

**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 REPLY BRIEF IN SUPPORT OF ITS
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION**

The Respondent did not violate §8(a)(1) of the Act during the August 23, 2011 meeting with employees. Counsel for the General Counsel bore the obligation to prove each Complaint allegation by a preponderance of evidence by making a persuasive record with strict proof to show the alleged violations actually occurred. See Case Handling Manual § 10380.4; *V.R.J. Smith Construction Co., Inc.*, 545 F.2d 187 (D.C. Cir. 1976). However, Counsel for the General Counsel failed to meet the burden to show that Respondent interfered with employees' Section 7 rights. While the standard is objective, the ALJ chose to ignore the testimony of three technicians who were both present for the meeting and who also listened to and reviewed the surreptitious recording, all stating unequivocally that they heard no threats. Ignoring such direct testimony, the ALJ wove strings of unconnected comments together to conclude there were implied threats and promises buried in the discussion. The ALJ's finding does not comport with a reasonably objective review of the comments made during the non-hostile, educational meeting on August 23, 2011.

I. SECTION 8(A)(1) STANDARD WAS MISAPPLIED

As noted in Respondent’s Exceptions Brief, §8(a)(1) makes it an unfair labor practice for an employer directly “to interfere with, restrain, or coerce employees in the exercise” of their Section 7 rights [right to organize]. However, that prohibition does not disallow an employer the opportunity to truthfully communicate with its employees concerning the fact-based realities of union organizing. Where an employer conducts a non-hostile meeting for the purpose of educating employees, as the ALJ clearly found here, it is not, thereafter, reasonable to find that the employer’s statements implicitly restrained §7 rights when it was only truthfully responding to employees’ questions.

Respondent’s Exceptions Brief did not, as Counsel for General Counsel claims, argue that it was only because words like “futility” were not used, no §8 violations could be found. Instead, Respondent has argued that the actual statements made at the meeting cannot be interpreted reasonably to stand as threats or promises, because numerous witnesses testified there were no threats or promises. General Counsel’s active attempt to mischaracterize Respondent’s agents’ statements must be rejected. The proper objective standard to evaluate direct violations of §8(a)(1) should be applied to the meeting in the context of the give-and-take nature of the session.

A. Respondent Did Not Threaten To Blacklist Employees

General Counsel incorrectly states that the ALJ found that comments by AutoNation Vice President and Assistant General Counsel, Brian Davis (“Davis”), directly threatened the careers of Libertyville technicians at other AutoNation dealerships. That is not the case. The ALJ found that Davis’ comments could be implied to convey that, should employees choose the Union, their future employment in the auto dealership industry could be stigmatized. In reality, Davis

lawfully expressed his §8(c) protected opinion that other dealerships could, and might, be suspect of technicians who come from unionized dealerships. He never stated that Libertyville or AutoNation would blacklist or interfere in any other way with Libertyville employees who were exercising their §7 rights.

General Counsel also actively misrepresents Davis' response to an employee question regarding the secret nature of union organizing. One employee's comment was: "So the guys that think that keeping things hidden from everybody around them should take that into consideration, why certain people's careers may be affected by this." (R 3, p. 107:16-19). Davis responded "that's the biggest problem out of the whole process is that you guys aren't allowed to be involved." (R 3, 107:24-108:1). The next employee to comment stated that he [the technician] personally believed most technicians are left out of the decision-making process, with or without a Union. (R 3, p. 108:16-20).

Clearly, this interchange addressed a live question of how employees' terms and conditions of employment could be affected by unionization; along with complaints by some technicians about not being included in the secret union meetings process, which could affect their terms and conditions as well. Davis merely responded to the technicians and agreed they should be inclusive of their colleagues because the decision to unionize could have an impact on all their terms and conditions.

Respondent's exceptions to the ALJ's finding of threatened blacklisting should be sustained.

B. Respondent Did Not Threaten Futility

Davis' comments regarding bargaining included lawful §8(c) statements about both employees' legal rights and fact-based examples of bargaining. In its Answering Brief, General

Counsel asserts that the ALJ's finding of threatened futility was properly based on Davis' comments regarding "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..." (GC Answering Brief, pp. 8-9). Respondent's core argument, however, has been that offering an opinion on the possible length of bargaining, along with examples from Respondent's actual bargaining experiences, Respondent did not threaten employees that selecting a union would result in futility in bargaining; only that such a selection could lead to complex and lengthy negotiations.

At no point did Davis ever state that Respondent was not required to bargain in good faith, that AutoNation or Libertyville would never agree or bargain, or that employees would never get a contract. General Counsel failed to distinguish controlling Board precedent such as *Wild Oats Markets Inc.*, 344 NLRB 717 (2005) ("Employer did not violate LMRA when it stated in flier to employees that "in collective bargaining you could lose what you have now," where statement was factually accurate observation regarding possible negative outcome of collective bargaining and is protected speech under §8(c)") and *Fern Terrace Lodge*, 297 NLRB 8 (1989) ("Even if it got in here, a union couldn't force us to agree to anything that we could not see our way clear to putting into effect from a business standpoint...[W]e have just as much right under the law to ask that wages and other employee benefits be reduced as the union would have to ask that they be increased.").

Ultimately, Davis stated that "...eventually the bargaining process will begin...eventually you will start bargaining." (ALJD, p. 47, lines 21-22). Although he expressed his opinion that in his experience bargaining could be a long and difficult process, he never stated or implied that selection of the Union would never result in good faith bargaining. In fact, Davis stated

bargaining could be as short as six months. Accordingly, Respondent's exceptions to the ALJ's finding of threatened futility should be sustained.

C. Respondent Did Not Promise Wage Increases

AutoNation Regional Human Resources Director Jonathan Andrews ("Andrews") commented that if the Dealership was not found to be competitive, it could need employees' help "in looking at that." The term "looking at" conveys a message of review, or a generalized commitment to remain competitive. It cannot be reasonably read to mean that raises would be given if the Union was rejected. Davis and Andrews both agreed with employees that the Dealership was required to remain aware of employee concerns (i.e. wages), but that it would – at a later time – deal with such issues in a manner consistent with the Company's practices. As noted in Respondent's Exceptions Brief, Andrews specifically cautioned employees that the Dealership had to ensure its own survival through a recession period before pay rates could even be evaluated. How such an exchange could be determined to constitute a promise of wage increases is astonishing. The ALJ was charged with applying an objective standard to the comments; however, the fact that no technician left the August 23 meeting believing that AutoNation would initiate pay increases should the Union be rejected cannot be ignored. It is not reasonable to ignore all testimony on this subject and, then, to rely on what employees might have heard from Andrews and Davis to conclude there were promised wage increases in exchange for rejecting the Union.

Unlike the decision in *California Gas Transport, Inc.*, 347 NLRB 1314 (2006) cited by General Counsel, Respondent's agents never identified a recent wage increase given to employees at a non-unionized dealership as part of the August 23 discussion. Similarly, neither Andrews nor Davis ever stated that changes were to be made to make the workplace better, as in

Superior Emerald Park Landfill, 340 NLRB 449 (2003). All that Andrews and Davis did was to note that the Dealership would continue to make the best business decisions it could, and that employees could continue to bring concerns to management's attention, even without a union. Despite the General Counsel's assertion that *International Baking Co.*, 348 NLRB 1133 (2006) did not involve wages, that decision did involve comments related to pay. See *id.* at 1133 ("the Union would harm employee's pay and seniority). The Board in *International Baking* found that the "comments amounted to nothing more than an expression of her personal belief that [the employee] did not need the Union and would not benefit from it. Such a statement is no different in kind from one in which an employer lawfully tells employees there is no need to call a union in to resolve issues." Therefore, the comments made by Andrews and Davis that the Dealership would continue to attempt to provide competitive pay, although cautioned by the recession, were protected under §8(c), and Respondent's exceptions should be sustained.

D. Respondent Did Not Threaten Demotions

With respect to the meeting's exchanges regarding the topic of journeymen and apprentice classifications, both Davis and Andrews agreed with employees and opined that union contracts are often negotiated to allow for gains in status for more experienced technicians, with possible accompanying losses of status for those with less experience. Neither Andrews nor Davis stated that this outcome was certain, and neither identified specific requirements on which the Libertyville Dealership might bargain. The focus of Andrews' and Davis' answers to employee questions was: "There will be one of three outcomes in any negotiation. Things will be better for you, things will be worse, or things stay the same." (ALJD, pp. 50-51). See *Uarco, Inc.*, 286 NLRB 55 (1987) (Board found statements lawful where the respondent characterized bargaining as horsetrading, and said employees could gain, lose, or break even).

Even General Counsel's Answering Brief recognizes the equivocal nature of Davis' comments – "a classification system with journeymen and apprentices was 'basically how it works'." (GC Answering Brief, p. 17) (emphasis added). Clearly, this statement was simply Davis' protected §8(c) opinion on a likely outcome where technician classifications are in issue.

General Counsel's derision of the "subjective" testimony and opinions of technicians who were present at the meeting should not be credited. The issue as framed by General Counsel – would an objective employee have taken the collective statements by Davis [and Andrews] as a threat that bringing in the Union would result in a demotion – was answered by all the witnesses presented at the hearing. That answer (multiple times) was "no." No threat of demotion was ever made. In response to employee questions regarding potential classifications, both Davis and Andrews expressed their opinions on the typical classifications negotiated in the industry in Chicago. Every technician who testified about the alleged threat of demotion unequivocally said that they heard no such threat. No reasonable person, reviewing what was actually said on August 23, 2011, could conclude that such a threat was made.

II. CONCLUSION

For the foregoing reasons, the Board should sustain Respondent's exceptions in their entirety.

Filed this 8th day of November, 2012.

Respectfully submitted,

/s/ David M. Gobeo
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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2012, I e-filed the foregoing **RESPONDENT'S REPLY BRIEF IN SUPPORT OF ITS 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