Auto Nation, Inc. and Village Motors, LLC d/b/a Libertyville Toyota *and* Automobile Mechanics Local No. 701, International Association of Machinists and Aerospace Workers, AFL–CIO
Case 13–CA–063676

July 9, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND SCHIFFER

On August 16, 2012, Administrative Law Judge Earl E. Shamwell, Jr. issued the attached decision. The Respondent and the General Counsel filed exceptions, supporting briefs, and answering briefs. The General Counsel also filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

I. THE 8(A)(1) ALLEGATIONS

We affirm the judge's findings that the Respondent, a car dealership, through Auto Nation's Vice President and Associate General Counsel Brian Davis and Human Resources Director Jonathan Andrews, committed numerous violations of Section 8(a)(1) of the Act through statements made at a meeting with employees on August 23, 2011.[3] We address several of those violations below.[4]

A. Threat of Futility

The judge found that the Respondent violated Section 8(a)(1) by implicitly threatening employees that it would be futile to select the Union as their bargaining representative. In affirming this finding, we agree in particular with the judge's rationale that the Respondent's comments effectively communicated that the selection of the Union would inevitably lead to years of delay and years of frozen benefits while negotiations were proceeding. Indeed, Vice President Davis even suggested that bargaining might never *begin*: "[W]hen you enter these negotiations, *if you ever get there*, employees tend to lose things" (emphasis added). To drive home his point, Davis cited the employees at the Respondent's Orlando dealership, who had voted for union representation in 2008: "I can bring those people up here that have been living that nightmare for almost 3 years now *without one bargaining session, not one contract negotiation*" (emphasis added). Based on Davis' statements alone, we agree with the judge that the Respondent conveyed the message to employees that selecting the Union was futile.[5]

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[1] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. 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 convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language, to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010), and to require the Respondent to compensate Huerta for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters. We shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

The General Counsel excepts to the judge's failure to award certain requested remedies. We agree that a notice-reading remedy is appropriate because of the nature of the Respondent's unfair labor practices, especially the unlawful statements made by high-ranking management officials to all, or nearly all, of the Respondent's employees at a meeting on August 23, 2011. Reading the notice will serve as a minimal acknowledgement by the Respondent of its legal obligations and will provide employees with some assurance that their rights under the Act will be respected in the future. As the Board has previously observed, "the public reading of the notice is 'an effective but moderate way to let in a warming wind of information and, more important, reassurance.'" *McAllister Towing & Transportation Co.*, 341 NLRB 394, 400 (2004) (internal citations omitted), enfd. 156 Fed.Appx. 386 (2d Cir. 2005). Accordingly, we shall require that the Respondent's associate general counsel, Brian Davis, or its human resources director, Jonathan Andrews, read the remedial notice to the Respondent's assembled employees, in the presence of a Board agent. Alternatively, the Respondent may choose to have a Board agent read the notice to assembled employees in the presence of Davis or Andrews. We find that the other special remedies requested by the General Counsel are not necessary to remedy the Respondent's unfair labor practices. For the reasons stated in his partial dissent, Member Miscimarra would not order notice reading.

[3] All dates are in 2011 unless otherwise noted.

[4] We agree with the judge, for the reasons stated in his decision, that the Respondent unlawfully threatened employees with blacklisting if they supported the Union.

[5] Our finding is bolstered by the Respondent's additional statements threatening employees with the loss of existing benefits. In particular, Davis told employees that even if bargaining eventually were to occur:

> [W]e sit down and we start from scratch, we start from scratch. We don't start with what you guys are making today. Everything goes to zero.

Those statements clearly threatened employees that "their wages and benefits were endangered, not because of the uncertainties of the collective-bargaining process, but simply because they selected the Union as their collective-bargaining representative." *Federated Logistics & Operations*, 340 NLRB 255, 255–256 (2003), citing *General Fabrications Corp.*, 328 NLRB 1114 (1990), enfd. 222 F.3d 218 (6th Cir.

B. Implied Promise of Wage Increases

The judge found, and we agree, that the Respondent violated Section 8(a)(1) by making an implied promise of wage increases to employees in order to discourage them from supporting the Union.[6] When an employee asked whether it would be possible for the Respondent's pay plan to be "updated" for currently low-paid technicians *without voting the Union into the dealership*, Human Resources Director Andrews responded, "I think it's absolutely possible." Both he and Vice President Davis explained that the Respondent had to pay competitive wages in order to attract and retain skilled technicians, and in any event wanted to pay employees a "fair wage" based on their contributions to the company. Davis further stated that the Respondent would be "definite[ly] willing[] to consider making adjustments" for employees who were "negatively impacted" by a failure on the Respondent's part to pay competitive wages. These statements—which invited confidence as to the Respondent's future actions (a wage increase was "absolutely possible" and something the Respondent was "definite[ly] willing[] to consider")—were especially meaningful because they pointedly contrasted with the Respondent's repeated statements, discussed above, that wages and other employment terms would remain "frozen," potentially for "years," if the employees selected union representation. See *Reno Hilton*, 319 NLRB 1154, 1156 (1995) (employees would reasonably interpret employer's statement as an implied promise to grant additional benefits when taken in the context of the employer's earlier statements and conduct). Davis concluded by saying that "we want a chance to address [those issues] before you pay someone else to address them." That statement, while not expressly promising an increase in wages, directly links the remedying of employees' grievances with the employees' rejection of union representation. See, e.g., id. (employer's request for chance to "deliver" was implied promise to remedy employees' grievances, implied promise to grant benefits, or both); see also *DynCorp*, 343 NLRB 1197, 1198 (2004) ("The use of 'cautious language or even a refusal to commit . . . to specific corrective action, does not cancel the employees' anticipation of improved conditions if the employees oppose or vote against the unions.'") (quoting *Reliance Electric Co.,* 191 NLRB 44, 46 (1971)), enfd. 233 Fed.Appx. 419 (6th Cir. 2007).

C. Threat of Demotions

A threat to demote employees because of their union activities violates Section 8(a)(1). See *Ace Beverage Co.*, 233 NLRB 1269, 1269 (1977). We agree with the judge's finding that the Respondent made such threats to employees. In particular, we rely on the following colloquy, sparked by an employee's comment that, under union representation, employees would be demoted to apprentices unless they met the requirements to become journeymen. Vice President Davis responded, "[T]hat's exactly how it would be negotiated."[7] In an apparent attempt to avoid the impression that demotions would necessarily take place, Human Resources Director Andrews interjected, "That's how a lot of them are. But it's all part of the negotiation process. That sets that up." Evidently oblivious to Andrews' hint, Davis then returned to his theme of inevitability: "You see, you need that structure. If not that identical structure, something similar to that would be negotiated so you could properly classify people without subjectivity." In the circumstances, employees would reasonably interpret Davis' statements as indicating that at least some employees would face demotion if the employees selected union representation.

This suggestion of inevitability was further underscored by the difference between Davis' remarks concerning demotion and Davis' and Andrews' comments concerning gains the employees might achieve through organizing. Throughout the meeting, in response to any suggestion that the Union might be able to negotiate improved terms and conditions of employment, Davis and Andrews repeatedly emphasized that the Union could not force the Respondent to take any particular actions or agree to any particular proposals that were not in the best interests of employees and/or the Respondent. This stance, however, changed dramatically when the discussion turned to employee reclassification, which might adversely affect some employees. At that point, Davis suggested that the Respondent would have no power to resist a union demand for a journeyman/apprentice structure and that, although the details might be subject to negotiation, a reclassification of employees, and subsequent demotion of at least some employees, was inevitable. Likewise, although the Respondent's officials often noted that the result of negotiations could be that things would get better, worse, or stay the same, Davis implied

2000); *Capitol EMI Music*, 311 NLRB 997 (1993), enfd. 23 F.3d 399 (4th Cir. 1994).

[6] For the reasons stated in his partial dissent, Member Miscimarra does not join this finding.

[7] Davis thereby effectively adopted the employee's comment as his own. See, e.g., *Airtex*, 308 NLRB 1135, 1142 (1992) (manager repeated antiunion employee's statements that union supporters would be "weeded out"); *Group One Broadcasting Co.*, 222 NLRB 993, 993, 997 (1976) (supervisor emphatically agreed with antiunion employee's statement that union supporters should be fired).

that the impact of a journeymen/apprentice structure could only be negative, at least for some employees. Accordingly, we find that, taken as a whole, the Respondent's comments about reclassification and demotion of employees were unlawful.

II. THE 8(A)(3) ALLEGATIONS

The judge dismissed allegations that the Respondent unlawfully suspended and discharged employee Jose Huerta because of his union activity. For the reasons discussed below, we affirm the judge as to Huerta's suspension, but reverse as to the discharge.

A. Facts

Jose Huerta was employed by the Respondent for about 15 years as an automotive painter. Huerta's job entailed some driving responsibilities, mainly to retrieve and return vehicles to the car lots. Huerta was active in the Union's organizing campaign. He spoke to 8 to 10 employees about the Union and obtained their signatures on authorization cards. Huerta's immediate supervisor was David Borre, service department director. Borre reported to General Manager Taso Theodorou.

At all relevant times, the Respondent maintained a vehicle usage and motor vehicle report (MVR) screening policy that applied to all employees in driving positions. The policy required that employees possess a valid driver's license and notify their supervisor immediately of any suspension, revocation, expiration, or cancellation of their driving privileges. The policy stated that failure to comply with any of its terms, including the notification requirement, could result in disciplinary action, up to and including termination. The policy also permitted waivers of the license requirement for employees occupying nondriving positions. Huerta was classified as a driving employee and had signed copies of the MVR policy, most recently on January 26, 2007.

On August 23, 2011, General Manager Theodorou received a voice mail from an anonymous woman alleging that an employee was being coerced into joining the Union, that employees Huerta and Hermengildo "Mere" Tellez were pushing the union cause, that both were of low moral character, and that Huerta had a DUI violation and did not have a valid driver's license. To confirm the DUI allegation, Theodorou asked Regional Human Resources Director Andrews to run an MVR on Huerta. Andrews submitted Huerta's name to Sterling Info Systems (Sterling), with whom the Respondent had a contract to run MVRs, as requested, on the Respondent's current employees.[8] Sterling's contract with the Respondent established the following protocol: if the employee's requested MVR failed to meet standards prescribed by the Respondent, an "adverse action" process was triggered. In the first phase of the process, Sterling sent a "pre-adverse action" letter to the employee. The letter informed the employee that something negative had turned up in his background check and invited him to provide information to refute the adverse information within 5 days. If the employee did not respond within the 5-day period, Sterling issued a final "adverse action" letter to the employee. The MVR was furnished to the Respondent, but Sterling automatically sent the "pre–adverse action" and "adverse action" letters to the employee without notice to the Respondent.

Sterling's inquiry revealed that Huerta's driver's license had been suspended, and on August 26 Andrews reported that fact to Theodorou. Theodorou in turn directed Service Department Manager Borre to suspend Huerta, and Borre did so the same day. Borre and Huerta agreed that the Respondent would give Huerta until September 14 to get his license reinstated.

In the meantime, however, Sterling's confirmation that Huerta's license was suspended had triggered its "adverse action" process. Thus, on August 27, Huerta received a letter dated August 25. The letter was generated by Sterling, but Sterling was nowhere identified as the sender, and the signature line read "2280—Libertyville Toyota." The letter, printed on a plain piece of paper with no letterhead, stated that the information in the accompanying report would prevent "2280-Libertyville Toyota from extending an employment offer, continuing your current employment or granting a promotion to you at this time." Enclosed with the letter was a copy of Sterling's background screening report. The report documented the suspension of Huerta's license. Huerta testified that he did not respond to the letter because he could not dispute that his license had been suspended. He also testified that, after receiving this letter, he believed that he had been terminated by the Respondent.

On about September 3, Huerta received a second letter from Sterling, again on a plain piece of paper with no letterhead and again bearing the signature "2280-Libertyville Toyota." The letter, dated September 1, informed him that, based on the information provided in the Sterling report he had received in August, "an offer of employment, a continuation of current employment or the granting of a promotion will not be made at this time." Huerta's reaction to the second letter was the same as to the first: he concluded that he had been terminated.

Barbara Sauvain, Sterling's vice president of operations integration, testified that the second letter ended

[8] The contract also provided for Sterling automatically to run annual MVRs on all current employees.

Sterling's involvement, that any decision to change the status of the employee in question was the client's, and that Sterling had no authority to terminate a client's employee. Sauvain also testified, however, that the Respondent did not sign or see either of the letters, was not told of their issuance, and was not copied on either letter. Rather, Sauvain testified, the Respondent had authorized Sterling to send employees these types of letters when they initially set up the process.

Huerta never contacted the Respondent or Sterling about either of Sterling's letters, but instead applied for unemployment benefits within 2 weeks of the August 26 meeting. Internal company emails, copies of which were sent to Theodorou, show that the Respondent learned of that application at some point during the week of September 5 and that, by the end of the following week, the Respondent knew that Huerta evidently had reported to the State unemployment compensation office that he had been discharged. Theodorou admitted that he then participated in a conference call with the State unemployment authorities in which he insisted that Huerta had only been suspended, not terminated.[9] There is no evidence, however, that Theodorou or anyone else at the Respondent ever sought to contact Huerta to correct his apparent misunderstanding of his employment status.

Huerta did not report to the Respondent about his progress towards reinstating his license either before or after September 14. On September 21, the Respondent completed a personnel action form indicating that Huerta was terminated for "job abandonment," effective September 15.

B. Discussion

1. Huerta's suspension

Our analysis of Huerta's suspension is governed by the burden-shifting framework set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under that framework, the General Counsel must prove that an employee's union or other protected activity was a motivating factor in the employer's action against the employee. The elements required to support such a showing are union or protected concerted activity, employer knowledge of that activity, and union animus on the part of the employer. See, e.g., *Consolidated Bus Transit,* 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009).[10] If the General Counsel carries that initial burden, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the protected activity. Id. at 1066. If, however, the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, and its *Wright Line* defense necessarily fails. See *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003), citing *Limestone Apparel Corp.,* 255 NLRB 722 (1981).

The judge found that the General Counsel showed that animus toward Huerta's union activity was a motivating factor in his suspension, and there are no exceptions to that finding. Nevertheless, the judge found that the suspension was lawful. The judge credited Theodorou's testimony that he always suspends employees who, like Huerta, have license problems, but that he also gives the employee time to correct the matter, as he did Huerta. Further, the judge found that Theodorou gave Huerta a "substantial accommodation" by merely suspending Huerta for his violation of the MVR policy (instead of terminating him on that count alone) and by giving Huerta more time, as he requested, to attempt to have his license reinstated.

The General Counsel disputes the judge's credibility determination and argues that the judge in effect applied

[9] The conference call was scheduled for September 19, and there is no indication that it did not occur that day.

[10] Contrary to the suggestions of the judge and our dissenting colleague, proving that an employee's protected activity was a motivating factor in the employer's action does *not* require the General Counsel to make some additional showing of particularized motivating animus towards the employee's own protected activity or to further demonstrate some additional, undefined "nexus" between the employee's protected activity and the adverse action. See, e.g., *Encino Hospital Medical Center*, 360 NLRB No. 52, slip op. at 2 fn. 6 (2014); *Mesker Door, Inc.*, 357 NLRB No. 59, slip op. at 2 fn. 5 (2011). See also *Willamette Industries*, 341 NLRB 560, 562 (2004) (finding it unnecessary for the General Counsel to show that decisionmakers had direct knowledge of unlawful statements in order to show that their decision was motivated by animus). In fact, where this same judge in a previous case had incorrectly stated the *Wright Line* standard, we clarified then, as we do again now, that "a 'nexus' is not an element of the General Counsel's initial burden." *The TM Group, Inc.*, 357 NLRB No. 98, slip op. at 1 fn. 2 (2011).

Our colleague's view is essentially that of former Member Schaumber, who articulated the position in favor of a fourth *Wright Line* element in many decisions, but who failed to persuade the Board. Compare, for example, *Shearer's Foods, Inc.*, 340 NLRB 1093, 1094 fn. 4 (2003) (Member Schaumber's original exposition of his view) with *DHL Express, Inc.*, 355 NLRB 680, 681 fn. 6 (2010) (Member Schaumber personal statement, citing his footnote in *Shearer's Foods*). Even though there are a handful of instances in which Board panels, without purporting to modify or add to the longstanding *Wright Line* test, have in passing referred to a "nexus" element, those decisions are not to the contrary, given the overwhelming number of cases in which the Board has stated the *Wright Line* test precisely as we do here. We note that such cases do not reflect a different approach as, in none of the cases cited by our colleague, was such a "nexus," or the lack thereof, the basis for the Board's holding.

an erroneous legal standard by examining whether the Respondent's actions towards Huerta constituted a "substantial" or "suitable" accommodation. As explained below, we find no basis on which to disturb the judge's credibility determination. Although we agree that the judge's analysis was flawed,[11] we conclude that the Respondent did, in fact, establish its *Wright Line* defense.

The key question in this regard is whether the record establishes—as the Respondent contends and as the credited testimony supports—that the Respondent's treatment of Huerta was consistent with that accorded similarly situated employees, i.e., other driving employees who lost their licenses. The General Counsel argues, citing various evidence, that if the judge had evaluated the record properly, he would have found that the Respondent's treatment of Huerta in fact contrasted sharply with its lenient approach to other employees who lost their licenses, and thus would have discredited Theodorou's testimony to the contrary. After carefully reviewing the record, we reject this contention.

The General Counsel argues that the documentary evidence shows that roughly one in four employees lost their licenses in the previous 7 years and that, unlike Huerta, those employees were allowed to continue working, without being suspended, by having their driving duties eliminated. To support these assertions, the General Counsel introduced 10 nondriving waivers given to 8 different employees since November 2005. Each waiver, signed by the employee and his manager, states that the employee has failed to meet the Respondent's standards for driving associates but that, in lieu of termination, the Respondent has agreed to allow the employee to continue working in a nondriving position or in his current position as modified to eliminate all driving responsibilities. The General Counsel introduced monthly screening reports from January 2009 to December 2011 and a summary chart prepared by the Respondent that shows which employees had passed or failed the MVR screening since 2005. The General Counsel also solicited testimony about the Respondent's treatment of several specific employees.

Having examined all of that evidence, we find that it does not support the General Counsel's assertions and thus does not undermine the Respondent's defense. The record fails to show that the Respondent did not, in the past, suspend employees who lost their licenses. For example, the evidence shows that Ivan Jasso failed his MVR on August 3, 2011, yet the nondriving waiver between Jasso and the Respondent was not signed until October 24, 2011. Francisco Tovar failed his MVR on October 6, 2009, and his waiver was executed on October 22, 2009. There is no record evidence of what occurred during those interim periods. It is possible that Jasso and Tovar (and the other employees who executed nondriving waivers) were suspended at the time their failure was discovered and that the waivers were signed only after some period of suspension had been served.[12] At a minimum, the nondriving waivers do not establish any grounds for rejecting Theodorou's credited testimony that he always suspends employees who, like Huerta, have license problems.

Similarly, the General Counsel's reliance on the Respondent's summary chart is misplaced. The chart shows that some employees remained employed by the Respondent in the year following their failed MVRs, but it provides no information about whether the employees were suspended for some time and then reinstated. Thus, like the nondriving waivers, the summary chart does not contradict the Respondent's claim that it always suspends employees in these circumstances.

By contrast, the testimony of employee Guadalupe Montoya does lend some limited support for the General Counsel's position. Montoya testified that his license had been suspended on two occasions, once in 2003 and again in 2004. Montoya testified that on each occasion he was allowed to keep working without being suspended, but was not allowed to drive any vehicles off the Respondent's lot. However, we do not think that the testimony of one employee about events that occurred 10 years ago provides sufficient grounds for reversing the judge, especially since Theodorou (whose suspension policy is in question) started working for the Respondent only in 2010. See *Merillat Industries*, 307 NLRB 1301, 1303 (1992) ("The Respondent's defense does not fail simply because not all the evidence supports it, or even because some evidence tends to negate it.").

In sum, the General Counsel has not established sufficient grounds on which to reject the Respondent's credited testimony that it would have suspended Huerta for losing his license, as it always did with similarly situated employees. See, e.g., *Carrier Corp.*, 336 NLRB 1141, 1141 fn. 3 (2001) (relying on credited testimony to find that employer established its affirmative *Wright Line* defense); *Colburn Electric Co.*, 334 NLRB 532, 550 (2001), enfd. mem. 54 Fed.Appx. 793 (5th Cir. 2002)

[11] After finding specifically that animus motivated the suspension, the judge found that the suspension was *not* based on Huerta's union activity, but solely on his loss of driving privileges. The judge's focus on the "accommodation" made for Huerta seems consistent with this latter finding. But the judge did not clearly find that the Respondent carried its *Wright Line* defense burden.

[12] The record does not reveal how much time passed between when the remaining employees failed their MVRs and when they executed their waivers.

(same). Accordingly, we affirm the judge's finding that the suspension did not violate Section 8(a)(3) and (1) of the Act.

2. Huerta's discharge

In analyzing Huerta's discharge, we again apply *Wright Line*, supra. It is undisputed that Huerta actively engaged in union activity and that the Respondent was aware of that activity. The Respondent's union animus is established by its unlawful statements made at the August 23 meeting and (as we will explain) by the pretextual nature of its claim that it fired Huerta for job abandonment.[13] Hence, we find that the General Counsel met his burden of showing that Huerta's union activity was a motivating factor in his discharge.[14] Our finding of pretext, moreover, forecloses the Respondent from establishing a *Wright Line* affirmative defense, as the Respondent does not assert any other basis for its action.[15]

The judge found that the Respondent lawfully discharged Huerta for job abandonment because he did not return to the dealership on September 14 and made no attempt to contact his supervisors after the suspension meeting. Contrary to the judge, we find that the Respondent used "job abandonment" as a pretext for discharging Huerta because of his union activities.

As stated above, Huerta was suspended on August 26 and given until September 14 to deal with his license problems. Just days later, however, Huerta received two letters, each stating that the Respondent could no longer employ him because of his suspended license. The letters both had the name "2280-Libertyville Toyota" in the signature line and bore no indication that they might have been sent by anyone else. The first letter said that if Huerta believed that the report of the license suspension was inaccurate, he should contact Sterling—not the Respondent—within 5 business days. Huerta knew that the report was accurate and therefore did not contact Sterling. As a result, the second letter informed Huerta that "a continuation of current employment will not be made at this time" by "2280-Libertyville Toyota." Sterling's Sauvain testified that a recipient of the second letter would understand that he had been fired.[16] Huerta, in turn, filed for unemployment benefits.

The judge found that Huerta's actions and conclusions were "illogical" and "unwise." We disagree. There is nothing especially illogical or unreasonable about Huerta's concluding that he had been discharged after he received two letters informing him that the Respondent would no longer employ him. And, based on that reasonable conclusion, there was likewise nothing illogical about Huerta's applying for unemployment benefits when he thought he had been fired. In any event, contrary to the judge, what is dispositive of the termination issue is not whether Huerta's actions were "illogical" or "unwise," but rather whether the Respondent discharged Huerta because of his union activity. The Respondent's assertion that Huerta was discharged for "job abandonment" does not withstand scrutiny.

By September 14, the date by which Huerta was supposed to contact the Respondent concerning the suspension of his license, the Respondent knew that Huerta had applied for unemployment compensation benefits. Internal company emails described earlier show that the Respondent also knew that Huerta had reported to the State unemployment agency that he had been discharged. Thus, before terminating Huerta on September 21 (effective September 15) purportedly for abandoning his job, the Respondent knew that Huerta believed he had already been discharged, and the Respondent should have known why. Having contacted Sterling to investigate Huerta's driving eligibility, the Respondent knew, or at least reasonably should have known, that Sterling would follow the contractual protocol and advise Huerta of the adverse MVR report and its consequences, including discharge.[17]

[13] It is well settled that a finding of discriminatory motivation may be predicated on pretextual reasons for a personnel action. *Suburban Electrical Engineers/Contractors*, 351 NLRB 1, 5 (2007).

Although the Respondent noted on Huerta's personnel action form that he was eligible for rehire, we do not share the judge's and our dissenting colleague's impression that the Respondent thereby indicated that it bore no animus toward Huerta. The Respondent's actions here speak louder than its words on an internal document.

[14] We have previously explained why our dissenting colleague is incorrect in arguing that the General Counsel was required to establish a "nexus" between the Respondent's union animus and the adverse actions against Huerta. The Respondent's union animus is demonstrated not least by its unfair labor practices, which interfered with its employees' statutory right to unionize. Moreover, the Respondent here failed to except to the judge's specific finding that its suspension of Huerta was motivated by union animus, and that finding accordingly became an established fact for purposes of this case.

[15] See *Golden State Foods*, supra, 340 NLRB at 385; *Suburban Electrical Engineers/Contractors*, supra, 351 NLRB at 5.

[16] Counsel for the General Counsel asked Sauvain, "The question is that first line of this [second] letter, that's telling the employee the continuation of your current employment will not be made. It's over." Sauvain answered, "Correct." (Tr. 231)

The judge found that Huerta should have recognized that the letters did not come from Borre or Theodorou because of their "obvious form-look." The letters, however, specifically referred to "2280—Libertyville Toyota" and appeared to be signed by "2280—Libertyville Toyota."

[17] The judge credited Theodorou's testimony that he "did not know" of the letters sent by Sterling until the Board investigated the charge. Contrary to the judge and our dissenting colleague, we do not find this testimony particularly significant. The Respondent had previously authorized Sterling to send adverse action letters in just such situations. Having agreed to the process and the use of such letters, the Respond-

But even if the Respondent did not make that logical connection, it knew that Huerta apparently thought that he had been fired. On being so informed, Theodorou participated in a call with State unemployment compensation officials in which he explained *to them* that Huerta had only been suspended and not fired. Yet the Respondent made no attempt to explain *to Huerta* how matters actually stood. Instead, it allowed Huerta to go on thinking that he had been fired and then, when he did not return to work for that very reason, proceeded to fire him allegedly for "job abandonment."[18] In those circumstances, we find that the Respondent's claim of "job abandonment" was a thinly veiled pretext for ridding itself of a prominent union supporter. See *Bantek West, Inc.*, 344 NLRB 886, 893 (2005).

We accordingly find, contrary to the judge, that the Respondent discharged Huerta because of his union activity, in violation of Section 8(a)(3) and (1).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating employee Jose Huerta for engaging in union activity, we shall order the Respondent to offer Huerta full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make Huerta whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful actions against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

Additionally, we shall order the Respondent to compensate Huerta for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

The Respondent shall also be required to remove from its files any and all references to the unlawful termination of Jose Huerta and to notify him in writing that this has been done and that the unlawful termination will not be used against him in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Auto Nation, Inc. and Village Motors, LLC, d/b/a Libertyville Toyota, Libertyville, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that selecting a union representative would be futile.

(b) Threatening employees with demotions if they select a union representative.

(c) Threatening employees with "blacklisting" if they support or select a union representative.

(d) Making implied promises of wage increases to employees in order to discourage employees from selecting a union representative.

(e) Discharging or otherwise discriminating against employees for supporting Automobile Mechanics Local No. 701, International Association of Machinists and Aerospace Workers, AFL–CIO or any other labor organization.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jose Huerta full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Jose Huerta whole for any loss of earnings and other benefits he has suffered as a result of his unlawful discharge, less any net interim earnings, plus interest ,in the manner set forth in the remedy section of this decision.

(c) Compensate Jose Huerta for the adverse tax consequences, if any, of receiving a lump-sum backpay award and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of

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ent cannot now disclaim responsibility for the message the letters reasonably conveyed to Huerta.

[18] This sequence of events highlights the immateriality of our dissenting colleague's observation that the Respondent had no legal duty to reach out to Huerta. Whether the Respondent was obliged to contact Huerta is beside the point. The question, rather, is why it chose not to, in the face of clear evidence that Huerta misunderstood his employment status. On the evidence here, we find that the Respondent's choice demonstrated the pretextual nature of its claim that Huerta's discharge was for job abandonment. For the same reasons, we are not persuaded by our colleague's assertion that the Respondent was entitled to stand pat, in the face of clear evidence that Huerta believed he had been discharged, and expect Huerta to report back to the Respondent following his September 14 court hearing.

Jose Huerta and, within 3 days thereafter, notify Huerta in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Libertyville, Illinois auto dealership copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 23, 2011.

(g) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice marked "Appendix" is to be read to assembled employees by Associate General Counsel Brian Davis or Human Resources Director Jonathan Andrews, in the presence of a Board agent, or by a Board agent in the presence of either Davis or Andrews.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 13 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 9, 2014

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

I join in my colleagues' disposition of the allegations except in the following respects.[1]

I.

Contrary to my colleagues, I would not find that the Respondent made an implied promise of wage increases in violation of Section 8(a)(1). During a question and answer session with employees on August 23, 2011, two Respondent officials, Jonathan Andrews and Brian Davis, addressed an employee's question about whether it would be possible for the Respondent's pay plan to be updated without voting the Union into the dealership. Andrews said he thought it was "absolutely possible," and Davis said he thought "there would be a definite willingness to consider making adjustments . . . ." Statements that wage adjustments were *possible* and that the Respondent would be willing to *consider* them are not promises that wages will increase.[2]

Davis also stated that "we want a chance to address [those issues] before you pay someone else to address them." My colleagues find that this statement, viewed in context, was an implied promise because it "directly link[ed] the remedying of employees' grievances with the employees' rejection of the Union." I respectfully disagree. In my view, although Davis came close to crossing the line with this statement, he avoided stepping over it because he phrased his statement in terms of the

[1] In joining my colleagues' finding that the Respondent violated Sec. 8(a)(1) by implicitly threatening employees that selecting the Union would be futile, I emphasize that the statements at issue, which suggested that the Respondent might delay collective bargaining indefinitely, were especially coercive in the context of other statements that, in bargaining, the Respondent "start[s] from scratch" and "[e]verything goes to zero."

[2] My colleagues state that Andrews' and Davis' statements "invited confidence as to the Respondent's future actions." The statements invited confidence in the Respondent's willingness to *consider* a future action. As noted in the text, our cases indicate that a statement that one is willing to consider an act is not the same as a promise to perform the act in question.

Respondent's *wanting a chance* to address the wage issue. Our cases indicate that such a statement is not the same as promising. See *Noah's New York Bagels*, 324 NLRB 266, 267 (1997) (finding that the respondent's statement—"[p]lease vote to give us a second chance to show what we can do"—was not unlawful because it did not make any specific promise that a particular matter would be improved); *National Micronetics*, 277 NLRB 993, 993 (1985) (finding "[g]eneralized expressions . . . asking for 'another chance' or 'more time'" to be "within the limits of permissible campaign propaganda").[3]

II.

Applying *Wright Line*,[4] the judge dismissed the General Counsel's allegations that the Respondent violated Section 8(a)(3) and (1) by suspending and discharging employee Jose Huerta. My colleagues affirm the judge's dismissal of the suspension allegation, and I agree. I disagree, however, with their finding that Huerta's discharge violated the Act. The judge found that the suspension and discharge decisions were made solely by the Respondent's general manager, Taso Theodorou. The judge credited Theodorou's testimony unreservedly, stating that he was "impressed by Theodorou" and that Theodorou "*showed no animosity . . . to the union cause*." The judge further found that Theodorou extended Huerta "substantial accommodations" and treated Huerta "fairly" and "honestly." Whatever antiunion animus other of the Respondent's managers may have harbored, the judge's credibility-based findings concerning Theodorou's motives toward and treatment of Huerta make it impossible to find that animus against Huerta's union activities was a motivating factor in his discharge.[5]

A.

As found by the judge, the relevant facts are as follows.[6] The Respondent maintains a vehicle usage and motor vehicle report screening policy (MVR policy). Under the MVR policy, employees such as Huerta whose job entails driving are required to possess a valid driver's license and to immediately notify their supervisors about certain driving infractions, including the suspension of their driver's license. The MVR policy further states that employees' failure to comply with any of its terms could result in disciplinary action, up to and including termina-

[3] *Reno Hilton*, 319 NLRB 1154, 1156 (1995), and *DynCorp*, 343 NLRB 1197, 1198 (2004), which my colleagues cite, are distinguishable from the present case. In *Reno Hilton*, the employer's president said, "[G]ive me a chance, *and I'll deliver*" (emphasis added). The promise to "deliver" was found to imply a promise of benefits if employees rejected the union. Here, the Respondent's officials asked for a chance and said they would *consider* a *possible* wage adjustment. In *DynCorp*, the plant manager assured employees that he knew that changes needed to be made, that it would be foolish of him not to address those issues, and that it was "quite probable" that significant changes would be made. Davis, by contrast, spoke only in terms of wanting a chance to address the issue by *considering* wage adjustments.

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

[5] The majority's erroneous finding to the contrary flows from their mistaken understanding of the General Counsel's initial *Wright Line* burden. They find that burden is satisfied by (1) evidence of protected activity, (2) employer knowledge of that activity, and (3) generalized union animus, and they reject the judge's statement that the General Counsel must establish a "link or nexus" between the employee's protected activity and the adverse employment action. But the judge correctly articulates the General Counsel's burden. The General Counsel *is* required, as part of his initial burden, to prove the existence of a nexus between protected activity and the particular decision alleged to be unlawful. In *Wright Line*, the Board explicitly characterized the General Counsel's initial burden as requiring proof that the challenged adverse action was motivated by antiunion animus. The Board stated that the General Counsel must, as an initial matter, make "a prima facie showing sufficient to support the inference that protected conduct *was a 'motivating factor' in the employer's decision*." 251 NLRB at 1089 (emphasis added). Contrary to the formulation set forth in the majority opinion, generalized antiunion animus does not satisfy the initial *Wright Line* burden absent evidence that the challenged adverse action was motivated by antiunion animus. See, e.g., *Roadway Express*, 347 NLRB 1419, 1419 fn. 2, 1422–1424 (2006) (evidence of union's generalized animus towards financial core payers insufficient under the circumstances to sustain General Counsel's burden of proof); *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 418–419 (2004) (finding that employer harbored animus against union activity, but that there was insufficient evidence to establish that animus against employee Rosario's union activity was a motivating factor in the decision not to recall him), enfd. 156 Fed. Appx. 330 (D.C. Cir. 2005). See also *Valley Health System, LLC*, 352 NLRB 112, 112 fn. 2 (2008) (Member Schaumber notes that the Board and courts sometimes characterize the initial *Wright Line* burden as "adding as an independent fourth element the necessity for there to be a causal nexus between the union animus and the adverse employment action" [citations omitted]). More generally, the Board's task in all cases that turn on motivation "is to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of the employer which detrimentally affect" their employment. *Wright Line,* above, 251 NLRB at 1089.

My colleagues incorrectly suggest that I have added "some additional, undefined" nexus requirement to the General Counsel's initial burden under *Wright Line*. To the contrary, as noted above, *Wright Line* itself explicitly states the General Counsel's initial burden as to make a prima facie showing that protected activity was a "motivating factor" in the particular "decision" alleged to be unlawful. *Wright Line*, 251 NLRB at 1089. For similar reasons, my colleagues are incorrect when they suggest that our different views regarding the *Wright Line* initial burden center around whether one applies a three-element test versus a four-element test (here, my colleagues state that most Board cases apply a three-element test). Regardless of whether one summarizes the initial *Wright Line* burden by reference to three or four elements (my colleagues concede that both approaches are reflected in our cases), *Wright Line* directly requires the General Counsel to make an initial showing that *the challenged adverse action* was motivated by antiunion animus. Nothing in *Wright Line* remotely suggests this burden is satisfied by evidence of generalized "animus" that is unconnected from the discipline or discharge at issue.

[6] I have included facts relating to Huerta's suspension in order to place the issue of his discharge in the appropriate context.

tion. On August 10, 2011, the State of Illinois suspended Huerta's driver's license for driving under the influence (substance unknown). Huerta knew that the State had suspended his license, but he did not report the suspension to his supervisor.

Huerta was active in the union campaign, and by August 15 the Respondent was aware of his involvement. On August 23, Theodorou received an anonymous voice mail alleging that Huerta and another employee were "pushing the union cause," and that Huerta had a DUI violation and did not have a valid driver's license. This was the first time that the Respondent heard anything about Huerta's DUI and the suspension of his driver's license.

Theodorou investigated the allegations cautiously and with respect for Huerta's legal rights and personal feelings because he did not want to confront Huerta based on an anonymous allegation. The Respondent's investigation—which included obtaining a motor vehicle report about Huerta from its third party screening vendor, Sterling Info Systems ("Sterling")—confirmed that Huerta's license had in fact been suspended as a result of a DUI.[7]

Under its MVR policy, the Respondent could have terminated Huerta for failing to report that his license had been suspended. Instead, on Theodorou's instructions, two supervisors met with Huerta on August 26, informed him that he was suspended, and gave him until September 12 to straighten matters out with his license. One of the supervisors reported back to Theodorou that Huerta had a court date on September 14, and Theodorou extended the deadline 2 more days. Huerta understood that he was to report back to the Respondent after his September 14 hearing. Based on the form letters he received from Sterling, however, Huerta decided that he had been discharged. Huerta never mentioned the letters to the Respondent, who knew nothing about them. During his suspension, Huerta filed for unemployment benefits, as Theodorou learned when he was contacted by State unemployment officials. Theodorou told the officials that Huerta was on suspension and had not been discharged, but he did not contact Huerta. Huerta never reported back to the Respondent. On September 21, the Respondent discharged Huerta for job abandonment, effective September 15, noting on Huerta's personnel action form that he was eligible for rehire.

Applying *Wright Line*, the judge dismissed the unlawful discharge allegation. The judge explained that, although Huerta understood that he had been given until September 14 to report back to the Respondent, he failed to do so. The judge rejected the General Counsel's argument that based on the form letters from Sterling, Huerta would have understood that he had already been discharged and therefore did not need to follow the Respondent's instruction to report back on September 14. Rather, he found that Huerta unwisely "[took] it upon himself to declare himself discharged," without asking his supervisor about the letters and their apparent inconsistency with the grace period he had been given. Further, the judge found that the decision to discharge Huerta was made by Theodorou alone, and that Theodorou "showed no animosity . . . to the union cause" or to Huerta. Finally, the judge took note of the fact that Huerta was eligible for rehire. Thus, he concluded, "not only did the Respondent harbor no animus to Huerta's union involvement, it seemingly harbored no personal animus against him and, in fact, is or may be willing to rehire him, should he reapply for his old job."

My colleagues reverse and find Huerta's discharge unlawful. Applying a three-element test, they find that the General Counsel met his initial burden under *Wright Line* by showing that (1) Huerta engaged in union activity, (2) the Respondent was aware of Huerta's union activity, and (3) the Respondent harbored antiunion animus, evidenced by the unlawful statements made by Andrews and Davis at the August 23 meeting and by the "pretextual nature of its claim that it fired Huerta for job abandonment." My colleagues further explain that their finding of pretext forecloses the Respondent from establishing a *Wright Line* affirmative defense because the Respondent did not assert any other basis for its action besides job abandonment.

B.

As a famous movie character once famously said, "what we've got here is a failure to communicate."[8] Based on the letters he received from Sterling, Huerta decided he had been discharged. But Huerta said nothing about the letters to the Respondent, and neither did Sterling. The Respondent learned that Huerta had filed for unemployment, but it did not ask Huerta why. Mean-

[7] Sterling performed annual motor vehicle screens for all of the Respondent's employees who drive as part of their jobs, and also ad hoc screens on request (such as the one requested for Huerta). If an employee's motor vehicle screen did not meet the standards established by the Respondent, Sterling would send a "pre–adverse action" letter to the employee informing him that something negative had turned up in his background check and inviting him to dispute the adverse information within 5 days. If the employee did not respond within 5 days, Sterling issued an "adverse action" letter to the employee. When Sterling sent these letters—which looked like form letters—it did not inform the Respondent that it had done so. Huerta received "pre–adverse action" and "adverse action" letters from Sterling. He never responded to them. The judge credited Theodorou's testimony that he had no knowledge of these letters, and a Sterling official testified that Sterling did not copy the Respondent on the letters.

[8] Cool Hand Luke (1967).

while, the Respondent was waiting for Huerta to make contact on September 14, and Huerta never did so. In a perfect world, such communication breakdowns would be avoided. But perfection is not possible in this world, particularly in the often-pressurized atmosphere of a car dealership, and the Act does not require an employer to handle its personnel matters perfectly. Indeed, it does not make it unlawful for an employer to handle such matters inconsistently, arbitrarily, and unfairly. The Act only requires, as relevant here, that an employer not discharge its employees based on their union activity. And under *Wright Line*, the General Counsel bears the burden of proving that Huerta's union activity motivated his discharge.

I find my colleagues' analysis of the General Counsel's *Wright Line* case unpersuasive. Their analysis exposes the fallacy of the notion that an inference of unlawful motivation may be based on generalized union animus absent evidence linking that animus to the adverse employment action at issue. The judge found, and my colleagues do not dispute, that Theodorou alone made the decision to discharge Huerta. And the record not only fails to support an inference that union animus was a motivating factor in Theodorou's decision, it *directly contradicts* such an inference.

To begin with, the entire chain of events involving Huerta arose by happenstance, based on an unsolicited anonymous allegation that his driver's license had been suspended. Upon hearing this allegation, the Respondent conducted an investigation that was careful, fair, sensitive to Huerta's rights, *and devoid of any antiunion animus*. Following that investigation, and at Theodorou's direction, Huerta was suspended—even though he could have been discharged under the MVR policy for failing to report the suspension of his license. Huerta was given until September 12 to resolve the problem. On learning that Huerta had a court date on September 14, Theodorou further accommodated Huerta by extending the deadline. These are not the acts of a man bent on ridding himself of a union supporter. The judge specifically found that Theodorou did not harbor any antiunion animus toward Huerta. And even when Huerta had been discharged, the Respondent marked him down as eligible for rehire. On this record, Andrews' and Davis' unlawful August 23 statements cannot support a reasonable inference that Huerta's discharge was motivated by animus against his union activity.[9]

That leaves, as their sole support for drawing that inference, my colleagues' finding that the Respondent's stated reason for Huerta's discharge was pretextual. As noted below, I disagree with that finding. But even assuming that "job abandonment" was not the real reason for Huerta's discharge, that alone cannot sustain the General Counsel's burden in this case. Under *Wright Line*, the General Counsel must show that animus against Huerta's union activity was a motivating factor in his discharge. To the extent that he relies on pretext to make that showing, the General Counsel must prove, not merely that the Respondent's stated reason for discharging Huerta was false, or not in fact relied upon, but that the *real* reason was animus against Huerta's union activity.[10] And as explained above, the record evidence in this case and the judge's credibility-based findings concerning the actions and motives of the Respondent's sole decisionmaker, Theodorou, rule out such a finding.

I disagree, however, with my colleagues' finding that the Respondent's stated reason for discharging Huerta was pretextual. The majority infers that union animus, not "job abandonment," was the real reason Huerta was discharged because the Respondent did not contact Huerta after learning that Huerta had filed for unemployment. But the record here indicates there is an obvious explana-

[9] To support their finding that Huerta's union activity was a motivating factor in his *discharge*, my colleagues note that the Respondent did not except to the judge's finding "that its *suspension* of Huerta was motivated by union animus" (emphasis added), which, my colleagues state, "accordingly became an established fact for purposes of this case." There are two problems with my colleagues' attempt to import the judge's discussion of the suspension allegation into the analysis of the discharge allegation. First, the judge explicitly found that the Respondent acted *lawfully* when it suspended Huerta. This more than adequately explains why Respondent did not file exceptions relative to the suspension. Second, not only did the judge conclude that Huerta's suspension was lawful, the judge's statement about "union animus" was made in the context of a *Wright Line* analysis in which the judge expressed *doubt* about the sufficiency of the evidence against the Respondent. The judge stated:

> I should note that *in candor, I believe that the nexus between the unfair labor practice violations that took place at the August 23 meeting which Huerta attended, and Huerta's suspension because of his suspended license, is rather tenuous*. However, for purposes of the Wright Line analysis, I will *consider* it established.

JD fn. 74 (emphasis added). In short, regarding Huerta's suspension, the judge's *Wright Line* analysis did not constitute an unqualified finding of unlawful motivation.

[10] I support truthfulness, and there are many contexts where false explanations may negatively affect credibility. However, stating a false reason for an adverse employment action *may* support a finding that the real reason is an unlawful one, but by no means does it compel such a finding. An employer may provide a false explanation for discharging an employee for many reasons that are not unlawful. It may be embarrassed to admit the real reason. Or an employer may lie because the truth would hurt too much, and it wishes to spare the employee's feelings. Or the stated reason may be false because the employer mistakenly believes that the employee did something that he or she did not do, or failed to do something that he or she did. Whether stating a false reason for a discharge supports a reasonable inference that the real reason is an unlawful one depends on the rest of the relevant evidence. In this case, that evidence precludes such an inference.

tion why the Respondent did not contact Huerta: the Respondent was waiting for Huerta to contact it. That was the understanding—that Huerta would report back to the Respondent on September 14. Huerta did not report back, assuming—however wisely or unwisely—that he had been discharged based on the Sterling letters. But the Respondent was not copied on those letters, and the judge credited Theodorou's testimony (a) that Huerta never told him or any other supervisor about the letters, and (b) that he was unaware of the letters until the Board agent brought them to his attention in November 2011. Even if the Respondent did not understand why Huerta had applied for unemployment insurance when he had only (at that point) been suspended, the Act imposed no duty on the Respondent to reach out to Huerta.[11] If anything, as the judge observed, Huerta's failure to seek clarification about the letters was imprudent, especially given that mere days before, Huerta had received face-to-face assurances from the Respondent that he had until September 14 to clear up the license issue. Under these circumstances, it is too much of a stretch to find that the Respondent's stated reason for discharging Huerta was not its real reason. The Respondent told Huerta to report back on September 14, and Huerta chose not to. Thus, the Respondent discharged him for abandoning his job.

In sum, the General Counsel failed to sustain his initial burden under *Wright Line*, but even assuming otherwise, the judge correctly determined that the Respondent would have discharged Huerta for job abandonment regardless of his prior union activity. I would affirm the judge's dismissal of the 8(a)(3) discharge allegation.[12]

Dated, Washington, D.C. July 9, 2014

Phillip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you that selecting a union representative would be futile.

WE WILL NOT threaten you with demotions if you select a union representative.

WE WILL NOT threaten you with "blacklisting" if you support or select a union representative.

WE WILL NOT make implied promises of wage increases to you in order to discourage you from selecting a union representative.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Automobile Mechanics Local No. 701, International Association of Machinists and Aerospace Workers, AFL–CIO or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's order, offer Jose Huerta full reinstatement to his former job or, if that job no longer exists, to a substantially

[11] Neither the record nor common sense supports an inference of unlawful motivation or antiunion hostility based on Respondent's failure to contact Huerta after learning he filed for unemployment compensation at a time he had only been suspended (and not discharged). Indeed, although my colleagues suggest Respondent did not satisfactorily explain "why it chose not to [contact Huerta]," the record does not even establish that Respondent made any conscious choice not to follow up with Huerta. Respondent operated a car dealership – obviously a complex operation with numerous employees – and Respondent's representative, Theodorou, was the general manager. If a non-discharged employee filed for unemployment compensation benefits at a time when he was not working, it would be entirely reasonable for the employer to respond to the claim without independently contacting the employee. The record supports a finding that Theodorou had many responsibilities as the general manager of a car dealership. Huerta's unemployment compensation claim obviously required a response by Respondent to the claim, and not to Huerta. If Huerta had filed some other type of legal claim (for example, alleging race or sex discrimination), one would reasonably expect the employer to respond to the claim without reaching out to Huerta. And in the circumstances presented here, it would be reasonable for any employer to regard the unemployment compensation claim as an indication that the employee no longer believed he was employed. Even if this perception by the employee or employer was mistaken, nothing in the Act reasonably supports a finding of unlawful motivation just because the employer failed to go to extraordinary lengths to secure an explanation from the employee about his confusing, inconsistent behavior.

[12] As a final matter, I disagree with my colleagues' decision to issue a notice-reading remedy. This special remedy is not warranted here because the Respondent's violations are not sufficiently serious or widespread.

equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Jose Huerta whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL compensate Jose Huerta for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's order, remove from our files any reference to the unlawful discharge of Jose Huerta, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

AUTO NATION, INC. AND VILLAGE MOTORS, D/B/A LIBERTYVILLE TOYOTA

The Board's decision can be found at www.nlrb.gov/case/13-CA-063676 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Charles J. Muhl, Esq., for the Acting General Counsel.
Douglas R. Sullenberger, Esq. and *David M. Gobeo, Esq. (Fisher and Phillips, LLP),* of Atlanta, Georgia, and Fort Lauderdale, Florida, respectively, for the Respondent.

DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. This case was heard before me in Chicago, Illinois, on January 26–27 and March 6–7, 2012, pursuant to an original charge filed by Automobile Mechanics Local No. 701, International Association of Machinists and Aerospace Workers, AFL–CIO (the Union) on August 31, 2011, against Auto Nation, Inc., and Village Motors, LLC, d/b/a Libertyville Toyota (collectively the Respondent); the Union filed an amended charge against the Respondent on November 29, 2011.

On December 12, 2011, the Acting Regional Director for Region 13 (the Region) of the National Labor Relations Board (the Board) issued a complaint against the Respondent and initially scheduled the matter for hearing on January 11, 2012; on January 10, 2012, the Acting Regional Director issued her amended complaint.

On December 22, 2011, the Respondent timely filed its answer to the original complaint essentially denying the commission of any unfair labor practices; and on January 24, 2012, the Respondent filed its answer to the amended complaint, reiterating its denial of the commission of any unfair labor practices.

The complaint as amended alleges that the Respondent, through its supervisors and managers, violated Section 8(a)(1) of the National Labor Relations Act (the Act) on August 23, 2011, in a meeting of its employees by making certain unlawful statements to the assembled employees. The Respondent also as alleged violated Section 8(a)(1) and (3) of the Act by first suspending one of its employees and later terminating him.

At the hearing, the parties were represented by counsel[1] and were afforded full opportunity to be heard, examine and cross-examine witnesses, and introduce evidence.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the posthearing briefs of the General Counsel and the Respondent,[2] I make the following findings of fact, conclusions of law, and recommended Order.

I. JURISDICTION

The Respondent,[3] a corporation—a Delaware limited liability company—with an office and place of business located in Libertyville, Illinois, has been engaged in the business of sales and service of new and used automobiles. During the past calendar year,[4] the Respondent, in conducting its business operations, derived gross revenues in excess of $500,000. During this period, the Respondent purchased and received goods, products, and materials valued in excess of $50,000 directly from points outside the State of Illinois. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The Respondent admits, and I would find and conclude, that the Union is a labor organization within the meaning of section 2(5) of the Act.

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[1] The Union was not represented by counsel, but one of its representatives was present at the hearing on all days and was given every opportunity to participate fully in the proceedings.

[2] The Union did not file a posthearing brief.

[3] The original complaint only included Village Motors, LLC doing business as Libertyville Toyota as the Respondent. The amended complaint added Auto Nation, Inc. as a respondent. Auto Nation did not object to its inclusion as a respondent party but did assert certain affirmative defenses to the charges leveled against Village Motors. The testimony at the hearing clearly established that Auto Nation, Inc. was the parent corporation of Village Motors. Accordingly, I will treat Auto Nation and Village Motors as a single Respondent for purposes of this case only.

[4] Unless otherwise indicated, all dates and times material to this litigation refer to 2011.

III. THE UNFAIR LABOR PRACTICE ALLEGATIONS

The complaint alleges that on August 23, 2011, the Respondent by and through certain supervisors and agents violated the Act by: (1) telling an assembly of its service department employees that it would be futile to select the Union as their bargaining representative because it could take years during (contract) negotiations; (2) threatening these employees with demotions if they selected the Union as their bargaining representative; (3) threatening these employees with blacklisting them to future employers if they supported the Union; and (4) making an implied promise of employee raises.

The complaint further alleges that on August 24, 2011, the Respondent unlawfully suspended employee Jose Huerta because he attempted to organize for the Union by engaging in protected concerted activities, and to discourage employees from engaging in these activities. The complaint also alleges that Huerta was discharged unlawfully on August 25, 2011, for these reasons.

IV. BACKGROUND FACTS

Liberty Toyota is owned by Auto Nation as a wholly-owed subsidiary corporation, its having been purchased some years ago. As a Toyota franchise dealership, Libertyville has a separate contractual relationship with the Japanese automobile manufacturer.

The dealership employs about 140 employees, 80 of whom are classified as fixed operations associates that include technicians (mechanics, or techs for short), porters, painters, and others who work primarily in the service department. The fixed operations side of the dealership business is managed by a parts manager, an assistant parts manager, a service director, a service lane manager, a controller, and an office manager.

The remaining employees are engaged in other aspects of the dealership's operations that include new car and used car sales, automobile finance and insurance, and accounting. These functions are described as variable operations. The instant litigation involves only those employees assigned to the service department or the fixed operations side of the dealership operations and the Union's attempt to organize them during the summer of 2011.

However, it is noteworthy that the Union had attempted to organize the Libertyville service department employees, primarily through the techs in other years; the Respondent, mainly through Auto Nation, has always resisted the Union's organizing efforts and pursuant to its opposition has developed strategies and created opposition materials to include video presentations in which Libertyville techs were featured as late as 2009.

The Union's latest organizing effort took place in the summer of 2011, around mid-August. On August 17–19, the Respondent undertook its opposition to the Union's organizing through several somewhat informal meetings with the service department employees. Later on August 23, Auto Nation representatives along with the lead dealership management convened a meeting with all or most of the service department employees and addressed them, expressing essentially the Company's opposition to the Union. Notably, this meeting was surreptitiously tape recorded by one of the techs who happened to be one of the lead supporters of the Union.

After the meeting, but on the same day, Libertyville's general manager received an anonymous call that identified another tech as both a union supporter and as an employee who had had his driver's license suspended by State authorities. The dealership suspended the employee and later terminated him.

V. THE UNFAIR LABOR PRACTICE ALLEGATIONS

The complaint alleges essentially that on August 23, 2011, the Respondent, by its agents and or supervisors at the August 23 meeting; (1) told employees that it would be futile to select the Union as their bargaining representative because it will take years during negotiations; (2) threatened employees with demotions if they selected the Union as their bargaining representative; (3) threatened employees with blacklisting them to future employers if they supported the Union; and (4) made an implied promise of raises, all in violation of Section 8(a)(1) of the Act.

The complaint also alleges that the Respondent suspended an employee, Jose Huerta, on about August 24, and on August 25, 2011, discharged him because Huerta attempted to organize for the Union and engaged in protected activities and to discourage (other) employees from engaging in these activities; all in violation of Section 8(a)(3) and (1) of the Act.

A. The General Counsel's Witnesses

Jose Huerta testified, stating that he was employed by the Respondent for about 15 years as an automotive painter, a job that entailed painting parts on repaired autos; but this job was not that of a technician or mechanic. Huerta, however, said that he was assigned to the service department and was directly supervised by David Borre, the service manager.[5]

According to Huerta, his job entailed some driving responsibilities, but mainly he retrieved vehicles to be painted from the new and used car lots and then returned them after he completed working on them. According to Huerta, he essentially took the vehicles to his workstation and then returned them to the appropriate lot, never taking them off the company premises.

Huerta stated that he became aware of the Union through a friend and coworker, technician Hermenegildo "Mere" Tellez. According to Huerta, Tellez told him about the Union and provided details about the Union's plan to organize the dealership. Huerta said that he told Tellez that he would be supportive of the effort and towards that end initiated conversations with his fellow workers about the benefits of having a union represent them, to include wage increases. Huerta noted that he was supportive of the Union because the service employees had not had a wage increase during the past 3 years. According to Huerta, he believed that about 21 employees were spoken to about the Union, and that he personally spoke to 8 to 10.

Huerta recalled that the union representatives convened three meetings so the dealership employees could meet them and discuss issues pertinent to the campaign; the meetings he at-

[5] Huerta described the jobs associated with the service department as automotive detailers who refurbished the interiors and exteriors of cars; service advisors who wrote up the repair orders; technicians or mechanics who actually repaired the cars; service porters who transport customers whose vehicles are being serviced; and new and used car porters who clean the vehicles arriving at the dealership.

tended were held in June, July, and the last in early August 2011. Huerta also recalled that the union representatives in attendance were William LePinske and Thomas Green; LePinske provided him with authorization cards at the second (July) meeting. According to Huerta, he obtained the signatures of 8 to 10 employees and returned them to the Union.

Huerta stated that on August 26, 2011, he was suspended by his direct supervisor, Dave Borre. Huerta said that when he reported for work that day, Borre called him to his office where Borre and Assistant Service Manager John Shubin told him that a background investigation had disclosed that his driving license had been revoked or was invalid.

Huerta said that he acknowledged to Borre that he indeed had license problems, that he had been cited for driving under the influence (DUI). Huerta said that Borre thereupon informed him that he was to be suspended immediately.

Huerta recalled that he told Borre that he (Huerta) had doubts about getting his license issues resolved in the time allotted for the suspension, but that he could not remember the date he was to come back with the results of the DUI court hearing.

Huerta noted that the Union was not mentioned by Borre, Shubin, or himself at the August 26 meeting. In fact, according to Huerta, Borre said nothing about the reason for his suspension except that he (Huerta) had the DUI and he was being suspended for that.

Huerta recalled that Borre told him that he was to be suspended on the spot, and asked him when he could possibly get his license reinstated. Huerta said that he then informed Borre of the court hearing in a couple of weeks. Huerta noted that Borre tried to reach the dealership's general manager, Taso Theodorou, on the telephone but was unsuccessful; however, Borre left the meeting for Theodorou's office. Upon Borre's return, Huerta said that Borre advised him that management would give him 2 weeks to get back with them with regard to the status of his license. Huerta stated that he left this meeting thinking that he was suspended for 2 weeks. Huerta conceded that he left the meeting with Borre understanding that Borre said to get back with the Company by September 12 or 14.[6]

Huerta testified that in spite of this understanding, he came to believe that in point of fact he was terminated by the Respondent. He explained as follows.

According to Huerta, on August 27, 2011, he received a letter dated August 25 addressed to him from a company called Sterling; the letter included certain enclosures.[7] Huerta testified that his reaction to this letter was that he was terminated by the Respondent. According to Huerta, the Sterling letter advised that if he believed the enclosed report was inaccurate, he was to contact Sterling within 5-business days; otherwise, it would be assumed that he no longer wished to be employed by the Respondent. Huerta said that the information in the report, including his suspension, was indeed accurate, so he elected not to contact Sterling within the 5-business days.

Huerta said that believing he was terminated, he first told the Union (LePinske) about the letter and faxed him a copy, annotating it with "Attn: Bill LePinske." At this point, Huerta said nothing immediately was done about the matter as far as he knew.[8]

However, on or about September 3, 2011, Huerta stated that he received another letter from Sterling dated September 1,which informed him (among other matters) that "a continuation of current employment will not be made at this time" based on the information provided in the Sterling report he had received in August.[9]

Huerta testified that his reaction to this second letter was identical to that of the August 25 Sterling letter—that he was terminated. Accordingly, Huerta said that he never contacted Borre after the passage of the 2 weeks, and also applied for unemployment benefits within 2 weeks of the August 26 meeting with Borre.

Huerta admitted that a part of the first letter did not apply to his situation—he was not applying for a job nor seeking a promotion—nonetheless, he never was curious about the letter or ever thought that a mistake had been made in spite of his having received the first letter only a day after reaching the understanding with Borre about the matter.

Huerta also admitted that he has known Borre for 15 years, considered him to be always honest with him, even called him by his first name, and got along well with him. Huerta conceded that the letters from Sterling were very different from what Borre had told him about his license situation. Huerta also admitted that he never spoke to Borre about the Sterling letters. Huerta also conceded that he never reached out to J.C. Morales, the night service manager, or Shubin and, in fact, never contacted Tellez or other technicians about the letters; he only contacted LePinske who advised that he (Lepinski) would be filing an unfair labor charge against the dealership.

Huerta stated that he did not feel it was appropriate to call the dealership or anyone there, including Tellez and other

[6] On cross-examination, Huerta said that he could not recall Borre telling him that he had 2 Mondays following August 26 to report to him about the license. Huerta said also that he could not remember what specific date he was to report back to Borre, but that he was to report after the court hearing on the license which was either September 12 or 14.

[7] A copy of the letter and enclosures are contained in GC Exh. 2. The enclosure was a document entitled "Confidential Background Screening Report," which set out Huerta's driving record covering November 4, 2007, through August 10, 2011, with the latest date indicating that Huerta's license was summarily suspended on that date. The offense is not expressly described, but states "Statutory summary/zero tolerance suspensions."

It should be noted that Huerta stated that this exhibit does not contain all of the pages of the letter, that is, he did not have/retain the cover letter and some pages outlining his rights under the Fair Credit Reporting Act.

[8] It should be noted that the Union filed a charge against the Respondent regarding the suspension of Huerta on August 31, 2011. See GC Exh. 1(a).

[9] See GC Exh. 3, a copy of this letter. Huerta stated that he annotated the letter with Attn: Chris Lee, and that did not have in his possession the cover letter or the Fair Credit Reporting Act information.

Huerta was shown his affidavit that he provided the Board on September 6, 2011, and agreed that at that time he had only received the August 25, 2011 Sterling letter. (Tr. 88.)

coworkers. Moreover, Huerta stated that he was not upset about the letters.

Huerta also related that while he had picked up his DUI in about May 2011, he elected not to report the matter to management because he did not think that having a valid license was important to his job.[10] Huerta said that he also believed that he was being wrongfully charged by the State authorities and that the DUI charge would not be sustained, "it would be defeated in court" (Tr. 100) and would not amount to anything.

David J. Borre, called by the General Counsel as a 611(c) adverse witness, stated that he has been employed by the Respondent for 20 years, and for the last 4 years he has served as the service department director whose duties and responsibilities include oversight of the dealership's service operations—vehicle inspections, service and repairs, customer relations, and the direct supervision of that department's employees. Borre indicated that he does possess hire and fire authority[11] and is responsible for putting dealership policies in place and ensuring that they are followed. Borre noted that he, along with the general manager and the human resources team, determine wages and other compensation and benefits in the work force, but since Auto Nation owns the dealership these matters have to be cleared through it.

Borre testified that he became aware of the possibility of a union organizing effort at the dealership around Monday, August 15, 2011. According to Borre, Julio Morales, the night service manager, told him that while dropping off repair orders to the lead technicians in the shop area, he (Morales) overheard two technicians (Jimmy Maxwell and Noll Leynes) talking about the Union as he was walking away from them. Borre stated that he only heard "a minor amount" of information about or reference to a union. However, Borre noted that on the next day, another technician, Ed Ingram, told him that another technician had approached him to say that some of the technicians were talking about voting for a union. Borre said that he reported these conversations to Theodorou, the general manager.

Borre stated that he attended an August 23, 2011 meeting called by the Respondent to deal with the Union's attempt to organize the dealership technicians. Borre recalled that the meeting was attended by the technicians, porters, and others working in the service department; and the management representatives included Theodorou; Auto Nation's human resources director, Jonathan Andrews; an Auto Nation's lawyer, Brian Davis; and Blanche Michaels (or Migel), the dealership's controller. According to Borre, the meeting lasted about 2 hours and he was present the entire time. Borre noted that he spoke very little and recalled personally only answering a single question from a technician, but that the majority of speaking was done by Davis and, to a lesser extent, Andrews; Theodorou mainly gave the introduction to the meeting. According to Borre, the meeting's format was that of a question and answer type.

Borre recalled that around this time—the week of August 24, 2011—Theodorou called him to his office and asked him to listen to a voice mail message.[12] According to Borre, Theodorou replayed the message that came from a woman claiming to be a technician's wife. The woman was to him very upset and questioned why we (management) were allowing technicians to bully other techs into joining a union. Borre testified that the woman seemed to be outraged by what she alleged; said that the lead organizers were Jose Huerta and Mere Tellez; and in the case of Huerta, she did not understand how he was allowed to work at the dealership because he had lost his driver's license because of driving under the influence (DUI). Borre stated the woman hung up without leaving her name.

Borre also recalled that the woman called back the next day or perhaps 2 days later, but he only learned of this from a conversation with Theodorou at the time.

Borre testified that he was familiar with the Respondent's employee policies which were contained in the Company's handbook, especially the policy that directs that all employees whose jobs require driving have to maintain a valid driver's license. Borre said that he was also familiar with the policy provisions that permit waivers of the licensure requirement for employees occupying nondriving positions.[13] Borre conceded that the company car had previously given a nondriving waiver to an employee whose license was suspended.[14]

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[10] Huerta stated that as the dealership's sole painter, he primarily did only touch-up work since the dealership did not have a body and paint shop for extensive repairs. Huerta noted that some of the cars he worked on were kept in off-site lots, but only when asked did he move cars to and from those locations.

[11] Borre explained that the Respondent utilizes a PAF (personnel action form) process for infractions that may result in suspension or termination. For other lesser infractions, the Company uses a corrective action form. According to Borre, when a termination is warranted in his view, he consults with the general manager, Taso Theodorou; human resources managers from Auto Nation, Jonathan Andrews and Jeff Darnell; and the dealership's on-site human relations team. As a practical matter, Borre stated that Theodorou ultimately approves all terminations because of Auto Nation's guidelines in place at the dealership.

[12] Borre believed the voice mail came in on the same day of the employee meeting, August 23, 2011.

[13] Borre identified certain excerpted pages from the company handbook dealing with the driving license requirements and the waiver policy. See GC Exh. 5.

[14] The General Counsel at this juncture inquired of Borre regarding his familiarity with an employee, Enrique Tobar. Borre stated that Tobar is a porter whose main duties were to move cars around the dealership, clean cars, and perform various odd jobs around the dealership. At the present time, he was employed in the parts warehouse, a nondriving position, because he failed his motor vehicle report on October 7, 2011. According to Borre, he initially suspended Tobar to give him time to get his license issue resolved. However, Tobar called back and beseeched him to help him out during the interim. Borre said that he consulted with Theodorou about the matter since Tobar was a longtime employee. According to Borre, an opening came up in the parts department and Tobar was installed there.

At the instance of the General Counsel, Borre identified his signature approving the extension of nondriving waivers to three different employees—Cassie Briton, a tech; Mario Lopez, a detailer; and Luis Cruz, a tech—whose positions required driving licenses. Borre agreed that Lopez' job required him to drive vehicles from the parking lot to his workstation, much like Huerta's job as a painter. See GC Exh. 6, pp. 4, 5, and 6. Borre was also familiar with an employee, James Bochard, a tech who also failed his motor vehicle report in August

Borre stated that he did not know whether driving under the influence (Huerta's offense) was equivalent to a driving while intoxicated conviction as set out in the handbook.

Julio Morales testified that he was employed by the Respondent as its night-time service manager for about 6-1/2 years; his duties included oversight of all service activity during the night shift and the direct supervision of all employees in the department which numbered around 12–13 techs and porters.[15] Morales said that he left the dealership on January 2, 2012, and is no longer employed there.

Morales stated that he became aware around the beginning of mid-August 2011 that some employees in his department were discussing the possibility of a union organizing effort.

Morales recalled that there was a meeting of employees called by management for August 23 to discuss the Union, but that his first awareness of the Union took place about a week prior to that meeting. Morales recalled that at that time, he overheard two technicians, lead tech Jimmy Maxwell and journeyman tech Noll Leynes, talking about the Union. Morales said at the time he was dropping off some repair orders/tickets and was not part of their conversation.

However, Morales stated that several days later, Maxwell told him that Jose Huerta was involved in the organizing campaign and that Huerta had spoken specifically with Leynes about the Union.

Morales said that he reported this information to Borre who, in his view, did not seem to think the matter was a "big deal." However, Morales volunteered that he personally was surprised that Huerta was involved. Morales also recalled that he spoke to Borre about Huerta's involvement with the Union before he was suspended.

Hermengildo Tellez, who goes by "Mere," testified that he has worked at the Respondent's dealership for about 10 years as a technician and, as such, repairs and overhauls engines, replaces transmissions, fixes brakes, and conducts diagnostic analyses of automobile repair and maintenance matters. Tellez noted that his direct supervisor was David Borre.

Tellez stated that not only was he personally aware of the union organizing campaign ongoing during the summer of 2011, but he was a prominent participant. According to Tellez, he canvassed the employees about their concerns over not receiving a pay increase in over 4–5 years in the face of increased costs of living, e.g., rising gasoline prices, as well as limited training opportunities.

Tellez testified that before the campaign was launched, he had attended a number of meetings with management about pay and the result was not satisfactory. Tellez recalled that in one meeting General Manager Theodorou asked the gathered technicians to give the Company 10 reasons in support of their requests for a wage increase—why they deserved a raise. According to Tellez, this response was not received well by the employees, so during the run up to the campaign, he canvassed the employees for their thoughts and this led him to place a call to the Union.

Tellez noted that Huerta was a union supporter and he personally observed him at work handing out union materials—brochures and booklets—to employees and asking them to read them, all the while soliciting their interests in the Union. Tellez also recalled that Huerta attended three union meetings convened by Union Representative William (Bill) LePinske.

Tellez said that he became aware of Huerta's suspension and believed that it was "weird" in that employees have worked at the dealership without a driver's license at other times.

Tellez noted that after Huerta's suspension, he and other employees became fearful for their jobs. Tellez stated he believed that if Huerta could be suspended, the same fate would befall him. He also noted that other employees were similarly fearful and had asked him (Tellez) about the paperwork they had signed as well as the materials "we [he and Huerta]" had passed out. Tellez stated that he told the inquiring employee to read the pamphlets and direct any questions to the Union; Tellez said that he gave them union business cards to contact the Union. Tellez volunteered that after Huerta's suspension, "everything stopped," no one really talked (about the Union), which made for an awkward atmosphere at work in his opinion.

Tellez testified that he attended a meeting convened by management for the service department employees on August 23, 2011.[16]

Tellez noted that prior to attending this meeting he arranged with LePinske to obtain a pocket tape recorder so that he could record the meeting.[17] On the day of the meeting, Tellez said that he and other service department employees listened to dealership managers and corporate persons talk about the Union and engage in a question and answer format with the employees.

According to Tellez, a corporate representative[18] spoke about what a union does and suggested to the assembled employees that they obtain more information about the Union, but stressed that they should not sign any papers unless they had full information about it (the Union). Tellez stated that he recorded the meeting so he could play it back and give the recording to LePinske. Tellez said that after the meeting, he contacted LePinske and told him about the recording and asked him to listen to it to see if anything unlawful was said by management.

2011, but is still employed at the dealership and not on suspension now, but had been. However, Borre noted he only found out about this about a week before the instant trial.

[15] Morales is an admitted supervisor.

[16] Tellez noted that the Employer had held earlier meetings concerning the Union in the shop area; and at some point the Company put a box in the employees' locker room to solicit any questions employees might have about the Union. Tr. 147.

[17] Tellez identified the tape recorder device, GC Exh. 4, he used to record the meeting at the hearing. He explained also how he operated the device and that it was placed in his shirt pocket in the record mode for the entire time of the meeting. Tr. 150. [Note: The tape recorder in question, while identified and made part of the record, was not physically placed in evidence because it could not be safely stored. By agreement of the parties, the General Counsel has maintained possession of the device in a locked office at the Region's offices.]

[18] Tellez stated that he did not know by name all of the management persons at the meeting, but that some had been at the dealership during a previous organizing drive by the Union.

Tellez noted that he kept the recorder in his locked vehicle for a few days before delivering it to LePinske.[19]

William LePinske testified, stating that he is currently employed by the Union as a full-time organizer, a position he has held since March 2001. LePinske stated that his responsibilities include assisting employees seeking information about unions, instructing them in the organization of their workplaces and soliciting them to membership.

LePinske said that he was familiar with the Union's organizing efforts at Libertyville Toyota. He noted that the organizing effort came into being after he received a call from Mere Tellez, an employee at the dealership. LePinske said that he also knew Huerta, whom he described as another dealership employee who attended union meetings and was assigned with obtaining authorization cards. LePinske described Huerta as an active participant in the organizing drive at Libertyville.

LePinske acknowledged that a few days before the August 23 meeting, he provided a digital recording device to Tellez after being informed by him that the Respondent had announced that it would be convening a meeting of the service department employees.

According to LePinske, he told Tellez to be attentive to what the corporate representatives said at the meeting, to be alert for illegal activity. LePinske stated it was in this context that he provided Tellez with the recorder[20] that he tested beforehand to be sure it was in working order. LePinske stated that Tellez returned the device to him some time later and after plugging the device into his vehicle's audio jack, he played the tape on his way home that night, listening to it for about 1 hour and 47 to 59 minutes. LePinske said that the next day he brought the recorder to his union office and placed it in his top desk drawer, where it remained for several weeks.[21] According to LePinske, he listened to the recording several times over this time, before delivering the device to the General Counsel a couple of weeks before the hearing.

LePinske noted, however, that he recorded the tape on to his computer and then made a MP3 file from the computer in order to have a portable copy of the recording and obviate carrying the recorder around.[22] LePinske stated that he prepared a transcript of the recording from the MP3 file. LePinske testified that he did not alter the recording, except to redact several minutes of employee conversations before the meeting started and several minutes of recordings in Tellez's truck after the meeting. LePinske noted that he also amplified the volume on the MP3 re-recording and tried to reduce background hissing noise to make the recording more audible.

LePinske noted that he possessed and listened to the recording during the Board's investigation of the instant litigation during the period covering September through November 2011, but did not offer the recording to the Board agent. LePinske said that he believed the recording could be entered into evidence and was not aware that the recording could be violative of State law.

LePinske recalled that after the August 23 employee meeting which he did not attend, he held one union meeting but substantially fewer persons attended, perhaps only about 4 or 5 whereas 9 to 12 had attended meetings prior to August 23.

Guadalupe Montoya testified that he currently works for the Respondent as a mechanic (technician), a position he has held for about 9 years; his immediate supervisor is David Borre.

Montoya stated that he is familiar with the Union and its organizing campaign that took place during the summer of 2011. Montoya recalled that he attended several meetings dealing with the Union that the dealership managers conducted during that time. Montoya related that two such meetings took place in the shop area where the technicians were essentially huddled in a circle with Theodorou, the primary speaker, but also Borre and another manager, John Shubin, addressing them. According to Montoya, at the first meeting Theodorou said that there was a rumor or talk about a union, and in that regard employees were all welcome to explore the matter. Theodorou suggested that employees should assure themselves that all employees know about the Union, that it should not be a secret, and that everyone should find out as much information (about the Union) as possible and know what they would be signing on to.

At the second meeting, Montoya said that again the employees were huddled together and management spoke similarly and solicited questions from the group.

Montoya said that the third meeting was held near the new car showroom in a conference area. According to Montoya, Auto Nation's lawyer was there with other management and addressed the assembled service department employees. Montoya recalled that the lawyer first announced that the meeting was not held to bash the Union. However, Montoya testified that he found nothing positive about unions in the lawyer's address. Montoya cited as an example that he heard the Auto Nation lawyer comparing the Union to a sexually transmitted disease (STD), herpes, in the sense that depending on how you handle the issue, being a union supporter can stigmatize you to another employer; that is, "it doesn't look good . . . when you apply for jobs at different dealerships." (Tr. 108.)

As to negotiations between the dealership and the Union, Montoya said that the lawyer said it would take about 2 weeks or as long as 2 years or even longer to negotiate a contract; that everything and everybody had to meet in the middle.

Montoya recalled that the lawyer also said that the dealership was willing to invite the Union to speak with the employees if they wanted to hear the Union's side of the matter. Montoya also recalled that perhaps five technicians spoke up at the meeting and neither one said anything positive about the Union; Montoya could not recall these technicians' names.

[19] Tellez said that he only listened to about half of the 2-hour recording, basically to be sure the recorder had operated properly. Tellez noted that he did nothing to alter the recording. Tellez noted that after turning the recorder over to LePinske, he had no further involvement with the recorder and its contents.

[20] LePinske identified GC Exh. 4 as the digital audio recorder that he had purchased for himself in 2008. He had affixed a Local 701 sticker on the device.

[21] LePinske said that his desk is not locked but his office is always locked when he is not there.

[22] LePinske explained that his recorder did not have a USB card that would allow a download of the recording into his computer. Accordingly, the recording could not be converted to digital format. LePinske said that he put his laptop on record and played the recording through the audio jack and then downloaded the recording to the MP3 file.

Montoya stated that he knew Huerta and that they had been good friends for the 9 years he had been employed with the dealership. Montoya recalled observing Huerta's talking to around 10 employees during the campaign and seeking their opinions about the Union. Montoya noted that he was not personally involved with the organizing effort, but Huerta or Tellez had approached him about the Union.

Montoya testified that he was aware of Huerta's suspension and that ultimately he never returned to work at the dealership. Montoya admitted that Huerta never contacted him after his suspension, at least with regard to the suspension or the reason(s) therefor.[23] Montoya noted, however, that everything just stopped after Huerta's suspension; all of the employees, including himself, did not want anything to do with the Union. Montoya stated that he needed his job and did not want to jeopardize his position by causing trouble to the Company. According to Montoya, he was merely exploring the possibility of a union at the dealership and did not want "all this to happen [presumably to Huerta]." (Tr. 110.)

Montoya stated that he was aware of the Respondent's policy requiring those in driving positions to have a valid driver's license and that it applied to mechanics such as he. Montoya related that he had his license suspended on two occasions, one in 2003 and another in 2004. At the time, he informed the then-service manager, Ben Mannella,[24] that he had lost his license on two occasions for 3–6 months for speeding, and Mannella told him he could keep his job but not to drive any vehicles off the lot. Montoya stated that Mannella allowed him this dispensation from the policy on both occasions, without ever suspending him.

B. The Respondent's Witnesses

Taso Theodorou (who evidently is very frequently referred to by employees at Libertyville by his first name, Taso) testified that he has been employed by the Respondent for a little over 2 years as the general manager. According to Theodorou, he has been employed in the auto industry for about 25 years, and before coming to Libertyville Toyota, he served as general manager of several other auto dealerships.

Theodorou described his duties and responsibilities as general manager at Libertyville to include the overall profitability of the dealership and in that regard had oversight responsibility for all of its departments and the personnel associated with each. According to Theodorou, he deals with employee relations daily and considered himself "pretty involved in the area" and that his authority extended to employee discipline, including suspension and discharge decisions for which decisions he is entrusted with sole authorized discretion.

Theodorou stated that he knew Huerta as a service department employee who worked as a painter and whose duties included touching up minor scratches and nicks on various vehicles. Theodorou related that Huerta worked out of a stall on the north end of the main building and he was the only employee working as a painter at the dealership. Theodorou stated that Huerta, who was not classified as a technician, reported to his immediate supervisor, David Borre.

Theodorou stated that he suspended Huerta on August 26, 2011, and ultimately made the decision to terminate him on September 21, 2011. Theodorou also admitted that he knew that Huerta was involved in organizing activities on behalf of the Union before he suspended him, having been informed of his involvement by his supervisor, Borre, around August 15. Theodorou noted that before August 15, he had only heard some talk of union organizing at the dealership and before that time did not know that Huerta was involved.

Theodorou explained in some detail how Huerta, a 15-year employee at Libertyville, came to be suspended and later terminated.

Theodorou said that on August 23, he received (via voice mail) an anonymous call from a female who said that she was the friend of a spouse of one of the technicians and she was concerned that her friend's husband was being coerced into joining the Union; that two persons, Jose Huerta and Tellez, were pushing the union cause; something to the effect that both were of low moral standard (character); and that one—Huerta—had a DUI and did not have a valid driver's license.

Theodorou noted that the call was received on August 23 during the meeting management had convened with the technicians to discuss the union organizing effort then ongoing at the dealership. According to Theodorou, he listened to the message after the meeting and decided to retain it. He noted that at the time there was speculation that Huerta was involved with the Union and he wanted to handle things on the up and up. Theodorou said that he believed the voice mail was important enough to save, although he admitted he did not save all voice mail messages.[25]

Theodorou stated that he did not contact Huerta or Tellez on August 23 about the matter because in his mind it was mere speculation (his term), and after all the call was anonymous. However, Theodorou said that he needed to confirm the DUI allegation and, since he was not familiar with the procedures

[23] On cross-examination, Montoya stated that Huerta , while a good friend then and now and a person with whom he regularly exchanged text messages, never mentioned receiving letters from any third party regarding his employment at the dealership; nor did Huerta ever call to ask him if he (Montoya) had information about his situation or say that he had been treated bad by management. Tr. 128–129. Montoya said that he was not aware of any company named Sterling or any annual MVR checks for driving positions.

[24] Montoya noted that Mannella's position was the same as that presently held by David Borre. Mannella is no longer employed at the dealership.

[25] Theodorou testified that he was fearful of the message's being lost so he saved the message on his voice mail, but he also played the message and recorded it on his cell phone. From his cell phone, Theodorou said that he then emailed it to his email address. From his email, about a week before testifying at the March 6 hearing, Theodorou said that he emailed the message to a court reporter service and it was then transcribed. Theodorou identified R. Exh. 4 as a transcript of the recorded message. [Note: R. Exh. 4(a) is a CD of the transcript.] Theodorou noted that the original message remains in his saved messages on his voice mail account. Theodorou recalled that he emailed the message to Auto Nation's lawyer, Brian Davis, and Human Resources Director Jonathan Andrews sometime in early September 2011. Theodorou could not recall the exact date.

for running a motor vehicle report (MVR), he asked Regional Human Resources Director Andrews to run a MVR on Huerta. According to Theodorou, Andrews reported to him on Friday, August 26, that Huerta's driver's license had been suspended. With the news, Theodorou called in Borre, informed him of the report, and directed him to call Huerta in and give him a couple of weeks to straighten out his license, but that he would be on suspension in the meantime.

Theodorou recalled that later that day he was called by Borre who said that Huerta could not get his license corrected before his court date and had requested a couple of extra days. According to Theodorou, Borre requested that Huerta be given more time and he approved the request, giving Huerta until September 14 to get the matter corrected. Theodorou noted that he did not personally attend the August 26 meeting with Huerta, but later Borre advised him that Huerta had admitted that his suspension was for a DUI.

Theodorou explained that employees like Huerta, who occupy positions requiring a valid driver's license, are subject to an annual review of their license status, usually in the month of their hire date. Theodorou stated he does not request the review, it is automatic. However, according 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; the suspension is usually for a couple of weeks. Theodorou noted that before the circumstances surrounding Huerta, he had never requested an individual motor vehicle report[26] Theodorou stated he believed some action was required because of the telephone call. Accordingly, he chose to do an individual record check on Huerta to avoid harassing him or acting on an accusation by some possibly jilted girlfriend and just upsetting him unnecessarily.

Theodorou stated that after his suspension on August 26,[27] Huerta never came back to him to report on the status of his license and on information, he never reported to Borre and/or John Shubin. However, Theodorou said that he learned that Huerta had filed an unfair labor practice charge around August 31 or September 1, 2011.[28]

Theodorou stated that in spite of the charge, he did not rescind Huerta's suspension. According to Theodorou, it was his position that Huerta had been instructed that he was suspended and that he had until September 14 to correct his license problem and return to work.[29]

Theodorou noted, however, that sometime after the filing of the unfair labor practice around September 4, Huerta also filed an unemployment claim with the State and since this type of matter fell within his administrative purview, Theodorou participated in September in a telephone conference call arranged by the dealership's unemployment claims contractor with the State unemployment authorities to discuss Huerta's claim.

According to Theodorou, he insisted in these discussions that Huerta was not terminated, but that he was on suspension. Theodorou noted that Huerta's unemployment claim was denied. Theodorou said that ultimately Huerta was terminated by him on September 21 for job abandonment because he did not return to work on September 14.[30]

Directing himself to the August 25 and September 1 Sterling letters, Theodorou testified that he was not aware of these until November 2011, when the Board investigator informed him of their existence. Theodorou stated that he had nothing to do with these letters and that Huerta never brought them to his or Borre's attention at any time after August 26.

Theodorou volunteered that in his view Huerta never gave him the chance to offer him any further accommodation, one that could possibly include a nondriving waiver or moving to a position that did not include driving vehicles. Theodorou stated that even to the day of the hearing, he did not know if Huerta ever got his license matter cleared up.

Before turning his attention to the August 23 employee meeting, Theodorou stated that he conducted several informal meetings with service department employees in the middle of the shop area on August 17, 18, and 19. According to Theodorou, the meetings were only about 5–6 minutes duration and were intended to inform the employees that the Company was aware of some employees' interest in the Union, but to advise them to acquire all information before signing up and to go to all (union) meetings for education about the Union.

Theodorou also stated that at these meetings he informed the employees that the Company was going to have "some folks" (from corporate) come the next week (August 23) to the dealership to talk to them and continue what he described as the education process. In that regard, Theodorou said he told the employees essentially to wait until that time before signing on to the Union, and if they believed they had all the information they needed, then by all means sign up; but not to be coerced into doing something they are not prepared for.

Theodorou noted that corporate representatives Brian Davis and Andrews did not recommend his speaking to the employees in the informal meetings, but he decided to proceed with this against their advice and counsel. However, Theodorou said that Davis and Andrews provided him with a talking-points memorandum to serve as a guideline for his addresses to the employees, and he utilized those points in his informal meetings with the employees.

[26] Theodorou confirmed that he was not familiar with the specific guidelines but the license requirement covered any kind of driving of a vehicle, even merely driving within the confines of the dealership.

[27] Theodorou was adamant in denying that he told Borre to terminate Huerta before the August 26 meeting.

[28] Theodorou identified R. Exh. 6, which included a copy of an email from the Respondent's controller, Blanche Migel, which included a copy of the unfair labor practice charge filed by the Union regarding Huerta's suspension.

[29] Theodorou identified R. Exh. 7, a copy of an email from the dealership's office manager dated September 16, 2011, stating that Huerta was as of that date still considered on suspension, although he was called a no-call/no-show employee because he had not reported as instructed on September 14 after his court hearing.

[30] See R. Exh. 8, a personal action form (PAF) indicating Huerta's termination for job abandonment. The PAF indicates that the effective date of Huerta's discharge was September 15, 2011. I would note that the form indicates that in spite of his discharge, Huerta was considered eligible for rehire.

Theodorou stated that he attended the August 23 meeting of the service department employees and in fact kicked it off by making some preliminary remarks and introducing Davis and Anderson and others to the assembled employees.

Theodorou recalled that Davis addressed the employees and noted that points 1–4 of the talking points memo Davis had sent to him were key points covered in the August 23 meeting.[31]

When called by the Respondent, Borre elaborated on his dealings with Huerta. Borre said that on the morning of August 26, 2011, he was told by Theodorou to meet with Huerta that day and that he was to be suspended because of his driving license issue, that Huerta's license was not valid. Borre noted that a couple of days prior to August 26, he had listened to a voice mail played to him by Theodorou which indicated that Huerta had lost his license. Borre noted that Huerta had never informed him that his license had been lifted and he did not know otherwise until Theodorou allowed him to listen to the voice mail.

On August 26, Borre met with Huerta in his office and Shubin was also present. According to Borre, he informed Huerta that his license was not valid, but still asked him if this were true; Huerta acknowledged that his license was indeed suspended. Borre stated that he asked Huerta why he had not informed him but Huerta offered no explanation; he just sat there with a blank stare on his face.

Borre said that he told Huerta that he had to be suspended for 2 weeks beginning the following Monday (August 26 being a Friday) through September 12, and that during that time he should get his license situation cleared up. According to Borre, Huerta said that 2 weeks might not be enough time because the suspension was for a DUI (driving under the influence), implying a certain seriousness and, furthermore, his court date for the matter was set for a Wednesday, September 14, before which date he would not know how the matter would play out. According to Borre, Huerta asked for additional time to accommodate his court date.

Borre stated that he had no problem with granting the extension, but he needed to clear it with Theodorou who was not immediately available. Later that day, Borre said that he told Huerta that he was suspended and that he should report to him on September 14 after his court date.[32]

Borre said that some time after September 14—perhaps in October—he tried to reach Huerta multiple times and left messages on his telephone. Ultimately, according to Borre, Huerta's telephone indicated that it was not taking his calls. Borre recalled that at some point during this time he spoke to a technician and close friend of Huerta's, Tellez, and asked him if he had heard from Huerta, that he (Borre) still had his tools, that Huerta needed to return the uniforms, and that he was owed paid time off.

Borre noted that up to September 14, Huerta was still only considered suspended but that by September 21, the dealership considered him terminated for job abandonment, and that his (three) attempts to reach him were possibly made during the couple of weeks after September 14.

Borre volunteered that Huerta knew where his office was located and had actually come to his office "more than one time" when he so desired; for instance, when he claimed that payroll was taking too much of his pay for child support. In any case, Borre recalled that a couple of days after speaking with Tellez, Huerta called him and together they set a time for Huerta to come in and deal with the tools and other matters. According to Borre, when he met with Huerta, there was no mention about Huerta's job by either. Borre admitted that prior to Huerta's coming in for his tools, he had never reached out to Huerta to ask why he did not come back to work on September 14.[33]

Borre also related that on August 26, he did not know that Sterling had sent any letters to Huerta regarding his job status at the dealership and that he only learned of it from the Board agent conducting the unfair labor practice investigation. Borre noted further that Huerta never called him after evidently receiving the Sterling letters and, in fact, from August 26 through September14, he heard nothing from Huerta regarding the status of the court matter, or for that matter anything else at all.

Borre also recalled that he later learned from human resources that Huerta filed for unemployment benefits, a fact which he found shocking as he expected Huerta to come back to work at the dealership.[34] According to Borre, human resources asked if Huerta had been fired or not, and that this inquiry happened perhaps the week following Huerta's suspen-

[31] See R. Exh. 9. Theodorou identified the document as the talking points memo David and Andrews provided to him preliminary to his meetings with the employees on August 17, 18, and 19. It should be noted that Theodorou's informal meetings are not the subject of any of the complaint allegations.

The points identified by Theodorou in the talking points memorandum (R. Exh. 9) are as follows:

> 1. Education is critical. Please be patient and take the time to carefully consider all of the pros and cons of union membership, listen very carefully to both the Company and union's positions, and ask tough questions about how unionization will directly impact you and your team here at the dealership.
> 2. Do not be pressured. Do not make the decision about your support or opposition to unionization until you have gotten all of the answers to your questions and feel comfortable that the time to make a decision is right.
> 3. Do not sign anything for any reason, *no matter what anybody tells you* [emphasis supplied], unless and until you have gotten fully educated and feel completely comfortable with what you are putting your signature on.
> 4. Authorization Cards are legal documents that are not easily withdrawn or taken back. You should only sign one when and if you are completely comfortable giving up certain of your rights to the union.

[32] Borre stated that there was no question that he told Huerta he was suspended on August 26, and not terminated. Borre noted that when an employee is suspended there is no personnel paperwork created, as is the case with terminations. He also noted that in the case of termination, the service department workers, techs, and a painter like Huerta would be instructed to remove their tools and follow their mustering out procedures, such as returning uniforms and squaring any paid time-off concerns. Borre stated that he fully expected Huerta to return to work on September 14.

[33] Borre noted that when Huerta came in for his tools, he did not seek to appeal his termination and, in fact, did not show any interest in getting his job back.

[34] Borre said that he thought one could not collect unemployment while on suspension.

sion but certainly before September 14. However, Borre stated that when Huerta did not show up on September 14, after waiting about a week he decided that Huerta had abandoned his job and he was then terminated.

Asked about the Respondent's suspension and termination policy, Borre stated first that he has not terminated anyone, but that he has told people that they would be terminated and in which case the person opted to resign. In the case of formal terminations, the dealership (human resources) performs this function. According to Borre, suspensions can take place for reasons other than driver license issues but, as far as he knows, the dealership only investigates these matters for compliance with the dealership policy.

David Shubin testified that he is the current service drive manager at Libertyville Toyota, a position he has held for about 1-1/2 years.

Shubin recalled meeting with Huerta and Borre in 2011, to discuss Huerta's suspension for a driver license problem. According to Borre, the meeting took place in Borre's office and he was there for the entire meeting, but said little if anything; that Borre did most of the talking as he listened in the main.

Shubin stated that Borre told Huerta that it had come to management's attention that his license had been suspended, and that because Huerta's position required a valid license, he would have to be suspended for the next few weeks; however, he would be given an opportunity to get his license reinstated. According to Shubin, Huerta admitted that his license was suspended but offered no reason for the suspension which prompted Borre to ask why he had not said anything to management. Shubin said that Huerta, looking sheepish, did not respond.[35]

Shubin recalled that Huerta said that he did not think it would be possible to get his license reinstated because of the nature of the violation for which his license had been suspended in the 2 weeks Borre accorded him, but that he had a court date for September 14. According to Shubin, Huerta thereupon asked for additional time; and Borre consulted with Theodorou who granted Huerta's request.

Cynthia Belmont stated that she is employed by the dealership and serves as its appointment coordinator and receptionist; her working hours are 6:30 a.m.–3:30 p.m., Monday through Friday.

Belmont described her duties and responsibilities as answering the telephones, transferring calls to the appropriate persons or dealership departments, taking messages, and answering questions from callers and customers.

Belmont stated that she had received calls for General Manager Theodorou and recalled receiving a call for him in August 2011 from a woman who not only would not give her name, but had blocked her line from caller identification.

According to Belmont, the woman said that she had been trying to speak to Theodorou who had not returned her call. According to Belmont, the woman sounded anxious and admitted as much, saying that her husband was a technician who worked in the back and that "they" (unidentified) were trying to get a union in the shop and her husband did not necessarily want that to happen. Belmont said that the woman went on to say that there were two ringleaders in the back, and one of them did not even have a driver's license. According to Belmont, the caller did not identify the two persons she claimed were ringleaders.

Belmont stated as was her custom and practice, she asked the woman if she wanted to leave a message for Theodorou by way of a transfer to his voice mail; the woman said that she did not want to do this. Belmont stated that she then decided to transfer the call to the dealership's office manager, Christine Gordon.[36]

Barbara Sauvain testified on behalf of the Respondent, stating that she is currently employed with a company called Sterling Info Systems (Sterling) as its vice president of operations integration. Sauvain stated that she has been employed for 2 years by Sterling since it acquired her former employer, APSO, another information company she had worked for since 2003 as a director of account management. Sauvain said that Auto Nation was one of her first clients as an account manager and that Auto Nation continues as a Sterling customer.

Sauvain explained the services Sterling provides for Auto Nation's Liberty Toyota dealership. According to Sauvain, Sterling provides essentially two services—(1) preemployment background screening of job applicants and (2) an annual MVR (motor vehicle report) process which screens a company's current employees annually for motor vehicle records. Sauvain noted Auto Nation also may request MVR by way of its account user identification and password; the company need not cite any reasons to request a motor vehicle report on an individual employee.

Sauvain explained that the annual process—called a bulk upload—entails Auto Nation's sending Sterling monthly an excel spread sheet of its employees and Sterling's uploading this data into its system and then running annual MVR checks. Sauvain noted that when the bulk upload process is employed for the annual report, Auto Nation is provided a copy.

Sauvain described an "MVR failure" as an employee's failure to meet certain prescribed adjudication standards as required by Auto Nation. This may occur after Sterling undertakes a motor vehicle review and it is determined that an employee's record, once applied against Auto Nation's requirements, is not acceptable; hence, a failure is noted. According to Sauvain, a person will either pass or fail the comparison. Where there is an MVR failure, an adverse action process is triggered. According to Sauvain, the first part entails sending a preadverse action letter to an applicant for employment or a current employee, as the case may be.

The preadverse letter informs the person that something adverse (negative) has turned up in the background check and invites the recipient to provide information to dispute the adverse information within 5 days. Sauvain stated that the first

[35] Shubin did not use the term "sheepish" in his testimony but as I observed him and heard him say that "Jose just kind of looked like, you know," Tr. 371, I interpreted him to be describing Huerta's response as sheepish.

[36] Belmont said that in her opinion the woman was concerned about retaliation, although she did not use the word, and that her husband had this concern. Belmont stated that upon hearing the woman's concerns, she believed that she was obliged to get the caller to someone (with responsibility). Tr. 495.

adverse action letter includes a copy of the background check results and a copy of the person's rights under the Fair Credit Reporting Act. Sauvain testified that the pre-adverse letter is essentially a template—a form letter—that is sent out automatically with no notice to Auto Nation. Sauvain stated that if the person does not respond to the preadverse letter within the 5-day period, a final adverse action letter is issued.

Directed to Huerta, Sauvain testified that the two MVR runs were made on him in 2011—one in July 2011—and he passed the adjudication standards. A second run was made on him via the individual method, that is, Auto Nation logged into the system and requested a MVR. Sauvain said that Huerta failed this time and a preadverse action letter was sent to him on August 25, 2011.[37] Sauvain noted that the dealership (Libertyville) did not sign this letter and did not see the letter; no one there was told of its issuance; and the dealership was not copied.

Sauvain stated that Huerta did not respond to this first letter, so a final adverse letter would have been sent and, in fact, one was sent to him on September 1, 2011.[38] Sauvain noted that the dealership had no part in the sending of this letter and would not have been sent a copy.

According to Sauvain, Huerta never protested the findings contained in the two letters.

Sauvain volunteered that in her experience, employees who receive the adverse action letter and believe the letters contain mistakes frequently call Sterling to ask what is going on, and in such a case Sterling will open a disputed case (file). She added that on many occasions the persons call in because they are confused by the letter(s) and do not understand why a dealership might have sent the letter. In such cases, Sauvain said that Sterling will refer them directly back to the employer.

Sauvain stated the letters—especially the preadverse action letter—are actually a warning to the employee, and if there is a problem he should contact Sterling within the 5-day period which, she noted, is recommended by the Fair Credit Reporting Act.

Sauvain said that after the final adverse letter is sent, Sterling takes no further action on the matter, leaving any further action, if any, to the dealership and the employee. Sauvain noted that the final adverse letter is final as to Sterling's involvement, but any decision to change the status of the employee in question is ultimately the client's, in this case Auto Nation/Libertyville Toyota; that Sterling has no authority to terminate any employee. Sauvain noted that (in her experience) some employees get the letter and are not terminated because there may be circumstances between the employer and the employee of which Sterling is not aware. Sauvain insisted that Sterling's role is simply to send out the letters as part of the adverse action process authorized by its contract with Auto Nation.[39] Sauvain stated that on balance, the process is automatic and whatever may be going on collaterally with the employee and the dealership is not known by Sterling; Sterling merely informs the employee of an issue and instructs him to dispute the matter.

Daniel Edward Hehr testified that he is a technician currently employed at Libertyville Toyota; Hehr stated that he is a team leader whose team is comprised of himself and three others, to include fellow tech Tellez whom he has known for about 7 years. Hehr also stated that he also knew Huerta who worked as a painter in the shop, but was not on his team.

Hehr said that he was working at the dealership in August 2011, and became aware or came to realize that Huerta was no longer working there. Hehr recalled speaking to Tellez about Huerta one day at work. According to Hehr, Tellez said that he believed Huerta left because he did not have a valid driver's license and that possibly Huerta's girlfriend had contacted the dealership and informed on him.

Hehr noted that before this conversation with Tellez, he had not heard this from anyone at the dealership. According to Hehr, he later heard this same reason being given for Huerta's departure around the shop. Hehr could not recall from whom specifically he heard this, that it was, as he described it, just common knowledge around the dealership.

Brian A. Davis testified that he was currently employed by Auto Nation as vice president and associate general counsel and has been acting in this capacity for about 12 years. Davis stated that his duties and responsibilities include labor management relations, and in this role, he deals with unions as well as unrepresented employees employed at the various auto dealerships under the Auto Nation corporate umbrella. Davis noted that he has dealt with the Machinists Union in particular and has engaged in contract negotiations with it and the Teamsters as well. Davis also noted that he has prepared training materials[40] that are designed to ensure all Auto Nation employees are managed properly, educated and informed about their rights, and treated fairly in terms of their working conditions. Davis stated that he also tried to educate managers about these matters in order to avoid legal problems and encouraged them to pay attention to the needs of the employees, as well as their rights. Towards that end, Davis stated that he has tried to provide guidance to dealership managers regarding union organizing campaigns. Davis recalled that Theodorou received training along these lines at some point but that he did not personally conduct Theodorou's training; he believed that Andrews or another human resources employee, Blake Edwards, trained Theodorou.

Davis stated that he participated in the August 23 meeting with the Libertyville service department employees. He explained how this came about.

During the week of August 15, 2011, Davis said that Andrews contacted him and informed him that there were rumors of union organizing at the Libertyville dealership and the employees were curious (his word) about the organizing effort and were going to meet with union representatives later that week, if not over the weekend.

Davis noted that union organizing is an important matter to the Company, a fact well known by Theodorou, who around

[37] Sauvain identified GC Exh. 2 as a copy of the preadverse letter Sterling sent to Huerta.

[38] Sauvain identified GC Exh. 3, a copy of Huerta's final letter.

[39] Sauvain pointed out that the "signature" part of the pre and final adverse letters is just a template, that 2280 is a Hyperion number assigned to Auto Nation within Sterling's system.

[40] See GC Exh. 12, a training document Davis said he helped create.

this time also contacted him seeking guidance as to how best to proceed with the employees. According to Davis, there were many telephone calls about the matter with Theodorou, and he provided him with a written set of guidelines that he (Davis) had prepared for the meetings Theodorou had with the service department employees. Davis noted that Theodorou was very concerned about the employees' having a fair opportunity to hear from the Company, but that this be done the right way and fairly quickly, as he thought the employees were misled in terms of the information they were getting.[41]

Davis stated that he was reluctant to move as quickly as Theodorou desired without the guidance he wanted to provide to him in order to meet the Company's concern that all employees be educated about their rights, as well as those of the Company.

Davis said that he eventually met with the Libertyville employees on August 23 and conducted the meetings as he had many a time at other dealerships.

According to Davis, he does not have or utilize a prepared script at this or other employees meetings; he tries to be educational based on the questions—the curiosities—of the employees and encourages their participation through a question-and-answer approach. Toward that end, Davis said his goal is to get the employees to know about the Company, its history, and relationships with unions. Davis stated that his desire also is to inform the employees that they should talk openly about their concerns, not to be afraid of retaliation, to be comfortable in any discussions.

According to Davis, the "nuts and bolts" of his presentation is to inform the employees, to make sure they get fully educated about the entire picture of the organizing effort and be mindful that ultimately it is their choice regarding the Union.

Davis stated that while he did not know that the August 23 meeting was being recorded, he suspected that it could be done every time he speaks; Davis said that in his view, surreptitious taping is deceptive and divisive, but, nevertheless, he had no real problem with it as the Company had nothing to hide.

Davis described the August 23 meeting environment, saying that it was conducted just off the showroom floor in the conference room, which he described as a fairly narrow room that was somewhat tightly packed with folding chairs arranged in rows, front to back of the room. Davis said that he stood in the front of the room about 4 feet from the assemblage.

Davis opined that some of the participants were fairly engaged, some perhaps were tense, while others appeared relaxed; others seemed frustrated.

Davis related that during the break in the hearings (from January to March), he reviewed the transcript of the taped hearing provided by the General Counsel, as did others in management; and he and others listened to the CD recording of the meeting simultaneously while reviewing the transcript. Davis stated that he had not reviewed the transcript prepared by the General Counsel over the recess.

Davis stated that he has read the complaint allegations regarding the events occurring at the August 23 meeting, and first would agree he was the primary speaker. However, Davis denied ever using the word "futile" in the meeting, although he did raise the length of negotiations, saying that it was anyone's guess as to how long they would take to reach an agreement (contract). Davis denied saying employees would never get a contract.

On the subject of demotions, Davis denied telling the employees on August 23 that they would be demoted if they chose the Union. Davis recalled that the word "demotion" never came up. However, in the context of a question from a technician as to whether some techs would or could be reclassified based on skill sets, Davis said he responded that in contract negotiations classification of employees in the bargaining unit could be on the table, that some employees could lose and some could gain in the negotiation process.

As to the complaint allegations that employees were threatened with blacklisting, Davis denied ever using that term or the term blackball. Davis recalled telling the employees (regarding not being able to get jobs at other dealerships if they supported the Union) that this was something they needed to think about, that it was a concern that they should possibly explore; Davis stated his comments came in response to a question by a technician, Jimmy Maxwell.

Regarding raises or any promises of raises by the Company if the employees did not support the Union, Davis denied making any such statements and, in fact, said he could not recall the term coming up. Davis said that he may have told the employees if they had concerns about pay, they should take this up with management.

Davis recalled that Theodorou, and perhaps Borre, may have raised issues that had come up many months before the meeting, and there was a concern by the employees about opportunities for raises.

Davis noted that as he listened to the CD recording of the meeting, he was "kind of" able to recognize his own voice but there were many places in the General Counsel's transcript where he was identified as the speaker but it clearly was not he; on the other hand, there were places where he was not identified as the speaker but it was he. Davis stated that these errors were corrected in the transcript prepared by the court reporter and reviewed by Theodorou, Borre, Andrews, and Controller Blanche Migel, all of whom agreed to the places in the recording where he was speaking.

Turning to the Huerta matter, Davis stated that after the August 23 meeting ended he returned to Florida, but in the afternoon of August 24, he was called by Theodorou or Andrews and informed about the anonymous call.[42] Davis said he was consulted about the actions to be taken and advised Theodorou how to proceed, with a view toward protecting both Huerta and the Company. Davis noted that he was informed about the motor vehicle report on Huerta and was aware of Theodorou's

[41] Davis recalled discussing (with Theodorou) the subject of "pre dues," that is, an unidentified person was in the shop soliciting so-called predues from the employees to get them to commit to the Union. Davis stated that he had never heard of predues before.

[42] As the Respondent's representative, Davis, was present during Theodorou's testimony about the anonymous caller's claims about Huerta's union involvement and the loss of his license.

decision to suspend him, with which he concurred. Davis noted that the ultimate decision always rested with Theodorou.

Noting that he is responsible nationally for all labor relations matters involving the Company, Davis stated he became aware of the Union's filing of an unfair labor practice charge over Huerta's suspension and became involved in the Board's investigation. Davis recalled that the Board agent came to the dealership in November 2011, and around that time (November 16) he was apprised of the Sterling letters. Davis said that he was also consulted about Huerta's unemployment claim which he recalled arrived within about a week of the ULP charge. In spite of the charge and the claim, Davis volunteered that he did not think that Huerta had resigned or believed that he had been terminated, but speculated at the time that perhaps (in Illinois) a suspended employee could receive unemployment for the period of the suspension or layoff.

Davis specifically denied the allegation that Huerta was discharged on August 25; that Sterling did not control company employment decisions and was a mere third-party administrator handling a process. Davis noted that the understanding given to Huerta when he was suspended was the controlling factor and the letter from Sterling did not change that agreement or understanding. Davis noted further that the decision to suspend Huerta because of the license issue was what was always done at the dealership and was done in his case to maintain a consistent policy.[43]

Joseph Syme testified that he has been employed at Libertyville for about 12 years and is a service technician team leader.

Syme recalled the Union's organizing campaign in mid-August 2011, and that management through Theodorou met with the service department employees and in the first of Theodorou's meetings with employees, he (Syme) learned of the campaign.

Syme stated that he and about 43–44 service department employees, including around 38 technicians, met with management representatives on August 23, 2011, in the dealership's conference room. According to Syme, all attendees were seated comfortably in the air-conditioned room. Syme recalled that Brian Davis, whom he had met before, spoke at the meeting.[44] According to Syme, Davis instructed the employees to attend union meetings so as to inform themselves and basically to educate themselves about the matter. Syme said that he left the meeting thinking that overall it was positive and his "take-away" from the meeting was that the employees should make sure they were educated, to go to the union meetings and learn.

Syme, however, testified that although employees were encouraged to educate themselves, he had already decided against the Union because in his view a union would not be a good fit at an auto dealership.[45] Syme said that he spoke up at the August 23 meeting and, while he could not clearly recall his exact words, expressed these sentiments along with his concern that he did not want to lose Davis as his representative, that he would rather stick with what he had instead of having an outside group to represent him.

According to Syme, the meeting was conducted in a question and answer format and other technicians spoke up at the meeting, to include Ron Sorg, Job Ford, Josh Wessel, Ed Ingram, and Jimmy Maxwell,[46]

Syme stated that he could not recall Davis ever saying that employees would or could be demoted if the Union came in;[47] that Davis never said the terms blacklist or blackball at the meeting;[48] and that Davis did not tell employees that they would get raises if the Union were not voted in.[49] Syme said that he did not recall Davis saying it would be futile to bring the Union in because negotiations could take years. Syme did recall that there was discussion about how long negotiations might take if a contract had to be negotiated. He recalled that it was also said that nothing is guaranteed, that it could take quite a while to negotiate a contract, but by the same token, it could take a short time.[50]

Syme was asked about his participation in the preparation of a transcript of the recording of the August 23 meeting by the Respondent and explained as follows:

According to Syme, about a week before he appeared at the (resumed) hearing he was asked to listen to a recording of the August 23 meeting by Davis and Respondent's trial counsel; fellow technicians Sorg and Ingram were also asked to audit the

[43] Davis stated that Theodorou, as general manager of the dealership, was not bound by any actions of his predecessors; his policy absolutely controlled in the case of Huerta. Davis said that Theodorou as a dealership general manager is an operator and as such is given free rein to run his store, and he was authorized to suspend or terminate employees without calling him for approval or advice. On the other hand, Sterling had absolutely no authority to terminate employees; its role is simply to send adverse action letters consistent with the Fair Credit Reporting Act requirements under Federal law or guidelines.

[44] Syme related that he had met Davis in 2009 in the context of Auto Nation's production of an educational video dealing with a then-ongoing union organizing effort at Libertyville. Syme said that he participated in the production of the video and appeared in it expressing his view that he was not in favor of union representation at the dealership. Syme stated that he did not consider the video to be antiunion.

[45] Syme stated that he had worked at a union shop at a Lexus dealership in the past and, based on that experience which he explained, he did not think unions were appropriate in auto dealerships.

[46] Syme noted that Wessel was an apprentice technician, relatively new at the dealership, and was a member of his four-man (including Syme) team.

[47] Upon my examination, Syme said he never heard the word demotion used by anyone in management and that he did not recall any language signifying demotion. Syme said that he recalled a question from a tech about the loss of wages coming out of the negotiated contract. He stated that Davis said this was possible but it all depended on what was bargained for in the contract, that nothing is guaranteed.

[48] Also, upon examination, Syme said that these terms were not uttered by Davis. However, based on a question from a tech, Davis said like anything, it (the Union) could follow you anywhere you go.

[49] Regarding raises, Syme said Davis said once negotiations are started, no raises can be given by the Company or, conversely, wages could be taken away. Syme said there was no threat of wages being taken away; they would stay the same—all benefits—during bargaining.

[50] Syme stated that he did not leave the meeting feeling that management created the impression that getting involved with the Union would just be an exercise in futility or that there would be no help to be gained by being a union member.

recording. So the three technicians listened together to the entire tape in Theodorou's office at the dealership and with the assistance of a court reporter a transcript of the recording was made. Syme said that the entire exercise took about 4–5 hours, although the recording was only about 2 hours long. Syme recalled that the three had to start and stop the recording numerous times to decipher what was being said and by whom because of the poor quality of the recording, what with a lot of muffled sound, periods of silence, and people talking simultaneously and over each other. Syme stated where they could the techs identified the speakers utilizing the transcript the General Counsel had introduced at the hearing. Syme volunteered that the General Counsel's transcript did not include specific names of speakers and parts of the recording were not included in the General Counsel's transcript; he pointed this out to the court reporter.

Syme stated that there were instances where no one could decipher what was being said and this was discussed by the technicians. There were other instances where none of the technicians could identify all the voices. Syme noted that three or four times the three technicians made mention among themselves the laughter on the tape.[51]

Syme testified that he knew Huerta as a painter—not a technician—at the dealership and that he learned after a time that he had left the dealership.[52] According to Syme, none of the technicians told him that Huerta was no longer working or that he had left because of his driver's license or his possible union involvement. Syme said that he never heard any rumors along these lines from September through November.

Ronald E. Sorg testified that he is currently employed by the Respondent as an auto technician and has been employed for 21 years; he has been a technician for 30 years, having been employed at other auto dealerships. Sorg said that he was a team leader at Libertyville.

Sorg recalled that there were discussions of union organizing activities around the dealership in August 2011, and that Theodorou conducted three meetings in the service department shop with the assembled techs and one in the conference room.

Sorg related that in the three shop meetings, Theodorou imparted a basic message to the techs, mainly that before making any decisions about the Union or doing anything that could either help or hurt our industry and our livelihood, techs should have all the facts, to have a really thorough understanding of that with which we were getting involved.

Sorg noted however, before these meetings there was a "wind" of union organizing activity and his initial reaction to this was to be a little bit angry. Sorg explained that he reacted in this way because he felt that he had been left out of the matter and not invited to any union meetings; however, he knew other techs had. Sorg stated that all of the techs should have been included even though he personally had its own "likes and dislikes" about unions based on prior experience.

Sorg stated that he attended the August 23, 2011 meeting and recalled asking a question; that is whether it was true or false that if a union was at the dealership certain techs would be demoted or elevated (his word) based on whatever process standard or rule there was governing tech pay and/or achievements.

Sorg said that his question was based on his experience at other union and nonunion dealerships. In the case of unionized dealerships, Sorg said unless a tech had satisfied all of his dealership requirements (certifications), he would only hold apprentice status; that if all requirements were satisfied, the tech would be promoted to journeyman status. Sorg said he wanted to know if that arrangement still obtained in August 2011, because he had satisfied all of his certification requirements at Libertyville, but some of the techs on his team had not and could be considered apprentices, a demotion in his view.

Sorg recalled that other techs asked questions—Job Ford, Joseph Syme, and Jimmy Maxwell came to mind—but he was not sure of Ford's or Maxwell's positions on the Union.

Sorg noted that Brian Davis spoke on behalf of management at the August 23 meeting and that he had met him before when he participated in the video produced by Auto Nation in 2009. Sorg stated that his "take away" from the August 23 meeting was that employees like himself need to be really well informed and understand what they were getting involved with, and basically have all facts before deciding.

Sorg also declared that no one, including Davis from management in his view said that it would be futile to bring the Union in because it would take many years to get a contract; that anyone would be demoted if a union was selected; that employees would be blacklisted or blackballed by future employers if a union was chosen.

Sorg noted that to his surprise, Davis impressed him by his positive stance toward the Union in that he encouraged employees to seek out the Union, to go to union meetings to find out the facts, or ask questions before making a decision.

Sorg stated that he was not antiunion but believed that a union would not be a "good thing" for the dealership because of the system the Libertyville employees (and management) have worked on that is now in place.[53] According to Sorg, while he was opposed to the Union he was willing to hear both sides. However, Sorg confessed that he felt disrespected because 2 to 3 or 5 to 10 employees tried to bring in the Union without allowing everyone to have a say about something all had to live with; that in his view, this was not a fair way of dealing with the issue.

Sorg stated that during the time the hearing was adjourned, he and fellow techs Ingram and Syme listened to a CD made by someone at the August 23 meeting and a transcript was produced with the assistance of a court reporter. Sorg said that the three met in Theodorou's office and the audit and transcription took about 2-1/2 hours or possibly longer because parts of the

[51] See R. Exh. 3, the transcript of the August 23 meeting as prepared by and at the behest of the Respondent. Ronald Sorg and Ed Ingram essentially corroborated Syme's version of the circumstances surrounding the preparation of this transcript. Accordingly, I will credit him and the other two men regarding their participation in the preparation of this transcript.

[52] Syme noted that Huerta worked on the other side of the dealership away from his duty station in the middle of the facility.

[53] Sorg related his experience at a unionized dealership, saying that the Union's presence changed the atmosphere at work and that he feared the same would happen at Libertyville Toyota.

recording were not audible because of what sounded like clothing being rubbed against the recorder's microphone; and on occasion people were talking at once and over each other.[54]

Regarding Huerta, Sorg stated that he was a painter, not a technician, whom he eventually realized was no longer working at the dealership. Sorg said that no other tech ever told him that Huerta had been terminated for union activity.

Sorg said that he really did not know who started or who was involved with union organizing until much later, but that at some point prior to the Board hearing he became aware that Huerta was involved with the Union.

Edward J. Ingram stated that he has been employed at Libertyville Toyota for about 20 years as a technician; he has also worked at other auto dealerships, for a total of 32 years in the mechanics trade.

Ingram recalled that the union organizing activity at the dealership began around August and ended perhaps into September 2011, and that management conducted three meetings covering the subject of unionism. According to Ingram, the management meetings were conducted by Theodorou, and later by Theodorou and corporate (Auto Nation) representatives from human resources (Andrews) and legal (Davis).

Regarding the meetings that Theodorou conducted, Ingram said that they lasted from about a few minutes to a half-hour, and the central theme or thought conveyed to the employees was that they should become educated about the Union to get both sides of the story before deciding one way or the other. Ingram recalled that at one meeting, Theodorou told the employees that people from human resources and legal would be coming in to speak to them and that meeting took place on August 23, 2011, in the dealership's conference room, with Theodorou, Brian Davis from legal, and Andrews leading the meeting.

Ingram testified that he and other service department employees attended the meeting which to him took on a question and answer format with technicians asking questions and making comments. Ingram recalls that he made a statement or comment at the meeting but could not recall exactly what it was.

However, Ingram said that he left the meeting feeling that he and the other employees needed to find out the other side of the story, that is the union side, since they had heard the Company's position. Ingram stated that he did not feel threatened, nor were any promises made by management; he deemed the meeting casual and, in fact, there was laughter among the employees at different times during the meeting.[55]

Ingram volunteered that he was not a union supporter; that he did not want a union at the dealership; and that he held to that position even before the August meeting and had communicated his feelings to perhaps as few as 5 but possibly as many as 15 fellow employees, including his service manager, David Borre, both before and after the meeting.[56]

Ingram testified that during the recess of the trial he and two other techs (Joseph Syme and Ronald Sorg) listed to the tape recording made by Tellez at the dealership (in Theodorou's office) and identified his voice on the tape recording and that he would stand by what the transcript indicates what he said at the meeting.

Regarding Huerta, Ingram noted that he knew him to be a painter—not a tech—at Libertyville, and that he left the dealership in 2011. However, Ingram said that he did not find out about Huerta's departure until much later in the year when a technician told him that Huerta was rumored to have left because he did not have a driver's license. Ingram testified that no one ever said to him that Huerta left because of his union activities.

VI. APPLICABLE LEGAL PRINCIPLES

A. Section 8(a)(1)

Section 7 of the Act (in pertinent part) provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities." 29 U.S.C. § 157. Thus, employees have the right to, inter alia, support or oppose union representation.

Section 8(a)(1) of the Act provides: "It shall be an unfair labor practice for an employer (1) to interfere with, retrain, or coerce employees in the exercise of rights guaranteed in Section 7." The test under Section 8(a)(1) does not turn on the employer's motive or whether the coercion succeeded or failed. *American Freightways Co.*, 124 NLRB 146, 147 (1959). Instead, the Supreme Court has established that the test is whether the employer engaged in conduct, which it may be reasonably said, tends to interfere with the free exercise of employee rights under the Act. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969). In *Gissel*, the Board instructed that if an employer discusses the effects of potential unionization, any "prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at." "If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First

[54] As previously indicated, Sorg essentially corroborated other Respondent witnesses, Syme and Ingram, regarding the procedures and other circumstances surrounding the production of R. Exh. 3, the transcript of the August 23 meeting.

[55] Ingram also stated that no one from management at the meeting gave him the impression employees would be demoted if the Union came in; that employees would be blacklisted or blackballed if the Union was selected; or that it would be futile to bring in a union because negotiations would take years and years.

[56] Ingram recalled that he had heard of the Union's organizing effort "through the grapevine"; some employees in the shop mentioned the campaign to him anywhere from a few days to a week before the August 23 meeting.

Amendment." Ibid.;[57] Thus, it is violative of the Act for the employer or its supervisors and agents to engage in conduct, including speech, which is specifically intended to impede or discourage union involvement. *F. W. Woolworth Co.*, 310 NLRB 1197 (1993); *Williamhouse of California, Inc.*, 317 NLRB 699 (1995).

The test of whether a statement or conduct would reasonably tend to coerce is an objective one, requiring an assessment of all the surrounding circumstances in which the statement is made as the conduct occurs. *Flying Food Group, Inc.*, 345 NLRB 101, 106 (2005); *Electrical Workers Local 6* (*San Francisco Electrical Contractors*), 318 NLRB 109 (1995); *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The Board has noted in this regard that the context of statements can supply meaning to the otherwise ambiguous or misleading expressions if considered in isolation. *Debbie Reynolds Hotel*, 332 NLRB 466 (2000); *Joseph Chevrolet, Inc.*, 343 NLRB 7, 9 (2004).

The complaint in the instant case alleges that Respondent's statements during the captive audience meeting violated Section 8(a)(1) of the Act by (1) threatening employees with blacklisting for supporting the union; (2) telling employees it would be futile to select the union as their bargaining representative; (3) making an implied promise of employee wage raises; and (4) threatening employees with demotions if they selected the union as their bargaining representative.

The Board has held that an employer's statement that employees "would have a hard time getting jobs because of their past union membership . . . [is] a threat to blackball employees because of their union membership and activities in violation of Section 8(a)(1) of the Act." *Highland Yarn Mills*, 313 NLRB 193, 207 (1993). An employer's comment concerning the potential blacklisting of employees is particularly threatening when the employer "provide[s] no basis for [its] statement." For example, in *Flamingo Hilton-Laughlin*, 324 NLRB 72, 112 (1997), the Board determined that the employer's statement that "employees who were shown in [a union pamphlet] would have a hard time finding a job in other [employer facilities] because of being so pictured" violated Section 8(a)(1) of the Act by "unlawfully threaten[ing the] employees with loss of employment opportunities."

Notably, the Board has held that statements regarding potential blacklisting do not necessarily have to be accompanied by a specific intent or specific acts to threaten employees in violation of the Act. In *Towne Ford, Inc.*, 327 NLRB 183 (1998), the Board noted that specific intent is not necessarily required for an employer to have "violated Section 8(a)(1) of the Act by attempting to blacklist" an employee.[58]

In *Alaska Pulp Corp*., 296 NLRB 1260 (1989), the Board examined the so-called blacklisting remarks for lawfulness by the test of whether they have a reasonable tendency to restrain or coerce employees in the exercise of their Section 7 rights, and not whether the threats are carried out. This further suggests that specific acts of blacklisting or other showings going to intent are not required.

Thus, an employer's statements connoting blacklisting may violate Section 8(a)(1) of the Act even when no specific actions are inevitable or imminently threatened by the employer. See *Pepsi-Cola Bottling Co. of Fayetteville,* 315 NLRB 882, 892 (1994); affd. 96 F.3d 1439 fn. 2 (4th Cir. 1996).

Regarding possible threats of futility, "[t]he Board has consistently held that, absent threats or promise of benefits, an employer may explain the advantages and disadvantages of collective bargaining in order to convince employees that they would be better off without a union." *Medieval Knights, LLC*, 350 NLRB 194 (2007). Indeed, the Board has taken pains to distinguish merely disparaging speech from unlawful threats of futility. See *Trailmobile Trailer, LLC*, 343 NLRB 95 (2004).

"Mere references to the possible negative outcomes of unionization . . . do not deprive [employer speech] of the protections of Section 8(c)." *UARCO, Inc.*, 286 NLRB 55, 58 (1987). Indeed, an employer's "general references to 'possibilities' are inadequate to establish" an unlawful threat where the employer's statements "clearly indicate that these possibilities would be based on the [employer] having no alternative in the face of either a union initiative or some other economic circumstance," unless specific evidence "provide[s] a reliable basis for concluding that [the employer] was making a threat." *Miller Industries Towing Equipment, Inc.*, 342 NLRB 1074, 1075 (2004). For example, in *Ludwig Motor Corp.*, the Board upheld the lawfulness of the employer's responses to exaggerated union claims because they "constituted nothing more than an accurate description of one possible consequence of lawful collective bargaining," especially "[i]n light of [the employer's] frequent assertions that it would bargain in good faith and abide by the law." 222 NLRB 635, 636 (1976).

The question regarding futility often redounds to whether "the employer's comments imparted the message to employees that their wages and benefits were endangered, not because of the possible uncertainties of the collective bargaining process, but simply because they selected the union as their collective-bargaining representative." *Winkle Bus Co.*, 347 NLRB 1203 (2006).[59]

In *Plastronics, Inc.*, 233 NLRB 155, 156 (1977), the Board stated the following:

> Depending upon the surrounding circumstances, an employer which indicates that collective bargaining 'begins from scratch' or, 'starts at zero' or 'starts with a blank page' may or may not be engaging in objectionable conduct . . . Such statements are objectionable when, in context, they effectively threaten employees with the loss of existing benefits and leave

[57] See, for example, *Almet, Inc.*, 305 NLRB 626, 627 (1991), where the Board refused to find the employer's "bald assertions . . . [based] on undefined beliefs and principles" to constitute statements of fact.

[58] The Board also noted in *Towne Ford* that an employer's otherwise "good recommendation" of an employee was unlawful because of its reference to the employee's union loyalties which were together "likely to interfere with [her] application for employment."

[59] See also *Federated Logistics & Operations*, 340 NLRB 255, 256 (2003), further suggesting that the Board may view inconsistencies between the employer's prediction and its "historical practice" as evidence that the "statements reasonably would be understood by employees as threats that benefits would be lost and that selecting union representation would be futile."

> them with the impression that what they may ultimately receive depends in large measure upon what the Union can induce the employer to restore. On the other hand, such statements are not objectionable when additional communication to the employees dispels any implication that wage and/or benefits will be reduced during the course of bargaining and establishes that a reduction in wages or benefits will occur, only as a result of the normal give and take of collective bargaining . . . The totality of all the circumstances must be viewed to determine the effect of the statements on the employees.

Thus, "[w]hether or not statements by an employer that it will 'bargain from scratch,' are violative of the Act have, under Board cases, turned on the context in which such statements were made." *Histacount Corp.*, 278 NLRB 681, 689 (1986).

Correspondingly, statements potentially suggesting the futility of unionization are nonetheless lawful under the Act if they "were made in a context which would indicate to employees that bargaining is a process in which each side makes its own proposals, that it requires mutual agreement, and where existing benefits may be traded away . . . [but do not] relay the message that the employer would unilaterally discontinue existing benefits if the employees selected union representation." *Histacount Corp.,* supra. In *UARCO, Inc.*, the Board reversed a finding that "the repetition of certain statements" indicating futility, in the absence of any express threats or falsehoods, violated Section 8(a)(1) because the employer's characterization of collective bargaining as a "two-way" process and assurances that it would negotiate in good faith "provided substantial context" for the speech. 286 NLRB at 58. In accord in *Bi-Lo*, 303 NLRB 749, 750 (1991), the Board found that the employer's remark about "bargaining basically from nothing" was not an unlawful threat, "notwithstanding the commission of numerous [other] unfair labor practices" by the employer, because the context indicated the comment referred to uncertainties in bargaining for a first collective contract and the employer otherwise expressed its intention to bargain in good faith. In *Winkle Bus Co.*, the Board reversed a finding that Section 8(a)(1) was violated because the employer in that case "did not tell [employees] that bargaining would start from zero . . . [or] imply that scheduled wage increases would be withheld," but "simply and accurately indicated that wage increases could be delayed because of the uncertainties of the collective bargaining process." 347 NLRB at 1206.

In *Fern Terrace Lodge*, 297 NLRB 8 (1989), the Board found lawful that part of the employer's speech that stated "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 . . . we 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" because it was "an accurate statement of the law and as such d[id] not imply that the employees' selection of the Union would be futile."

However, if the employer's statements, which do not "accurately reflect the obligations and possibilities of the bargaining process . . . indicate that bargaining was a 'give and take' process or that the result would be the product of good-faith bargaining," this may constitute an unlawful threat of futility. *Federated Logistics & Operations*, 340 NLRB 255.

However, in *Fieldcrest Cannon, Inc.*, 318 NLRB 470 (1995), the Board, agreeing with the judge, found an employer's statements that it "would not have to bargain in good faith if the Union won; that employees would have something to lose if the union came in; . . . that the Employer would go to the negotiating table with a blank piece of paper year after year; that it would tie up the Union in litigation for years; and that the employees would never get a contract" were "egregious" threats of futility in violation of Section 8(a)(1).

The Board has noted and held that the Act does not necessarily prohibit employers from "provid[ing] employees with a concrete example of a potential negative outcome to electing a union" because "[t]he Board has found that employees can distinguish between a hypothetical exercise about bargaining and an employer's description of its actual or planned bargaining strategy." *Medieval Knights, LLC*, 350 NLRB 194.

The employer's promise of benefits during a preelection campaign clearly violates Section 8(a)(1) of the Act because "[s]uch promises made in the course of urging employees to reject unionization . . . link improved conditions to the defeat of the Union. Furthermore, it is not necessary in order to find a promise of benefits to be unlawful that employee grievances or complaints be identified precisely or commit to specific corrective action, that the employer fail to disclaim its intention to violate the act, or that unambiguous language be used. *Dyncorp.*, 343 NLRB 1197, 1198 (2004).

Essentially then an employer's promise or grant of benefits during an organizing campaign is presumed to influence employees to relinquish their support for the union. And the relevant question is whether any such promises were contingent on employees' relinquishing support for a union. *California Gas Transport*, 347 NLRB 1314, 1318 (2006). In short, would the employees reasonably understand that there is a nexus between implantation of enhanced benefits and rejection of the union in the election?

Finally, as to the question of demotions, "[t]he Board has long held that there is no threat, either explicit or implicit, in a statement that explains to employees that, when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before." *Office Depot*, 330 NLRB 640, 642 (2000). At the same time, an employer's threats to employees that union membership or union activities will result in demotions violate Section 8(a)(1) of the Act. *First Western Bldg. Services*, 309 NLRB 591, 608 (1992); *Lobster Trap*, 259 NLRB 1197, 1203 (1982).

B. Section 8(a)(3)

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3)[60] or violations of Section 8(a)(1)[61]

[60] Sec. 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. This showing must be by a preponderance of the evidence. Then upon such showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board's *Wright Line* test was approved by the United States Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

Under the *Wright Line* framework, the General Counsel must establish four elements by the preponderance of evidentiary standard. Accordingly, the General Counsel must first show the existence of activity protected by the Act, generally an exercise of an employee's Section 7 rights.[62] Second, the General Counsel must show that the employer was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a link or nexus between the employee's protected activity and the adverse employment action. If the General Counsel establishes these elements, he is said to have made out a prima facie case of unlawful discrimination, or a presumption that the adverse employment action violated the Act.[63]

The Respondent, in order to rebut this presumption, is required to show that the same action—the adverse action—would have taken place even in the absence of protected activity on the employee's part. *Manno Electric,* 321 NLRB 278 (1996); *Farmer Bros Co.*, 303 NLRB 638 (1991).

While the *Wright Line* tests entails the burden shifting to the employer, its defense need only be established by a preponderance of evidence. The employer's defense does not fail simply because not all of the evidence supports, or even because some evidence tends to negate it. *Merillat Industries*, 307 NLRB 1301, 1303 (1992).

It is worth noting that proving discriminatory motive and animus is often elusive. Accordingly, the Board has held that animus or hostility toward an employee's protected and concerted activity or union activity may be inferred from all the circumstances even without direct evidence. Therefore, inferences of animus and discriminatory motive may derive from evidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was fired, and disparate treatment of the discharged employees. *Adco Electric*, 307 NLRB 1113, 1123 (1992); enfg. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Bryant & Cooper Steakhouse*, 304 NLRB 750 (1991); *Visador Co.*, 303 NLRB 1039, 1044 (1991); and *In-Terminal Services Corp.*, 309 NLRB 23 (1992).

The judge may also consider prior unfair labor practices in resolving this issue, as well as violations that have occurred before and after an election.[64]

However, it should be noted that the Board has held that the existence of or lack of unlawful animus is not material when the very conduct for which employees are disciplined is itself protected concerted activity. *Burnup & Sims, Inc.*, 256 NLRB 965, 975 (1981).

As stated, once the General Counsel establishes initially that the employee's protected activity was a motivating factor in the employer's decision, the burden of persuasion shifts to the employer to show that it would have taken the same action even in the absence of the protected activity. *Transportation Management Corp.*, 462 U.S. 393.

It is also well settled, however, that when an employer's stated motives for the actions are found to be false, the circumstances may warrant an inference that the true motive is one that the employer desires to conceal. The motive may be inferred from the total circumstances provided. Moreover, under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole. *Fluor Daniel, Inc.,* 304 NLRB 970 (1991).

To establish an affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co.,* 311 NLRB 1118, 1119 (1993), enfd. 99 F.3d 1139 (6th Cir. 1996).

Notably, the test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services,* 271 NLRB 1302 fn. 2 (1984). The Board has held that, "[A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive." *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). In short, a finding of pretext defeats any attempt by the employer to show that it

[61] As noted previously herein, Sec. 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Sec. 7 of the Act."

[62] The protected activity includes not only union activities but also invocation and assertion of rights guaranteed employees under Sec. 7 of the Act. *NLRB v. City Disposal Systems,* 465 U.S. 822 (1984); *Interboro Contractors,* 157 NLRB 1295 (1966).

[63] *Yellow Transportation, Inc.*, 343 NLRB 43 (2004); *Tracker Marine*, *L.L.C.,* 337 NLRB 644 (2002).

Notably, on occasion the Board and the circuit courts of appeals have added as an independent fourth element, the necessity for there to be a causal nexus between the (union/concerted activity) animus and the employer's adverse action. *Blue Diamond Growers*, 353 NLRB 50 fn. 4 (2008).

[64] See *Robert Orr/Food Services*, 343 NLRB 123 (2004), holding that union animus was evident through the respondent's many violations of Sec. 8(a)(1), (3), and (4) found to have occurred before and after the second election campaign. See also *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418 (2004), where the Board noted that the knowledge element of the General Counsel's initial burden also may be satisfied by evidence of the surrounding circumstances, including contemporaneous 8(a)(1) violations; *Mesker Door, Inc.*, 357 NLRB No. 59 (2011), where the employer's animus against the union was found through its violations of Sec. 8(a)(1), (3), and (4); and *Regency Grand Nursing & Rehabilitation Center*, 354 NLRB 530 (2000), where the Board determined that the employer's unlawful statements could reasonably be seen as hostile toward anyone engaging in activity on behalf of the union.

would have discharged the discriminatee absent his protected activities. *Golden State Foods Corp.,* 340 NLRB 382 (2003).

The Board has determined that decisions affecting an employee's condition of employment may be based on its exercise of business judgment and that judges should not substitute their business judgment for that of an employer. *Lamar Advertising of Hartford*, 343 NLRB 261 (2004); *Yellow Ambulance Service*, 342 NLRB 804 (2004).

Moreover, the Board has emphasized that the crucial factor is not whether the business reason was good or bad, but whether it was honestly invoked and in fact was the cause of the action taken. *Framan Mechanical, Inc.*, 343 NLRB 404 (2004).

VII. CONTENTIONS OF THE PARTIES

A. The August 23 Employee Meeting

The General Counsel contends that primarily through Davis and Andrews, the main speakers at the August 23 meeting, the Respondent repeatedly violated the Act as alleged.

Characterizing the meeting as an unusually long—1 hour and 48 minutes—captive audience meeting in a cramped environment, the General Counsel asserts that Davis in particular spent the bulk of the meeting time lecturing the gathered employees about union organizing and was interrupted only infrequently by questions from technicians who were antagonistic towards the campaign. He further submits that the meeting atmospherically speaking was "very tense" and "pretty serious," not "relaxed," with nothing good or positive being said about the Union.

It is with this serving as a backdrop, the General Counsel submits that Davis' statements boiled to their essence, was that the employees would not only be risking their current employment at Libertyville, but their ability to secure future employment in their chosen industry if they chose the Union. He argues that Davis' statements conveyed to the employees that they would be "blacklisted" from future employment and even possibly lose their present jobs if they chose Local 701 as their representative. The General Counsel contends that such statements in the context of the Union's organizing campaign are violative of the Act.

The General Counsel also contends that both Andrews and Davis told the employees in so many words that it would be an exercise in futility to select the Union, because as Davis said, it could take "years and years" before a first contract would be reached, and further the Company could reject without negotiation any and all proposals not in its business interests. The General Counsel submits that the only clear objective message the employees reasonably could get from these statements is that it would be pointless to vote the Union in given the Company's anticipated response to their choice. To underscore the point, the General Counsel notes that Davis even provided the example of a union shop at one of its dealerships in Orlando whose members have purportedly been living a nightmare for almost 3 years with not one bargaining session, let alone contract negotiation, having taken place. The General Counsel submits that Davis, in summing up, stated: "At the end of the day, I promise you, it will not be what you had hoped for or expected it would be when you signed that card." The General Counsel contends that this statement, combined with others, reasonably conveys similar thoughts and translates objectively to the employees that choosing the Union would ultimately be a futile action. He submits that their statements are clearly coercive and, hence, are violative of the Act.

Regarding the issue of wages, the General Counsel first notes that it was recognized by all including management, but certainly the employees, that there had been a wage freeze at the dealership for a number of years and, in fact, the freeze was the main impetus for the union campaign.

In dealing with this matter, the General Counsel points to Theodorou's reading of a question placed in the Company-provided suggestion box that asked (essentially) whether the dealership could evaluate or update its current pay plan for progressing technicians whose current pay plan contained a low pay ceiling that depended on cost of living raises, without voting the Union in.[65]

The General Counsel contends that in a number of responses by Davis and Andrews, the Respondent promised explicitly, or at a minimum implicitly, that it would grant for (or consider granting) a pay increase if the employees did not vote for the Union or that it would do something about the employees' concerns that they were not being paid a fair or competitive wage if they did not vote the Union in.

The General Counsel lastly argues that Davis threatened the employees with demotion if they selected the Union. He asserts that Davis' response to a tech's question, as to whether employees would be demoted if they became a union shop, was that some people would probably need to be reclassified and that some people will probably lose some pay, lose some status. He argues that this was clearly an attempt to scare the employees and constituted an unlawful threat.

The General Counsel notes that while Davis attempted to cover himself by resorting to the uncertainties—lack of guarantees—of the negotiation process, he nonetheless conveyed to the employees that being represented by the Union would mean being subject to an occupational classification system—journeymen and apprentices—that could include demotions in the present job classifications and pay. In these representations, the General Counsel contends that the Respondent unlawfully threatened that employees would be demoted should they choose the Union.

The Respondent first notes that the meeting was conducted in an informal manner, with "give and take" between the designated speakers and the audience members who were encouraged to participate and communicate with the management repre-sentatives, and some participants did so though their on-site questions, as well as those coming from the suggestion box.

Regarding the allegation that Davis told the employee that it would be futile to select the Union because it could take years during negotiations, the Respondent submits that the word "futile" or "futility" never appears in the recording of the transcript, and that the word connotes the notion that something or an event will never happen. The Respondent contends that its

[65] The actual literal question was in my view awkwardly worded, so I have attempted to clarify it by way of a paraphrase. The question, as I read it, basically asked if the dealership's pay system could be changed to the benefit of the techs without the Union coming in.

speakers never conveyed the impression that the Union will never be able to achieve results for the employees. The Respondent points to my examination (on the point of futility) of one of the General Counsel's witnesses who said he did not leave the meeting feeling that it would be futile to select the Union. The Respondent also submits that a statement that negotiations could take years does not equate to an unlawful "threat of futility, and moreover, such a statement should be viewed as falling within the ambit of permissible (and protected) free speech as envisioned by Section 8(c) of the Act.

The Respondent contends that its speakers did not say that the Company would never bargain with the employees' union representatives. Although concededly Davis said that a first contract can take years and years, this expression of the negotiating process has been approved in previous Board decisions. The Respondent also contends any such statements should be considered in the context of the overall message Davis delivered about the collective-bargaining process, and not as an isolated remark. The Respondent notes that Davis' primary message was that a contract is never reached immediately, that it could be a month, or 6 months, or 5 years, and that he delivered his message in an even-natured manner while in an attempt to paint an accurate description of one of the possible consequences of lawful collective bargaining and inform the employees of the realities of the process. All in all, the Respondent contends that neither Davis nor any of its speakers conveyed to the gathered employees that their selection of the Union would result in a futile attempt to secure a contract simply because bargaining would take years and years.

Regarding the issue of demotions, the Respondent concedes that the term "demoted" was used by Davis, but only in response to a direct question from one of the employees who used the term in his question. Davis, the Respondent submits, responded, saying that he did not know whether employees would be demoted or elevated, that the negotiations would control. The Respondent contends that Davis merely agreed with the employee's description of the classification system—journeyman/appren-tice—and said employees "probably" could move up or down. The Respondent contends, considering the entirety of the exchanges between Davis and the questioning employees, that Davis did not threaten the employees with demotions if they chose the Union.

Turning to the blacklisting allegations, again the Respondent states that term appears nowhere in the transcript and there was no proof from the various employee witnesses that such a term was ever employed in the meeting; the same, it asserts, may be said of the term blackballing. Conceding that Davis did say essentially that a technician's experiences could follow him to another shop, he qualified the remark, saying that such had nothing to do with the Union.

To the extent the remark about herpes can be attributed to Davis, the Respondent contends this was part of a dialogue Davis had with the two other employees concerning potential difficulties should the employees no longer want union representation; this had nothing to do with any blacklisting.

The Respondent also contends that Davis gave an honest response to an employee's question about his ability to getting a job in the future from a unionized dealership. The Respondent concedes that Davis did say that employees might consider such background in making hiring decisions, but this is not the equivalent of Davis' saying that Auto Nation or Libertyville Toyota would blacklist its employees to other dealerships or any future employers. The Respondent submits that Davis' statements that other future employees might not want unions in their shops was a simple but honest response which did not constitute an unlawful threat to blacklist employees who chose the Union to represent them.

The Respondent contends that the General Counsel presented no witnesses who could recall that Davis or any of the management speakers expressly or impliedly promised the employee a raise. The Respondent asserts that this charge is completely and simply unexplainable and should be dismissed.

B. The Suspension and the Termination of Huerta

The General Counsel first asserts that Huerta, along with Tellez—the main proponent of the organizing campaign at the dealership—engaged over several months in union activity that included his speaking to 8 to 10 employees about the Union's representing them and the benefits to be derived therefrom, as well as attending union meetings. The General Counsel submits that it is clear on this record that the Respondent's upper management learned of Huerta's involvement with the Union in mid-August.

The General Counsel next asserts that the various violations of Section 8(a)(1) that occurred at the August 23 meetings establish the Respondent's animus to the Union's organizing campaign. Additionally, the General Counsel asserts that even where some statements made at the meeting did not rise to the level of violations of the Act, they, nonetheless, constitute animus against the campaign. In that regard, the General Counsel contends that Davis attempted to convince the employees that the Union was trying to divide them, making them hate one another because of the possibility of the Union's ushering in strikes and slowdowns, scaring customers away and thereby hindering their ability to earn money and, in short, creating a civil war-like situation at the dealership. The General Counsel also notes that Davis went so far as to equate the Union to a sexually transmitted disease. All in all, the General Counsel asserts that in spite of his entreaties to the contrary, Davis engaged in such a level of union bashing at the meeting that, coupled with the actionable violations of the Act, clearly establishes the Respondent's animus against the Union campaign and derivatively those who were supporters of or involved with it, specifically Huerta.

The General Counsel acknowledges that the Respondent received the anonymous message that identified Huerta and Tellez as union supporters and that Huerta also actually did not have a valid driver's license, a requirement. However, the General Counsel contends that the Respondent's (Theodorou's) handling of the matter was out of the ordinary, that is, after playing the voice mail to Andrews, the Respondent decided to run a motor vehicle report, as opposed to confronting Huerta directly.

The General Counsel submits that this was a first-time response to a situation where the employee's license status was subject to other than the annual review. The General Counsel

notes that this action was undertaken by the Respondent immediately after the coercive August 23 captive audience meeting with the employees, Huerta among them.

As to Huerta's suspension on August 26, the General Counsel seems to acknowledge that Huerta essentially admitted to the suspension of his license and that he needed additional time—beyond the offered 2 weeks—to go to court and straighten the matter out. However, the General Counsel contends that the Respondent never offered Huerta the opportunity to continue working at some other position at the dealership that did not require a license.

It is this failure that the General Counsel asserts that Huerta was unlawfully disparately treated by the Respondent. While acknowledging that the Respondent's written (the associate handbook) policy requires any employee who drives customer vehicles to possess a valid driver's license and that Huerta was subject to and aware of this policy as of August 9, 2000, the General Counsel, contends that Huerta's managers, Theodorou and Borre, repeatedly made exceptions for employees in driving positions who not only had suspended licenses but, like Huerta, did not report the matter to them. The General Counsel notes that in several of these cases, the employees were accommodated by being given nondriving waivers, which allowed them to continue their employment at the dealership. The General Counsel submits that in spite of his long tenure with the dealership and the limited and minimal nature of Huerta's driving duties as a painter, the Respondent did not offer a waiver to him.

As to Huerta's discharge, the General Counsel submits that it, too, was unlawful. Conceding that Huerta did not report to the dealership after his court date on September 14, the General Counsel asserts that this was excusable. He notes that the day after Huerta was suspended he received the first Sterling letter and logically and understandably believed that he had been terminated. As a result, he filed for unemployment and the Union filed an unfair labor charge. When Huerta received the second Sterling letter, this only further confirmed in Huerta's mind that he had been terminated. The General Counsel asserts that the Respondent (through Borre or Theodorou) did not communicate or reach out to Huerta despite their admitted shock over the oddness of the situation.

The General Counsel concedes that Huerta did not report to the dealership on September 14 (as he had agreed) because he logically and reasonably had concluded that he had been terminated, just as he had upon receipt of the first Sterling letter.

The General Counsel submits that both Theodorou and Borre never took the "expected step" of contacting Huerta before terminating him for job abandonment and, in fact, never communicated with him in spite of his unemployment claim and his not reporting to the dealership on September 14. All in all the General Counsel argues that Huerta was unlawfully suspended and terminated because of his union activity and support. The General Counsel submits that the Respondent's contention that Huerta abandoned his job and that his termination was based thereon should be rejected as pretext. He submits that the managers simply waited for enough time to pass to justify Huerta's termination for this reason.

The Respondent for its part contends simply that Huerta, consistent with its practice, was suspended in order to give him time to repair his driver's license and to return to the dealership to report on the status of his efforts. The Respondent concedes that on August 27, Huerta received the first Sterling letter, a computer-generated letter that was triggered because of the motor vehicle report check initiated by the dealership once it was apprised of Huerta's possible loss of his license by the anonymous woman caller. However, the Respondent's claims that it was not then aware that such letters are even sent out by Sterling, but certainly because Sterling did not copy the dealership, it was not given notice that letters had been sent to Huerta. The Respondent notes that this fact was corroborated by the Sterling representative who said that pursuant to the MVR check, such letters are automatically sent to the employee, but the dealership is not copied nor is the dealership's permission sought.

The Respondent asserts that the Sterling letters are merely form letters, a fact acknowledged by Huerta who could not articulate why he believed that they were termination letters, especially in view of the clear-cut arrangement with his supervisors, one of whom he had worked for in good terms for about 15 years and was in his view honest.

The Respondent also notes that Huerta never explained why he never made any attempt to contact the dealership about the letters or why he did not even tell coworkers with whom he was friends for years about his "termination." The Respondent asserts that had Huerta made an inquiry to Borre or Theodorou, he would have been told that the Sterling letters in no way were to be construed as termination letters, or that his suspension had been cancelled. However, the Respondent submits that Huerta assumed no responsibility for his own job, and even in the hearing did not indicate that he had attempted to clear up his driver's license—the sole reason for his suspension in the first place.

The Respondent contends that like other employees with motor vehicle issues, Huerta was treated in a consistent way but unlike Huerta, they sought work-related accommodations and acted on them. Huerta, however, refused to take any affirmative steps to protect his job, choosing instead to institute a complaint against the dealership. The Respondent submits that by such action, Huerta set himself apart from other employees similarly situated to him.

The Respondent contends that the decision to suspend Huerta was based solely upon his having had his license suspended for a DUI and not because of his union activity or involvement. Moreover, Huerta was not discharged on August 25, 2011, as alleged because, as it is undisputed, Huerta was suspended on August 26 and instructed by Respondent to return on September 14 with a report of the status of his license. The Respondent discharged him on September 21 for job abandonment because Huerta failed with no excuse to report to work on September 14, and not because of his involvement with the Union. Accordingly, the Respondent contends that it has not violated the Act in its treatment of Huerta.

Discussion and Conclusions

As to the August 23 meeting and the recording thereof, this presented a rather unique opportunity for me actually to hear what was said by the participants to gather a more definitive idea of what I described at the hearing as its atmospherics, to include the tone and tenor of the speakers and the questions of and responses by the participants. Granted that the recording was not of the best quality, but not much could be expected when the recording was accomplished with a basic voice recorder recording through the shirt pocket of Tellez.

Be that as it may, the recording was intelligible to me, and aided by the two transcripts prepared by the General Counsel and one of the Respondent, all of which I consulted as I listened to the recording at separate times, I was able to get a fair idea of what went on at the meeting. I might add that I found the transcript provided by the Respondent to be very helpful and, in point of fact, I have relied heavily on this transcript in resolving the issues here. The methodology employed by the Respondent in preparing it utilizing three other employees who attended the meeting along with their testimony at the hearing was very helpful to me as I listened to the tape.[66]

Turning to my impression of the meeting, I would first note that the Respondent's managers did not take on a hostile or aggressive tone with the gathered employees.[67] While the General Counsel characterizes the meeting as a captive audience type, I would note that the Respondent made it clear that the employees would be paid for their time spent at the meeting. I would note also that the managers from the start stated that they wanted feedback—an open dialogue—from the audience regarding the topic at issue, the union campaign. The Respondent's managers also, as I heard (and read), emphasized that it was their ambition to educate the employees about the Company's position regarding the propriety of a union at the dealership. However, this announcement of its purpose was generally accompanied by an admonition to employees that they should also educate themselves by going to the Union for answers, to attend union meetings before making a decision. Implicit in this message, in my view, is that the employees should not solely be guided or influenced in their decisions about the Union by the Company's stance. The Respondent's managers to me set the table of the discussion by reminding all employees that the Union and the Company were basically making a sales pitch, and that they should be wary of this. Of course, the managers clearly emphasized that the employees should be especially wary of the "sales pitch" of the Union.

The managers primarily, through Davis, also emphasized that in the interest of an open dialogue, the employees should feel free to talk openly about the Union (on premises) that there would be no adverse consequences, such as discipline or demotions. After these somewhat preliminary remarks, the Respondent's managers launched into specific representations and comments, some of which form the basis of the complaint allegations.

At the hearing, the employee participants, along with the Respondent's speakers, Davis and Theodorou, testified about the meeting. Clearly, the employees were divergent in their views about the Union. Tellez, a main union supporter, left the meeting feeling that nothing positive was said about the Union to him; it was one-sided (against the Union); there was a lot of tension; and management was just using the meeting to ascertain who of the employees had contacted the Union. Montoya also concluded that nothing positive about the Union was said by management at the meeting, and that the Union was regarded as a sexually transmitted disease that could follow an employee to other dealerships.

The employee participants called by the Respondent, Syme, Sorg, and Ingram, were to me clearly antiunion and their opinions were expressed openly at the meetings. I would note that to the extent there were stridently antiunion comments made at the meeting, most of these comments were made by other employees, to include Ingram, Syme, and Sorg but also seemingly antiunion employees Job Fort and Jimmy Maxwell, who did not testify at the hearing.

So on balance, what can be said is that the gathered employees had different and divergent opinions about the Union, or unions in general; some of the opinions were formed before the meeting. It can also be said that the service department employees, at least based on my impression of those who testified at the hearing—including Huerta—were intelligent and experienced employees working in skilled or semi-skilled jobs in the automobile industry.

Accordingly, with the foregoing serving as a circumstantial backdrop of sorts, I turn to the complaint allegations emanating from the August 23 meeting. I will note that in analyzing these allegations, I have considered the pertinent statements attributed to the Respondent's managers for the meaning one could reasonably construe from their utterance, and not necessarily the actual words employed to convey the message.

1. The Respondent's alleged threat of blacklisting employees should they select a union to represent them

At a point in his presentation, Davis answered a question and a statement from employee (and witness at the hearing) Montoya, who was basically complaining about a verbal altercation he had had with his team leader about the Union and that the team leader has not approached him with facts about the Union. Davis responded, saying that he had three answers to Montoya's concerns, which to him redounded to the employees having mutual respect for each other, and not becoming what he said the Union was trying to accomplish or make them—destructive, divisive, (having) civil war-like relationships.

Davis said:

> . . . And No. 3, you have to understand, this isn't about—as much about remaining union-free as it is about significant decisions that affect all of your lives. All right? This is about your career. This is about your relationship with the people you work with. This is about your ability to go get another

[66] I should note that the General Counsel's witnesses who attended the meeting—Huerta, Montoya, and to some extent Tellez—did not testify that they had listened to the tape recording. Tellez in particular stated that he listened to only a portion of the recording, but only to assure himself that the recorder had operated properly at the meeting.

[67] I would note that as evidence of the rather relaxed or informal atmosphere of the meeting, there was at times laughter from the group of employees over some jocular remark from a speaker.

job at another dealership if you were to leave here. [R. Exh.3, pp. 90–93.][68]

Later in his presentation, Davis responded to employee (and witness) Ingram who asked, "If we don't want to vote for the Union, do we still have to be a part of it." (R. Exh. 3, p. 105.) Davis answered, "Yes," and, among other things, said, "This is not a right to work state—If you don't join a union, and this shop becomes union, you got to find another job. So if the union wins an election, you either join the union, even if you want it, or you pack your toolbox and go down the street." (R. Exh. 3, p. 106.) This response led employee Maxwell to ask, "Let's say the shop does go union for a long period of time . . . . Is this like something that's going to follow you through your lifetime, if you transfer to another store. Is it going to be like something like an issue they look at and say, Hey this guy worked in a union shop." (R. Exh. 3, p. 106.)

Davis responded as follows:

> That is one of my concerns, and I want you guys to think about. The union will tell me I am threatening you by bringing this up. The bottom line is, that's the reality. Employers don't want unions in their shops. If you guys leave or, you know, move to another state and you are interviewing for jobs and those employers know you came from a union shop, they *are* going to think twice about hiring you even if they think you are a superstar. Because they are thinking, what role did he play? Was he pro [union]? They can't ask you, but they are going to be suspicious.
>
> They may be inclined to pass on you and go to the next guy simply because of that badge or that scarlet letter that you will wear as a result of having gone through—even if it is a campaign and the company wins—so it is an issue. If you commit yourself to it [the union], you've got to commit yourself to all of it, including those consequences. [R. Exh. 3, p. 107.]

Maxwell followed this statement of Davis with the following:

> 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 effected by this.

Davis responds, "Absolutely." (R. Exh. 3, p. 107.)

I would find and conclude that in these series of remarks at the August 23 meeting, while Davis did not say or imply that his Company would blacklist them to future employers, Davis did effectively threaten the employees with "blacklisting or blackballing" if they chose the union or even became associated with a union campaign, in terms of their future employment in the auto industry and otherwise. I note here that the dictionary defines blackball as a vote against a candidate or applicant, or to ostracize a person (or group), or a negative note especially in deciding on an applicant; the same dictionary defines blacklist as a list of persons or organizations under suspicion, disfavor, censure.[69]

In these series of remarks, in my view, Davis clearly conveyed that the assembled employees, should they choose the union or even more significantly were thought to be associated with a union campaign, *would* be—not could be—stigmatized such that their career ambitions or other employment opportunities would be adversely affected. I would find and conclude that the Respondent violated the Act by and through these remarks.

2. The Respondent's alleged statements telling employees that it would be futile to select the Union

Based on the recording, Davis and Andrews at different times spoke about the bargaining process associated with union representation. The complaint allegations go to the charge that between the two, the employees were told on balance that it would be pointless—futile—to vote for the Union given the anticipated way the Company would respond to the negotiations for a contract.

At the beginning of the meeting, Andrew made the following (excerpted) statements explaining what would happen once the Union is elected to represent the employees:

> If a union gets in, it is a matter . . . of myself, along with Taso and Dave . . . sitting down at a table . . . . You got the company on one side, you got union on other side, and we negotiate everything. We negotiate the rules, we negotiate the benefits, we negotiate everything. . . . And you need to understand when we sit down like that, no matter what anyone promises you, they cannot guarantee it. It's a bargaining game . . . and it's a give and take. It's getting something for giving up something. That's just how it works.
>
> Because the company is not going to do something that's still not in the best interest of the technicians, the service department or this dealership at the end of the day, regardless [R. Exh. 3, pp. 14–15.]

Davis, following through on Andrews' remarks, made the following statements (excerpted):

> . . . No. 2, the process is lengthy. It's long and it's drawn out. Anybody who tells you otherwise is lying to you.[70]
>
> . . . . There's 136 different legal issues that we have to consider after the fact [of the Union's winning the election]. And there's potentially years and years and years of bargaining for a first contract that would have to take place. [R. Exh. 3, pp. 21–22.]

Davis went on to speak (excerpted) about which he describes as the Union's sales pitch:

> They want you guys to believe in their ability to protect you from layoffs, you know, to get your work distributed properly, to keep that third shift out of here, or whatever it is, they're going to tell you they can accomplish it. [But] be very careful

[68] It should be noted that where I have quoted a participant at the meeting, I may have in some cases omitted some parts which added nothing in my view to the statement being parenthetical to the main point of the managers, such as a jocular remark or unrelated comment.

[69] *The Random House College Dictionary*, 1980 edition.

[70] Davis here seems to be referring to the election process but, as is later obvious, he ties this in with bargaining.

> about buying into that stuff, because like Jonathan [Andrews] said, they can't give you anything we're not willing to give you already. The law only requires us to negotiate in good faith. It doesn't require us to agree to anything.
>
> In fact, in many cases, when you enter these negotiations, *if you ever get there*, employees tend to lose things . . . . It's all part of this . . . this big negotiation that becomes you know a wide open game of uncertainty which is why . . . we want you guys to understand that, you know, nothing is guaranteed even if you win the election. [R. Exh. 3, p. 27.]

Davis later said, in the context of an employee question about the election process and the Board's part therein, "Do you know what the bargaining unit is? That's the unit that the union selects as its potential membership group which is the only union that's going to vote and be part of the contract, *if one is ever reached*." (R. Exh. 3, p. 13.)

In the context of a strike by the Respondent's employees at another dealership, Davis said:

> . . . . We were working towards a deal. It was taking time. They [the union] did not like it. They were going to try and bully the company into agreeing to something we wouldn't agree to. *And ultimately, we agreed to what we had on the table to begin with, and 22 people lost their jobs.* [R. Exh. 3. p. 35.]

Later in the meeting, speaking about the Company's competiveness in the auto industry, Andrews said:

> But you know, this goes back. It's not that we're against the unions, as we said, and what not. We've got to operate a business for the long haul. And it's painful, and it's been painful for years. But no third party is going to make the company do anything that's not in the right interest to make sure—we've come too far . . . . So no third party's going to come in and make it [the Company] do something that's uncompetitive or going to make it go backwards. [R. Exh. 3, pp. 53–54.]

Following Andrews, Davis, responding to an employee's statement about contract negotiations, said:

> Yeah, yeah. But when you begin the campaign process when the petition's filed everything is frozen status quo. No changes, one way or another. . . . But [other than lay-off decisions] otherwise, increases, anything like that any material changes in what you guys make and working schedules, conditions, anything like that is frozen until contract is signed. . . . That could be a month, it could be six months, it could be five years. All right? [R. Exh. 3, pp. 55–56.]

Davis went on to say:

> But yes, eventually the bargaining process will begin. . . . But eventually you will start bargaining. The bargaining process is a complicated one because everybody comes to the table with their own wish list.
>
> The company is going to take a look at what it's currently providing for the associates, compare that against the market try and figure out what's fair, where we're coming up short, and then we will begin bargaining on our terms. . . . I can tell you this: the bargaining process is *never* automatic . . . a contract *is never reached immediately* . . . . *And often times it takes many, many months and even years for the bargaining process to begin.* [R. Exh. 3, p. 57.]
>
> So you know, what you guys think you may be entitled to what you think you may have coming to you as a result of committing yourselves . . . to that union membership may be somewhat elusive in that *you may never see it in your lifetime at the dealership* . . . . Or when you see it . . . it may end up being something completely different than what you thought you were going to get because it is a negotiation. [R. Exh. 3, pp. 56–57.]

Speaking to what happens at the bargaining table with the Union and its handpicked most loyal supporters among the employees, and the company representatives, Davis then stated:

> Bargaining usually takes many, many, many years. And if you ever see the light of day, okay, if you ever do reach an agreement, it's going to be something you guys will have to vote on, okay? [R. Exh. 3, p. 58.]

Davis then went on to say that even if the contract is reached, employees who have not seen the contract will have to vote to accept or reject it, and stated:

> . . . . And there you are back starting the process all over again, . . . man this isn't what I was told. That's not the money I was supposed to be getting. That's not the paid time off I was promised. [R. Exh. 3, p. 58.]

Davis then says:

> . . . and you guys will vote, and you'll fight amongst each other as you try to reconcile your disagreements. . . . If you don't ratify it [the contract], it's back to the table. You guys may even be forced to strike at some point or go protest in front of your dealership throughout this entire process. That's how it works. So nothing is guaranteed." [R. Exh. 3, p. 59.]

Towards the end of his presentation, Davis told the employees of his real life experiences with their brothers and sisters in other dealerships, especially those employed at the Company's Orlando dealership and who chose the union in December 2008, stating:

> We can get, you know, your brothers and sisters from other dealerships who deal with this on a daily basis to talk about it. And I can bring those people up here that have been living that nightmare for almost three years now without one bargaining session, not one contract negotiation. [R. Exh. 3, p. 96.]

In agreement with the General Counsel, I would find and conclude that taken as a whole, Davis' message conveyed to the gathered 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 there might not be a contract.[71]

I would find and conclude that these statements again taken as a whole, are violative of the Act.

3. The Respondent's alleged implied promise of employee raises

As noted previously, before the meeting the Respondent placed a suggestion box in the service department locker area and employees submitted questions and comments regarding issues of importance to them. Theodorou read some of the submissions to the gathered employees on August 23, and in particular read the following question aloud to the employees:

> Is it possible without voting the union into the dealership that the dealer's current pay plan can be evaluated or updated for progressing technicians whose current pay plan has a low pay ceiling depending upon cost of living raises? [R. Exh. 3, p. 85.]

Andrews responded as follows:

> I think it's absolutely possible. I think it's something we try to do every year, I mean, if we're going to be competitive. I would say the first thing we need to do, we need to look at that. We need to find out if we're competitive, and we need to make decisions. We've got to do that. We always have to stay competitive.

In responding to a question from employee Sorg about the comment above as it relates to the Respondent's need to be competitive, Andrews said, among other things:

> You also have to look at the wage rates, you know, in the different areas. I would say we're not perfect, and I would say in this downturn since 2008, you know, that's possibly something we ought to get back and look at. I think in 2008, knowing where we are, we haven't really done any wage surveys. . . . So we've got to get through this recession, but if we're not competitive with the different dealerships that are in this area, it's something we've got to look at. [R. Exh. 3, p. 87.]

Then Davis followed up on this exchange, saying:

> The last thing we want to do is lose talent and not be able to recruit talent to replace natural attrition. So I think you are right. . . . Most importantly to you guys and being competitive at this as to wages that the market bears for your skill set. . . . But at the end of the day we just want to be able to pay you for a fair wage that respects what you guys have put into the business and have given back to the company. And if we are falling short you know, then it's something that we need your help looking at. [R. Exh. 3, pp. 87–88,]

Employee Sorg then said in response:

> The reason that I ask that question is, I think that the biggest concern is that . . . what's generating a lot of momentum as far as the union is concerned, is the thought that we as technicians, are being paid under what other technicians in other dealerships or in other areas around here are being paid, and therefore, we should deserve more money, regardless of the pay freeze kind of theory. Not overall profitability of the company. [R. Exh. 3. p. 89.]

Davis responded, saying:

> That's very fair. That's very fair. And that's something that, you know, we need to try to find a way to take a look at. He's your voice of reason right here. His boss will make those decisions.
>
> . . . . And [if] we are not being fair or we're not being competitive to what you guys could get on the open market place on your own, I think there would be a definite willingness to consider making adjustments for those of you who are negatively impacted by that. I mean, you know, these are the kind of things that we need to talk about, and if they are your concerns, we want a chance to address them before you pay someone else to address them. [R. Exh. 3, pp. 89–90.]

In agreement with the General Counsel, I would find and conclude that the 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. Davis' last remark especially to me exhorts the employees to come to management and deal with their concerns about wages without bringing the Union in, and in that regard there is almost an expressed promise to do something about the employees' concerns for wages if the employees exclude the Union. Accordingly, I would find and conclude that the Respondent violated the Act by these statements of Andrews and Davis.

4. The Respondent's alleged threatening of employees with demotions if they selected the Union

Davis, evidently reading from another question submitted, asked aloud the following: "Will people get demoted if we become a union shop?" Davis then proceeded to answer the question, saying:

> I don't know. You just don't know the answer to that question, because why? Negotiations are just that, negotiations. Some people would probably need to be reclassified, some people will probably lose some pay, lose some status. Others may gain some status.
>
> It just—there's no way for me to answer that question because it would be part of the bargaining process that we would ultimately have to go through to make decision about how everyone's going to fit in to whatever spots are negotiated. Okay. Make sense? [R. Exh. 3, p. 77.]

Employee (witness) Sorg then asked a followup question: "But isn't it also true that in the union, you have basically apprentices and journeymen?" Davis responded: "Yeah, that's basically how it works." Sorg continued along this line of questioning:

[71] As noted by the Respondent, none of the management speakers ever utilized the word "futility." I have considered Davis' speech from the point of view of whether what he said reasonably redounds to the ordinary meaning of the word, that is, incapable of producing any result, ineffective, and useless. (See the *Random House College Dictionary*, 1980 edition.)

> So unless a guy has all his ASEs, unless a guy's been in the business for X number of years, whatever qualifications are to put him in that journeyman status, you're basically dropped down or demoted to an apprentice.

Davis then responded, "[T]hat's exactly how it would be negotiated." (R. Exh. 3, p. 78.) This exchange prompted the following exchange between Davis, Andrews, and Sorg:

> MR. ANDREWS: That's how a lot of them are. But it's all part of the negotiation process. That sets that up.
>
> MR. DAVIS: You see, you need that structure. If not that identical structure, something similar to that would be negotiated so you could properly classify people without subjectivity.
>
> MR. SORG: Right. And I think the irony of that is that most of the guys that are in this room that know anything about that whole process, who've been through it, realize—like myself, and I'll speak for myself, is that I probably as a journeyman with X number of years' experience, and I have all my certifications and everything else, I would benefit the most out of this whole process.
>
> f the union came in from a labor standpoint or from a wage standpoint, I'd probably benefit the most. And I'm absolutely opposed to it.
>
> MR. DAVIS: Yeah, it's possible. I mean, the more senior guys with the most—the guy with the skill set, with the most certification, would probably stand to gain the most. Everybody else, you know, benefitting from riding your coattails, for example, you know, stands to have, you know, their status reduced both in terms of pay and level.

Andrews then said finally, "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." (R. Exh. 3, p. 79.)

Taking these exchanges as a whole, the message conveyed by management in my view 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. Notably, the managers did not posit their opinions on the *possibility* of there being a reclassification different from that proposed in the discussions, but as Davis said, that is exactly how it would be negotiated. In my view, in agreement with the General Counsel, the Respondent's managers conveyed the message that should the Union come in, there would be a demotion of some employees in the service department. Accordingly, I would find and conclude that the Respondent threatened the gathered employees with demotion should they select the Union as their representative in violation of Section 8(a)(1) of the Act.

Turning to the suspension and termination of Huerta, it is useful to make some preliminary observations.

First, since at least January 2007, and perhaps longer, the Respondent has had in place at Libertyville a vehicle usage and motor vehicle report (MVR) screening policy that applied to all employees (associates) in driving positions.[72]

The policy by its terms, inter alia, required all employees who drive a personal vehicle, customer vehicle, or company-owned vehicle for business purposes, including in the course of the (employee's) job duties to possess a valid driver's license for the state of his residency and type of motor vehicle driven and present proof of appropriate licensure. The policy also required all such driving employees to notify their supervisor/manager immediately of any of the following infractions or other violations (collectively, "driving infractions"):

> a. Criminal vehicular conviction within the past one year;
> b. Current suspension, revocation, expiration or cancellation of driving privileges;
> c. Current cancellation of automobile insurance for any reason; and/or
> d. Any damage to or accident in a Company-owned or customer vehicle that occurs at any time during the driving Associate's employment with the Company.

The policy informed that the Company will investigate the driving records of all driving employees annually for purposes of determining insurability as well as ensuring the safety of the driving employee, fellow employees, the customers, and the customer's property.

The policy also informed as follows:

> Failure to comply with any of the terms of this policy, including the above notification requirements, may result in disciplinary action, up to and including termination. The Company may also suspend or revoke any demonstrator vehicle privileges of a Driving Associate who fails to comply with any of the terms of this policy. The Company may also terminate the Driving Associate's employment if the Driving Associate's annual Motor Vehicle Record screening does not meet Company standards.

Second, Huerta was classified as a driving employee and had been such for the entire time he was employed by the Respondent and he, as late as January 26, 2007, signed a copy of the policy statement.[73] In signing the statement, Huerta indicated that he understood and agreed to abide by the policy, that he understood that the Company would conduct an annual MVR screening of driving employees and that he had to meet all company standards to remain employed in his driving position. Also, by his signature, Huerta stated that he understood that any failure to comply with the policy may result in disciplinary action up to and including termination.

Third, it is beyond dispute that Huerta's license was or had been suspended by the State of Illinois on August 10, 2011, and as he later acknowledged, that the suspension was for driving under the influence (substance unknown). It is also undisputed that Huerta knew his license had been suspended, but he made

[72] See R. Exh. 1, a copy of the policy which is excerpted from the Company's employee manual.

[73] See R. Exh. 1, where Huerta's signature appears beneath a printed version of his name; the document is dated January 26, 2007.

a conscious decision not to report the matter to his supervisors/managers for reasons of his own.

Fourth, it is beyond dispute that on August 25, 2011, Huerta met with his supervisors, Borre and Shubin, on the instruction of Theodorou to discuss the suspension of his license and when the meeting concluded, all parties, including Huerta, had agreed that Huerta was to be placed on immediate suspension and that he was given initially until September 12, 2011, to try to straighten out his licensure problem. However, upon being informed by Huerta that he was scheduled for a court appearance to deal with the matter on September 14, Theodorou allowed Huerta an extra 2 days to see to the matter. It was understood by all parties that Huerta was to report to the Company by September 14, but he did not and instead, among other actions on or about August 27, filed a claim for unemployment insurance with the State.

Fifth, there is no real controversy that the Respondent officially terminated Huerta on September 21 (effective September 14) for job abandonment and that Huerta has never reported to the Company with regard to the status of his driver's license.

Finally, it is clear to me the decision to suspend and later terminate Huerta was for all intent and purposes made by Theodorou acting alone in the Company's disciplinary process.

With these observations serving as a factual backdrop, I will discuss the matter utilizing the *Wright Line* analysis.

It is clear to me that the Respondent knew or suspected Huerta's involvement with the Union and the organizing campaign before the August 23 anonymous phone call, most probably around August 15 when Morales overheard a conversation between the technicians and passed this information on to upper management. However, upon receipt of the anonymous phone call, the Respondent had more than a suspicion of his involvement, and truly on this record Huerta was an active supporter of the union cause. It should be noted, however, that the Respondent at the same time also was aware that another of its technicians, Tellez, was active with the organizing effort.

Now as it happened, the anonymous phone call was received on the same day as the so-called August 23 captive audience meeting, at which I have determined the Respondent committed four unfair labor practice violations.

As the Board instructs, these violations may serve or fulfill the animus requirement of *Wright Line* as well as a nexus between Huerta's union support and the adverse action taken against him.[74] I will consider in that regard that for purposes of *Wright Line,* the Respondent's decision to suspend him was made with an antiunion animus that derivatively inured to Huerta's detriment.

However, the Respondent insists that its decision to suspend Huerta was based on his violation of the Company's policy for employees who drive its and customers' cars. As I have indicated the decision-maker in this regard was the Respondent's general manager at the dealership, Taso Theodorou. Theodorou testified that it was his policy to suspend employees for violations of the policy, and that he suspended Huerta solely because he violated the policy and specifically did not have a valid driver's license which he needed to perform his job duties.

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. I also note that his testimony is buttressed by other evidence. For example, it is clear that the Respondent only found out about Huerta's possible loss of his license through the anonymous call. Theodorou fairly and wisely did not immediately confront Huerta because, as he testified, he would not solely rely on an anonymous accusation regarding a matter important to an employee—his livelihood.

So Theodorou, who had been tutored about the Federal law involved in the context of a union drive, discussed the matter with corporate officials and then initiated the MVR process. And it was only after it was determined that Huerta's license was indeed suspended that he called the meeting with Borre, Shubin, and Huerta. In this regard, I would note that the Board has found animus on an employer's part by dint of poorly done investigations and rushes to judgment, as it were. However, here Theodorou did not jump the gun based on the call. In my mind, Theodorou considered not only Huerta's personal feelings but also his legal rights as an employee before confronting him and later disciplining him.[75] So if a poor investigation is emblematic of animus then the obversely, a properly conducted investigation can be emblematic of a lack of animus. I believe that Theodorou's action prior to confronting Huerta with what turned out to be the actual case—he had indeed lost his driving privileges—was not motivated by any animus against Huerta's union support or activities. I would further find and conclude that Huerta's suspension was not based on his union activities and support to discourage other employees, but was based on Huerta's loss of his driving privileges and that the Respondent's decision was based on a purely business basis.

I recognize that the General Counsel essentially argues that Huerta was disparately treated by Theodorou, that he did not accommodate Huerta with a nondriving waiver or perhaps finding another nondriving position for him at the dealership as had been done for other employees at different times.

First, in my view, the General Counsel's version of accommodation is too narrowly drawn. In point of fact, as I see the matter, Huerta was given a substantial accommodation by Theodorou. Notably, Huerta violated the policy that he was well aware of by not telling his supervisors of the loss of his license. The Respondent could very well have terminated him summarily on that count alone. One should be mindful that the policy is designed to reduce risk to the Company which could be held liable for any driving related mishap by unlicensed employees.

[74] I should note that in candor, I believe that the nexus between the unfair labor practice violations that took place at the August 23 meeting which Huerta attended, and Huerta's suspension because of his suspended license, is rather tenuous. However, for purposes of the *Wright Line* analysis, I will consider it established.

[75] It is noteworthy regarding Theodorou's behavior that during the organizing campaign he conducted three meetings with service department employees and as a result no charges were filed. This suggests that 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.

By not informing the Company of his suspended license, Huerta put the Company in jeopardy of financial loss. However, he was not fired for violation of the policy, and in this regard he was indeed accommodated.

It would also be noted that Huerta was given more time as he requested to go to court and perhaps resolve the matter satisfactorily. Irrespective of what the court might do, Theodorou acceded to Huerta's request for more time. In this respect he also was given an accommodation. Finally, Theodorou, in addition to giving him additional time, allowed Huerta to return to the dealership after his court date and report the status of the situation. Theodorou could have demanded that Huerta report with his license reinstated, but he did not. In this regard also Huerta was accommodated. Of course, Huerta never returned to the dealership to report on his status, so it will never be known whether Theodorou would have found a nondriving position for him or perhaps worked out a way for Huerta to keep his job, but not actually drive vehicles.

On balance, in my view, Theodorou provided Huerta with suitable accommodations as had at least one other of the Respondent's general managers. However, Theodorou, as the dealership's top executive, chose to accommodate Huerta in a way he though fit and appropriate for the circumstances. I am mindful of the Board's admonition not to second guess the business decisions of employers unless they are undertaken dishonestly. In my view, given the circumstances, Theodorou acted honestly in his treatment of Huerta. I would recommend that this aspect of the complaint be dismissed.

Turning to Huerta's termination, I would likewise find and conclude that he was not unlawfully discharged. Clearly, Huerta left the meeting with Borre and Shubin with the understanding that he was to return to them after his September 14 hearing at court, at which time the matter would be revisited. 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. Receiving no word from Huerta, the Respondent discharged him for job abandonment on September 21, effective September 14.

The General Counsel claims that the discharge was unlawful, that Huerta, having received the Sterling letters, was justified in thinking that he had been terminated, especially since the Respondent made no attempt to reach out to him when he failed to report to the dealership on September 14. I disagree.

First, in my view, 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. In my view, that was the logical thing to do. Huerta was a 15-year employee evidently in good stead as an employee and on good terms with his immediate supervisor, Borre. 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.

Theodorou credibly testified that he did not know of the Sterling letters until the matter was investigated by the Board and the Sterling representative, Sauwain, testified that her company has nothing to do with the relationship an employee may have with his employer; her company's role is to provide a service only; and Sterling did not provide copies of its action letters to its clients. In this regard, I believe 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.

However, for various reasons not articulated on the record, Huerta did not go back to his supervisors, but elected to file an unfair labor charge first over the suspension (and later the termination); Huerta then filed an unemployment claim, evidently taking it upon himself to declare himself discharged. In my view, these steps and conclusions were not only illogical, but unwise. Accordingly, I cannot find or conclude that the Respondent unlawfully discharged Huerta for his union activities or support on or about August 25 as alleged. I would find and conclude that the Respondent discharged Huerta for job abandonment since he did not report to the Respondent regarding the status of his driver's license on September 14, as agreed. I would recommend dismissal of this aspect of the complaint.

I would note in passing that even though the Respondent ultimately decided to discharge Huerta for job abandonment, a fairly serious ground in my view, it, nonetheless, noted on his personnel action form that he was eligible for rehire.[76] In this regard in my view, not only did the Respondent harbor no animus to Huerta's union involvement, it seemingly harbored no personal animus against him and, in fact, is or may be willing to rehire him, should he reapply for his old job.

In this regard is my finding further buttressed that Huerta was not treated unlawfully by the Respondent.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. On August 23, 2011, the Respondent violated Section 8(a)(1) of the Act by:

(a) Telling employees that it would be futile to select the Union as their bargaining representative because it could take years, if ever, to reach a contract during negotiations.

(b) Threatening employees with demotions if they selected the Union as their bargaining representative.

(c) Threatening employees with "blacklisting" by future employers if they supported or selected the Union as their bargaining representative.

(d) Making an implied promise of employee raises during the Union's organizing drive.

4. The unfair labor practices found above affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not violated the Act in any other manner.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices, I find that it must be ordered to cease and desist

[76] See R. Exh. 8, a copy of Huerta's personnel action form denoting his discharge effective September 15 for job abandonment, and the box checked that he is eligible for rehire.

and take certain affirmative action designed to effectuate the policies of the Act.

I recommend that within 14 days after service by the Region, the Respondent be ordered by Region 13 to post at its Libertyville Toyota dealership copies of an appropriate "Notice to Employees," a copy of which is attached hereto as "Appendix," for a period of 60 days in order that employees may be apprised of their rights under the Act and the Respondent's obligation to remedy its unfair labor practices.[77]

On these findings of fact and conclusions of law and on the entire record, I make the following recommended[78]

ORDER

The Respondent, Auto Nation, Inc. and Village Motors, LLC, d/b/a Libertyville Toyota, Libertyville, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that it would be futile to select Automobile Mechanics Local No. 701, International Association of Machinists and Aerospace Workers, AFL–CIO (the Union) as their bargaining representative because it could take years, if ever, to reach or contract during negotiations.

(b) Threatening employees with demotions if they selected the Union as their bargaining representative.

(c) Threatening employees with "blacklisting" by future employers if they supported or selected the Union as their bargaining representative.

(d) Making an implied promise of employee raises during the Union's organizing drive.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Libertyville, Illinois auto dealership copies of the attached notice marked "Appendix."[79] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 23, 2011.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 16, 2012

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything which interferes with, restrains, or coerce you with respect to these rights. More specifically:

WE WILL NOT tell you that it would be futile to select Automobile Mechanics Local No. 701, International Association of Machinists and Aerospace Workers, AFL–CIO (the Union) as your bargaining representative because it could take years, if ever, to reach or contract during negotiations.

WE WILL NOT threaten you with demotions if you select the Union as your bargaining representative.

WE WILL NOT threaten you with "blacklisting" by future employers if you support or select the Union as your bargaining representative.

WE WILL NOT make implied promises to you of raises during the Union's organizing drive.

AUTO NATION, INC. AND VILLAGE MOTORS, LLC,
D/B/A LIBERTYVILLE TOYOTA

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[77] The General Counsel has requested certain special remedies which he feels are warranted mainly because of, as he asserts, the Respondent's recidivist unlawful behavior regarding employee rights and the effect its behavior had on the Union's organizing activity at the dealership. More to the point, the General Counsel submits that all such activity ceased after Huerta's departure.

I decline to impose these requested remedies feeling as I do that the standard Board remedy I have recommended here is quite sufficient to effectuate the policies and purposes of the Act.

[78] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[79] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."