

**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
REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Libertyville Toyota suspended and discharged car painter Jose Huerta for his Union activity and support in violation of Section 8(a)(3). To refute the Acting General Counsel's exceptions to the ALJ's decision to the contrary, Respondent relies upon incomplete or mischaracterized facts and legal conclusions, inapplicable case law, and a reconstruction of the Board's burdens under *Wright Line*. None of these arguments warrant the upholding of the ALJ's decision.

I. RESPONDENT'S STATED REASON OF JOB ABANDONMENT FOR DISCHARGING JOSE HUERTA IS A PRETEXT.

In its Answering Brief, Respondent makes a variety of arguments as to why it was not reasonable for Jose Huerta to conclude he was terminated, despite receiving two letters from "2280—Libertyville Toyota" stating that his suspended driver's license would prevent the dealership from continuing his current employment. (GC 2, 3). It is Respondent's arguments, and not Huerta's interpretation of these letters, that involve unreasonable conclusions.

A. Huerta Reasonably Concluded that Libertyville Toyota Terminated Him.

A plain reading of all of the language contained in the two letters sent to Huerta by “Libertyville Toyota” establishes that he reasonably concluded the dealership had terminated him. The first letter stated that Libertyville Toyota was prevented from “continuing your current employment” if information in the attached report was accurate. (GC 2) The attached report showed Huerta’s license had been suspended and was accurate. The letter also indicated that Huerta need only contact Sterling if the report was inaccurate. The second letter told Huerta “a continuation of your current employment...will not be made at this time.” (GC 3) It also told him that the decision had been made by Libertyville Toyota, not Sterling. As the totality of this language makes clear, the only reasonable conclusion Huerta could make after receiving the letters was that Respondent discharged him because his driver’s license had been suspended, a fact he did not dispute.

Respondent contends that Huerta should have recognized that these were form letters from Sterling, not Libertyville Toyota, and further inquired about whether they applied to him. The dealership also objects to focusing on only the relevant language of these letters, claiming that it results in incomplete or inaccurate facts. These contentions do not withstand close examination of the language in the letters. First, that language makes clear that Libertyville Toyota was the sender of the letters, since it was listed as the signatory on both. In contrast, Sterling is identified as the consumer reporting agency which ran the report showing his license had been suspended. Next, the second letter specifically states “The consumer reporting agency did not make the decision whether or not to make an offer to you,” meaning the signatory “Libertyville Toyota” did so. Finally, the reference in the letters to offers of employment or

promotion clearly did not apply to Huerta's status as a current employee, and thus is not relevant to whether his evaluation of the meaning of the letters is reasonable.

Respondent also argues that the letters instruct Huerta to contact Sterling if "any information" was inaccurate and it was not accurate that he was a new hire or being considered for a promotion. This argument itself is a mischaracterization. The language in the letters states that Huerta should contact Sterling "[i]f, *after reviewing the report*, you believe any information to be inaccurate" and "[i]f you have any questions about the report or wish to dispute its accuracy or completeness." The "report" was the attached Motor Vehicle Report (MVR) showing Huerta's license had been suspended. Thus, Huerta only was supposed to contact Sterling if he contested that his license had been suspended and he did not contest that fact.

In addition to incorrectly interpreting the language of those letters, Respondent argues that the Board's decisions in *North American Dismantling Corp.*, *Hale Manufacturing Co.*, *Apex Cleaning Service*, and *Ridgeway Trucking Co.*, do not apply here, claiming distinctions that are neither present nor meaningful.

Respondent first contends that the cited Board decisions involve cases where an "agent" of the employer spoke to an employee, whereas in this case the letters received by Huerta were not sent by a dealership supervisor or agent. However, the notion that Sterling is not an "agent" of both Auto Nation and Libertyville Toyota is inconceivable. *Alliance Rubber Co.*, 286 NLRB 645 (1987) (Board applies common law principles of agency, including whether agents have actual authority to act for specific, limited purposes). Auto Nation's contract with Sterling granted it actual authority to conduct MVR screenings for Auto Nation dealerships and, depending on the results, to send out letters on the dealership's behalf with the dealership name as the signatory. (GC 16, pp. 2-3, 6; Tr. 228) The contract was signed by an Auto Nation VP of

Human Resources; Respondent here admits that Auto Nation officials Brian Davis and Jonathan Andrews, the latter of whom also works in the Human Resources Department, are Section 2(13) agents of Libertyville Toyota. (ALJD, p. 2, fn. 3; Tr. 401, lns 24-25, p. 402, ln 1; GC 1(n), p. 3) Thus, the dealership's own agents granted Sterling actual authority to act on behalf of Libertyville Toyota for specific, limited purposes.

Second, Respondent takes the wrong perspective in arguing that no agent was acting on its behalf because no one at the dealership knew of the Sterling letters. The dealership's involvement in and knowledge of the Sterling-generated letters is irrelevant. *Alliance Rubber Co.*, supra at 645 (no defense that supervisors did not authorize agents to ask unlawful questions or know questions would be asked). The issue in question here is Huerta's interpretation of the letters, not whether the dealership's managers knew about them.

Likewise, the case Respondent does rely upon, *Oklahoma Fixture Co.*, 308 NLRB 335 (1992), is irrelevant to the question of whether an employee reasonably concluded that he or she was discharged. That case involved the question of whether an employer, prior to discharging an employee, had any "hint of impropriety" in a union's request to do so. 308 NLRB at 338. The Judge there did not say "the employee failed to take any reasonable steps to contact his employer," as Respondent claims. Rather, the ALJ cited the fact that the employee had not contacted the employer and was on workmen's compensation leave as support for the conclusion that the employer could not have known of the "impropriety" of the union's request.

None of Respondent's arguments in its Answering Brief can alter the language used in the two letters sent by Sterling on the dealership's behalf to Huerta, which informed him that he was discharged due to his suspended driver's license. Jose Huerta reasonably concluded that Respondent terminated him.

B. Respondent Was Obligated to Contact Huerta Before Terminating Him for Job Abandonment.

Respondent claims it had no obligation under Board law to contact Huerta to resolve the confusion surrounding his job status before terminating him for job abandonment. In doing so, the dealership does not address in any fashion the Board's directive in *Apex Cleaning Service*, 304 NLRB 983, fn. 2 (1991) that the employer bears the burden of resolving any ambiguity or confusion regarding an employee's job status.

Moreover, *Abramson, LLC*, 345 NLRB 171 (2005) and *Consolidated Biscuit Co.*, 346 NLRB 1175 (2006), relied upon by Respondent, do not alter that proper conclusion. In *Abramson*, an employee simply stopped showing up to work with no indication to the employer about why or when the employee would return. Here, Respondent and Huerta had a fixed date for his return and Respondent had information, the filing of an unemployment benefits claim, suggesting Huerta thought he had been terminated. Respondent possessed knowledge the employer in *Abramson* did not, placing the burden on the dealership to follow up with Huerta. Similarly, *Consolidated Biscuit* is inapposite because that case involved the discharge of an employee for violating the employer's no-call/no-show policy. In this case, Respondent introduced no evidence that Huerta not reporting back on September 14 violated any workplace policy, necessary pursuant to its *Wright Line* burden. Thus, the ALJ's conclusion that Huerta had the responsibility to contact Respondent is legal error.

Libertyville Toyota was required to contact Huerta before discharging him for job abandonment. The dealership failed to do so, despite having strong reason to believe that Huerta thought he was terminated. Respondent's failure to resolve the ambiguity around Huerta's job status establishes the pretext of its contention that it terminated him due to job abandonment.

II. RESPONDENT TREATED JOSE HUERTA DIFFERENTLY THAN OTHER EMPLOYEES WHO LOST THEIR DRIVER'S LICENSES.

A substantial number and different types of Libertyville Toyota's own documents establish that they treated Jose Huerta more harshly than numerous other drivers who previously lost their driver's licenses. To combat this substantial showing in its Answering Brief, Respondent misconstrues the burdens of proof on this issue and discounts the viability of documentary evidence.

Respondent's contention that it was not required to introduce documentary evidence that Theodorou always suspended employees who lost their driver's licenses requires an improper reassignment of legal burdens. The Judge here determined that the Acting General Counsel met the initial *Wright Line* burden. (ALJD p. 53, lns 8-28) After such a showing, the burden shifts to Respondent to demonstrate it would have suspended Huerta even in the absence of his Union support. *Wright Line*, 251 NLRB 1083, 1089 (1980). Thus, Respondent, not the Acting General Counsel, was required to show that it always suspended employees who lost their licenses. If Theodorou really always did so, it would have been easy for Respondent to introduce disciplinary forms showing that was the case. The dealership even had the additional advantage of a five-week continuation of the hearing before it had to put on its own case. Yet it offered no documents to sustain its *Wright Line* burden.

Moreover, this is not a case, as Respondent contends, with an "absence of evidence to the contrary." (Resp. Br. p. 10) The Acting General Counsel introduced numerous documents in the case-in-chief demonstrating that the dealership frequently accommodated employees who had lost their licenses, even in some cases without suspending them. Respondent takes exception to its own documents by arguing that, unless documents are discussed with the dealership's

witnesses, they do not constitute evidence. Of course, it is not the Acting General Counsel's responsibility to make Respondent's case for it by giving its supervisors opportunities to explain away documents already introduced into evidence. The documents speak for themselves. If Respondent could rebut what was shown in those documents with something more than a blanket statement that employees always were suspended, it was Respondent's burden to question witnesses about the documents and have them explain it. But no witness did so.

Respondent's attempts to distinguish the cases of employees James Boehart and Ivan Jasso also are unsuccessful. Regarding Boehart, the dealership cites to incomplete testimony of Service Department Manager Dave Borre concerning its handling of Boehart. The complete testimony is as follows:

- Q. Do you know an employee named James Bochart [sic]?
A. Yes, I do.
Q. What's his position?
A. He's a technician.
Q. And he's another individual that his license suspended or I guess failed his motor vehicle report?
A. Yes.
Q. In August?
A. Yes.
Q. He's still employed there?
A. Yes, he is.
Q. Did Mr. Bochart [sic] advise you recently that his license had been suspended again?
A. Did he advise me? No.
Q. Or did you learn of it?
A. I learned of it.
Q. When was that?
A. It was just a week ago –
Q. He's still employed now?
A. Yes, he is.
Q. Is he on suspension?
A. He's not currently now. He was, yes.
Q. And you may have told me, he's a technician, right?
A. Yes, he is.

(Tr. p. 209, lns 24-25; p. 210, lns 1-22) The complete testimony establishes that Boehart lost his license in both August 2011 and January 2012. It also establishes that he was not on suspension as of January 27, the date Borre testified to this, even though he lost his license the second time “just a week ago.” Theodorou testified that his suspensions of employees who lost their licenses were “usually for a couple of weeks.” (ALJD p. 15, lns 9-10) Thus, Theodorou did not suspend Boehart for two weeks like he did Huerta, instead providing more lenient treatment.

Regarding Jasso, Respondent provided no explanation through testimony or documents, as required by its *Wright Line* burden, concerning what Jasso’s job status was from August 3, 2011, when he failed his MVR, and October 24, when the dealership gave him a non-driving waiver. Even if Jasso had been immediately suspended, then the length of his suspension would have totaled nearly 12 weeks. Like the situation with Boehart’s one-week suspension, this would contradict Theodorou’s actual testimony that he suspended employees for a couple of weeks.

Respondent inadequately discounts a plethora of additional disparate treatment evidence by claiming that Huerta was the only employee who refused to return to work. That fact does not distinguish Huerta’s case from all other employees, because Huerta is the only employee who received two termination letters from Respondent telling him that his suspended driver’s license meant his employment could not be continued. (ALJD p. 15, lns 10-11) He also was the only suspended employee whom the dealership undoubtedly knew was confused about his job status, which caused him not to return to work.

Respondent’s attempts to minimize the similarity between this case and the factual situation in *Golden State Foods*, 340 NLRB 382 (2003), are not persuasive. First, Respondent curiously contends that this case is distinguishable because “the record is devoid of any evidence of threats made by the dealership’s managers prior to, or after, Huerta’s suspension and

discharge.” (Resp. Br. p. 15) The record is, in fact, replete with unlawful threats made by high-ranking Auto Nation and admitted dealership agents Davis and Andrews at the August 23, 2012, meeting with technicians held almost immediately prior to Huerta’s suspension. Second, Respondent contends that the dealership conducted a proper investigation into Huerta’s license situation before suspending him. What Respondent did not do was conduct a proper investigation into why Huerta filed for unemployment compensation and why he did not report back to work as expected on September 14.

Likewise, *Green Valley Manor*, 353 NLRB 905 (2009), *Piner’s Napa Ambulance Service*, 352 NLRB 609 (2008), and *St. George Warehouse, Inc.*, 349 NLRB 870 (2009) do not support Respondent’s claim that no disparate treatment occurred here. In each of these cases, the conduct of the discriminatees was more severe than the compared employees. Here, Huerta engaged in the exact same conduct—losing his license—as the comparators. His lack of communication with Respondent thereafter did not make his conduct more severe, since it was caused by Respondent’s own failure to contact him despite knowing of his confusion regarding his job status.

Finally, Respondent’s attempt to cast the ALJ’s disparate treatment conclusion as resting on credibility reads language into the Judge’s opinion that is not present. Respondent cites to a portion of the ALJ decision discussing how Theodorou did not demonstrate any animosity towards the Union or Huerta’s Union support. (ALJD p. 53, lns 33-38) However, the Judge did not rely on Theodorou’s testimony in the portion of the decision where he discounted the evidence of disparate treatment. (ALJD p. 54, lns 20-41; p. 55, lns 1-12) In dealing with that issue, the ALJ simply stated that Theodorou gave Huerta a “suitable accommodation” and then

described the factors which, in the Judge's view, established that it was suitable. Thus, the ALJ used the wrong legal standard in evaluating the disparate treatment evidence.

Accordingly, Respondent's suspension and discharge of Jose Huerta violated Section 8(a)(3), because the dealership failed to meet its burden of demonstrating it would have taken those adverse actions against Huerta absent his Union support.

III. CONCLUSION

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

DATED at Chicago, Illinois, this 15th day of November, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **REPLY BRIEF IN SUPPORT OF COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** was electronically filed with the Office of the Executive Secretary of the National Labor Relations Board on November 15, 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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