

**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
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

Objective, not subjective, reactions. From a reasonable, not actual, employee. The totality of the statements made, not comments taken in isolation. Statements which interfere with employees' Section 7 rights, not whether the statements include the actual words "blacklisting" or "futile" or "promise of benefit" which denote legal conclusions. These are the cornerstones of the Board's clear and long standing legal standard for evaluating whether an employer's statements violate Section 8(a)(1). *Smithfield Packing Co.*, 344 NLRB 1 (2004); *Nebraska Bulk Transport*, 240 NLRB 135, 157 (1979); *Gissel Packing Co.*, 395 U.S. 575, 618 (1969); *American Freightways Co.*, 124 NLRB 146, 147 (1959); *NLRB v. Virginia & Electric Power Co.*, 314 U.S. 469 (1941). Administrative Law Judge Earl E. Shamwell Jr. properly applied the standard in this case to conclude that Respondent Libertyville Toyota committed multiple such violations, including threatening employees with blacklisting, repeatedly telling employees how becoming unionized would be futile, impliedly promising them a wage increase if they stayed non-union, and threatening demotions to lower occupational status if they went

union, during the dealership's August 23, 2012, meeting with service technicians. (ALJD p. 42, lns 23-41 through p. 51, ln 28)

In its Exceptions, Respondent acknowledges the Board's legal standard for evaluating Section 8(a)(1) violations and that the standard applies here. Yet it then proceeds to make arguments that directly conflict with that standard. First, Respondent repeatedly relies upon the subjective reactions of anti-union employees who attended the August 23, 2012, meeting to contend that the statements of its supervisors had no impact. (Resp. Br. pp. 5-7, 13-14) Subjective reactions as to whether coercion actually succeeded or failed are irrelevant. The "individual perceptions" of employees and how "they interpreted the meeting message" are not, as Respondent, contends "crucial" to determining whether it violated Section 8(a)(1). Respondent's exception to the Judge "reasonably constru[ing]" the meaning of Respondent's utterances is an objection to the ALJ using the proper Board legal standard, one that was approved by the U.S. Supreme Court and followed for decades. *Gissel Packing Co.*, 395 U.S. at 618.

Second, Respondent repetitively argues that it could not have violated Section 8(a)(1) because none of the supervisors or agents speaking at the August 23, 2012, meeting ever "directly" stated that it would be futile to choose the Union, or you will be blacklisted if you are identified as a Union supporter, or we will give you a wage increase if you vote no, or you will be demoted if the Union comes in. (Resp. Br. pp. 6-7, 11-16, 21) The argument appears to be that, if the words that are contained in the Acting General Counsel's complaint alleging the Section 8(a)(1) violations are not actually uttered by Respondent, the complaint allegation cannot be sustained. At the hearing, Respondent even went so far as to read the Section 8(a)(1) allegations to witnesses to elicit denials that the actual words alleged therein had ever been used.

Of course, the complaint allegations are legal conclusions, not the actual statements that support those allegations. The fact that words like “futile” and “blacklisting” were not used simply is not a defense.

Finally and time after time, Respondent picks and chooses excerpts from all of the statements relied upon by the Judge to find the Section 8(a)(1) violations, and contends that these isolated statements were within the protection of Section 8(c). (Resp. Br. pp. 9, 14-20) Needless to say, both the courts and the Board have long held that statements must be viewed in context, not isolation, when evaluating Section 8(a)(1) conduct. Even if supervisors and agents made some statements over the course of a nearly two hour meeting that did not violate the Act, Respondent obviously was not precluded by that from threatening and coercing employees at the meeting with other statements.

Judge Shamwell made the proper legal conclusions concerning the alleged Section 8(a)(1) violations based upon an objective, not subjective, analysis of the actual words used by Respondent at the meeting, citing almost 150 lines of actual statements from the tape-recorded meeting. He made the right legal findings in this regard based upon what a reasonable employee—not a few of those that were present for the meeting—would conclude from the entirety of what was said, not comments in isolation. That was the legally-correct approach. Accordingly, Respondent’s exceptions should be denied in their entirety.

I. THE JUDGE PROPERLY FOUND THAT RESPONDENT THREATENED TO BLACKLIST EMPLOYEES IF THEY SELECTED THE UNION AS THEIR REPRESENTATIVE. (Respondent Exceptions 5-6, 10-13, 23, 25)

ALJ Shamwell properly concluded that comments by Auto Nation Vice President Brian Davis during the August 23, 2012, meeting reasonably conveyed to the attending employees that, if they chose to be unionized, their careers at both the Libertyville Toyota dealership itself and

other dealerships in the industry would be jeopardized. (ALJD p. 45, lns 11-24) The ALJ relied upon a series of statements made by Davis regarding the impact that becoming union would have on their “career ambitions or other employment opportunities.” Among the most compelling of those statements was the following from Davis:

That is one of my concerns, and I want you guys to think about. The union will tell me I am threatening you by bringing this up. The bottom line is, that’s the reality. Employers don’t want unions in their shops. If you guys leave or, you know, move to another state and you are interviewing for jobs and those employers know you came from a union shop, they *are* going to think twice about hiring you even if they think you are a superstar. Because they are thinking, what role did he play? Was he pro [union]? They can’t ask you, but they are going to be suspicious.

They may be inclined to pass on you and go to the next guy simply because of that badge or that scarlet letter that you will wear as a result of having gone through—even if it is a campaign and the company wins—so it is an issue. If you commit yourself to it [the union], you’ve got to commit yourself to all of it, including those consequences.

(ALJD p. 44, lns 32-42, p. 45, lns 1-2; R 3, p. 107.) In addition, Davis told the assembled drivers that they “absolutely” should think about why certain people’s careers may be affected by the Union campaign, and that the campaign was about the driver’s “career” and “ability to go get another job at another dealership if you were to leave here.” (ALJD p. 44, lns 14-18, p. 45, lns 6-9; R 3, pp. 90-93, 107)

Although not specifically identified by the Judge, Davis made additional comments a reasonably employee would conclude meant that choosing the Union would be a detriment to their current and future careers. When an employee expressed displeasure at things being “hidden from everybody” when it could have an impact on their careers, Davis stated:

That’s the—that’s the thing—biggest thing we want you guys to understand that if it’s going to happen, you all need to be involved,

and those of you who are doing it secretly need to be more respectful of your colleagues and your teammates than to go ahead and *throw their careers here* with this dealership under the bus, if, in fact, bad decisions were made and the union ultimately gets in here. And that's the bottom line. (emphasis added)

(R 3, p. 108, lns 7-15) Davis also made clear how other dealerships would view employees'

Union support at Libertyville Toyota:

I guarantee if you guys ever left here and went down the street to work at another dealership that was nonunion, you'd probably be hard-pressed to convince them to go out, and I wouldn't even mention the word union in their presence. They'd just as soon put a gun to your mouth and pull the trigger than to allow you to walk around the dealership saying, union, union, union, union, union.

(R 3, p. 37, lns 23-24, p. 38, lns 1-7)

Given this evidence, Judge Shamwell properly concluded that Respondent violated Section 8(a)(1) by threatening employees with blacklisting for supporting Automobile Mechanics Local 701. Employer threats to employees of the loss of current and future employment opportunities for engaging in union activity or supporting a union have repeatedly been found as unfair labor practices by the Board. See, e.g., *Flamingo Hilton-Laughlin*, 324 NLRB 72, 112 (1997) (adopting ALJ conclusion that employer unlawfully threatened employees with loss of employment opportunities when supervisor stated that workers who publicly supported union would have a hard time finding a job in other casinos owned by employer); *Cal Western Transport, Inc.*, 316 NLRB 222, 225, 231 (1995) (adopting Judge's finding of 8(a)(1) violation where company's northern regional manager told employee that he would have a hard time finding other work because he "was going to be marked as a troublemaker" due to his union support); *Highland Yarn Mills, Inc.*, 313 NLRB 193, 207 (1993) (supervisor comment to employee that employees would have a hard time getting jobs because of their past union membership was an unlawful threat to blackball employees).

No question exists that Davis's statements to employees that supporting the union would, among other things, cause them to "throw their careers here with this dealership under the bus" and that future employers would pass on hiring the dealership's employees because of the "scarlet letter" of being a Union supporter objectively conveyed to employees that they would be blacklisted from future employment, and possibly lose their existing employment, for supporting the Union. The comments Davis made are more severe than those that constituted violations in the *Flamingo Hilton*, *Cal Western Transport*, and *Highland Yarn Mills* decisions. Davis was telling employees of the "consequences" if they went through with the organizing campaign, namely that their ability to stay employed was at risk. As a result, Judge Shamwell correctly concluded that Respondent unlawfully threatened employees with blacklisting by applying the Board's proper, objective legal standard and treating as irrelevant Respondent's intent here or the fact that the threats were not carried out. *Towne Ford, Inc.*, 327 NLRB 183 (1998); *Pepsi-Cola Bottling Co. of Fayetteville, Inc.*, 315 NLRB 882, 892 (1994); *Alaska Pulp Corp.*, 296 NLRB 1260 (1989).

In its Exceptions, Respondent makes multiple, inadequate arguments to contend the statements by Davis did not violate the Act. The first is a suggestion that none of the comments addressed technicians' current employment with Respondent, only potential, future employment with other employers. (Resp. Br. pp. 16-17) That simply is inaccurate. As noted above, Davis stated specifically that drivers were going to "throw their careers *here with this dealership* under the bus, if, in fact, bad decisions were made and the union ultimately gets in here." He also said that the careers of employees in attendance "absolutely" may be affected. A reference to the drivers' "careers" obviously includes their current employment with Libertyville Toyota. Second, Respondent contends that the fact Davis did not use the word "blacklist" renders his

statements lawful. (Resp. Br. p. 15) That simply is not required by Board law. The violations found in *Flamingo Hilton*, *Cal Western Transport*, and *Highland Yarn Mills* did not involve use of the word “blacklist” by the persons making the unlawful statements. Third, Respondent attempts to use subjective reactions of employees who attended the meeting to claim no violation occurred, stating “the technicians testified that they did not find the comments made at the meeting by Respondent’s agents to be threatening” and “were able to discern the difference between Respondent’s opinion and fact.” (Resp. Br. p. 16) That subjective testimony is inconsequential to the legal question to be answered here. Inconceivably, immediately after making these arguments, Respondent notes the Board’s objective standard again. Finally, the fact that Davis made some of these statements in response to employee questions does not convert an unlawful statement into a lawful one. (Resp. Br. p. 15) If that were the case, Respondent, and all other employers opposed to a union organizing campaign, could have employees ask questions in meetings and then, with impunity, make unlawful threats or coercive comments in response.¹

The Judge correctly concluded that Respondent violated Section 8(a)(1) by threatening employees with blacklisting if they chose the Union as their bargaining representative.

¹ In making its argument that employees’ subjective reactions to statements should be considered by the Board, Respondent points to the fact that Counsel for the Acting General Counsel elicited testimony from certain witnesses regarding their reactions to what was said. (Resp. Br. p. 5) However, that testimony was elicited not because it had any bearing on the substantive question of the Section 8(a)(1) violations, but instead because the Acting General Counsel had requested special remedies in the Complaint against Respondent. The need for those special remedies was based, in part, on the impact that Respondent’s unfair labor practices had on the employees, both at that meeting and after Respondent suspended and terminated Union supporter Jose Huerta.

II. THE JUDGE CORRECTLY DETERMINED THAT RESPONDENT TOLD EMPLOYEES IT WOULD BE FUTILE TO SELECT THE UNION. (Respondent Exceptions 4, 10, 14-15, 23, 25)

Judge Shamwell appropriately held that Respondent's statements in the August 23, 2012, meeting, as an objective matter, reasonably tended to coerce the attending employees in their Section 7 rights by conveying that it was pointless for them to vote the Union in. (ALJD p. 45, lns 26-43, p. 46-47, p. 48, lns 1-30) Using the collective meaning contained in three pages of statements, the ALJ concluded Respondent unlawfully threatened employees that, if they choose the Union, the dealership had no intention of addressing their concerns about wages and other terms and conditions of employment, would not agree to anything in contract negotiations it did not want to, and that the negotiations themselves could take many years and might not result in a contract. (ALJD p. 48, lns 22-27) Board precedent definitively supports this legal conclusion. See, e.g., *Federated Logistics*, 340 NLRB 255, 255-56 (2003) (supervisors' comments that bargaining would start from zero and parties would negotiate from there violated Section 8(a)(1)); *Fieldcrest Cannon*, 318 NLRB 470, 510-12 (1995) (Section 8(a)(1) violation where supervisors told employees, among other things, that the company did not have to agree to anything and bargaining could take years, nobody could force the employer to do something it did not want to do, the company would bargain from scratch, and it would tie up the union in litigation for years); *Airtex*, 308 NLRB 1135, fn. 2 (1992) (statement by president and owner that he had only to negotiate with the union and negotiations could last a year in context was a threat that employee support for the union would be futile).

Here, Judge Shamwell correctly found that the breadth and entirety of the admitted supervisors' statements conveyed to employees that choosing the Union ultimately *would*, not could, be futile and violated Section 8(a)(1). That finding was proper due to the totality of the statements made by Respondent, combined and repeated comments about how long negotiations

would take, the lack of intent the dealership had of doing anything that was not in its best interests, and the profoundly negative outcomes that other technicians who previously went union experienced based upon Auto Nation's response.

Without recounting the entire three pages of statements relied upon by the Judge, certain of the declarations make this point clear. First, with respect to the length of negotiations, Davis told employees that:

No 2, the process is lengthy. It's long. It's drawn out. Anybody who tells you otherwise is lying to you....There's 136 different legal issues that we have to consider after the fact. And then there's potentially years and years and years of bargaining for a first contract that would have to take place.

(ALJD p. 46, lns 8-13) This was followed up with comments that any changes in working conditions, including wages, "could be a month, it could be six months, it could be five years."

(ALJD p. 47, lns 16-17) It concluded with Davis declaring "a contract is never reached immediately...And often times it takes many, many months and even years for the bargaining process to begin." (ALJD p. 47, lns 28-30) Second, with respect to the company's actual or planned bargaining strategy, Vice President of Human Resources Jonathan Andrews told the gathered employees that "the company is not going to do something that's still not in the best interest of the technicians, the service department or this dealership at the end of the day, regardless." (ALJD p. 46, lns 1-3) Davis then followed up by stating the Union "can't give you anything we're not willing to give you." (ALJD p. 46, lns 20-21) Moreover, Davis also told the employees "when I say that we sit down and we start from scratch, we start from scratch. We don't start with what you guys are making today. Everything goes to zero." (R 3, p. 81, lns 20-23) To wrap up the trifecta, Davis then vividly described for the employees how Auto Nation had handled prior situations where its employees decided to bring in a Union. Davis began by

describing how one set of employees, after going on strike “agreed to what we had on the table to begin with, and 22 people lost their jobs.” (ALJD p. 46, lns 40-41) Then he brought up unionized technicians in Auto Nation’s Orlando Mercedes Benz dealership who “have been living that nightmare for almost three years now without one bargaining session, not one contract negotiations.”² (ALJD p. 48, lns 17-20)

This case mirrors the factual situation, and Board finding of a Section 8(a)(1) violation, in *Madison & Kipp Co.*, 240 NLRB 879, 879 (1979). In that case, an employer representative indicated several times that any bargaining between the company and union would start from scratch; stated specifically that “the Company would bargain long and hard and would only grant what is economically feasible;” and then provided an actual example of a different company bargaining for eight years without reaching a contract which ended in lost jobs and no contract. The situation in this case is identical, with all elements also present. Respondent here made comments about starting from scratch, repeatedly stated that negotiations could take years, informed employees about how it previously did not engage in any negotiations and employees lost jobs in other dealerships that went union, and told the technicians that they were not going to see any improvements in working conditions unless it was in the best interests of the company. As in *Madison & Kipp*, the total context of Respondent’s statements constitutes an unlawful threat of futility, as the Judge concluded.

On appeal, Respondent contends that the numerous statements by Davis and Andrews were lawful concrete examples of potential negative outcomes to electing a union, as opposed to a description of the dealership’s actual or planned bargaining strategy. (Resp. Br. pp. 17-21)

² Auto Nation’s conduct in response to the organizing campaign at this dealership is the subject of another complaint by the Acting General Counsel, now pending at the Board. *Mercedes-Benz of Orlando, Inc.*, Case 12-CA-26126. The ALJ in that case found multiple unfair labor practices by Auto Nation and its dealership. 2011 WL 970447, slip op. (NLRB Div. of Judges, March 18, 2011).

However, to support this argument, Respondent again does not apply the Board's proper legal standard and instead considers each statement in isolation without addressing their collective effect over the course of the nearly two-hour meeting. In addition, the dealership suggests that the comments relied upon the Judge indicate that Davis acknowledged the "inevitability" of the bargaining process, despite specific statements to the contrary. (Resp. Br. p. 19) When speaking to the employees about negotiations, Davis specifically stated "*if you ever get there,*" a possibility that certainly does not indicate negotiations are inevitable. Instead, it actually suggests that an employer has the ability to refuse to negotiate with a union after employees chose it, which obviously cannot happen.

Finally, the cases cited by Respondent do not support its contention that it did not violate the Act in this regard. (Resp. Br. pp. 18-21) In *Medieval Knights, LLC*, 350 NLRB 194 (2007), a representation case decision not involving any alleged Section 8(a)(1) conduct, the Board concluded that no objectionable conduct occurred when an employer conducted an exercise during a meeting involving hypothetical bargaining parties. No such hypothetical exercise or skit occurred here. In addition, employees in that case could not remember the exact words used by the supervisor to describe the hypothetical employer's conduct. In this case, the tape recording of what was said by Davis and Andrews concretely establishes exactly what was said.

The differentiation drawn by the ALJ, and adopted by the Board, in *Histacount Corp.*, 278 NLRB 681, 689 (1986), actually supports Judge Shamwell's finding here. The ALJ in *Histacount* found no violation because the statements there were different from those in *Madison and Kipp*. In particular, the employer in *Histacount* did not include an actual example of bargaining taking 8 years without any contract ever being reached or a comment that it intended

to bargain for a long time, which the employer in *Madison & Kipp* did. As described above, this case mirrors the situation in *Madison & Kipp* and thus is distinguishable from *Histacount Corp.*

Likewise, *Ludwig Motor Corp.*, 222 NLRB 639 (1976) is inapposite because it involved employer statements made in response to “exaggerated” claims of the organizing union and those statements did not contain the *Madison & Kipp* areas covered by Davis here, which collectively conveyed the futility of choosing the Union. The finding of lawful statements in *Langdale Forest Products, Co.*, 335 NLRB 602 (2001) does not apply, because the dealership here certainly did not disclaim its ability to promise improvements in wages, instead impliedly promising a wage increase (as discussed below), and did not compare wages and benefits of employees at unionized and nonunionized locations. Finally, *Winkle Bus Co.*, 347 NLRB 1203, 1206 (2006), involved an employer which lawfully stated that wage increases could be delayed because of the uncertainties of the collective-bargaining process, but did not involve a situation like this one where the comment was accompanied by a “start from zero” comment or any of the other comments relied upon by Judge Shamwell to find that, collectively considered, the statements violated Section 8(a)(1).

Respondent violated the Act by telling employees it would be futile for them to select the Union as their bargaining representative, because negotiations would take years if they ever happened and then start from scratch, they would not get a wage increase or any other improvements in terms and conditions unless it benefitted the dealership, and other employees who had chosen the path to unionization were paying the consequences at other Auto Nation dealerships. Respondent’s exceptions regarding these allegations should be denied.

III. THE JUDGE PROPERLY FOUND THAT RESPONDENT IMPLIEDLY PROMISED TO INCREASE WAGES IF TECHNICIANS DID NOT VOTE IN THE UNION. (Respondent Exceptions 10, 16-18, 23, 25)

The ALJ correctly concluded that the multitude of statements by Davis and Andrews at the August 23, 2012, meeting, considered collectively, conveyed to employees that, if they did not choose the Union, Respondent would address their concerns about the lack of a wage increase. Judge Shamwell relied heavily on an express promise by Davis regarding wages, saying “these are the kinds of things that we need to talk about, and if they are your concerns, we want a chance to address them before you pay someone else to address them.” (ALJD p. 49, ln 46, p. 50, lns 1-2) In addition, the Judge also supported his conclusion, in part, by citing to statements by Davis and Andrews that “we need to look at that [the technicians’ current pay plan]...and we need to make decisions;” “if we’re not competitive with the different dealerships that are in this area, it’s something we’ve *got to* look at (emphasis added); and “...if we are falling short [in providing a fair wage] you know, then it’s something that we need your help looking at.”³ (ALJD p. 49, lns 5-6, 15-16, 24-25)

Board precedent supports the Judge’s legal conclusion concerning Respondent’s implied promise of a wage increase. An employer violates Section 8(a)(1) when it promises, explicitly or implicitly, to grant a benefit contingent on employees relinquishing support for a union.

California Gas Transport, Inc., 347 NLRB 1314, 1318 (2006) (in a situation where employees sought out a union due to desire for a wage increase, supervisor made unlawful implied promise of benefit when he noted wage increases already provided by employer to its non-union facilities

³ Counsel for the Acting General Counsel does not agree, as the ALJ suggested, that these statements were “almost” an expressed promise or that they conveyed that the dealership was “amendable to considering providing wage increases.” (ALJD p. 50, lns 5-6, 9) The specific language used as noted here, and the totality of those statements, concretely establish that Respondent would address—not maybe address—the employees’ concerns about wage increases.

and suggested the same increase would be granted to employees if union was defeated), citing *Bakersfield Memorial Hospital*, 315 NLRB 596, 600 (1994) (implied promise of benefit where supervisor in anti-union meeting noted that employer was considering benefit changes, had already undertaken a compensation benefit program for employees which included survey, and noted benefits employees desired). See also *Superior Emerald Park Landfill*, 340 NLRB 449, 459-61 (2003) (supervisor's statement to employees that changes would be made to make workplace better constituted implied promise of benefit).

In its Exceptions to the ALJ's finding in this regard, Respondent attacks on multiple fronts that do not compel a different result. First, Respondent cites to portions of the statements relied upon the Judge where Davis and Andrews attempted to qualify their implied promise by saying a wage increase was a "possibility" or that they had a "willingness to consider it." (Resp. Br. p. 9) Of course, the specific statements cited above were not qualified in that manner, but instead explicitly told the gathered employees that "we've got to look at" employees' wages "before [they] pay someone else" to do so. In addition, that certain, isolated statements were qualified does not change the overall message conveyed by the totality of all statements that Respondent would address the lack of a wage increase on its own if the Union did not come in.⁴

Second, and in a repeated refrain, Respondent argues that the ALJ engaged in "personal speculation about what employees might have thought or felt was being said" as well as engaged in "tenuous and fanciful personal assumptions." (Resp. Br. p. 10) What the Judge did was an

⁴ Respondent uses the same technique when detailing how Libertyville Toyota General Manager Taso Theodorou conducted meetings with employees to discuss the Union organizing campaign prior to the August 23, 2012, meeting, and that no unfair labor practice charges were filed concerning Theodorou's conduct in those meetings. (Resp. Br. p. 4) The suggestion appears to be that, if Respondent did not violate the Act in Theodorou's meetings, it also could not have in the August 23, 2012, meeting. Of course, that argument is nonsensical. Just because a different supervisor in a different meeting did not violate Section 8(a)(1) does not preclude Davis and Andrews from breaking the law in the August 23, 2012, meeting. What Theodorou did in his preliminary meetings is irrelevant to the legal questions presented in Respondent's Exceptions.

objective analysis of how an employee would reasonably construe the many comments made by Davis and Andrews about wage increase. Thus, Respondent's objection, at its core, appears to be that the Judge should not have done his job and adhered to the Board's objective standard for evaluating Section 8(a)(1) violations. It was the Judge's role to determine what an objective employee "might have thought or felt was being said" by Davis and Andrews. Similarly then, Respondent's contention that the ALJ's finding is somehow affected by the lack of a "single witness who could recall a 'promise' of raises, implied or otherwise" likewise ignores the Board standard. Respondent's reliance on the subjective reaction of employees who were present at the meeting has no place in the Board's legal analysis.

Counsel for the Acting General Counsel takes no issue with the general proposition that employers have Section 8(c) rights to express their views and opinions if such expression does not contain a threat of reprisal or promise of benefit. Yet the cases relied upon by Respondent in its exceptions, where expressions were found to be protected by Section 8(c), plainly do not involve the same types of issues presented in this case. (Resp. Br. pp. 9-11) *Putnam Buick*, 280 NLRB 868 (1986), presented drastically different factual and legal situations. The complaint there alleged a Section 8(a)(5) violation for direct dealing, arising out of an employer providing bargaining proposals during ongoing contract negotiations and then telling employees that, if the company's proposals were not accepted, the employees might be on strike. The Board found this to be a "realistic possibility" because the Union already had conducted a strike vote 6 weeks earlier amongst the effected employees. In this case, Davis and Andrews did more than discuss a "realistic possibility"—they told employees that they would look at their wages and address their concerns before they paid the Union to do so. They did this without any prompting from Automobile Mechanics Local 701. The Board's finding of no Section 8(a)(1) violation in *Uarco*,

Inc., 286 NLRB 55 (1987), was premised on an employer's written materials being evaluated within the context of additional, oral statements made at numerous meetings held by the employer where it gave assurances to employees that it would bargain with the union. In this case, the context of the statements by Davis and Andrews concerning wage increases was one meeting where numerous other Section 8(a)(1) violations were committed, which supports the conclusion that Respondent's implied promise of benefit was unlawful. Finally, in *International Baking*, 348 NLRB 1133 (2006), the Board found the following statements by a supervisor to an employee were lawful: "the Union wasn't a good thing. That it wasn't right. That [the employee] was one of the most senior drivers there with more time there," as well as that the employee was making decent money, the Union would harm him, and it would be better for him not to sign a union card." Unlike this case, these statements do not involve wages and are not as extensive or specific as the numerous statements made by Davis and Andrews, in terms of what Respondent would do for employees with respect to their wages if the Union was not present.

Libertyville Toyota violated Section 8(a)(1) by impliedly promising employees a wage increase at the August 23, 2012, meeting, if they would choose not to vote the Union in.

IV. THE ALJ'S HOLDING THAT RESPONDENT THREATENED EMPLOYEES WITH DEMOTIONS IF THEY CHOSE THE UNION WAS PROPER. (Respondent Exceptions 10, 19-23, 25)

Judge Shamwell accurately concluded that, based upon the "exchanges as a whole," Davis and Andrews conveyed to employees at the August 23, 2012, meeting that a contract with the Union would include a reclassification of employees into journeymen and apprentice status, resulting in the demotion of any technicians without the proper certifications and skills sets to apprentice. (ALJD p. 51, lns 18-28) In particular, the Judge noted how Respondent's comments indicated the certainty and inevitability of such a classification system in contract negotiations.

The legal conclusion was supported by, among other comments, the statements by Davis that, in a unionized environment, a classification system with journeymen and apprentices was “basically how it works;” confirming that an employee without the proper qualifications for the journeyman status would be demoted by saying “that’s exactly how it would be negotiated;” telling the employees that “you need that structure. If not that identical structure, something similar to that would be negotiated so you could properly classify people without subjectivity;” and ultimately, after commenting that senior technicians would probably stand to gain the most, that “[e]verybody else...stands to have...their status reduced both in terms of pay and level.” (ALJD p. 50, ln 31-33, 35-39, 45-47; p. 51, lns 10-13) These statements make clear that reclassification would—not just could—occur if the Union became the technicians’ bargaining representative. Thus, the ALJ properly relied upon, not “cherry picked,” these statements to find a violation. (Resp. Br. p. 14)

The ALJ’s legal conclusion that Respondent’s threat of demotion violated Section 8(a)(1) was the right one given the statements by Davis. *The Lobster Trap*, 259 NLRB 1197, 1202-03 (adopting Judge’s finding that threat to demote by employer in response to learning of employees’ union organizing was unlawful); *First Western Building Services, Inc.*, 309 NLRB 591, 605, 608 (1992) (adopting ALJ conclusion that employer violated Section 8(a)(1) by threatening to demote, discipline, or discharge employee if he continued to engage in protected conduct consisting of complaints about perceived violations of collective bargaining agreement).

On appeal, Respondent yet again relies upon the subjective reactions of its anti-union witnesses to argue that no threat of demotion was made, a legally irrelevant factor. (Resp. Br. pp. 13-14) In particular, Respondent recounts the testimony of its employee witnesses, then summarily states that “...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 a union? All responded ‘no’ without hesitation.” A Section 8(a)(1) violation in this regard is not dependent on Davis using the word “demoted” when he spoke. It also is not dependent on employees who admittedly did not support the union giving their subjective opinion that they never heard such a threat. In addition, Respondent also recounts other, allegedly proper statements by Davis and Andrews concerning demotions. However, the Judge did not rely on those isolated statements to find a violation and thus they have no bearing on the ALJ’s ultimate conclusion. A review of the record evidence and the legal opinion on this question establishes that the Judge conducted the proper legal analysis—would an objective employee have taken the collective statements by Davis as a threat that bringing in the Union would result in a demotion? Framing the issue properly, the violation is obvious.

V. CONCLUSION

For all of the aforementioned reasons, Counsel for the General Counsel requests that Respondent’s Exceptions be denied in their entirety.⁵

DATED at Chicago, Illinois, this 25th day of October, 2012.

Respectfully submitted,

/s Charles J. Muhl

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⁵ Respondent’s remaining exceptions (1-3, 7-9) are to factual findings made by Judge that are fully supported by record evidence, most notably the tape recording of the statements made by Davis and Andrews at the August 23, 2012, meeting. Exception 24, objecting to the Judge’s unobjectionable use of italics to emphasize the importance of certain statements he was relying on in his opinion, does not necessitate a response.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS** was electronically filed with the Office of the Executive Secretary of the National Labor Relations Board on October 25, 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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