 2011 Meeting

On August 23, Respondent convened a meeting of the Service Department in a conference room adjacent to the sales floor area of the Dealership. Employees who were off the clock were paid for their time at the meeting. (ALJD, p. 43, line 1). The ALJ agreed that the meeting was not hostile or aggressive, but instead include light-hearted comments and laughing. (ALJD, p. 42, fn.67). The technicians, including witnesses for the General Counsel, noted the informal question-and-answer nature of the dialogue, describing the meeting as casual, fair, and not threatening. (Tr. 279, 327-28, 505-06, 508, 523, 533, 547).

The meeting was conducted in an informal manner, with “give-and-take” between the designated speakers and audience members, as well as constant interaction between co-workers during the meeting. Numerous questions were asked by employees in the audience, and Theodorou and others also read aloud some questions that had been previously deposited in a question box. (ALJD, p. 43, lines 2-12).

All witnesses, including those presented by Counsel for the General Counsel, offered their individual perceptions of what they heard and said at the meeting. (ALJD, pp. 7, 9, 12, 16, 23, 25, 27, 29; Tr. 328, 505, 508, 533, 547). Those perceptions are crucial to any ultimate determination of whether the Respondent violated the Act in the manner alleged in Paragraph V of the underlying Complaint. Contrary to the ALJ’s conclusions, witnesses, who were present at the August 23 meeting, expressly testified that they did not interpret any comments to be threats or promises. In most situations where an employer has been accused of making direct, verbal threats in violation of employees’ §7 rights, the trier of fact is required to sift through the testimony of witnesses to decide who is exaggerating, who is telling the truth, and/or who is lying about what was said at a meeting.

Here, that was not the case. The actual words used by speakers was available for review and consideration. Further, the perceptions of those technicians who appeared at the Hearing could be considered and weighed by the ALJ. Instead, it appears the ALJ relied solely on his personal perceptions of what the words used might or could have meant to employees.

3. Suspension and Termination of Huerta

With respect to the suspension and termination of Painter Jose Huerta, the ALJ recommended dismissal of this Complaint claim. (ALJD, p. 56, line 4). The ALJ found that Huerta's termination was not unlawful. (ALJD, p. 55-56).

D. Issues to be Resolved

The Complaint stated that Respondent violated §8(a)(1) of the Act by its speakers' statements at the August 23 meeting identified in Paragraph V of the Complaint by:

- I. threatening employees that it would be futile to select the Union as their bargaining representative because it could take years during negotiations;
- II. threatening employees with demotions if they selected the Union as their bargaining representative;
- III. threatening employees with blacklisting them to future employers if they supported the Union; and
- IV. making an implied promise of employee raises in exchange for rejecting the Union.

II. ARGUMENT AND CITATION OF AUTHORITY

At the hearing, over an initial objection by Counsel for General Counsel, Respondent's counsel asked each witness if they heard any threats and/or promises while at the August 23

meeting. In every instance, the witnesses credibly testified that they did not hear any threats made or promises offered, as alleged in the Complaint.

Section 8(a)(1) makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise” of their Section 7 rights [right to organize]. However, Section 8(c) allows for the “**expressing of any views, arguments, or opinion, or the dissemination thereof...shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.**” Congress added Section 8(c) to the NLRA in 1947 to confirm the legitimate rights of both employers and employees. Section 8(c) has long been found to grant employers the right to truthfully communicate with their employees concerning the realities of union organizing, NLRB elections, the collective bargaining process, and related issues. *See Beverly Enterprises-Hawaii*, 326 NLRB 335 (1998). Here, the Respondent’s agents’ words were well within the framework of Section 8(c).

As the ALJ noted, the test of unlawful conduct is not based on a respondent’s motive, but is to objectively look at “whether an employer’s conduct interferes with or restrains employees in the exercise of their Section 7 rights”. *Technology Service Solutions*, 332 NLRB 1096 (2000); *Gissel Packing Co.*, 395 U.S. 575 (1969). The ALJ clearly stated, in his decision, that the purpose of Respondent’s August 23 meeting was to educate employees. Moreover, witnesses testified that they interpreted the meeting message as one where the Company was sharing its perspective and encouraging them to educate themselves on the issues.

The ALJ noted that the test of whether a statement could reasonably be judged to coerce is based on an objective standard, viewed in the context of all surrounding circumstances. *See Flying Food Group, Inc.*, 345 NLRB 101, 106 (2005). However, an employer need not be

neutral in its message, so long as it does not deliver direct threats or make unlawful promises. Under these circumstances, an employer is freely permitted to convey its opinion on the value of unions in a particular shop. See *Wild Oats Markets Inc.*, 344 NLRB 717 (2005) (employer has right under §8(c) to state negative effects of bargaining); *Uarco, Inc.*, 286 NLRB 55 (1987) (where an employer does not state falsehoods or make threats, it is permitted to state negative outcomes of unionization). That is certainly what transpired on August 23, 2011. There is simply no proof that any §8(a)(1) violations were committed during that meeting.

Moreover, the mere fact that an employer “said nothing positive about unionization” is never a violation of the Act. See *Basic Industries, Inc.*, 348 NLRB 1267, fn. 5 (2006) (“Animus toward unionization is not unlawful. What is unlawful is an employer’s active animus toward the Sec. 7 activities of its employees to freely choose a collective-bargaining representative”).

A. Respondents Did Not Violate Section 8(a)(1) With Regard To Any Of The Comments Made At The August 23 Meeting.

The ALJ found that the Respondent violated the Act by: 1) making an implied promise of employee raises; 2) threatening employees with demotions; 3) threatening employees with blacklisting; and, 4) telling employees it would be futile to select a union. The ALJ began his discussion of the §8(a)(1) allegations by noting that he listened to the entire tape recording, and relied heavily on Respondent’s version of the transcript as a more accurate representation than Counsel for the General Counsel’s. (ALJD, p. 42, lines 30-32). He also noted that Respondent did not take a hostile or aggressive tone in the meeting, that Respondent paid the employees for their attendance and wanted feedback in an open dialogue format, and that Respondent hoped to educate employees to be wary of the Union’s “sales pitch.” (ALJD, p. 42, lines 39-41). But, the ALJ also stated he was looking for the “meaning one could reasonably construe from [Respondent’s] utterance[s], and not necessarily the actual words employed to convey the

message.” (ALJD, p. 43, lines 45-46). By adopting such an approach, the ALJ erred. Cf. *International Baking Co.*, 348 NLRB 1133 (2006) (finding judge erred by relying on subjective intent instead of whether a threat reasonably coerced employees); *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270 (2005) (reversing ALJ’s where employer’s statement could not have reasonably caused employee to assume he was under surveillance). The appropriate standard to be applied is whether the unrefuted statements directly interfered with employees’ rights. See *Technology Service Solutions*, 332 NLRB 1096 (2000); *Flying Food Group, Inc.*, 345 NLRB 101 (2005).

1. Statements Made By Respondent In Response To Employee Questions Did Not Promise Raises In Exchange For Rejecting The Union (Responsive to Exceptions 16-18).

The ALJ quoted two statements by AutoNation Regional Human Resources Director Jonathan Andrews (“Andrews”) and two by Davis, all of which were responses to employees’ questions, as evidence of implied promises that employees would receive a raise for rejecting the Union. Andrews commented that “I think it’s absolutely possible” that the Company could evaluate the existing pay plan without a union, noting that the Company needed to remain competitive. In further response to an explicit employee question, Andrews said that looking into pay raises could be a “possibility,” but cautioning that, first, “we’ve got to get through this recession.” The ALJ also relied on a statement by Davis where Davis responded to employee questions and said that the Company always needed to pay a fair wage, and “that its something we need your help looking at.” Davis also said there was a “willingness to consider making adjustments.” (ALJD, pp. 49-50) (emphasis added). None of these comments were tied to employees’ rejection of the Union’s message. None even implied that Respondent would have definitely increased pay or taken any affirmative steps if employees rejected the Union. See

Putnam Buick, 280 NLRB 868 (1986) (finding that employer did not violate Act by calling meeting to inform employees of negotiations and informed employees of realistic possibilities).

In *Putnam Buick*, the ALJ found that the respondent exceeded its §8(c) rights because it conveyed the impression that the union was not advancing employees' interests, and it implied that the failure of union representatives to accept the company's proposals would mean the employees would be forced to strike. *See id.* The Board disagreed with the ALJ's finding of implied threats. Instead, the Board found that the purpose of the meeting was to inform employees so there would not be confusion or misunderstanding of the issues. The Board held these statements to not be coercive. *See id.*

Similarly, in *Uarco, Inc.*, 286 NLRB 55 (1987), the Board relied on testimony of numerous employees who stated that, at a company meeting, the speakers characterized bargaining as horsetrading, and that employees could gain, lose, or break even. The Board in *Uarco* found those mere references to possible negative outcomes of unionization do not operate to deprive employers of §8(c) protections. *See id.* (concluding that reasonable employees should view such communications as vigorous campaigning).

In the instant matter, the ALJ's own words demonstrate that his decision was based on personal speculation about what employees might have thought or felt was being said. It is submitted that the ALJ stretched his reasoning to extreme ends in finding that Andrews and Davis "conveyed by implication that the Respondent was at least amenable to considering and providing wage increases." (ALJD, p. 50, lines 5-6) (emphasis added). Apparently, one comment that the ALJ found troubling was Davis' statement "we want a chance to address them [problems] before you pay someone else to address them." Judge Shamwell opined that this statement was "almost an expressed promise to do something." (ALJD, p. 50, line 9) (emphasis

added). The standard for decision-making should not be whether Respondent almost made a promise; it must be whether a statement was direct and actually interfered with employee rights. Statements made in response to specific employee questions regarding whether the Company could review employees' wages, where Respondent's speakers merely stated that such a response was a "possibility," without intimating a certainty of acts or any *quid pro quo* for rejecting the Union, are not violations of the Act.

Obviously, the qualifiers in the ALJ's description of his reasoning process, ("implication," "amendable to considering," and "almost") demonstrate that his 8(a)(1) findings were based on tenuous and fanciful personal assumptions. See *International Baking Co.*, 348 NLRB 1133 (2006). In *International Baking*, the ALJ found that an employer impliedly threatened an employee with reprisals for supporting a union, directing a message that her union support would negatively impact her seniority and pay. The Board overturned the ALJ, and found that the employer merely expressed its lawful opinion concerning the possible effects of unionization. The Board found that the employer's "comments amounted to nothing more than an expression of her personal belief that [the employee] did not need the Union and would not benefit from it. Such a statement is no different in kind from one in which an employer lawfully tells employees there is no need to call a union in to resolve issues." *Id.*

At the hearing, Counsel for the General Counsel failed to present a single witness who could recall a "promise" of raises – implied or otherwise. Certainly, none of the witnesses introduced by Respondent could recall any promised pay raises. (Tr. 508; 534; 571). In response to questions from the ALJ, Technician Joe Syme only recalled that Davis said, "no raises can be given or taken away in bargaining" and that everything would stay the "same" while bargaining was ongoing. (Tr. 512-513). The Respondent's comments only noted the

possibility of changing pay rates, and such statements (that it was possible the Company could review pay rates) were never directly connected to the unionization issue.

In response to employee questions regarding pay, Respondent told employees that the Company reviews pay rates to ensure consistency with market wages. Respondent's speakers stated that it might not be the highest paying dealership, but believed that its goal should be to remain "fair." Respondent also cautioned that the Company needed to first "weather the recession" before discussing the possibility of reviewing employee pay issues. Such vague and undefined responses do not approach direct promises, nor can anyone reasonably find the promise of implied raises in these statements. In fact, the Dealership conveyed that it had no plans to act differently regarding pay reviews, whether a union was selected or not. There must be more than a tenuous, implied suggestion that the Company was amenable to considering the possibility of reviewing wages in order to trump Respondent's 8(c) rights to express its views, where its agents responded to a question on market wages. The ALJ's finding is erroneous and must be overturned.

2. The Statements Made By Respondent In Response To Employee Questions Did Not Threaten Demotion (Responsive to Exceptions 19-22).

As noted by the ALJ, "the Board has long held that there is no threat, either explicit or implicit, in a statement that explains to employees that, when they select a union to represent them, the relationship that existed between employees and the employer will not be as before." *Office Depot*, 330 NLRB 640 (2000). In his decision, the ALJ cherry-picked comments made by Andrews and Davis in response to one written question and comments by Technician Ron Sorg to find that Respondent threatened demotions if the Union was selected.

At the Hearing, Sorg testified that he had worked in a shop that was covered by a union contract and that it was his understanding that technicians were divided into two basic groups. His recollection was that, by contract, technicians were classified as either “journeymen” or “apprentice,” based on years of service or A.S.E. training levels. (Tr. 548). He testified that he asked Davis if it was possible that “certain techs ... could be demoted or elevated ... [as a result of a] standard ... [in a union contract]. (Tr. 547). Sorg testified that during the August 23 meeting he stated “you’re basically dropped down or demoted to an apprentice [under the two-classification contract approach].” (R. Ex. 3, p. 78). Sorg went on to testify that he was “concerned that [Libertyville] techs could be reclassified as apprentices” if there was a union contract in place. (Tr. 549, 555).

Davis’ response to Sorg’s question was simply that: “I just don’t know the answer to that question, because why? Negotiations are just that, negotiations.” Davis then agreed that – in the two classification system described by Sorg – some employees “probably” could move up or down. (R. Ex. 3, p. 77).

Technician Joe Syme also recalled the union contract/two classification issue being raised by Sorg. (Tr. 510). He also recalled that Davis never threatened employees in the meeting with demotion for selecting the union as representative. (Tr. 509). To the contrary, Syme recalled Davis’ response to Sorg as neutral: while a “loss of position... is possible ... it depends on what’s bargained into the contract. Nothing is guaranteed.” (Tr. 510-511).

Witnesses Syme, Ed Ingram, and Sorg were all consistent in their response to the question: Did Davis ever make a threat that employees would be “demoted” if they chose to select the union? All responded, “no” without hesitation. (Tr. 507; 534; 550). None of the witnesses presented by Counsel for the General Counsel testified that they had heard any

mention of demotions caused by a Union becoming the bargaining representative of the employees. In fact, the issue of demotions was never raised with Counsel for the General Counsel's witnesses at all.

When asked about the apprentice/journeyman issue, Davis replied that he did not know about that approach, but agreed that some people might need to be reclassified and could lose pay under such an approach. He also said that others might gain status. Davis merely agreed with the employee's statement regarding how apprentices and journeymen are paid, agreeing that it could be negotiated that way. Andrews said "That's how a lot of them are, but its all part of the negotiation process." Davis responded, saying "something similar to that would be negotiated" and "more senior guys...would probably stand to gain." Andrews then said "There will be one of three outcomes in any negotiation. Things will be better for you, things will be worse, or things stay the same." (ALJD, pp. 50-51). None of these statements amount to §8(a)(1) violations.

Here, as well, the ALJ relied on a number of qualifiers to translate this short interchange into a §8(a)(1) violation. The ALJ stated that, taken as a whole, he saw the message conveyed as one where there would be a reclassification, and that apprentices would be demoted. He somehow came to the conclusion that Respondent did not just offer its opinion on the possibility of reclassification, but affirmatively predicted that is exactly how it would be negotiated. (ALJD, p. 51, lines 22-23). It is submitted that the ALJ ignored the obviously speculative nature of the Employer's response. No definitive, or even implied, statements were made concerning reclassification of employees; possibilities were discussed in response to express questions. *See Uarco, Inc.*, 286 NLRB 55 (1987) (Board found statements lawful where the respondent characterized bargaining as horsetrading, and said employees could gain, lose, or break even);

Wild Oats Markets Inc., 344 NLRB 717 (2005) (employer did not violate Act with flyer claiming employees could lose what they have now through collective bargaining).

Companies have the right to express their opinions and views under §8(c) so long as there is no threat of reprisal or force or promise of benefit. Here, in response to employee questions, Respondent agreed that job classifications could change as a result of bargaining, not that they would change. Andrews told employees they could expect three outcomes, things getting better, getting worse, or staying the same, and Davis stated that employees could move up or down, and that “negotiations are just that, negotiations.” (ALJD, pp. 50-51; R. Ex. 3, p. 77). The testimony of the witnesses and the transcript of the meeting’s content all demonstrate that the ALJ’s finding of a §8(a)(1) violation for threatening demotions is completely unsupported.

3. The Statements Made By Respondent Did Not Amount To Implicit Blacklisting By Other Dealerships (Responsive to Exceptions 11-13).

The ALJ found that selected remarks caused him to conclude that Respondent threatened employees they “*would* be – not *could* be – stigmatized” (ALJ emphasis) and their careers could be affected if they chose the Union. The ALJ specifically agreed that Davis did not actually say or even imply that Libertyville or AutoNation would blacklist employees; but that he concluded that Davis, nevertheless, somehow “effectively” threatened employees regarding future employment in the dealership industry. (ALJD, p. 45, lines 11-23).

Three statements attributed to Davis were all responses to questions by technicians. Specifically, Davis responded to a question, saying: “This is about your ability to go get another job at another dealership if you were to leave here;” “if...you are interviewing for jobs and those employers know you came from a union shop, they *are* going to think twice about hiring you (ALJ emphasis)...They may be inclined to pass on you” (emphasis added); and in response to a

technician's statement that employees should take that into consideration why certain people's careers may be affected, Davis said "absolutely." (ALJD, pp. 44-45).

Ignoring the fact that the ALJ pulled Davis' statements out of context, and that all responses were to the employee questions, none of Davis' direct quotes rise to a threat that employees would be discriminated against for selecting the Union. At worst, Davis merely speculated about what other employers might "think" about hiring union employees. By agreeing that an employer might think about its hiring decisions, and that such a process might impact employees, Davis only stated his opinion. He never claimed they would be blacklisted. *Cf. Towne Ford, Inc.*, 327 NLRB 193, fn.2 (1998) (finding employer liable for threat of blacklisting where employer told prospective employer that employee "would do whatever the Union said"); *Alaska Pulp Corp.*, 296 NLRB 1260 (1989) (finding that although the threat was not carried out, telling employee that he would be blacklisted if he filed charge against the employer was a violation). In the context of this meeting, the employees were able to discern the difference between Respondent's opinion and fact, and were aware of the "vigorous campaigning" by both sides. *See Uarco, Inc.*, 286 NLRB 55 (1987). As the ALJ noted, he found the technicians "were intelligent and experienced employees." (ALJD, p. 43, lines 39-40). Notably, the technicians testified that they did not find the comments made at the meeting by Respondent's agents to be threatening or promising any benefit.

However, even though the standard laid out by the ALJ states that blacklisting threats need not be accompanied by a speaker's specific intent, the standard for review does certainly require some objective basis to conclude that an actual threat could be carried out by Respondent. The ALJ cites *Flamingo Hilton-Laughlin*, 324 NLRB 72, 112 (1997), where a statement that "employees who were shown in [a union pamphlet] would have a hard time

finding a job in **other [same employer facilities]** because of being so pictured” was a violation. (ALJD, p. 31, lines 19-23) (emphasis added). Even assuming Respondent’s comments to be an unwarranted and ominous prediction of potential employment in the industry, the ALJ acknowledges that the comments at no point imply a threat that Respondent will preclude employment of its technicians for union activity. (ALJD p. 45, line 12).

The ALJ admittedly did not find that Respondent directly told employees that it would not hire them at its other facilities should they select a union. Neither did Respondent tell employees that other dealerships would definitely not hire them after selecting a union. Instead, Respondent responded to questions and expressed the possibility that other employers might take into consideration the union status of an employee’s previous job. This expression of opinion clearly falls within the protections provided by §8(c). Accordingly, the ALJ’s finding that Davis’ language implied certainty of employees’ inability to get a job based on their union affiliation is unfounded.

4. Respondent’s Comments Regarding Bargaining Merely Identified Uncertainties, And Never Rose To The Level of Threats of Futility (Responsive to Exceptions 14-15).

In finding that Respondent threatened futility for selecting the Union, the ALJ cited statements by Andrews and Davis. The discussion included a number of statements of legal rights, as well as factual examples that Respondent has experienced - *e.g.*, “they can’t give you anything we’re not willing to give you already. The law only requires us to negotiate in good faith, it doesn’t require us to agree to anything;” “*And ultimately, we agreed to what we had on the table to begin with, and 22 people lost their jobs*” (ALJ emphasis); “That could be a month, it could be six months, it could be five years;” “I can bring those people up here that have been living that nightmare for almost three years now without one bargaining session, not one contract

negotiation.” (ALJD, pp. 45-48). Similarly, in *Medieval Knights, LLC*, 350 NLRB 194 (2007), the Board found that “provid[ing] employees with a concrete example of potential negative outcome to election a union” was lawful because “the Board has found that employees can distinguish between a hypothetical exercise about bargaining and an employer’s description of its actual or planned bargaining strategy.” Accordingly, Respondent was privileged under §8(c) to express the concrete examples emphasized by the ALJ.

During the August 23 meeting, Davis described the collective bargaining process for a first contract by stating that bargaining can take “years and years.” Such statements regarding negotiations for a first or initial contract have been approved as lawful explanations of collective bargaining in a number of Board decisions. *See, e.g., Histacount Corp.*, 278 NLRB 681, 689 (1986). Simply describing the possible length of negotiations, from a very short time frame to a longer one, does not constitute a “threat of futility.” As in *Ludwig Motor Co.*, 222 NLRB 639 (1976), Davis’ communication “constituted nothing more than an accurate description of one possible consequence of lawful collective bargaining ... was to inform the employees as to the realities of the collective-bargaining process.” *Id.*; *see also Langdale Forest Products, Co.*, 335 NLRB 602 (2001) (“An employer has a right to compare wages and benefits at its nonunion facilities with those received at its unionized locations...The Respondent here did not threaten to bargain in bad faith or to retaliate against employees if they failed to reject the Union. It expressly disclaimed the ability to promise improvements in wages and benefits....”)

Davis’ statements are exactly the type of conduct that the Board has routinely upheld as legal. For example, in the case of *Histacount Corp.*, the Board found legal a statement “that bargaining ‘can take weeks, months, or even years’ ... [that was] made in a context which would indicate to employees that bargaining is a process in which each side makes its own proposals,

that it requires mutual agreement, and where existing benefits may be traded away.” 278 NLRB 681, 689 (1986). *See also Medieval Knights*, 350 NLRB 194 (2007) (no violation based on statement that “bargaining process could take weeks, months, or even more than a year”). As the Board has previously recognized, “the reality of collective bargaining is that negotiations can be prolonged for lawful reasons, and the prolongation may not be the fault of the employer.” *Winkle Bus Co.*, 347 NLRB 1203, 1206 (2006) (footnote omitted).

Furthermore, the ALJ even quoted Davis’ statement that “But yes, eventually the bargaining process will begin...But eventually you will start bargaining.” (ALJD, p. 47, lines 21-22). This is a statement of certainty, unlike the comments “often times,” “potentially”, and “may take” years. Davis clearly communicated a message that informed employees of the length and realities of bargaining, but ultimately acknowledged the inevitability of bargaining process.

As the ALJ noted, “the Board has consistently held that, absent threats or promise of benefits, an employer may explain the advantages and disadvantages of collective bargaining in order to convince employees they would be better off without a union.” *Medieval Knights, LLC*, 350 NLRB 194 (2007). Also, “mere references to the possible negative outcomes of unionization...do not deprive [employer speech] of the protections of Section 8(c).” *Uarco*, 286 NLRB 55, 58 (1987). Still, the language cited by the ALJ included statements of possibility, such as “potentially years and years and years of bargaining for a first contract;” “when you enter these negotiations, *if you ever get there*, employees tend to lose things...nothing is guaranteed” (ALJ emphasis); the bargaining unit is “going to vote and be part of the contract, *if one is ever reached*” (ALJ emphasis); “a contract *is never reached immediately...and often times it takes many, many months and even years for the bargaining process to begin*” (ALJ emphasis); “union membership may be somewhat elusive in that *you may never see it in your lifetime at the*

dealership” (ALJ emphasis); “Bargaining usually takes many, many, many years. And if you ever see the light of day...if you ever do reach an agreement...” (ALJD, pp. 45-48).

The ALJ stated that, taken as a whole, the messages conveyed was that selecting a union was an exercise in futility, and that “the Company essentially would not agree to anything in the contract negotiations that it did not want to; and that any such negotiations would take many, many years and in the end, there might not be a contract.” (emphasis added). (ALJD, p. 48, lines 22-27). However, saying that the Company conveyed a message that it essentially would not agree to anything it did not want to agree to does not express futility. *Cf. Equipment Trucking Co.* 336 NLRB 277 (2001) (respondent unlawfully threatened futility when it told employees that it would never negotiate a contract). Also, the message outlined through these quotations does not state that negotiations *would* take years, but simply that it *could* take this long. The *Fieldcrest Cannon, Inc.* decision cited by the ALJ demonstrates this principle, wherein the Board found that a statement by the company that it would not bargain in good faith, and employees would never get a contract, was unlawful. 318 NLRB 470 (1995). At no point did Davis state that Respondent did not have to bargain in good faith, or that employees would never get a contract.

Section 8(c) of the Act expressly authorizes employers to exercise their free speech rights in an effort to communicate with employees on the issue of union representation. Employers are expressly allowed to explain the collective bargaining process, and even to offer examples of how bargaining results might or “could” be manifested. *See for example, Wild Oats Markets Inc.*, 344 NLRB 717 (2005) (“Employer did not violate LMRA when it stated in flier to employees that “in collective bargaining you could lose what you have now,” where statement

was factually accurate observation regarding possible negative outcome of collective bargaining and is protected speech under §8(c).”)

In *Fern Terrace Lodge*, 297 NLRB 8 (1989), the Board reversed a judge’s finding and approved an employer’s predictions that the employer could ask for wage and benefit reductions in contract negotiations:

“You should know that voting the union in does not automatically guarantee any increase in wages or other benefits, because under the law a company does not have to agree to any demand or proposal that a union might make. Even if it got in here, a union couldn’t force us to agree to anything that we could not see our way clear to putting into effect from a business standpoint...[W]e have just as much right under the law to ask that wages and other employee benefits be reduced as the union would have to ask that they be increased.”

Id. at 8.

Obviously, Counsel for General Counsel never proved that Respondent issued any direct threats of bargaining futility. The comments made by employees and speakers during the August 23 meeting merely expressed the factual issues that the Company has faced during bargaining in the past, as well as uncertainties associated with the bargaining process. Such comments were well within Respondent’s §8(c) rights. Respondent’s message was simply that the bargaining process is an uncertain one, never that bargaining would be “futile.” For these reasons, the ALJ’s finding is erroneous, and must be overturned.

III. CONCLUSION

In the instant case, the ALJ did not find animus with respect to any of the actions taken by Respondent. At no point during the August 23 meeting did Respondent expressly threaten or promise any benefit to employees with respect to the Union. In the context of the open discussion and back-and-forth questioning that took place at the meeting, stringing together comments that the ALJ believed to be implicit threats and promises is not a sufficient basis for

ignoring Respondent's §8(c) rights. Respondent used concrete examples that the Company itself had experienced when educating the employees on the uncertainties of the bargaining process. These comments, made during a sole meeting, cannot be construed as a threat because Respondent merely relayed factual examples and possibilities relating to the Union, as permitted by law. Accordingly, all findings of §8(a)(1) violations should be overruled.

Filed this 27th day of September, 2012.

Respectfully submitted,

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Counsel for Respondent

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

VILLAGE MOTORS, LLC D/B/A)
LIBERTYVILLE TOYOTA,)
)
Respondent,)
)
and)
)
AUTOMOBILE MECHANICS' LOCAL NO.)
701, INTERNATIONAL ASSOCIATION OF)
MACHINISTS & AEROSPACE WORKERS,)
AFL-CIO,)
)
Charging Party.)
_____)

CASE NO. 13-CA-63676

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2012, I e-filed the foregoing **RESPONDENTS VILLAGE MOTORS, LLC D/B/A LIBERTYVILLE TOYOTA POST-HEARING BRIEF** with the office of the NLRB's Executive Secretary using the Board's e-filing system and that it was served on Charles Muhl (Charles.Muhl@nrb.gov), Esquire, National Labor Relations Board, and Gary Schmidt (gschmidt@iamaw.org), International Association of Machinists and Aerospace Workers, AFL-CIO, via e-mail

/s/ David M. Gobeo