

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

AUTONATION, INC. AND VILLAGE )  
MOTORS, LLC D/B/A LIBERTYVILLE )  
TOYOTA )  
 )  
and )  
 )  
AUTOMOBILE MECHANICS' LOCAL NO. )  
701, INTERNATIONAL ASSOCIATION OF )  
MACHINISTS & AEROSPACE WORKERS, )  
AFL-CIO, )  
\_\_\_\_\_ )

CASE NO. 13-CA-63676

**RESPONDENT'S ANSWERING BRIEF TO ACTING  
GENERAL COUNSEL'S EXCEPTIONS TO  
ADMINISTRATIVE LAW JUDGE'S DECISION**

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**TABLE OF CONTENTS**

I.	INTRODUCTION .....	4
II.	STATEMENT OF FACTS .....	4
	A. BACKGROUND .....	4
	B. AUGUST 23 ANONYMOUS CALL .....	5
	C. AUGUST 26 MEETING .....	5
	D. HUERTA’S POST-SUSPENSION CONDUCT .....	6
	E. HUERTA’S DISCHARGE.....	7
III.	ARGUMENT .....	7
	A. THE JUDGE PROPERLY FOUND THAT DEALERSHIP DID NOT VIOLATE THE ACT BY SUSPENDING AND TERMINATING JOSE HUERTA.....	7
	1. The judge applied the correct standard and properly found there was no evidence of disparate treatment.....	8
	a. The judge applied correct legal standard.....	8
	b. The judge appropriately found no evidence of disparate treatment .....	9
	2. The judge properly found that Libertyville’s stated reason for terminating Huerta was not pretextual. ....	16
	a. Huerta did not reasonably conclude he had been terminated.....	17
	i. Undisputed Facts .....	17
	ii. Judge’s Discussion .....	19
	iii. Incomplete/inaccurate facts .....	19
	iv. Inapposite case law .....	22
	b. It was not the Dealership’s responsibility to contact Huerta prior to terminating him.....	25
	B. THE JUDGE APPROPRIATELY REFUSED TO AWARD SPECIAL REMEDIES IN THIS CASE.....	26
	1. Standard for awarding special remedies .....	27
	2. The General Counsel has failed to carry his burden of proving special remedies are warranted.....	27
	a. Alleged unlawful statements.....	28
	b. Statements were not outrageous .....	30
	3. The General Counsel’s reference to Auto Nation’s alleged “recidivism” is improper and highly prejudicial. ....	31
	4. The General Counsel’s remaining arguments are not based on record facts and/or do not comport with Board precedent. ....	32
IV.	CONCLUSION .....	34

## Cases

<i>Abramson, LLC</i> , 345 NLRB 171 (2005) .....	26
<i>Apex Cleaning Service</i> , 304 NLRB 983 (1991) .....	23
<i>Conair Corp.</i> , 261 NLRB 1189 (1982) .....	30
<i>Consolidated Biscuit Co.</i> , 346 NLRB 1175 (2006).....	26
<i>Fieldcrest Cannon, Inc.</i> , 318 NLRB 470 (1995).....	27, 33
<i>First Legal Support Services, LLC</i> , 342 NLRB 350 (2004).....	27, 30
<i>Golden State Foods Corp.</i> , 340 NLRB 382 (2003).....	13, 14
<i>Hale Manufacturing Co.</i> , 228 NLRB 10 (1977) .....	23
<i>Merillat Industries</i> , 307 NLRB 1301 (1992).....	8
<i>Monfort of Colorado (“Monfort IP”)</i> , 284 NLRB 1429 (1987) .....	33
<i>Nichols, Inc.</i> , 284 NLRB 556, 594 (1987) .....	33
<i>North American Dismantling Corp.</i> , 331 NLRB 1557 (2000).....	22
<i>Oklahoma Fixture Co.</i> , 308 NLRB 335 (1992).....	24
<i>Overnite Transportation Co.</i> , 343 NLRB 1431, 1436 (2004).....	8, 10, 12
<i>Piner’s Napa Ambulance Service</i> , 352 NLRB 609 (2008).....	13
<i>Ridgeway Trucking Co.</i> , 243 NLRB 1048 (1979).....	23
<i>S.E. Nichols, Inc.</i> , 284 NLRB 556, 560 (1987).....	27
<i>St. George Warehouse, Inc.</i> , 349 NLRB 870, 879 (2007).....	13
<i>Standard Dry Wall Products</i> , 91 NLRB 544 (1950).....	9
<i>Sturgis-Newport Business Forms</i> , 227 NLRB 1426 (1977).....	30
<i>U.S. Service Indus.</i> , 319 NLRB 231 (1995) .....	33
<i>Wallace Corp. v. NLRB</i> , 323 U.S. 248 (1944).....	32

## **I. INTRODUCTION**

Administrative Law Judge Earl E. Shamwell Jr. issued a decision in this matter on August 16, 2012. The judge found that Respondent AutoNation, Inc. (“AutoNation”) and its subsidiary company, Village Motors, Inc. d/b/a Libertyville Toyota (“the Dealership”) (collectively “Respondent”), did not violate the Act by suspending and later terminating Dealership employee Jose Huerta.<sup>1</sup> The judge further found that Respondent violated the Act by threatening and making an implied promise of benefits to a group of employees at a single meeting on August 23, 2011.<sup>2</sup> On September 27, 2012, Respondent and the Acting General Counsel (“General Counsel”) filed their respective exceptions to the judge’s decision and supporting briefs. Pursuant to Section 102.46(f)(1) of the Board’s Rules and Regulations, Respondent submits this answering brief to the General Counsel’s exceptions.

## **II. STATEMENT OF FACTS**<sup>3</sup>

### **A. BACKGROUND**

The Dealership is a traditional retail automobile dealership, selling, leasing, and servicing new and used vehicles in Libertyville, Illinois. In June 2011, employee Jose Huerta was arrested for driving under the influence, and consequently, his driver’s license was suspended by the State of Illinois. (Tr. 57, 83, 377). The Dealership requires that employees, such as Huerta, who drive vehicles as part of their job maintain a valid driver’s license. (GC Exh. 5). The Dealership further requires that all such employees immediately notify their direct supervisor in the event their driver’s license is suspended or revoked. (GC Exh. 5).

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<sup>1</sup>The original complaint in this case only identified the Dealership as a respondent. (GC Exh. 1(e)). The amended complaint added AutoNation as a respondent. (GC Exh. 1(k)). AutoNation raised various affirmative defenses to its inclusion in its answer. (GC Exh. 1(n)). In his decision, the judge considers AutoNation and the Dealership as a single respondent for purposes of this case only. (ALJD p. 2, fn. 3).

<sup>2</sup>All dates referenced herein are to 2011, unless otherwise indicated.

<sup>3</sup>The facts discussed herein only relate to the General Counsel’s exceptions.

**B. AUGUST 23 ANONYMOUS CALL**

On August 23, an anonymous caller left a voicemail for the Dealership's General Manager, Taso Theodorou, stating that Huerta should not be working at the dealership because he had a "DUI" and had lost his driver's license. (Tr. 295, 305). After listening to the message, Theodorou played it for AutoNation's Regional Human Resources Director, Jonathan Andrews, and the two discussed how best to respond to the allegation. (Tr. 297). Rather than confront Huerta solely on the basis of an anonymous tip, Theodorou decided that the veracity of the claim should first be examined. (Tr. 306, 343). Consequently, Andrews initiated a request for a Motor Vehicle Registration ("MVR") check on August 23 to determine if Huerta had indeed lost his license. (Tr. 307).

**C. AUGUST 26 MEETING**

On August 26, Theodorou was notified that Huerta's license had in fact been suspended. (Tr. 307). Theodorou informed Huerta's immediate supervisor, Operations Manager Dave Borre, of the situation, and Borre in turn called Huerta into a meeting to discuss the matter. (Tr. 307). Another Dealership manager, John Shubin, was summoned as a witness. (Tr. 376). Upon being confronted by Borre about the report, Huerta acknowledged he had lost his license and, in fact, even confessed that he had been charged with a DUI. (Tr. 57, 83, 377). Huerta offered no explanation as to his reason(s) for failing to come forward and voluntarily report the DUI when it occurred in May 2011. He also failed to apologize for his failure to report the license revocation or offer any other excuses. (Tr. 377).

Borre advised Huerta he would be suspended for two weeks, which would allow him ample time to resolve the legal issues associated with his license. (Tr. 57, 84, 377). Borre had been specifically instructed by Theodorou to allow Huerta a two-week time frame in which to

remedy the license situation (even though it was a DUI) because that was the same time-frame Theodorou had given other employees with MVR-related issues. (Tr. 389). Theodorou testified that, ever since he first assumed management of the Dealership two years earlier, he had always offered a two-week time frame to employees who needed to “fix” license problems. (Tr. 307-308, 340).

Upon being told that he would be given two weeks from the following Monday to attend to his DUI issue, Huerta asked for additional time, explaining that his next court hearing would not take place until September 13. (Tr. 57). Borre stepped out of the meeting, conferred with Theodorou, and then returned to advise Huerta that he could have until September 14 (a full 17 days after the August 26 suspension) to deal with his issue. (Tr. 294).

Borre and Shubin confirmed that there was no discussion of “termination” or “firing” at the meeting, and that Borre had clearly stated to Huerta that he was only *suspended* until September 14. (Tr. 370, 377, 384). Huerta confirmed that nothing was said about the “union” in the August 25 meeting. (Tr. 93).

#### **D. HUERTA’S POST-SUSPENSION CONDUCT**

It is undisputed that Huerta never returned to the dealership at any point between August 26 and the September 14 deadline given by Borre. (Tr. 57, 86-87, 316, 380-381). The following Wednesday, August 31, however, the International Association of Machinists Union (“IAM”) filed an unfair labor practice charge alleging that Huerta’s August 26 *suspension* was in violation of the Act. (GC Exh. 1(a)).

One week later (on September 6), Huerta apparently filed a claim for unemployment compensation benefits with the Illinois Department of Employment Security. (Tr. 62). At that point, Theodorou communicated with the Dealership’s employment security insurance agency to

apprise them of the fact that Huerta had *not* been terminated and, therefore, should not be entitled to unemployment compensation. (Tr. 317).

Huerta readily admitted that at no time between his suspension and September 14 did he attempt to contact the Dealership management or anyone else, other than an IAM representative. (Tr. 86-87). Huerta testified that he had known Borre for 15 years and that he believed that Borre had always been “honest” with him. (Tr. 93). He offered no explanation for failing to contact Borre, Shubin, Theodorou or anyone else at the Dealership to ascertain his employment status before authorizing the filing of the ULP charge or filing for unemployment compensation benefits. (Tr. 86-87).

**E. HUERTA’S DISCHARGE**

On September 21, one week after the September 14 deadline on which Huerta and Borre had agreed, the Dealership terminated Huerta’s employment for “job abandonment.” (Tr. 322; R Exh. 8).

**III. ARGUMENT**

The General Counsel excepts to the judge’s finding that the Dealership did not violate Section 8(a)(3) and (1) of the Act by suspending and later terminating Jose Huerta. (GC Excs. 1-10). The General Counsel also excepts to the judge’s failure to award special remedies as a consequence of the Dealership’s alleged unlawful conduct. (GC Exc. 11). For the reasons set forth below, the Board should reject the General Counsel’s exceptions to the judge’s decision.

**A. THE JUDGE PROPERLY FOUND THAT THE DEALERSHIP DID NOT VIOLATE THE ACT BY SUSPENDING AND TERMINATING JOSE HUERTA.**

The General Counsel argues the judge should have found that: (1) Huerta was subject to disparate treatment because of his union activities (GC Br. 6-15); and (2) the Dealership’s

justification for terminating Huerta was pretextual (GC Br. 15-23). The General Counsel's arguments are meritless.

**1. The judge applied the correct standard and properly found there was no evidence of disparate treatment.**

According to the General Counsel, the judge applied an incorrect legal standard by viewing the Dealership's conduct toward Huerta in isolation and by not discussing how the Dealership treated other employees who lost their driver's licenses. (GC Br. 7-15). The General Counsel misreads the judge's findings and misinterprets current Board precedent.

**a. The judge applied correct legal standard**

Evidence of an employer's treatment of similarly-situated employees is relevant to the inquiry of whether a preponderance of the evidence supports the employer's claim that it would have disciplined an employee regardless of his or her protected activities. See *Overnite Transportation Co.*, 343 NLRB 1431, 1436 (2004) ("The relevant inquiry . . . is whether the Respondent treated its employees consistently when it discovered [the improper conduct]."); *Merillat Industries*, 307 NLRB 1301 (1992) ("Naturally, evidence of the Respondent's treatment of more or less similarly situated employees [is] relevant . . ."). In this case, the judge's decision plainly reflects that he did not view Huerta's suspension in a vacuum, but rather thoroughly considered whether the decision-maker, General Manager Taso Theodorou, similarly suspended other employees who lost their driver's licenses.<sup>4</sup>

At the hearing, Theodorou testified, without contradiction, as follows: "Any time I get notification that I have an employee in a driving position that . . . does not have a valid driver's

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<sup>4</sup>To the extent the General Counsel argues the judge should have considered whether other employees who lost their driver's licenses were *terminated*, the argument can easily be rejected. It is undisputed that Huerta was only *suspended* for losing his license. Huerta was *terminated* for abandoning the job. Thus, with respect to comparing other employees who lost their licenses, it is irrelevant whether they were terminated.

license, I suspend them and give them time to correct it . . . .” (Tr. 340).<sup>5</sup> In his decision, the judge repeatedly credited Theodorou’s testimony regarding this practice. For example, on page 15 of his decision the judge writes, “[A]ccording to Theodorou, if he gets notice of a license problem for an employee in a driving position, his practice is to suspend him but give him time to correct the matter . . . .” (ALJD p. 15). Similarly, on page 53 the judge writes, “Theodorou testified that it was his policy to suspend employees for violations of the policy . . . .” (ALJD p. 53). The judge specifically credited Theodorou’s testimony based on his observation of the witness: “I was impressed by Theodorou who, in my view, testified in a straightforward manner and showed no animosity, not only to the union cause but also Huerta.” (ALJD p. 53).<sup>6</sup>

In arguing that the judge applied an incorrect standard and failed to discuss how the Dealership treated other employees, the General Counsel turns a blind-eye to the judge’s discussion of Theodorou’s uncontroverted testimony. At best, the General Counsel can argue – as he subsequently does – that the judge should not have *accepted* Theodorou’s testimony. A plain reading of the decision, however, dispels the notion that the judge failed to even consider evidence of how similarly-situated employees were treated.

**b. The judge appropriately found no evidence of disparate treatment**

The General Counsel argues that if it were really true that Theodorou always suspended employees immediately when he learned they lost their licenses, Respondent “could have introduced documentary evidence at the hearing of the alleged suspensions issued by Theodorou during his tenure.” (GC Br. 11). This argument is flawed because it was not Respondent’s burden to introduce documentary evidence corroborating Theodorou’s testimony, which the

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<sup>5</sup>Theodorou’s testimony was corroborated by Borre: “[I]t’s [Theodorou’s] guidelines that we suspend everybody if they do not have a driver’s license.” (Tr. 389).

<sup>6</sup>The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence demonstrates they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

judge expressly credited. See *Overnite Transportation Co*, 343 NLRB at 1436 n.11 (accepting management witness's testimony that falsifying a job application "always resulted in termination for everyone that [he's] ever been involved with since [he's] been with the company" and noting that "in the absence of evidence to the contrary, this testimony supports the Respondent's assertion that it applied its termination policy in a consistent manner").

Significantly, the General Counsel did not cross-examine Theodorou or Borre about Theodorou's policy of immediately suspending all employees who are found to have lost their licenses. Moreover, the General Counsel did not call any other witnesses to refute or otherwise discredit Theodorou's or Borre's testimony. Only now, in his exceptions brief, does the General Counsel contend that there is "documentary evidence" belying the credited testimony that Theodorou always immediately suspends employees who lose their licenses. (GC Br. 11).

The evidence on which the General Counsel now purports to rely relates to employees James Boehart and Ivan Jasso. The General Counsel failed to explore this evidence through any witnesses at the hearing. Regardless, the evidence not only fails to support the General Counsel's position – it completely undermines it.

According to the General Counsel, Boehart failed his annual MVR screening on August 3, 2011, yet he was not suspended. (GC Br. 11). In support of this assertion, the General Counsel cites to page 210 of the transcript and General Counsel's Exhibit 7. Strikingly, Theodorou's testimony on page 210 of the transcript makes clear that Boehart *was* suspended when Theodorou discovered his license has been suspended:

Q. He's still employed now?

A. Yes, he is.

Q. Is he on suspension?

A. He's not currently now. *He was, yes.*

(Tr. 210) (emphasis added).

Additionally, General Counsel's Exhibit 7, which is a spreadsheet reflecting all employees who have lost their driver's licenses since 2004, in no way indicates that Boehart was not immediately suspended by Theodorou. General Counsel's Exhibit 7 merely identifies Boehart as having failed the MVR screening process on August 3, 2011, and it indicates that he is still an active employee. Thus, General Counsel's 7 is consistent with Theodorou's testimony on page 210.

As for Ivan Jasso, the General Counsel contends that Theodorou immediately accommodated him by permitting him to execute a non-driving waiver on October 24, 2011. (GC Br. 11). Jasso's waiver was introduced as General Counsel's Exhibit 6, page 1. The only other evidence in the record relating to Jasso is on General Counsel's Exhibit 7, which indicates that Jasso was discovered on August 3, 2011, to have lost his license. (GC Exh. 7). Thus, contrary to the General Counsel's suggestion, the record is devoid of any direct evidence as to what happened to Jasso between August 3, 2011, and October 24, 2011. Thus, consistent with Theodorou's and Borre's testimony about Theodorou's policy, it can only be inferred from the record that Jasso was treated consistently with all other employees (i.e., he was immediately suspended on August 3, 2011).

After unpersuasively arguing that Boehart and Jasso are "comparators" of Huerta, the General Counsel devotes nearly four pages of his brief to discussing how other employees were allegedly permitted to continue working following their immediate suspensions for losing their licenses. (GC Br. 11-15). The General Counsel's argument in this regard fails for one

overarching reason: none of those employees failed or refused to return to work after being suspended.

Theodorou testified that every employee besides Huerta who has been suspended during his tenure for losing his license has made direct and regular contact to let management know where they were in the process of rectifying the license issue/problem. (Tr. 379-380). The General Counsel did not cross-examine Theodorou on this issue, and, yet again, he failed to introduce evidence to refute Theodorou's testimony. See *Overnite Transportation*, 343 NLRB at 1436 n.11 (accepting management witness's past practice testimony "in the absence of evidence to the contrary").

In fact, the General Counsel only called to the witness stand two of the alleged "comparators" identified in pages 11-15 of the General Counsel's brief: Guadalupe Montoya and Mere Tellez. Neither Montoya nor Tellez offered support for the General Counsel's position. Montoya testified that both times his license was suspended, he reached out to his supervisor. (Tr. 111). Tellez did not testify at all about his suspended license. (Tr. 139-157).

The only other alleged "comparator" the General Counsel asked another witness about was Enrique Tovar. The General Counsel asked Operations Manager Dave Borre about the circumstances surrounding Tovar losing his license. Borre explained that, unlike Huerta, Tovar "returned within a couple of days to ask if there was anything we could do to help him." (Tr. 204).

At no time has the General Counsel even disputed that Huerta is the *only* Dealership employee who made absolutely no effort to reach out and try to preserve his job following the loss of his license. Simply put, the only reasonably comparative example would be another employee who was suspended but never contacted management to report on the progress of

having his license reinstated or inquire about his job. Because the General Counsel offered no such example, he urges the Board to ignore this critical distinguishing factor in its analysis and broadly find that other employees who experienced license issues were similarly-situated to Huerta.

To pursue the General Counsel's approach would be inconsistent with well-established Board precedent. See, e.g., *Green Valley Manor*, 353 NLRB 905, 906 (2009) (finding no disparate treatment where, although other employees had been disciplined for leaving the work area, the alleged discriminatee was the only one who "left the assigned work area not once, but five times, and falsely denied her misconduct when confronted by [management]"); *Piner's Napa Ambulance Service*, 352 NLRB 609, 609 n.2 (2008) (finding no disparate treatment where "the record evidence establish[ed] that, although [the alleged comparator] may have dishonestly called in sick in 2002, she, unlike [the alleged discriminatee] did not abandon her shift"); *St. George Warehouse, Inc.*, 349 NLRB 870, 879 (2007) ("Although most employees who were suspended had received prior warnings, there is no record of any other incident involving four infractions in one week.").

In his final attempt to convince the Board that the judge erred in finding Huerta was not subject to disparate treatment, the General Counsel cites *Golden State Foods Corp.*, 340 NLRB 382 (2003). The General Counsel's reliance on this case, however, is badly misplaced. In *Golden State*, Danny Davidson, a truck driver and open union supporter, was suspended when his employer discovered on a moving violation certification form that all drivers were required to annually submit that he did not possess a driver's license from his state of residence. *Id.* at 384. After being notified of the issue by his employer, Davidson secured a correct driver's license that same day and was taken off suspension. *Id.*

The following morning, Davidson's supervisor compared a Department of Motor Vehicles ("DMV") report with Davidson's past certification forms, and discovered that Davidson had also failed to disclose a one year-old speeding violation, and he failed to disclose another driving violation within 30 days as required by the employer's rules. *Id.* The next day, the employer discharged Davidson for the stated reasons of willfully falsifying the certification form and failing to report traffic violations in a timely manner.<sup>7</sup>

*Golden State* is easily distinguishable from the case at bar. First, unlike in this case, the record in *Golden State* revealed that in the days and weeks leading up to Davidson's suspension and discharge, the employer blatantly expressed its animosity toward him and his fellow union supporters, even going so far as directly threatening them with termination on multiple occasions. *Id.* at 383-384. The Board cited the following examples of the employer's animosity:

- Two days after Davidson wrote a letter to his co-workers urging union support, the employer's vice president stated in a meeting with the employees that management had an idea about who wrote the letter and suggested that that person should not be working for the employer.
- About a week after Davidson sent the letter, a supervisor told him, "[T]he eyes are on you and you need to watch your step because you can get fired for discussing this stuff on company grounds."
- Around that same time period, another supervisor told Davidson, "[I]t looks like the Union is pretty close . . . you know that they really got their eye on you, you are going to have to watch your step."
- Two days before the election, the employer's plant manager told Davidson that the employer's president said, "I guarantee you one thing, that after these elections, come Monday, there are jobs going to be lost."
- The day before the election, the employer sponsored a Super Bowl party, which was attended by several managers and employees. During the party, a list of all

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<sup>7</sup>In his description of the case, the General Counsel mistakenly explains that Davidson was suspended *and terminated* for failing to have a valid driver's license in the state in which he was employed. (GC Br. 14). Davidson was only suspended for failing to maintain the correct license. *Golden State*, 340 NLRB at 384. He was terminated for willfully falsifying the certification form and failing to timely report a violation. *Id.*

employees was posted on a board. A discussion ensued about which employees were for the union and which employees were not. Six employees, including Davidson, were identified as being for the union. The employer's labor consultant remarked, "[I]f those six drivers do not get fired [the employer's president] wants the management fired."

- The following day, another supervisor told an employee that the employer was "really pissed off" and that the employer might eliminate his [the other employee's] job.
- The day after Davidson was suspended, the employee's supervisor told another employee, "We got him."

In the instant case, the record is devoid of any evidence of any threats made by the Dealership's managers prior to, or after, Huerta's suspension and discharge. More significantly, there is no evidence that Theodorou, the decision-maker, made any such threats prior to suspending or terminating Huerta. On the contrary, the judge specifically found that Theodorou "testified in a straightforward manner and showed no animosity, not only to the union cause but also Huerta." (ALJD p. 53). Moreover, the judge found that Theodorou's behavior in meetings held during the organizing campaign further illustrates his lack of animosity. According to the judge, "Theodorou was careful in his approach to the employees and respectful of their rights and his responsibilities as an employer representative even before he received the call about Huerta." (ALJD p. 54 fn.75).

Of further distinction, the employer in *Golden State* did not seek out any explanations from Davidson for not having the correct license before suspending him. Here, there was a necessary and careful investigation. When Huerta reported to Borre's office on August 26, Borre directly asked him about the license issue, and he gave Huerta an opportunity to respond. Huerta confirmed that his license had been suspended, and he volunteered that it was because of a DUI. (Tr. 57, 83, 377).

Further, in *Golden State*, there was absolutely no evidence that any other employees had ever been disciplined for failing to maintain a driver's license in their state of residence. *Id.* at 385. Here, in contrast, uncontroverted record evidence establishes that all Dealership employees who lost their driver's licenses were immediately suspended when management learned of it. (Tr. 340, 389).

*Golden State* is also distinguishable because, in that case, the employer exhibited a "lackadaisical attitude" toward Davidson's prior driving record, as well as the driving record of an open union opponent. *Id.* at 386. Specifically, the record revealed that Davidson's supervisors in each of the two years prior to his suspension signed documentation certifying that he met the employer's minimum requirements for drivers, ostensibly after reviewing his certification form, indicating no violations, and comparing it with the DMV report, indicating his conviction. *Id.* The record further revealed that the employer had "overlooked" the failure of the union opponent to list a prior speeding conviction on his certification form, although the employer acknowledged receiving a DMV report indicating that conviction. *Id.*

Here, there is no evidence that Huerta lost his driver's license in the past, much less that he had lost his license before, and the Dealership had failed to take action against him. The record clearly establishes that all employees who have lost drivers' licenses have always been suspended. Thus, unlike in *Golden State*, there is no evidence that the Dealership "overlooked" any prior infractions of any employees, including Huerta.

**2. The judge properly found that the Dealership's stated reason for terminating Huerta was not pretextual.**

The General Counsel next contends the judge erred by failing to find that the Dealership's articulated reason for terminating Huerta – job abandonment – was pretextual. (GC Br. 15-23). In support of this argument, the General Counsel first argues the judge should have

found that Huerta reasonably concluded he had been discharged following his receipt of two form letters from a third-party background check vendor used by AutoNation to process MVR requests. (GC Br. 16-19). Second, the General Counsel argues the judge should have found it was the Dealership's burden to communicate with Huerta prior to terminating him for job abandonment. (GC Br. 19-22). Both of these arguments are meritless.

**a. Huerta did not reasonably conclude he had been terminated.**

The judge found that Huerta left the August 26 meeting with Borre and Shubin "with the understanding that he was to return to them after his September 14 hearing at court . . . ." (ALJD p. 55). The judge's findings are supported by Huerta's own testimony: "I left them with the impression that I was suspended [for two weeks]." (Tr. 58). Notwithstanding this clear understanding, the judge observed, "Huerta did not return to the dealership on September 14 as agreed, and in fact made no attempt to contact his supervisors after the August 25 suspension meeting." (ALJD p. 55).

In sole defense of Huerta's failure to return to work pursuant to this clear understanding, the General Counsel contends that two computer-generated form letters from the Dealership's third-party background check vendor, Sterling InfoSystems, caused him to "reasonably conclude[] he was discharged and would have no reason to contact his supervisors." (GC Br. 17). The General Counsel's arguments are premised on an incomplete and misleading recitation of the pertinent facts. Moreover, it relies on a string of Board cases that are wholly inapposite.

**i. Undisputed facts**

It is undisputed that on August 27, one day after his meeting with Borre and Shubin, Huerta received and read a letter from Sterling advising him that information contained in a consumer report, if accurate, would prevent "2280-Libertyville Toyota from extending an

employment offer, continuing [his] current employment or granting a promotion to [him] at this time.” (GC Exh. 2; Tr. 60, 69, 219).<sup>8</sup> The letter advised Huerta to contact Sterling within five business days “if he believed any information to be inaccurate.” (GC Exh. 2). The letter included a copy of the consumer report that had been run on Huerta. (GC Exh. 2).

It is further undisputed that the letter was computer-generated and batch-mailed from Sterling’s office in California on August 25 as a result of the MVR check initiated on Huerta’s records the previous day. (Tr. 217, 219). It is also undisputed that Sterling did not inform the Dealership that this letter had been sent, nor did it send the Dealership a copy or otherwise ask anyone at the Dealership for permission to send the letter. (Tr. 219-20).

As Sterling representative Barbara Sauvain explained at the hearing, AutoNation utilizes two methods for running MVR checks: an annual (or bulk) check and a manual check. (Tr. 216). When an individual’s MVR fails under the bulk process, a summary report is sent directly to AutoNation. (Tr. 218). When, however, an MVR report is requested manually, such as was the case with Huerta (Tr. 219), Sterling sends out a “pre-adverse action” letter directly to the employee or job seeker (Tr. 217).<sup>9</sup> The letter Huerta received on August 27 was such a “pre-adverse action” letter.

After five business days, Huerta failed to contact Sterling regarding the letter; consequently, Sterling automatically sent a second letter on September 1, 2011. (Tr. 220-21; GC Exh. 3). Huerta testified that he received the second letter on September 6. (Tr. 63). The second letter advised Huerta that “an offer of employment, a continuation of current employment or the

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<sup>8</sup>Curiously, the letter, as introduced by the General Counsel as Exhibit 2, is missing three pages. When questioned by Respondent’s counsel about the missing pages at the hearing, Huerta could not explain where they were. (Tr. 60).

<sup>9</sup>Pre-adverse action and adverse action letters are required pursuant to the Fair Credit Reporting Act (“FCRA”), informing employees or applicants that a background check has been run, advising them of their rights under the FCRA, and instructing them to contact Sterling to dispute any inaccurate information. (Tr. 217-218).

granting of a promotion will not be made at this time.” (GC Exh. 3). As with the initial letter, the Dealership was not copied on, or contacted about, the letter. (Tr. 221).

**ii. Judge’s discussion**

Based on the above evidence, the judge concluded that “when Huerta received the first Sterling letter that arrived right on the heels of his suspension meeting, he should have gone back to Borre and queried him about the letter and what it meant, since there was an agreement reached between them.” (ALJD p. 55). According to the judge, “[T]hat was the logical thing to do.” (ALJD p. 55). The judge added, “It is a mystery to me why an intelligent person (as I observed and heard Huerta at the hearing) would not have questioned his bosses about the Sterling letters.” (ALJD p. 55).

The judge was further persuaded by the fact that “Theodorou credibly testified that he did not know of the Sterling letters until the matter was investigated by the Board and the Sterling representative . . . testified that her company has nothing to do with the relationship an employee may have with his employer.” (ALJD p. 55). The judge believed “Huerta should have recognized from the obvious form-look of the Sterling letters that they did not come from Borre or Theodorou, the persons with whom he had directly dealt and worked out an arrangement to deal with his license issue.” (ALJD p. 55).

**iii. Incomplete/inaccurate facts**

In his brief, the General Counsel offers an incomplete and, in part, misleading recitation of the pertinent facts. First, when quoting from the initial Sterling letter regarding Huerta being prevented from “continuing [his] current job,” the General Counsel conveniently inserted ellipses where the phrases “extending an employment offer” and “granting a promotion to [him] at this time” were in the letter. (GC Br. 17). These phrases are important when analyzing the

reasonableness of Huerta’s conduct after receiving the letter, of course, because the phrases were clearly inapplicable to his situation, as Huerta readily acknowledged. (Tr. 71). In other words, the inclusion of those two phrases in the letter should have clued Huerta in that something was amiss. Indeed, the judge aptly recognized as much, “Huerta should have recognized from the obvious form-look of the Sterling letters that they did not come from Borre or Theodorou . . . .” (ALJD p. 55).

Second, the General Counsel mischaracterizes the first letter by asserting, “The letter further stated that, if he *did not dispute that his license had been suspended* within five days . . . .” (GC Br. 17) (emphasis added). The portion of the letter to which the General Counsel refers actually reads, “If, after reviewing the report, you believe *any information* to be inaccurate . . . .” (GC Exh. 2) (emphasis added). Again, this is a critical omission, as it affects the context considered by the judge in rendering his decision. If the letter had indeed advised Huerta to contact Sterling only in the event he disputed that his “license had been suspended,” it *may* have been more reasonable for Huerta to assume he need not take any action. Those are not the facts, however. The record evidence establishes that the letter informs Huerta to contact Sterling if he believed “any information” was inaccurate. As explained above, clearly there was at least some inaccurate information in the letter, as Huerta was not applying for a job or a promotion.

Third, the General Counsel incorrectly asserts that the “only party” identified on the letters was “Libertyville Toyota” and not Sterling. (GC Br. 17). As an initial matter, neither of the letters identifies “Libertyville Toyota”; rather, both letters identify “2280-Libertyville Toyota.” (GC Exhs. 2, 3). Huerta testified he did not know what the reference to “2280” meant,

and he had never before seen it used in reference to the Dealership. (Tr. 71).<sup>10</sup> Additionally, contrary to the General Counsel's assertion, "Sterling" is plainly identified on both letters, multiple times. (GC Exhs. 2, 3). Moreover, the consumer report attached to the first letter plainly identified Sterling as the consumer reporting agency and included Sterling's address. (GC Exh. 2). Sterling's address is also directly on the second letter. (GC Exh. 3).

Fourth, the General Counsel stretches the transcript by representing that Sauvain "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." (GC Br. 17). Even assuming Sauvain were qualified to testify about how current employees would view the letter, a careful review of Sauvain's testimony reveals she made no such concession, despite counsel for the General Counsel's repeated attempts to solicit such testimony.

To wit, in response to counsel for the General Counsel's question, "So if you were a current employee, this is telling you you are no longer employed?," Sauvain answered, "The decision to change the status of employment is ultimately the client's." (Tr. 229). Unsatisfied with that response, counsel for the General Counsel asked again, "But just in terms of that sentence it says, this letter is to inform you that a continuation of current employment will not be made at this time?" (Tr. 229). Responding to this question, Sauvain explained, "I'm just stating that we are not terminating their employment. It's up to the client." (Tr. 230). Still unsatisfied, counsel for the General Counsel asked, "Well, this letter tells [Huerta] he's not employed anymore, right?" (Tr. 230). Sauvain answered, "If this were a pre-employment situation, it's cut and dry. As a current employee, though, there may be circumstances that between the employee and employer that Sterling is unaware of." (Tr. 230). In a final effort, counsel for the General

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<sup>10</sup>Sauvain testified that the signature block was actually a "Hyperion" form-letter stamp referencing a dealership number. (Tr. 229).

Counsel asked, “The question is that first line of this letter, that’s telling the employee the continuation of your current employment will not be made. It’s over.” (Tr. 231). And to that question Sauvain responded, “Correct.” (Tr. 231).

As the above colloquy reveals, Sauvain hardly “conceded” that current employees would get the impression from reading the second letter that they had been terminated. Regardless, Sauvain’s testimony is pure speculation, and of no probative value given that the overarching issue presented is whether Theodorou terminated Huerta because of his union activities.

#### **iv. Inapposite case law**

At the outset of his argument that Huerta reasonably concluded he had been terminated based on the letters he received from Sterling, the General Counsel cites four Board decisions for the proposition that an employee can reasonably believe he has been terminated even though his employer has not directly indicated as much. (GC Br. 16). The cases cited by the General Counsel are entirely irrelevant because they are based on completely different factual circumstances than are presented here.

First, the General Counsel cites *North American Dismantling Corp.*, 331 NLRB 1557 (2000), a case in which a group of employees walked off the job to protest over a wage issue. Prior to leaving the job, the employees’ supervisor told the employees that “unless they were willing to work on the terms the employer was offering, they would have to leave and find another job.” *Id.* at 1557. The Board found the statement “was reasonably interpreted by the employees to mean that if they walked off the job they would be discharged.” *Id.* at 1558.

Second, the General Counsel cites *Hale Manufacturing Co.*, 228 NLRB 10 (1977), a case in which a group of employees walked off the job after the plant manager refused their request for a wage increase. Upon being confronted by the employees, the plant manager angrily

responded, “There just isn’t any way I am paying it; you are all going to have to go home.” *Id.* at 11. According to the Board, the plant manager’s statement “could be reasonably interpreted by the employees to indicate that [he] had fired them, even though [he] did not directly and specifically tell the employees that they were fired or terminated.” *Id.* at 13.

Third, the General Counsel cites *Apex Cleaning Service*, 304 NLRB 983 (1991), a case in which a group of employees walked off the job and confronted one of the company’s owners at her home to complain about their wages. After refusing to address the employees’ complaints, the owner engaged in an angry exchange with one of the employees, seized the keys to the facility from them, and ordered them off the premises under threat of arrest if they failed to comply. *Id.* at 986. The Board held under these facts the employees “reasonably believed that they had been discharged . . . .” *Id.* at 983 fn.2.

Finally, the General Counsel cites *Ridgeway Trucking Co.*, 243 NLRB 1048 (1979), a case in which a group of employees refused to work unless their employer addressed certain wage concerns. The employer’s general manager “ordered the drivers engaged in the work stoppage to leave the premises unless they were going to go to work.” *Id.* at 1049. The Board found the employees reasonably construed this statement to mean they were discharged. *Id.*

Even a cursory reading of the above-cited cases reveals several key factors which clearly distinguish them from the case at bar. Most notably, in all of the above cases, the alleged statements giving rise to the employees’ belief they had been discharged came directly from an undisputed agent of the employer.<sup>11</sup> Here, of course, it is undisputed that the computer-generated letters the General Counsel claims caused Huerta to “reasonably believe” he had been terminated did not emanate from the Dealership; were not sent at the direction of anyone from the

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<sup>11</sup>In *North American* the agent making the statement was the employees’ supervisor; in *Hale Manufacturing* it was the plant manager; in *Apex Cleaning* it was an owner; and in *Ridgeway Trucking* it was the general manager.

Dealership; did not name any Dealership manager; and were never sent to the Dealership by way of carbon copy. (Tr. 219-220, 320-321, 444). This distinction is critical because, as pointed out by the Board in *Ridgeway Trucking*, “It is sufficient if the words or actions of the *employer* would logically lead a prudent person to believe his tenure has been terminated.” 243 NLRB at 1048-1049 (emphasis added) (quoting *NLRB v. Trumbull Asphalt Co.*, 327 F. 2d 841, 843 (8th Cir. 1964)).

The facts here are similar to those found in *Oklahoma Fixture Co.*, 308 NLRB 335 (1992). In that case, the union sent a letter to an employee notifying him that his dues had not been paid and that he would be terminated if they remained unpaid. Unfortunately, the letter was sent to the wrong address. Two weeks later the union requested that the employer terminate the employee. The employer sent a termination letter to the employee’s proper address, not knowing that he had failed to receive the earlier letter. The employee received the employer’s letter, but only contacted the union to inquire about the termination. The employee never attempted to reach out to the employer regarding his situation. Both the union and employer were alleged to have unlawfully terminated the employee. The Board affirmed the ALJ in finding that the employer did not violate the Act where it was unaware of the letter and the employee failed to take any reasonable steps to contact his employer.

Of further significance, in the cases relied on by the General Counsel, the questionable statements all arose in the context of a group of workers collectively walking off the job to protest a perceived unfair labor condition. In the instant case, Huerta was not engaging in protected concerted activity when he received the letters from Sterling, and he is the only one who received the letters.

Accordingly, the General Counsel's reliance on these inapposite cases does not support his position.

**b. It was not the Dealership's responsibility to contact Huerta prior to terminating him.**

The General Counsel argues as a final matter that the judge erred in failing to find pretext because Theodorou and Borre had clear reason to believe Huerta thought he had been discharged, yet they avoided contacting him to "resolve the confusion." (GC Br. 19). According to the General Counsel, "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." (GC Br. 20). The General Counsel blatantly misreads Board law as imposing a legal obligation on employers to contact employees before they discharge them for abandoning the job.

In each of the cases the General Counsel cites, "contacting the employee before termination" just happened to be one of the facts in the record. What was significant to the Board in each case, as illustrated in the first case cited by the General Counsel, *Fresh & Easy Neighborhood Market*, 356 NLRB No. 85, slip op. at 14 (2011), is that the record revealed the employer "was following its no-show/no-call practice." In the instant case, there is no evidence that the Dealership has a practice of reaching out to employees before terminating them for job abandonment. If such evidence had existed, the General Counsel's theory that the Dealership failed to follow that practice with respect to Huerta may have held water. Instead, the record here illustrates that Huerta is the *only* employee to have not returned to work or otherwise made an effort to salvage his or her job. (Tr. 379-380).

The General Counsel's reliance on cases where the employer reached out to the employee prior to terminating them for job abandonment for the proposition that employers in general have

an affirmative obligation to do so is further undermined by *Abramson, LLC*, 345 NLRB 171 (2005). In that case, the Board found that the employer proved the alleged discriminatee abandoned his job in the absence of evidence that the employer reached out to him prior to discharging him. The alleged discriminatee testified that he became ill and was hospitalized for a couple of weeks. *Id.* at 175. According to the Board, however, “the record [did] not reflect any effort by [the alleged discriminatee] to notify the Respondent of his hospitalization.” *Id.* Thus, the Board found, “In the Respondent’s view, [the alleged discriminatee] failed to report for work . . . and this was the basis for their decision not to return him to work.” *Id.*

Similarly, in *Consolidated Biscuit Co.*, 346 NLRB 1175 (2006), the Board found that an employee’s termination for job abandonment was warranted pursuant to the employer’s policies in the absence of any attempt by the employer to reach out to the employee. Ultimately, the General Counsel in that case failed to prove that the employee did everything that was required of him, finding that he was merely awaiting a response from the employer about the availability of restricted work. The employee’s failure to report to work or follow up, or to inquire about his work status, was simply not reasonable, and neither was Huerta’s.

**B. THE JUDGE APPROPRIATELY REFUSED TO AWARD SPECIAL REMEDIES IN THIS CASE.**

In his final exception, the General Counsel contends the judge erred by failing to award special remedies following his finding that several remarks made by two of the Dealership’s agents at a single August 23 meeting were unlawful. (GC Exc. 11). The Dealership has filed its own exceptions to the judge’s findings that the statements were unlawful. Nevertheless, even assuming the statements were unlawful, the judge appropriately refused to award special remedies.

**1. Standard for awarding special remedies**

The Board has reserved special (or extraordinary) remedies – such as public notice reading requirements and equal access rights for unions – for circumstances involving unfair labor practices so “numerous, pervasive, and outrageous” that such remedies are necessary “to dissipate fully the coercive effects of the unfair labor practices found.” *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995). As the Board in *S.E. Nichols, Inc.*, 284 NLRB 556, 560 (1987), explained, “Extraordinary notice and access remedies are necessary to clear the atmosphere poisoned by Respondent’s unrelenting, egregious, and pervasive trampling on its employees’ statutory rights.” (internal quotations omitted). Because these remedies are “extraordinary,” the General Counsel carries the burden of demonstrating, as a precondition for granting them, why traditional remedies will not sufficiently ameliorate the effect of the unfair labor practices found. *First Legal Support Services, LLC*, 342 NLRB 350, 350 fn.2 (2004).

**2. The General Counsel has failed to carry his burden of proving special remedies are warranted.**

The judge found that the Dealership, acting through two management representatives of the Dealership’s parent company, AutoNation, violated Section 8(a)(1) at a single meeting held on August 23. (ALJD pp. 42-51).<sup>12</sup> This one meeting can hardly be considered “numerous” or “pervasive.” Cf. *Fieldcrest Cannon, Inc.* 318 NLRB at 473 (finding statements made at *numerous* unlawful captive audience meetings warranted special remedies). Moreover, none of the remarks made by Davis or Andrews come close to being “outrageous,” but instead were made in response to employee questions at a meeting the judge found to have taken place in a “rather relaxed or informal atmosphere” at which there was “laughter from the group of employees over some jocular remark from a speaker.” (ALJD p. 42 fn.67).

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<sup>12</sup>The two employees were Vice President and Associate General Counsel Brian Davis and Human Resources Manager Jonathan Andrews.

**a. Alleged unlawful statements**

The first allegedly unlawful series of remarks was made by Davis in response to an employee's specific question about whether "going union" would follow employees through their lifetime. Davis essentially explained to the group that if they left the company or moved to another state, and those employers knew they came from a union shop, they would think twice about hiring them. (R. Exh. 3, p. 107). The judge found this series of remarks by Davis could be construed by employees as a threat that they would be "blacklisted or blackballed" if they chose the union or even became associated with the campaign. (ALJD p. 45). Significantly, the judge noted that Davis did not directly state or imply that "his Company would blacklist them to future employers . . . ." (ALJD p. 45).

The second allegedly unlawful series of remarks was made by Davis in response to employee questions about the bargaining process. The judge found that, "taken as a whole, Davis' message conveyed to the gather employees that if they chose the union, this would be essentially an exercise in futility in terms of addressing their concerns for improvements in their terms and conditions of employment; 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, still might not be a contract." (ALJD p. 48). As with the prior allegedly unlawful remarks, the judge observed that neither Davis nor any other management speakers directly threatened employees that voting for a union would be futile: "[N]one of the management speakers ever utilized the word 'futility.'" (ALJD p. 48 fn.71).

The third allegedly unlawful series of remarks came from Davis and Andrews in response to a question placed in a suggestion box prior to the meeting. One of the questions in the box was whether it was possible that employees' current pay plan could be evaluated or updated

without voting in the union. (R. Exh. 3, p. 85). In response, both Davis and Andrews affirmatively represented that it was possible to evaluate wages to ensure the Dealership remained competitive. (R. Exh. 3, pp. 87-90). The judge found, “[T]he statements of Andrews and Davis combined conveyed by implication that the Respondent was at the least amenable to considering and providing wage increases to employees in the interest of competitiveness if the employees did not vote the Union in.” (ALJD p. 50).

The fourth and final allegedly unlawful series of remarks came from Davis in response to another question pulled from the suggestion box. The question was, “Will people get demoted if we become a union shop?” (R. Exh. 3, p. 77). Davis essentially responded that he did not know the answer to that question, because “[n]egotiations are just that, negotiations.” (R. Exh. 3, p. 77). Davis continued, “[S]ome people would probably need to be reclassified, some people will probably lose some pay, lose some status.” (R. Exh. 3, p. 77). Davis added, “Others may gain some status.” (R. Exh. 3, p. 77).

Following up on Davis’ statement, an employee remarked that, in a union shop, there are basically two categories of technicians – journeymen and apprentices. (R. Exh. 3, p. 78). The employee then asked whether that meant that if an existing technician does not meet the new standards negotiated for a journeyman, he would be demoted to apprentice. (R. Exh. 3, p. 78). Davis responded, “[T]hat’s exactly how it would be negotiated.” (R. Exh. 3, p. 78). Davis explained, “If not that identical structure, something similar to that would be negotiated so you could properly classify people without subjectivity.” (R. Exh. 3, p. 78). The judge found that “the message conveyed by management . . . was that when the Union comes in, there would be a reclassification of the current employees into either a journeyman or apprentice classification,

and that along those lines anyone in the apprentice class would be demoted, the classifications being based on acquired certifications and skill sets.” (ALJD p. 51).

**b. Statements were not outrageous**

The Board analyzes the outrageousness of employer conduct through variables such as the gravity of the violations, the extent to which their coercive effect pervaded the bargaining unit, their timing, and the degree to which they were repeated. See *Conair Corp.*, 261 NLRB 1189 (1982). In *First Legal*, 342 NLRB 350, the Board rejected the General Counsel’s request for special remedies strikingly similarly to the remedies requested in the instant case, despite finding violations by the employer for repeatedly threatening discharge, actually discharging two employees, forcing employees to sign independent contractor agreements, repeatedly threatening to close the facility, promising benefits, refusing to hire a union supporter, and threatening futility.

Here, none of the alleged threatening statements made by Davis and/or Andrews were direct threats. See *Sturgis-Newport Business Forms*, 227 NLRB 1426 (1977) (rejecting special remedy where threat was indirect). Davis did not directly threaten to “blacklist” employees; the judge merely inferred such a threat from the context. (ALJD p. 45). Likewise, Davis did not directly advise employees that voting for the union would be an exercise in futility, as the judge correctly noted. (ALJD p. 48 fn.71). Finally, Davis did not directly threaten employees with demotion; he merely explained that a different classification structure would be negotiated, and “some people would probably need to be reclassified, some people will probably lose some pay, lose some status . . . [and] [o]thers may gain some status.” (R. Exh. 3, p. 77).

Regarding the alleged promise of benefits, the General Counsel’s complaint allegation itself confirms this was implied: “[The Dealership] made an implied promise of raises.” (GC

Exh. 1(e), p. 2). Moreover, the judge expressly confirmed as much: “[T]he statements of Andrews and Davis combined conveyed *by implication* that the Respondent was at the least amenable to considering and providing wage increases to employees in the interest of competitiveness if the employees did not vote the Union in.” (ALJD p. 50) (emphasis added).

**3. The General Counsel’s reference to AutoNation’s alleged “recidivism” is improper and highly prejudicial.**

According to the General Counsel, because the Dealership’s parent company, AutoNation, “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,” special remedies are warranted. (GC Br. 25). This argument is wholly inappropriate and unfairly prejudices the Dealership’s position.

The General Counsel did not pursue a case against AutoNation as a whole, but instead focused on the specific incidents that occurred at the Dealership, including the August 23 meeting and the suspension of Huerta. At the hearing, the judge acknowledged that special remedies were sought, but found that it was inappropriate to explore all of AutoNation without a predicate. (Tr. 192). The judge further remarked, “If there was some sort of . . . concern about the activity of this company nationwide, perhaps it should have made its way into the complaint.” (Tr. 192). Thus, at the hearing, the judge made it abundantly clear that the General Counsel had made no allegations against AutoNation or any of its other subsidiaries and had not established a predicate for why special remedies should apply nationwide.

Of further significance, a settlement agreement following charges stemming from a campaign in 2008 was not introduced at the hearing, as the judge agreed there was no relevance to admitting a non-admission settlement from four years prior. (Tr. 144-46). Furthermore, it would not be appropriate to introduce a settlement agreement, as it would discourage parties

from entering into future settlements. See *Wallace Corp. v. NLRB*, 323 U.S. 248, 253–254 (1944) (the Board’s policy from its earliest days has been to encourage voluntary settlement of labor disputes).

Here, the un rebutted testimony demonstrates that the Dealership operated its personnel management independently, and that Theodorou made the decision to suspend Huerta without input from AutoNation executives. Moreover, the judge did not find animus on the part of the Dealership or Theodorou in the instant case. (ALJD p. 53 fn.74). Thus, the General Counsel’s references to another unfair labor practice case against AutoNation is inappropriate and should be disregarded.

**4. The General Counsel’s remaining arguments are not based on record facts and/or do not comport with Board precedent.**

The General Counsel’s suggestion that the unfair labor practices allegedly committed by Davis and/or Andrews led to the decline in organizing activity is pure speculation, at best. (GC Br. 24). The reason for the decrease in union support following the August 23 meeting can just as easily be explained by employees learning the facts from the company’s perspective for the first time, including numerous opinions from technicians who had worked in unionized shops.

Additionally, the “special remedy” decisions cited by the General Counsel deal with situations vastly different from the instant case. In *Fieldcrest*, for instance, the Board required a specific executive to sign, read, and publish a notice in a local newspaper and to allow reasonable access and equal time to the union where the employer committed *over one hundred* unfair labor practices. See *Fieldcrest Cannon, Inc.* 318 NLRB 470.

Similarly, both *Monfort*, *supra*, and *U.S. Service Indus.*, 319 NLRB 231 (1995), dealt with numerous unfair labor practices over three separate Board cases for each employer. Further, no evidence of AutoNation’s Mercedes-Benz Orlando (“MBO”) store was introduced at

the instant hearing. In the cases relied on by the General Counsel, however, the ALJ specifically reviewed and considered the prior violations. See *S.E. Nichols, Inc.*, 284 NLRB 556, 594 (1987) (dealing with fifteen 8(a)(1) and four 8(a)(3) terminations, and following nine Board decisions against the employer which were enforced by Circuit Courts, as well as three contempt proceedings in court); *U.S. Service Indus.*, 319 NLRB at 259 (reviewing prior evidence).

Finally, access remedies are not appropriate where the union had, and continues to have, access to communicating with the employees. See *Monfort of Colorado (“Monfort IP”)*, 284 NLRB 1429 (1987) (“Access remedies, however, are generally designed to assist a union in communicating with employees when the employer’s unfair labor practices have otherwise virtually foreclosed the possibility of holding a fair election.”); Case Handling Manual, 10131 (“Access remedies may be appropriate where there is an adverse impact on employee/union communication”). In the instant case, as the judge recognized, the Dealership repeatedly encouraged its employees to communicate with the union. (ALJD p. 25, line 28; p. 28, line 19; p. 38, line 24; p. 43, lines 7-8).

Ultimately, the instant facts do not approach the level of outrageousness or pervasiveness required to award special remedies. The instant case deals with one isolated meeting with employees, and the suspension of one employee which the judge found to be lawful. No evidence from any other case was presented at the hearing. Furthermore, the requested remedies do not fit the instant situation, as the posting of a settlement agreement would discourage settlements, and allowing equal access to the union where lines of communication are still open is fruitless.

**IV. CONCLUSION**

For the foregoing reasons, the Board should overrule the General Counsel's exceptions in their entirety.

Filed this 25th day of October, 2012.

Respectfully submitted,

/s/ David M. Gobeo  
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David M. Gobeo  
For Fisher & Phillips LLP

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

AUTONATION, INC. AND VILLAGE )  
MOTORS, LLC D/B/A LIBERTYVILLE )  
TOYOTA )  
 )  
and )  
 )  
AUTOMOBILE MECHANICS' LOCAL NO. )  
701, INTERNATIONAL ASSOCIATION OF )  
MACHINISTS & AEROSPACE WORKERS, )  
AFL-CIO, )  
\_\_\_\_\_ )

CASE NO. 13-CA-63676

**CERTIFICATE OF SERVICE**

I hereby certify that on October 25, 2012, I e-filed the foregoing **RESPONDENT'S ANSWERING BRIEF TO ACTING GENERAL COUNSEL'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION** with the office of the NLRB's Executive Secretary using the Board's e-filing system and that it was served on Charles Mull (Charles.Muhl@nlrb.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