JD(SF)-26-08
San Jose, California

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

STEVENS CREEK CHRYSLER JEEP DODGE, INC.

and

Cases 20-CA-33367
20-CA-33562
20-CA-33603
20-CA-33655

MACHINISTS DISTRICT LODGE 190, MACHINISTS AUTOMOTIVE LOCAL 1101, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

David B. Reeves, Atty. and *Cecily A. Vix, Atty*.,
of San Francisco, California, for General Counsel.

Daniel T. Berkley, Atty., *(Gordon & Rees, LLP)*
of San Francisco, California, for Respondent.

Caren Sencer, Atty. (Weinberg, Roger & Rosenfeld, P.C.)
of Alameda, California, for the Union.

DECISION

Statement of the Case

JAY R. POLLACK, Administrative Law Judge: I heard this case in trial at San Francisco, California, on November 6-9, 14, 19-20 and 26-27, 2007. On April 2, 2007, Machinists District Lodge 190, Machinists Local Lodge 1101, International Association of Machinists and Aerospace Workers, AFL-CIO, (the Union) filed the original charge in Case 20-CA-33367 alleging that Stevens Creek Chrysler Jeep Dodge, Inc., (Respondent) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (29 U.S.C. Section 151 et seq., herein called the Act). On May 3, the Union filed the first amended charge alleging that Respondent had violated Sections 8(a)(1) and (3) of the Act. [1] A second amended charge was filed on June 12, and on August 14, a third amended charge was filed. The Union filed the charge in Case 20-CA-33562 on August 29. The Union filed the charge in Case 20-CA-33603 on September 27. The charge in Case 20-CA-33655 was filed on October 18, 2007. The Regional Director for Region 20 of the National Labor Relations Board issued a Complaint and Notice of hearing against Respondent in Case 20-CA-33367on August 24, 2007. The consolidated Complaint in Cases 20-CA-33367 and 20-CA-33562 issued on October 10, 2007. An amended consolidated Complaint (Complaint) issued in Cases 20-CA-33367, 20-CA-33562, 20-CA-33603 and 20-CA-33655 on October 29, 2007. The Complaint alleges that Respondent unlawfully discharged employee Patrick Rocha, Sr., and refused to hire employee Mark Higgins for their union membership or activities. Further, General Counsel alleges that Respondent interrogated employees about their union activities, threatened to close its business, threatened

[1] All dates are in 2007 unless otherwise indicated.

to discharge employees, created the impression that employee union activities were under surveillance, solicited grievances and promised increased benefits in order to discourage union activities. The Complaint alleges that a bargaining order is necessary to remedy these unfair labor practices, Finally the Complaint alleges that Respondent unilaterally laid off an employee without bargaining with the Union after the bargaining obligation arose. Respondent filed timely answers to the complaints, denying all wrongdoing.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs of the parties, I make the following. [2]

Findings of Fact

I. Jurisdiction

Respondent is a California corporation with an office and principal place of business located in San Jose, California where it is engaged in the business of the sale and service of automobiles. During the past twelve months, Respondent received gross revenues in excess of $500,000. During the same period of time, Respondent purchased and received goods and services valued in excess of $5,000 from outside the State of California. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2)(6) and (7) of the Act.

Respondent admits and I find that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. The Facts

Respondent began operating its car dealership in San Jose, California in December 2006. Respondent hired only two of the mechanics plus the service manager employed by its predecessor Chris' Dodge World. The mechanics at Chris' Dodge World had been represented by the Union. In December 2006, employee Rick Avelar met with Richard Breckenridge, business representative for the Union, and signed a union authorization card. In January 2007 Breckenridge met with employee Jeff Wells who signed a union authorization card.

On March 2, Breckenridge held a meeting at a local restaurant with a group of nine mechanics from the dealership. Breckenridge told the employees of the benefits of unionization. Breckenridge explained that the union authorization cards would be used to represent the employees, to make a demand for recognition, to petition the Board for an election and to prove that the employees were part of an ongoing organizing campaign. Employees Michael Lane,

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[2] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings, herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

Patrick Rocha, Gilbert Bumagat, Paul Seefeld, Manuel Blanco, Alque Baybayan and Stephen Rother signed authorization cards. Avelar and Wells had previously signed authorization cards. The cards state:

> I, the undersigned, an employee of (print company name) _____ herby authorize the International Association of Machinists and Aerospace workers (IAM) to act as my collective bargaining agent with the company for wages, hours and working conditions.

Avelar testified that on December 7, 2006, right after he was offered employment , service manager Mike Frontella told Avelar that he needed a to obtain a union withdrawal card in order to work for Respondent. Avelar obtained a withdrawal card and gave it to Frontella on his first day of work. Frontella made a photocopy of the withdrawal card and returned it to Avelar. When Wells went to work on December 11, Frontella asked if he had a union withdrawal card. Wells obtained a withdrawal card and gave it to Chris Nickerson, parts and service director. Nickerson made a photocopy of the card and returned it to Wells. On or about January 15, before employee Paul Seefeld began work for Respondent, Frontella told him that Respondent required a withdrawal card before an employee could start work. Frontella testified that he simply informed applicants that they could sign a union withdrawal card, available at the union hall, to protect their union membership. Frontella denied that he told any applicant that Respondent required a union withdrawal card.

After the union meeting of March 2, 2007, employee Ron Adamson questioned Michael Lane about the union meeting. Adamson, who opposed the Union, left the shop floor but returned and told Lane that James Garcia, service manager, wanted to speak with Lane. According to Lane, Garcia asked Lane who went to lunch and if there had been a union meeting. Garcia asked if Lane had signed a union card, who had signed cards and who the organizers were. Lane refused to answer these questions. Garcia responded that everyone was going to get in trouble, or fired, and that heads would roll if he tried to organize the shop. According to Lane, Garcia said that if Respondent were picketed, a lot of people would get in trouble and possibly lose their jobs and that heads would roll. Garcia further threatened that he would "run the shop with three people if he had to shut it down." According to Lane, Mathew Zaheri, Respondent's owner, would be extremely upset if he found out Lane was organizing for the Union. Garcia threatened that Zaheri would never let the shop be Union and that he would shut the doors,

While Lane was in Garcia's office, the phone rang and Garcia answered it stating "Chris, I am talking to Mike Lane, trying to get information about this meeting." Garcia stated that if he found out employees and Rocha organized the meeting he would "blow them out."

Employee Paul Seefeld was also summoned to Garcia's office and questioned about the lunch meeting. Garcia asked Seefeld if he attended the lunch, if the union representative was present and whether he had signed a union card. Garcia also called employee Manuel Blanco into his office and asked Blanco if he had attended the meeting. Garcia asked whether the union representative was present and whether Blanco had signed anything.

On March 5, Garcia called Baybayan into his office and demanded to know if he went to lunch with the Union on March 2 and if he had signed a union card. Baybayan answered that he had signed a card and Garcia said that the Union would cause a pay cut.

General Counsel contends that on March 5, Garcia approached Wells at his stall and asked if there had been a union meeting and told him that he had caused a lot of problems. Garcia said that the luncheon had caused a lot of commotion with management and created problems in the

shop. This evidence is contained in a pre-trial affidavit given by Wells during the investigation by the Region. However, at trial Wells testified that his affidavit was untrue. Wells further testified that he, Lane and Avelar had conspired to give testimony to help the Union's case and to help the case of employee Patrick Rocha. I do not credit Wells' testimony that Lane and Avelar agreed to testify falsely. However, I did not find Wells to be a credible witness and do not credit his pre-trial affidavit either.

On March 5, Nickerson called Lane on his cell phone and asked if Lane knew who was behind the union organizing effort.

On March 8 or 9, Mark Higgins a former employee of Chris' Dodge World went to the dealership and asked Garcia for a job. Higgins, a relative of Breckenridge, had previously applied for work with Respondent. According to Higgins, Garcia said that he was going to hire him but now he could not. Higgins asked if he was blackballed due to Breckenridge and Garcia answered, "yes, pretty much."

General Counsel contends, based on a pre-trial affidavit from employee Gilbert Bumagat that Garcia questioned Bumagat about the union meeting and told Bumagat that the Union was going to cause a pay cut. However, at trial Bumagat disavowed his pre-trial affidavit. I place no reliance on Bumagat's testimony.

In April, Garcia asked Blanco whether he had attended a lunch and who was there. Blanco answered that Breckenridge was there and Garcia responded by telling Blanco not to get involved in things. Garcia told Blanco to remember that it was a non-union shop.

Zaheri held approximately three meetings in which the Union was discussed.[3] At the first of these meetings, in early May, Zaheri brought out blue prints for a new service department and said that he was going to build a new shop. At this meeting Zaheri stated that he had paid for the training of the employees and that he had made an investment in his technicians and proclaimed, "I own you." Zaheri made a statement to the effect that if employees did not do their jobs correctly they would be replaced.

At another meeting on May 11, Zaheri mentioned a union meeting of May 9 and questioned who had paid for the pizza. Zaheri stated that he did not know why people wanted to make him out as a monster and why they wanted to destroy the business. He stated that it would cost him $100,000 to defend the charges and prove that he had done nothing wrong. Zaheri said "don't let some outside people influence you." Finally, he invited employees to talk to him and that he would gladly discuss anything.

In early April, Garcia told Avelar that Wells was going to give Zaheri a chance and that Wells was done with the Union. In late May, Garcia told Avelar that Seefeld was done with the Union and that Seefeld was not going to attend anymore union meetings.

On May 16, the Union filed a petition in Case 32-RC-5505 seeking to represent Respondent's mechanics. That same date, the Union sent Respondent a letter requesting that Respondent recognize and bargain with the Union as the exclusive representative of the employees.

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[3] On April 2, 2007, the Union filed the original charge in Case 20-CA-33367 alleging that Respondent committed certain violations of Section 8(a)(3) and (1) of the Act. On May 3, the Union filed the first amended charge.

Respondent implemented wage raises for its employees effective May 14. Mechanics Adamson, Wells and Avelar received a $1 an hour raise. Employees Ring and Blanco received a $2 per hour raise and employees Seefeld and Erick Gonzales received a $.75 per hour raise. Only these employees received a raise and there were no subsequent raises.

Garcia testified that the employees were reviewed at this time because employee Dave Ring had another job offer. According to Garcia, Ring needed a $2 per hour raise in order to stay with Respondent. Garcia took the matter to Zaheri who allegedly told Garcia to review all the employees at that time. Garcia performed evaluations of all the mechanics.

At the hearing, Garcia testified that he informed the employees upon their hire that they would be reviewed after 90 days of employment. However, in his pre-trial affidavit, Garcia testified that he told employees that they would receive a review once a year, after six months. Employees Avelar, Baybayan, Bumagat, and Lane all testified that they were not told of a raise or review when hired. Eight employees were given raises; however, none had worked six months at the time of the raises.

Employee Patrick Rocha was terminated on March 6, two working days after he attended the union meeting of March 2. Rocha testified that when he was hired in December 2006, Nickerson asked him whether he was still a union member. Rocha answered that he was on a withdrawal card from the Union. According to Rocha, Nickerson told him that the shop would be non-union.

Rocha was discharged for attendance and productivity issues. Garcia testified that he counseled Rocha on February 12, 19 and 26 about his attendance problems. Rocha was late on February 27. According to Garcia, he contacted Zaheri and recommended discharge. Zaheri approved the discharge. Garcia testified that he intended to discharge Rocha on March 2 (the end of the pay period) but was delayed due to the unexpected arrival of a Chrysler factory representative. Rocha clocked out early on March 2. Garcia gave instructions to prepare Rocha's final check on Monday morning, March 5. The check gives Rocha credit for eight hours on March 5. Garcia could not find Rocha after the check had been prepared so he terminated the employee on March 6. Rocha was discharged when he reported for work on March 6. Rocha's separation notice states "Patrick's inability to get the work done correctly and on time" and "left early without permission did not advise anybody that he left."

Frontella testified that he spoke to Rocha in January 2007 about his late arrivals, his long lunches and early departures. Frontella also testified that he spoke to Garcia about Rocha's attendance the second week of February. He further testified that he spoke to Rocha about diagnostic issues.

In the period from January 22 to March 2, 2007, (30 working days) Rocha worked less than a six-hour day on eleven occasions and took more than an hour lunch on nine days. On four days, Rocha took more than a 2-hour lunch. During that same 30-day period, Rocha left work early on 29 days.

Mark Higgins worked at Respondent's predecessor. It is undisputed that he was a good technician. Zaheri testified that he did not hire Higgins in December 2006 because he was advised by Frontella that Higgins was not a team player and did not work well with others. Parts manager Juan Robles also advised Zaheri that no one in the parts department wanted to work with Higgins. Robles recommended that Higgins not be hired. Also controller Jean Hanicke

recommended that Higgins not be hired. The evidence that Higgins had issues in the parts department was corroborated.

Higgins again sought work with Respondent in March 2007. Garcia wanted to hire Higgins. Garcia told Zaheri that he believed he could work with Higgins. However, Zaheri would not approve the hire based on the information he had received in December 2006. Zaheri told Garcia that he did not believe Higgins would change.

Higgins testified that Garcia told him , "Well, I was going to hire you, but we cannot hire you at this time." Higgins asked if he was blackballed because his cousin was Richard Breckenridge and Garcia replied "Pretty much, so." Garcia denies this.

General Counsel asserts that Respondent should be ordered to bargain with Respondent as a remedy for its unfair labor practices. Based on this bargaining order, General Counsel contends that Respondent violated Section 8(a) (5) by not bargaining with the Union when it eliminated the job of employee Steve Rother, a lube technician. Further, general Counsel contends that Respondent refused to bargain with the Union in August 2007, when it failed and refused to furnish the Union with requested information relevant to collective bargaining.

B. Analysis and Conclusions

1. Pre-employment conduct

I find that Frontella told Avelar that he needed to obtain a union withdrawal card in order to work for Respondent. Avelar obtained a withdrawal card and gave it to Frontella on his first day of work. Frontella made a photocopy of the withdrawal card and returned it to Avelar. When Wells went to work on December 11, Frontella asked if he had a union withdrawal card. On or about January 15, before Seefeld began work for Respondent, Frontella told him that Respondent required a withdrawal card before an employee could start work. Soliciting and requiring employees holding union membership to withdraw their union membership violates Section 8(a)(1) of the Act. *Bridgeway Oldsmobile*, 281 NLRB 1246, enfd. mem. *N.L.R.B. v. Bridgeway Oldsmobile, Inc.*, 933 F.2d 1015 (9th Cir. 1991). Accordingly, I find Respondent violated Section 8(a)(1) by requiring Avelar and Seefeld to withdraw from the Union.

2. Alleged threat of plant closure and job loss

I find that Garcia told Lane that everyone was going to get in trouble, or fired, and that heads would roll if he tried to organize the shop. Garcia said that if Respondent were picketed, a lot of people would get in trouble and possibly lose their jobs and that heads would roll. Garcia further threatened that he would "run the shop with three people if he had to shut it down." Garcia threatened that Zaheri would never let the shop be Union and that he would shut the doors. While Lane was in Garcia's office, the phone rang and Garcia answered it stating "Chris, I am talking to Mike Lane, trying to get information about this meeting." Garcia stated that if he found out employees and Rocha organized the meeting he would "blow them out." Such conduct restrains and coerces employees in the exercise of the right to select a bargaining representative of their own choice. See *Winges Company, Inc.*, 263 NLRB 152 (1982); *A & A Ornamental Iron, Inc.*, 259 NLRB 1019 (1982). See also *San Souci Restaurant*, 235 NLRB 604 (1978): *Bell Burglar Alarms, Inc.*, 245 NLRB 990 (1979). Accordingly, I find that Respondent violated Section 8(a)(1) by these threats.

A threat of termination in retaliation for engaging in protected activity is the ultimate threat an employer can convey to an employee. *Central Valley Meat Co.*, 346 NLRB 1078 (2006). During Garcia's March 2 interrogation of Lane, Garcia's statement he would "blow out" Rocha if he was behind the union organizing was a direct threat of termination in retaliation for union activities. Accordingly, I find Respondent violated Section 8(a)(1) of the Act.

3. The Interrogation

Interrogation of employees is not unlawful per se. In determining whether or not an interrogation violates Section 8(a)(1) of the Act, the Board looks at whether under all the circumstances the interrogation reasonably tends to interfere with, restrain or coerce employees in the exercise of their Section 7 rights. *Rossmore House*, 269 NLRB 1176 (1984); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). Some of the factors used by the Board under its totality of the circumstances approach have been: the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. *Shen Automotive,* 321 NLRB 586, 592 (1996).

On March 2 and 5, Service Director Garcia called employees Blanco, Lane and Seefeld into his office for individual questioning about the meeting of March 2. Garcia asked who was at the meeting for the Union and whether the employees had signed union authorization cards. Garcia similarly question Baybayan about the meeting. Garcia continued to question Blanco and Seefeld throughout the spring.

Here, I find that the interrogations by Garcia tended to interfere with and restrain employees in their organizing activities. First, the interrogation took place in the office of service director Garcia. This took place immediately after Respondent had knowledge of the fledgling organizing effort. The interrogation of Lane took place during a meeting at which Garcia said that if Respondent were picketed, a lot of people would get in trouble and possibly lose their jobs and that heads would roll. Garcia further threatened that he would "run the shop with three people if he had to shut it down." Garcia threatened that Zaheri would never let the shop be Union and that he would shut the doors. While on the phone with Nickerson, Garcia stated that if he found out employees and Rocha organized the meeting he would "blow them out." Under these circumstances, employees would reasonably conclude that union activities would lead to adverse action by Garcia and Respondent. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act.

General Counsel contends that Garcia gave the impression of surveillance when he told employees that he knew of the union lunch. While I found that Garcia unlawfully interrogated employees, I do not find that he gave the impression of surveillance.

4. The Alleged Solicitation of Grievances

The Board has held that, in the absence of a previous practice of doing so, the solicitation of grievances by an employer during an organizational campaign violates the Act when the employer promises to remedy those grievances. See *Center Construction Co.,* 345 NLRB 729 (2005). Enfd. in part, den. in part 482 F.3d 425 (6th Cir. 2007). The solicitation of grievances alone is not unlawful but it raises an inference that the employer is promising to remedy the grievances. *Uarco, Inc.*, 216 NLRB 1, 2 (1974).

The record shows that Zaheri invited employees to come to his office to discuss anything. However, Zaheri had an open door policy. Further Zaheri did not offer to remedy grievances. Accordingly, I do not find a violation of the Act.

5. Promise of benefits

General Counsel contends that Zaheri unlawfully promised benefits to employees by displaying the blue prints for the new shop at a meeting in early May. I find that the planned new shop and Zaheri's investment therein, was unconnected to the Union's organizational drive. I further find that presentation of this plan to the employees was unconnected to the union organizing. I find that a reasonable employee would not believe that the proposed new shop was designed to obtain employee withdrawal from union activities. Accordingly, I do not find that presentation of the blue prints violated the Act.

6. Threats of Termination - Threat to Higgins

It is a violation of Section 8(a)(1) for an employer to tell an applicant for employment that it would not hire a person affiliated with the union. *J & R Roofing Co.,* 350 NLRB No. 61 (20007); *T.C. Broome Construction Co*., 347 NLRB No. 63 (2006). Garcia told Higgins, "Well, I was going to hire you, but we cannot hire you at this time." Higgins asked if he was blackballed because his cousin was Richard Breckenridge and Garcia replied "Pretty much, so." Although the statement originated with Higgins, I find that Garcia acquiescence in the accusation by Higgins amounted to an unlawful threat. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act.

7. The Pay Raises

In *Capital EMI music, Inc.,* 311 NLRB 997, 1012 (1993) the Board stated the test with respect to the announcement and/or grant of benefits:

> The law on this point is clear, to promise or grant benefits to employees in order to dissuade them from supporting a union violates Section 8(a)(1) of the Act. See e.g., *Mack's Supermarkets,* 288 NLRB 1082 at 1099 (1988). The announcement and/or grant of wages or other benefits increases is legally permissible if it can be shown that an employer was following its past practice regarding such increases or that the increases were planned and settled upon before the advent of union activity.

In his pre-trial affidavit Garcia testified that he told employees that they would receive a salary review after six months. Employees Avelar, Baybayan, Bumagat, and Lane all testified that they were not told of a raise or review when hired. Eight employees were given raises; however, none had worked six months at the time of the raises. No raises were given thereafter. Respondent has a defense to the raise given to employee Ring that it had to give him a raise in order to meet an offer by another dealership. However, that defense does not cover the other raises. Under these circumstances, Respondent has not shown that the pay increases were pursuant to a past practice or were planned and settled upon before the advent of the union activity. Accordingly, I find that Respondent has violated Section 8(a)(1) of the Act.

8. The Discharge of Patrick Rocha

Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must show, by a preponderance of the evidence, that protected conduct was a motivating factor in the employer's adverse action. The General Counsel meets this initial burden by demonstrating that the employee engaged in protected activity, the employer knew of that activity, and the employer harbored animus against

the protected activity. The burden of persuasion then shifts to the employer to show that it would have taken the same adverse action in the absence of the protected activity. *United Rentals,* 350 NLRB No. 76, slip op. at 1 (2007) (citing *Donaldson Bros. Ready Mix, Inc.,* 341 NLRB 958, 961 (2004). The employer's burden on rebuttal is not met by a showing merely that it had a legitimate reason for its action. Rather, the employer "must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Roure Bertrand Dupont, Inc.,* 271 NLRB 443, 443 (1984).

It has long been held that there are five principal elements that constitute a prima facie case insofar as Section 8(a)(3) and (1) are concerned. The first is that the employee alleged to be unlawfully disciplined must have engaged in union or protected activities. The second is that the employer knew about those protected activities. Third, there must be evidence that the employer harbored animus against those individuals because of such activities. Fourth, the employer must discriminate in terms of employment. Finally, the discipline must usually be connected to the protected activity in terms of timing. See e.g. *Goodyear Tire & Rubber Co.*, 312 NLRB 674 (1993).

I find that General Counsel has made a prima facie showing that Respondent was motivated by Rocha's union activities in discharging the employee. Rocha attended the union lunch of March 2. Garcia learned that Rocha had been at the meeting. Garcia threatened to "blow out" Rocha. Rocha was discharged shortly thereafter.

The burden of persuasion then shifts to Respondent to show that it would have taken the same action in the absence of the protected activity. Garcia counseled Rocha on February 12, 19 and 26 about his attendance problems. Rocha was late on February 27. Garcia contacted Zaheri and recommended discharge. Zaheri approved the discharge. Garcia intended to discharge Rocha on March 2 (the end of the pay period) but was delayed due to the unexpected arrival of a Chrysler factory representative. Rocha clocked out early on March 2. Garcia gave instructions to prepare Rocha's final check on Monday morning, March 5. The check gives Rocha credit for eight hours on March 5. Garcia could not find Rocha after the check had been prepared so he terminated the employee on March 6. Rocha was discharged when he reported for work on March 6. Rocha's separation notice states "Patrick's inability to get the work done correctly and on time" and "left early without permission did not advise anybody that he left."

Frontella spoke to Rocha in January 2007 about his late arrivals, his long lunches and early departures. Frontella spoke to Garcia about Rocha's attendance the second week of February. He further also spoke to Rocha about diagnostic issues.

In the period from January 22 to March 2, 2007, (30 working days) Rocha worked less than a six-hour day on eleven occasions and took more than an hour lunch on nine days. On four days, Rocha took more than a 2-hour lunch. During that same 30 day period, Rocha left work early on 29 days. Nickerson credibly testified that Rocha cost the dealership time and money by clocking out early.

Based on the facts, I find that Respondent has shown that Rocha would have been discharged even in the absence of his union activities.

9. The Failure to Hire Mark Higgins

In *FES (A Division of Thermo Power,* 331 NLRB 9, 12 (2000) the Board set forth the following test for a refusal to hire case:

> To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity. In sum, the issue of whether the alleged discriminatees would have been hired but for the discrimination against them must be litigated at the hearing on the merits.
>
> If the General Counsel meets his burden and the respondent fails to show that it would have made the same hiring decisions even in the absence of union activity or affiliation, then a violation of Section 8(a)(3) has been established. The appropriate remedy for such a violation is a cease-and-desist order, and an order to offer the discriminatees immediate instatement to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions, and to make them whole for losses sustained by reason of the discrimination against them.

In the instant case, I find that General Counsel has established a prima facie case that Higgins was not hired because of his union affiliation: Respondent was hiring at the time and Garcia wanted to hire Higgins. Higgins was a skilled mechanic. Garcia answered affirmatively when Higgins accused the Respondent of blackballing him because of his relationship to Breckenridge the union agent. The burden shifts to Respondent to show that it would not have hired Higgins even in the absence of his union activity or affiliation.

In the instant case, prior to any union activity, Zaheri chose not to hire Higgins based on the recommendations he received from Frontella, Robles and Hanicke. The evidence that Higgins had issues in the parts department was corroborated. When Garcia sought to hire Higgins, Zaheri based on the prior recommendations would not approve the hiring. Zaheri told Garcia that he did not believe Higgins could change. Accordingly, I find that Respondent has met its burden of showing that Higgins would not have been hired even in the absence of his union affiliation.

C. The Request for a Bargaining Order

Under *Gissel*, *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Board will issue a remedial bargaining order, absent an election, in two categories of cases. The first category is "exceptional" cases, those marked by unfair labor practices so "outrageous" and "pervasive" that traditional remedies cannot erase the coercive effects, thus rendering a fair election impossible. The second category involves "less extraordinary cases marked by less pervasive practices

which nonetheless still have the tendency to undermine the majority strength and impede election processes." Id at 614. In the latter category of cases, the "possibility of erasing the effects of past practices and of ensuring a fair election . . . by use of traditional remedies, though present, is slight and . . . employee sentiment once expressed [by authorization] cards would, on balance, be better protected by a bargaining order." Id.

In determining the propriety of a bargaining order, the Board examines the seriousness of the violations and the pervasive nature of the conduct, considering such factors as the number of employees directly affected by the violations, the size of the unit, the extent of the dissemination among employees, and the identity and position of the individuals committing the unfair labor practices. *Intermet Stevensville*, 350 NLRB No. 94 (2007) citing *Abramson, LLC*, 345 NLRB No. 8, slip op. at 6 (2005) (citing *Garvey Marine, Inc.*, 328 NLRB 991, 993 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001)). Accord: *Holly Farms Corp.*, 311 NLRB 273, 281 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), cert. denied in pertinent part 516 U.S. 963 (1995). A *Gissel* bargaining order, however, is an extraordinary remedy. The preferred route is to order traditional remedies for the unfair labor practices and to hold an election, once the atmosphere has been cleansed by the remedies ordered. *Hialeah Hospital*, 343 NLRB 391, 395 (2004) (citing *Aqua Cool*, 332 NLRB 95, 97 (2000)).

Respondent committed several violations of Section 8(a)(1), including requiring employees to withdraw their union membership, threatening plant closure and job loss, interrogating employees, threatening not to hire an employee because of his union affiliation, and unlawfully granting wage increases. Significantly, however, no employee lost employment as a result of the Respondent's unfair labor practices. *Intermet Stevensville*, 350 NLRB No. 94 (2007).These unfair labor practices do not alone support the issuance of a *Gissel* bargaining order. See *Hialeah Hospital*, 343 NLRB 391, 395-396 (2004) (declining to impose a *Gissel* bargaining order against an employer that committed a retaliatory discharge and multiple 8(a)(1) violations directly affecting the entire unit, including threats, surveillance, promise of benefits, and removal of benefits, in unit of only 12 employees).

In *Hialeah Hospital* the Board found that the case fell into the second category of *Gissel* cases. Thus, the Board considered both the extensiveness of the employer's unfair labor practices and their likelihood of recurrence in determining whether a bargaining order is appropriate. *Gissel* at 614. The Board cited *Desert Aggregates*, 340 NLRB 289, 294-295 (2003), in which it found that traditional remedies were adequate to redress the employer's discriminatory layoff of two union supporters and its solicitation and promise to remedy employee grievances in spite of the unit's small size of 11 employees. Similarly, in *Aqua Cool*, supra, 332 NLRB at 97, the Board found that a bargaining order was not warranted in a unit of eight employees where the unfair labor practices committed by the employer included only a single hallmark violation. Likewise in *Burlington Times, Inc.*, 328 NLRB 750, 752 (1999), the Board declined to issue a bargaining order where an employer threatened to close the plant, made noneconomic grants of benefits, promised to improve wages and other benefits, and solicited grievances in a unit of 11 employees.

Bearing in mind that a *Gissel* bargaining order is an extraordinary remedy and should be reserved for those exceptional cases where the possibility of erasing the effects of the unfair labor practices is slight, I find that the Board's traditional remedies are sufficient here and that the issuance of a *Gissel* bargaining order is unnecessary.

Based on failure to find a bargaining order, I find that the derivative violations of a failure to bargain over the elimination of the lube tech job and the failure to provide the Union with requested information have not been established.

Conclusions of Law

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 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. By unlawfully interrogating employees Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By soliciting and requiring employees holding union membership to withdraw their union membership Respondent violated Section 8(a)(1) of the Act.

5. Respondent violated Section 8(a)(1) by telling an applicant for employment that it would not hire a person affiliated with the Union.

6. By threatening plant closure and job loss Respondent violated Section 8(a)(1) of the Act.

7. By granting wage increases to employees in order to dissuade them from supporting the Union Respondent violated Section 8(a)(1) of the Act.

8. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. Respondent did not otherwise violate the Act.

Remedy

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

Respondent, Stevens Creek Chrysler Jeep Dodge Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

   a. Interrogating employees about their activities or the union activities of fellow employees.

[4] 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.

b. Soliciting and requiring employees holding union membership to withdraw their union membership.

c. Threatening of plant closure and job loss for employees because of their support of the Union

d. Threatening applicants for employment that it would not hire a person affiliated with the union.

e. Granting wage increases to employees in order to dissuade them from supporting the Union.

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 after service by the Region, post at its San Jose, California, facilities copies of the attached Notice marked "Appendix".[5] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced or covered by 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 attached notice to all current employees and former employees employed by the Respondent at any time since March 2, 2007.

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 Respondent has taken to comply.

Dated, Washington, D.C. July 1, 2008

_____
Jay R. Pollack
Administrative Law Judge

[5] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice "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."

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 coercively interrogate employees about their union activities or the union activities of fellow employees.

WE WILL NOT require you to execute union withdrawal cards in order to obtain employment.

WE WILL NOT threaten plant closure or job termination in order to discourage union activity.

WE WILL NOT threaten job applicants that they will not be hired because of their union affiliation.

WE WILL NOT grant wage increases in order to discourage union activities.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

Stevens Creek Chrysler Jeep Dodge, Inc.,
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

901 Market Street, Suite 400

San Francisco, California 94103-1735

Hours: 8:30 a.m. to 5 p.m.

415-356-5130.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUSTNOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THISNOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 415-356-5139.