

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STEVENS CREEK CHRYSLER JEEP DODGE, INC.

(Respondent)

Cases: 20-CA-33367
20-CA-33562
20-CA-33655

and

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

(Charging Party)

**RESPONDENT STEVENS CREEK CHRYSLER JEEP DODGE INC.'S
ANSWERING BRIEF**

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I. INTRODUCTION¹

The Administrative Law Judge (hereinafter the “judge”) found that Stevens Creek Jeep Dodge (hereinafter the “Respondent”) violated Section 8(a)(1) by unlawfully interrogating employees about union meetings; by interrogating employees about and requiring employees to withdraw their union membership; by threatening an applicant it would not hire him because of his union affiliation; by threatening job loss and plant closure; and by granting wage increases to employees in an effort to dissuade them from supporting the union (ALJD 11:20-24).

Thereafter, counsel for the General Counsel (hereinafter the “General Counsel”) filed 61 exceptions to the judge’s decision², alleging that the judge failed to consider relevant evidence and failed to make proper credibility resolutions. As a result, General Counsel contends the judge erred in failing to find that Respondent violated Section 8(a)(1) by unlawfully soliciting grievances, creating the impression of surveillance and making statements concerning the futility of union organizing; violated Section 8(a)(3) by discharging employee Patrick Rocha and by failing to hire applicant Mark Higgins; and derivatively violated Section 8(a)(5) by failing to furnish requested information and

¹ The Administrative Law Judge is referred to herein as the “judge.” References to the judge’s decision are noted as “ALJD” followed by the line and page number(s). References to the transcript are noted as “Tr.” followed by the page number(s). References to the General Counsel’s exhibits are noted as “GC” followed by the exhibit number. References to the Respondent’s exhibits are noted as “R” followed by the exhibit number. References to the GC brief in support of exceptions are noted as “GC Br” followed by page number(s).

² This relates to General Counsel's Exception 27. Contrary to the General Counsel's assertion that GC-34 relates to a "statement to the Board" given by Zaheri, GC-34 is in fact Respondent's counsel's position letter written and prepared by Respondent's counsel and not a statement by Zaheri. Consequently, this exception should be dismissed pursuant to Section 102.46(b) of the Board's Rules and Regulations which requires a precise citation to the page and portion of the record relied on. Here General Counsel misidentified the exhibit upon which General Counsel based its exception.

by not bargaining over the elimination of the lube technician position. Finally, General Counsel contends the judge erred in failing to find a *Gissel* bargaining order was warranted.

II. THE JUDGE'S CREDIBILITY FINDINGS

General Counsel specifically excepts to many of the judge's findings of fact that are fully supported by the record and the judge's credibility determinations.³ Essentially, General Counsel argues that the judge's credibility determinations should be overruled because the judge (1) did not explicitly provide the reasons for his rulings with respect to each witness; (2) did not explicitly deal with evidence⁴ that General Counsel argues

³ The Board should dismiss General Counsel's Exception 28 which requests that the Board credit the pretrial affidavits of employees Jeff Wells and Gilbert Bumagat to the extent they support other testimonial evidence. The judge explicitly discredited Wells' and Bumagat's testimony and their pre-trial affidavits based on an evaluation of their demeanor and the fact that they recanted their testimony on the stand. (ALJD 4:1-6, 16-20; GC Brief p 6). The Board should defer to the judge's credibility resolution under *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951) ("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 [the Board] that they are incorrect.")

The Board should also dismiss General Counsel's Exception 37 because General Counsel examined Garcia's hard drive and General Counsel was permitted to speak with the Board's IT personnel to learn the date the Garcia's February 12 minutes and the subsequent February 19 and 26th minutes were created (GC-16) (Tr. 1038:23-1039:6). General Counsel chose not to ascertain the dates when the counseling minutes were created. Therefore, the Board should dismiss General Counsel's exception 37 requesting that an adverse inference be drawn.

⁴ The Board should exclude from its consideration GC- 38 a document described by General Counsel as Zaheri's statement to the Region. The document strictly speaking is not a statement by Zaheri. While it is true Zaheri presented the document to the Region, Zaheri did not prepare the document, nor did he sign it. Zaheri merely instructed his administrative employee Darla to transfer information contained in Respondent's R-12 (Tr. 1245:3-1246:9). Additionally, Zaheri testified that he explained to Board agent Reeves "that he did testify as to exactly what happened..." with respect to Rocha's discharge and that GC-38 did not accurately reflect what actually happened (Tr.

contradicts the judge's credited facts; (3) relied on testimony of Respondent's witnesses whom the judge had discredited in other instances; and (4) used the same credibility footnote in a number of his recent decisions.

Contrary to General Counsel's characterization, there is no requirement that a judge's credibility resolutions be explicit for the Board to defer to the judge's credibility resolutions. *See St. Francis Medical Center*, 347 NLRB No. 35 slip. op. at 2 (2006)(Board relied on judge's implicit crediting of one witness' testimony over that of another witness' conflicting testimony). Furthermore, the judge in the instant case did properly evaluate the testimony and evidence. The judge explained that he made his credibility resolutions based on his review of the entire testimonial record and exhibits, with due regard for logic, probability and the demeanor of the witnesses. The judge went on to state that as to witness testimony contradictory to his findings, those witnesses' testimony were disregarded either because the testimony was in conflict with credited documentary or testimonial evidence or because it was incredible or unworthy of belief (ALJD 2:45-50).

Nor is it impermissible for a judge to discredit only a portion of a witness' testimony where the judge believes some of the witness' testimony. As Judge Learned Hand stated in *NLRB v. Universal Camera Corp.*, 179 F.2d 794, 795 (2d 1950) "[i]t is no reason to refuse to accept all a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some but not all." See

1246:19). Further, the document should be disregarded because there is better evidence of the reasons underlying Rocha's discharge. Zaheri provided a sworn affidavit to the General Counsel and also testified under oath at the hearing regarding Respondent's rationale and the timing for the discharge.

Bliss Clearing Niagara Inc., 344 NLRB No. 26 (2005); *Amber Foods Inc.*, 338 NLRB 712, 715 fn.13 (2001). Finally, the General Counsel cites no case for the proposition that a judge, who uses similar language on more than one occasion to explain his credibility resolutions, is entitled to less deference.

If the Board chooses to take an independent evaluation of both the testimonial and documentary evidence, the Board will find that the preponderance of the relevant testimonial and documentary evidence support the judge's findings and conclusions. Thus, the Board should find no additional unfair labor practices were committed and that a bargaining order is not warranted.

III. DISCHARGE OF PATRICK ROCHA⁵

The judge correctly found that Respondent did not violate Section 8(a)(3) and (1) of the Act in terminating the employment of service technician Patrick Rocha Sr., ("Rocha") on March 6, 2007 (ALJD 8:47-9:45). General Counsel has excepted to the judge's findings and conclusions arguing that a thorough review of the documentary and testimonial evidence in this case will reveal that Respondent failed to demonstrate that it would have discharged Rocha in the absence of his union activities under a *Wright Line* analysis. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir, 1981), *cert. denied* 455 U.S. 989 (1982).

More particularly, General Counsel contends the judge erred in finding that Garcia counseled Rocha about his attendance problems, that Zaheri approved Rocha's

⁵ This section relates to General Counsel's Exceptions 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55.

discharge on February 27, that Frontella counseled Rocha, and that Rocha cost Respondent time and money by leaving work early (ALJD 9:22-42). Rather, General Counsel asserts the evidence demonstrates that Respondent tolerated Rocha's early departures and long lunches until March 2, 2007 when Respondent learned its employees intended to organize the dealership. Respondent thereafter terminated Rocha and attempted to cover up its unlawful actions with inconsistent and shifting explanations.

A. Garcia's February Counseling of Rocha

General Counsel contends that the judge erred in finding that Garcia counseled Rocha on February 12, 19, and 26, 2007 about his attendance problems (ALJD 9:23-24).⁶ General Counsel notes that Rocha denied having been counseled by Garcia, and that the only meeting Rocha and Garcia had in February was initiated by Rocha and concerned Rocha's request for additional work (Tr. 333-336). General Counsel also contends Respondent's witnesses' testimonies are not creditable and should be disbelieved, and that the documentary evidence suggests Garcia never counseled Rocha.

1. Credibility of Garcia, Zaheri, Nickerson and Frontella

General Counsel contends the judge's findings were based on the unsupported testimony of Garcia, Zaheri, Nickerson and Frontella and that these witnesses' testimony

⁶ Respondent asserts that the complaint in matter 20-CA-33562, alleging that Respondent violated Section 8(a)(3) and (1) by discharging Rocha, should be dismissed because the Charging Party had previously filed and the Region dismissed 20-CA-33376 alleging the same violation. Region 20, with the full cooperation of Respondent, investigated 20-CA-33367 and dismissed it. Charging Party subsequently re-filed the charge alleging the exact same facts. Nonetheless, the Region issued a complaint. No additional facts were alleged. Clearly, if the charge was investigated and found to be without merit the first time and no additional relevant facts were revealed, the charge should be found to be without merit the second time. Thus, Respondent requests the Board dismiss this allegation. Moreover, Respondent suggests that the Region is demonstrating bias against Respondent in its prosecution of a charge that the Region previously found lacked merit.

should be discredited because the judge specifically discredited their testimony on a number of points. However, as mentioned above, it is perfectly common for a judge to believe some but not all of a witness' testimony. Thus, it was perfectly acceptable for the judge to credit Garcia's, Zaheri's and Frontella's testimony with regard to Garcia's counseling of Rocha, particularly given that Garcia's, Zaheri's and Frontella's testimony are consistent.

Garcia said he first spoke to Rocha on February 12 after Frontella indicated Rocha was difficult to find during the day because Rocha came in late, left early, and took long lunches, and after Nickerson advised Garcia to counsel and verbally warn Rocha (Tr. 963:19-964:3; 967: 8-13; 905:4-20; 853:10-20). Garcia testified that he informed Rocha that Rocha needed to come see him if he ran out of work, if it took longer than ½ hour to diagnose a problem, if he felt he was being undersold by a service advisor, and that they would meet weekly to chart Rocha's progress (Tr. 966:14-19). Garcia testified that he thereafter showed Frontella his counseling notes and indicated he discussed Rocha's low hours and the five items listed in Garcia's counseling notes with Rocha (Tr. 967:17-24). Frontella confirmed that he had a conversation with Garcia regarding Garcia's counseling of Rocha, that Garcia showed Frontella his counseling notes, and that Frontella was to let Garcia know how Rocha was progressing (Tr. 855:3-22). Garcia indicated he checked with Frontella later that week and that Rocha was still hard to find, left early and was taking long lunch hours (Tr. 968:1-10). Garcia stated he then met with Rocha on February 19 and that they discussed the same problems they previously discussed, including Rocha's leaving early and taking long lunches (Tr. 968:13-19). Garcia later spoke with Frontella about Rocha's continued poor performance

and attendance issues (Tr. 968:20-969:10). Frontella testified he informed Garcia towards the end of the week that Rocha was still difficult to find in the afternoon either because Rocha had taken a long lunch or because Rocha left early (Tr. 855:25-856:11). Garcia talked with Rocha again on the 26th about the same issues. Garcia orally provided Rocha a final warning, stating that if Rocha was late again, left early or took a long lunch he would be terminated (Tr. 856:12-18; 863:3-14). Frontella informed Garcia that Rocha was late the next day. Garcia testified that he then asked Zaheri for permission to terminate Rocha, and that he would likely do so on March 2 (Tr. 970:8-24; 856:19-857:13; 906:4-16). Finally, Zaheri confirmed Garcia requested permission to terminate Rocha at the end of February and that he approved Garcia's request (Tr. 1190:15-1191:4).

Further supporting the judge's decision to credit the consistent testimony of Garcia, Nickerson and Frontella is that Rocha himself lacks credibility. Rocha distorted the truth when he initially testified that he was laid off from Stevens Creek Subaru rather than terminated for poor productivity and poor attendance (Tr. 898; 755-758; R-19, R-20). Moreover, Rocha's termination from Allison BMW for a time card infraction further calls into question Rocha's veracity (Tr. 899). Thus, it is unclear why Rocha's testimony should be preferred to that of Respondent's witnesses (Tr. 467:5-16; 468:11-18; Tr. 758:7-759:5; R-20).

2. Garcia's Documentation of Rocha Counseling --- GC-16

General Counsel argues that GC-16, an Excel spreadsheet Garcia contends memorialized Garcia's February counseling session with Rocha, is a fraud and should be disregarded because Respondent declined to hire a computer expert to verify when the

document was last modified. The Board should decline to do so. First, Respondent was not obligated to hire a computer expert to authenticate the date of the document's creation. Respondent asserts the document is authentic. Second, Respondent granted General Counsel access to Garcia's computer's hard drive, and General Counsel had the opportunity to speak by phone with the Region's IT people to verify when the spreadsheet was last modified (Tr. 1038:23-1039:6). For whatever reason, the General Counsel chose not to do so. General Counsel should not be permitted to benefit from its own inaction. In any event, General Counsel did not provide any evidence supporting the notion that the counseling minutes contained in GC-16 were other than the dates on which Garcia counseled Rocha (Tr. 965:9-21; 967:3-7). Garcia conceded that the document in which the February 12, 19 and 26 counseling sessions were documented was initially created on January 22, 2007 well before any union activity (Tr. 1038:9-11). Consequently, the mere fact that the excel document was initially created prior to February 12, and was later modified, should not call into question either the legitimacy of the counseling minutes contained in the document or the dates upon which Garcia testified he created the counseling minutes.

General Counsel also argues that GC-16 is a forgery created after the filing of the unfair labor practice because Garcia did not place a formal written warning in Rocha's file as instructed by Nickerson. However, all that demonstrates is that Garcia decided to give Rocha a verbal warning on February 12 rather than a written warning. It bears no impact on whether GC-16 is a forgery and to the extent General Counsel argues that Nickerson requested Garcia to "write up" Rocha, it supports Respondent's contention that

Rocha's attendance and performance were an issue in February 2007 and that Rocha needed to correct these problems.

General Counsel further contends that that the counseling sessions never occurred because (1) Rocha's separation report makes no mention of the February 12 counseling session; (2) neither GC-16 nor the separation report mention that Garcia gave Rocha a final warning; and (3) despite Garcia's testimony that Rocha's discharge was precipitated by Rocha's late arrival on February 27th neither GC-16 nor the separation report mention Rocha's coming in late as either a problem or the reason for his discharge.

The mere fact that the Respondent did not list the February 12 counseling session in the separation report or every specific event that informed Respondent's decision to discharge Rocha does not mean the February 12, 19 and 26 counseling sessions never occurred. The separation report clearly documents that Respondent counseled Rocha for time and attendance problems on at least two occasions in February of 2007, that Rocha failed to improve, and consequently Respondent terminated Rocha. While it is true the separation report does not mention Rocha's late arrival as the final event precipitating Rocha's discharge, the report makes clear attendance problems resulted in Rocha's discharge. That the precipitating event was Rocha's arriving to work late, rather than leaving work early or taking a long lunch break, is immaterial. Moreover, the separation report like GC-16 does mention Garcia having counseled Rocha on the 19th and 26th of February. Thus, the documentary evidence confirms Respondent's witnesses' testimony that Garcia counseled Rocha for attendance problems in February 2007.

B. Frontella Counseling Rocha

General Counsel excepted to the judge's finding that Frontella counseled Rocha about his late arrivals, long lunches and early departures. General Counsel notes that Rocha specifically denied being counseled by anyone at Respondent, and that Respondent furnished no documentary evidence supporting this contention (Tr. 333-36). Contrary to General Counsel's assertion, the record evidence supports the judge's conclusion that Frontella counseled Rocha in January 2007 about being late, taking long lunches and about leaving early, and that Frontella spoke with Garcia about Rocha's attendance and performance issues (Tr. 852-857). Additionally, common sense strongly supports a finding that Frontella discussed or counseled Rocha regarding his attendance problems. Rocha missed 62 hours of work in a six week period (177.15 out of 240 hours (6 weeks x 40 hour/wk)); as a result Rocha averaged only 29.5 hours work each week including 10 hours of training (R-31; 1187:18-22). As Rocha's immediate supervisor and the individual charged with assigning service technicians work, Frontella surely would have discussed Rocha's regular absences from his position. Further, Garcia testified that he had Frontella report to him Rocha's progress and that he informed Frontella about his meetings and discussions with Rocha (Tr. 967:19-24; 968:1-10). This further supports Frontella's testimony that he was concerned with Rocha's attendance and makes more credible Frontella's claim to have independently discussed the matter with Rocha.

C. Zaheri Approved Rocha Discharge on February 27

The General Counsel also asserts the judge erred in finding that Zaheri approved Rocha's discharge on February 27 (ALJD 9:24-25). General Counsel contends that Rocha's separation notice (GC-15), Respondent's response to the California Employment

Development Department (EDD) regarding Rocha's discharge (GC-31), Respondent's counsel's position letter dated May 22, 2007 (GC-34), and Zaheri's alleged statement to the Board (GC-38), all indicate that Respondent did not decide to terminate Rocha until March 5 after Respondent became aware of its employee's organizational activities.

Contrary to General Counsel's contention, the documentary evidence does not show that the decision to terminate Rocha was made on March 5. Rocha's Separation Notice states: "on 19th February we had [Rocha and Garcia] discussion on Patrick's [Rocha's] ability to do work correctly and make time. On 26th of February we discussed this again. Still no improvement - left early without permission did not advise anybody that he left." The document is silent as to when the decision to terminate Rocha was made. Moreover, the document is consistent with Garcia's testimony that Rocha was counseled on the 19th and 26th regarding his attendance problems, that Rocha did not heed his February 26 final warning and was shortly thereafter terminated.

Respondent's response to the EDD states "the employee was counseled about poor performance and failed to improve his performance and he left early in defiance of employer's express provision that he not do so." The document is silent as to when the decision to terminate Rocha was made. Further, the document is consistent with the separation report and Garcia's testimony that Rocha was discharged because of his attendance problems.

Similarly, Respondent's counsel's position statement to the Region states, in relevant part:

"... February 19, 2007, Garcia talked with Rocha regarding the low level of flat rate hours and ongoing failure to work a full forty hours, and his going home early. One week later ... Rocha still took too long No

correction of the problems was evident on March 6, 2007... .
Accordingly, Rocha was terminated on March 6, 2007.”

The document only indicates that Rocha was terminated on March 6, which is perfectly accurate. It is silent as to when the actual decision to terminate was made. The fact that the letter states that there was no evidence the problem was corrected on March 6 shows only that Rocha had not corrected his attendance problem after Respondent decided to terminate Rocha.⁷ Further, this document is consistent with Garcia’s testimony, the separation report and the statement to EDD regarding the fact that Rocha was terminated because of his attendance problems.

Finally, Zaheri’s alleged statement to the Region does not support the General Counsel’s position that the decision to discharge Rocha was made on March 5. Rather, the document states: “Rocha’s dismissal came about for a lack of hours worked and ... low hours produced through the months of January and February. ...” and “On the following Monday, 3/5 he did not come in or call and the decision to terminate him was made.” Had Respondent intended to say Respondent decided to terminate Rocha on 3/5 because he did not come in or call, it could have. Respondent did not. Thus, a more plausible reading of this statement is: Respondent made a decision to terminate Rocha and on March 5 Rocha did not show up for work. This reading makes particular sense in

⁷ General Counsel also argues that Respondent must have reached its decision to terminate Rocha after March 2 because the separation report, the response to EDD and Respondent’s counsel’s position letter to the Region each indicate that Rocha was terminated in part because he left work early without permission. General Counsel contends based on Rocha’s testimony that the only date he left work early without permission was on March 2 when Rocha claims Frontella asked him to stay a bit later and Rocha left without informing Frontella (Tr. 327:6-25). However, Frontella did not recall Rocha asking for permission to leave work early in March (Tr. 866:20-23) and Garcia indicated that part of Rocha’s problem was that he did not request permission to leave early like other employees (Tr. 1082). Thus the preponderance of the credited evidence shows that March 2 was not the only date Rocha may have left early without permission.

light of Zaheri's affidavit to the Region and Zaheri's and Garcia's consistent testimony that Respondent made the decision to terminate Rocha on February 27.

D. Shifting Defenses

General Counsel also argues that these documents (GC-15, 31, 34, and 38) demonstrate that Respondent's rationale for Rocha's discharge has shifted over time. As such, General Counsel urges the Board to reject Respondent's stated reasons for the discharge and to infer that Respondent's asserted reason for discharging Rocha was pretextual, and that Respondent discharged Rocha because it believed Rocha was one of the ring leaders of the union.

Contrary to General Counsel's assertion, these documents do not demonstrate that Respondent's rationale for Rocha's discharge shifted over time. The documents instead show that Respondent's position consistently has been that Rocha was discharged for attendance and performance problems. Rocha's separation report (GC 15) states that Rocha was discharged because: "on 19th February we had [Rocha and Garcia] discussion on Patrick's [Rocha's] ability to do work correctly and make time. On 26th of February we discussed this again. Still no improvement - left early without permission did not advise anybody that he left." This document supports the judge's finding that Garcia counseled Rocha in February 2007 on his attendance (leaving work early) and performance problems. Although this document does not mention the February 12 counseling that does not mean the counseling session never occurred, it just indicates Garcia provided an incomplete picture of the steps he took to counsel Rocha. Thus, the document does not support General Counsel's assertions or undermine Respondent's.

Respondent's response to the Employment Development Department (GC 31) states that Rocha was "counseled about poor performance and failed to improve his performance, and he left work early in defiance of employer's express directions that he not do so. Therefore, he was terminated." The document specifically states that Rocha was discharged because Rocha failed to improve his attendance and performance. Thus, this document is perfectly consistent with Respondent's position.

Similarly, General Counsel's Exhibit 34 is not inconsistent with Respondent's contention that Respondent decided to terminate Rocha because of his poor performance and attendance record. GC-34 provides:

"Employee Patrick Rocha was counseled on February 12, 2007 regarding his failure to work the required forty hours per week [attendance issue] and only producing twenty five to twenty six flat rate hours [performance issue] ... that various elements were discussed ... including ... [that] if he takes longer than 1/2 hour and cannot find a problem, he is to contact Garcia before continuing ... he is to speak with Garcia if he has no work to do ... [and] is not to leave work early unless a manager agrees to it One week later, February 19, 2007, Garcia talked with Rocha regarding the low level of flat rate hours and ongoing failure to work a full forty hours, and his going home early. One week later ... Rocha still took too long to diagnose a problem and needed to come speak with Garcia. No correction of the problems was evident on March 6, 2007, including an early unauthorized departure. Accordingly, Rocha was terminated on March 6, 2007."

This document is also consistent with Respondent's contention it counseled Rocha with regard to Rocha's performance and attendance in February 2007 and that Rocha was discharged for that reason.

Zaheri's statement to Region 20 (GC-38) provides that "Rocha's dismissal came about for a lack of hours worked and ... low hours produced through the months of

January and February. ...” In other words, Rocha was discharged because of attendance and performance problems. Thus there is nothing inconsistent in GC-38.

As such, GC-15, 31, 34 and 38 do not demonstrate that Respondent’s rationale for the discharge shifted over time. Each document is consistent with Respondent’s witnesses’ testimony that Respondent counseled and ultimately discharged Rocha for his performance and attendance issues. That the documents do not employ the exact same language in each instance is immaterial as the documents were authored by different individuals with differing levels of familiarity with Rocha’s discharge. Thus, Respondent’s rationale for Rocha’s discharge has not changed over time and, consequently, there is no basis to infer that Respondent’s true motive in discharging Rocha was unlawful based on a shifting explanation. *See Shattuck Den Mining Corporation v. NLRB*, 362 F.2d 466 (9th Cir. 1966) (shifting explanations justify inferring unlawful motive in discharge).

E. Rocha’s Attendance Problems Cost Respondent Time and Money

General Counsel asserts that the judge erred in finding that the Rocha cost Respondent time and money by clocking out early. Rather, General Counsel contends that the evidence shows that Respondent permitted its employees to go home early if they had no work, that Respondent’s business was slow during the month of February, and that Rocha left work early because he had no work. Moreover, Rocha was a flat rate employee and his leaving work early under these conditions did not cost Respondent time and money.

1. Other Employees Left Work Early

General Counsel contends that Respondent permitted employees Jim Massey and Ron Adamson to work less than forty hour weeks. Garcia did grant Jim Massey an alternative arrangement whereby Massey had some flexibility as to the days and hours he worked. However, this was with the understanding that Massey would work close to a forty hour a week shift (Tr. 1116-1117). Garcia stated that he granted Massey the concession because Massey had a three hour commute to and from home (Tr. 1080-1081). General Counsel presented no evidence that Massey's work arrangement resulted in Massey regularly working less than 40 hours a week. In fact R-31 showed Massey worked 238.5 hours (including 6 hours of training) out of the 240 hours he was scheduled to work from January 22 through March 2, compared with Rocha's 177.15 hours (10 hours training). General Counsel also notes that Respondent permitted Ron Adamson to take long lunches suggesting that this also demonstrates Respondent permitted employees to work fewer hours. It does not. R-31 shows Adamson worked 248.3 hours (37 hours training) in that time same time period. Further, General Counsel never demonstrated Rocha requested that Respondent grant Rocha a concession. Thus, Rocha's situation differed from Massey's and Adamson's not only in that Rocha worked just 29.5 hours a week, but also in that Rocha reduced his work hours without receiving prior approval from management.⁸

⁸ General Counsel notes that Massey and Adamson did not sign authorization cards thereby implying that the Respondent engaged in disparate treatment by claiming Rocha was not permitted to leave work early, come in late or take long lunch hours whenever he liked because Respondent permitted two employees who failed to sign authorization cards to work an alternative schedule or to take an occasional long lunch. This fails because Respondent permitted other employees, including union ringleader Lane, to attend training, and to leave work early if they had no work. The key is that these

General Counsel also pointed out that Respondent permitted Lane to leave work early on two occasions in February, including once for training, and that Blanco, Gonzales and Baybayan left work early three times in February (Tr. 124, 134, 292, 634; GC Brief 17-18; GC-27). However, these employees' early departures from work stand in stark contrast to Rocha who left work early 12 times since January 22 and that does not include the occasions when he took long lunches or arrived late for work. Therefore, Rocha's attendance differed dramatically from his colleagues.

Finally, unlike Respondent's other employees, Rocha never informed management he wanted to leave early and consequently never received permission to do so. General Counsel argues that Rocha did inform Respondent that he was leaving because of lack of work (Tr. 318). However, General Counsel presented no corroborative evidence to support Rocha's testimony. The best support General Counsel could find was former employee Rother's testimony that he had heard Rocha say that he was going to go home early because he had no work (Tr.601). Rother did not testify that he heard Rocha inform Frontella or Garcia that he wanted to leave early, nor did he hear Garcia or Frontella grant Rocha permission to leave early. Moreover, Garcia indicated that Rocha's problem was that he did not request permission to leave early (Tr. 1082). Thus, it is patently absurd to suggest that because Respondent permitted an occasional early departure from work, it necessarily must have permitted more extensive early departures such as Rocha's.

employees only did it occasionally and they first notified a manager and were permitted to leave. Lane for instance only left work early on three occasions in February and one was for training.

2. Respondent Was Busy During Months of January and February

Contrary to the General Counsel's assertion, the preponderance of the evidence supports Nickerson's characterization that Respondent was busy in the months of January and February and that it needed Rocha to work his full shifts. General Counsel relies on Rocha's testimony that he was not busy in January and February (Tr. 1018) and GC-25, which shows the total labor hours Respondent's technicians worked by month. GC-25 shows Respondent's technicians worked 1,751.49 hours in January and 1926.72 hours in February. However, General Counsel failed to show that those raw labor hours would not provide Respondent's technicians 40 hours of work each week. Thus, General Counsel failed to provide support for its assertion that Respondent was not busy in January and February.

Respondent's witnesses on the other hand testified that Respondent was busy during this two month period. Frontella informed Rocha that the Respondent was busy and that he needed Rocha to show up to work on time (Tr. 855:17-20). Similarly Nickerson testified Respondent was busy (Tr. 904:3-4) Even General Counsel's witness Avelar admitted Respondent had sufficient work to keep service technicians working forty hours a week during January and February (Tr. 433:13-18; 437:2-10; 423:15-21; 425:5-11). Avelar himself worked eight hour days (Tr. 437:2-10). Further, it appears Respondent's other service technicians must have had sufficient work as General Counsel only presented evidence that Lane, Bayabyan, Gonzales and Blanco left work early during the month of February, and these employees left early just a few times each, including training. Thus, the evidence supports a finding that Respondent's technicians were busy in January and February 2007.

3. Rocha's Early Departures Did Cost Respondent Money

General Counsel further asserted Rocha did not cost Respondent money because he had no work to complete. The evidence suggests otherwise. Nickerson testified that he had 50-70 cars come into the shop every day and that Respondent would not have time to look at 10-20 of the cars (Tr. 911:3-11). Similarly, Frontella testified that he almost always had work available for technicians (Tr. 865:11-24). Thus, the evidence suggests work was available for Rocha had he requested it from Frontella. Rocha chose not to do so. Given the work was available, Rocha's failure to work the full day limited the revenues Respondent could earn in each day.⁹

Further, even assuming Rocha personally had no work, Rocha's early departures cost Respondent money. First, as mentioned above, Respondent had cars that needed to be serviced and Rocha's early departures prevented Rocha from working on these cars. More specifically, Rocha's early departures were at least partially responsible for Respondent incurring \$475 in costs associated with a rental car Respondent provided a customer because Rocha spent several partial days trying to diagnose a problem on RO50799 (Tr. 915:25-917:23). Although another service technician was ultimately needed to diagnose the problem, Rocha's attendance issues that week resulted in Rocha working on the car over a few days and therefore delayed Respondent's transferring the

⁹ Rocha worked only 177.15 hrs, including training and billed 153 hrs for the six week period preceding his discharge. Blanco worked 229.7 hrs and billed 284 hrs; Massey worked 238.5 hrs and billed 279 hrs; Wells worked 246.5 hrs and billed 220 hrs; Adamson worked 248.3 hrs and billed 260 hrs; Gonzales worked 251.5 hrs and billed 250 hrs; Lane worked 252.7 hrs and billed 201hrs; Seefeld worked 253.5 hrs and billed 232 hrs, Gonzales worked 254.8 hrs and billed 222 hrs; and Avelar worked 288.4 hrs and billed 292 hrs. Only Bumagat, an apprentice, billed fewer hours (145) than Rocha, an experienced technician. And Bumagat worked significantly longer hours (241.2), demonstrating he was putting in effort to improve, unlike Rocha who made no effort to improve even after being informed his attendance was deficient. (R-31)

vehicle to another service technician who could have more timely completed the repair and thereby reduced Respondent's cost in providing the rental.

Similarly, Rocha's failure to remain at the dealership until the end of his shift on February 6 likely prevented Rocha from completing the repairs on RO51558. General Counsel is correct in stating that the vehicle needed an out of stock battery to complete repairs on the vehicle, but Respondent ordered the battery from another local dealership by 3:30 P.M. and shortly thereafter picked up the battery (Tr. 1344:17-1345:20; 1350-1351; R-36; R-37). Had Rocha remained at the dealership until the end of his scheduled shift at 4:30 P.M. rather than leaving at 3:06 P.M., Rocha would have had the battery and been able to complete the repair (Tr. 910:17-24). This would have permitted the customer to have their car a day earlier and would have freed Rocha up for other repairs and increased earnings.

Ultimately, Rocha's poor attendance cost Respondent money because his reduced work hours required him to spread repairs over a greater number of days than was necessary, thereby preventing Rocha from taking on more work.

F. Garcia's "I will blow Rocha out"

General Counsel noted that the judge found that Garcia stated to Lane on March 2 shortly after the Union meeting that if Rocha and Avelar were union ringleaders he would 'blow them out.' General Counsel contends that this is an admission that Rocha was discharged because of his union activity, and that Garcia would never have said this if Respondent had already decided to terminate Rocha.

Contrary to General Counsel's contentions, there is a more plausible rationale for Garcia's statement. Garcia likely made the statement to scare Lane from engaging in

further union activity. Lane was unaware that Respondent had already decided to discharge Rocha, so Lane would not have known Garcia's statement was mere posturing. Further, the judge found that Garcia threatened Avelar as well as Rocha with discharge if he found they were union ringleaders. Rocha denied active involvement in the Union. Yet Avelar, who was involved in the organizing Respondent, was not discharged (Tr. 368:7-369:12). Similarly, Lane was involved in the Union and did not hide it, yet he was not discharged (Tr. 142:5-18, 25-143:2; 143:15-24). The distinction: Lane and Avelar performed well. (R-31). Avelar worked 288 hours and Lane 252 hours compared to Rocha's 177.15 hours. Further, Avelar produced 292 hours worth of work and Lane 201 hours compared with Rocha's 153 hours in that same time period. If union activity was really the reason for Rocha's discharge, Lane and Avelar would have been terminated as well. Rocha was terminated, unlike Lane and Avelar, because Rocha performed poorly and missed too much work.

G. Conclusion

Thus, there is no merit to General Counsel's exceptions to the judge's finding that Garcia counseled Rocha on February 12, 19 and 26 for his attendance problems, that Rocha was late arriving for work on February 27, that Garcia concluded Rocha was not improving and should be discharged, that Zaheri approved Rocha's discharge later that day, and that Rocha discharged Rocha the following week for attendance and performance issues.

IV. FAILURE TO HIRE MARK HIGGINS¹⁰

The judge, relying on *FES (A Division of Thermo Power)* 331 NLRB 9, 12 (2000), properly found that the Respondent did not violate Section 8(a)(3) and (1) by unlawfully refusing to hire applicant Mark Higgins (Higgins) because of his union affiliation. Although the judge found General Counsel made out a prima facie case of discrimination, the judge concluded that Respondent would not have hired Higgins in any event because of recommendations Zaheri received from Higgins' former colleagues and managers in November 2006 when Higgins initially applied for work (ALJD 10:37-46). General Counsel has excepted to the judge's conclusions.

General Counsel asserts that the judge erred in finding Respondent would not have hired Higgins even in the absence of his union affiliation. General Counsel noted that the judge specifically credited the testimony of Higgins that Garcia conceded that the reason Higgins was not hired was "pretty much" because his cousin was Richard Breckenridge (ALJD 8:16-18; GC Br 30). General Counsel contends that this is clearly an admission that Higgins was not hired because of this union affiliation. General Counsel also noted that virtually everyone conceded that Higgins was a good mechanic and Garcia conceded he wanted to hire Higgins. General Counsel contends that if Respondent was as busy as it claimed to be, Respondent surely would have hired Higgins absent his perceived union affiliation. Finally, General Counsel argues there is no need to apply the dual motivation analysis of *Wright Line* and *FES* because Respondent has essentially admitted its discriminatory motivation.

¹⁰ This section relates to General Counsel's Exceptions 59-61.

Contrary to General Counsel's contention, the evidence fully supports the judge's determination that Higgins would not have been hired regardless of his union affiliation. First Zaheri credibly testified that in investigating Higgins prior to Respondent's opening, Zaheri learned that Higgins had a bad temper, was not a team player and was not well-liked (Tr. 1143:6-16; 1170:17-1172:1; 1172:19-1173:3; 1173:8-1174:14; 1224:1-15). Former colleagues of Higgins including Garcia attested to this (Tr. 955:6-956:5; 1010:23-1011:2). Ms. Zapien who was the receptionist at Respondent's predecessor testified that Higgins was always upset and spoke in loud abusive language. Higgins even conceded that Higgins had a bad temper (Tr. 722-17-20). Doyle Buckmaster, Respondent's predecessor's former service manager testified that Higgins could at times be volatile and that at times he screamed and yelled at the dealership (Tr. 733:11-23). Frontella and Respondent's parts manager Juan Robles stated that when Zaheri initially discussed Higgins employment with them in November 2006, they all indicated Higgins had a bad temper and recommended he not be hired (Tr. 822:23-823:19; 843:18-844:17; 843:2-15; 842:12-15). It was for this reason Zaheri refused to employ Higgins in November 2006, months before Respondent's employees began organizing (Tr. 955:6-956:5; 1143:6-16; 1170:17-1172:1; 1172:19-1173:3; 1173:8-1174:14; 1224:1-15). And given that no one denies Respondent had knowingly hired union members prior to the March 2 union meeting, it is reasonable to assume that Higgins union affiliation was not a substantial or motivating factor in Respondent's refusal to hire Higgins in November 2006.

Moreover, nothing Garcia said or did suggest that Zaheri changed his mind regarding Higgins suitability for employment between December and March 2007. Zaheri testified that Garcia asked about employing Higgins on at least three occasions

following Higgins initial application in December 2006 and each time Zaheri said no (Tr. 1173:8-1174:11). Nor is there any evidence demonstrating that Zaheri was aware of Higgins relationship with Breckenridge or that Breckenridge was a union business agent (Tr. 1174:18-21; 1176:2-7). Thus, it is unclear how Higgins surmised that his relationship with the union organizer would be the reason for Respondent's refusal to hire Higgins.

The only evidence supporting General Counsel's theory that Higgins was not hired because of his relationship to union business agent Breckenridge was the unsupported testimony of Higgins that Garcia agreed that Higgins relationship with the union business agent was "pretty much" the reason he was not hired.¹¹ There is no other evidence supporting a finding that Higgins was denied employment because of his union activity. In any event, the words attributed to Garcia do not constitute an admission that Respondent would have hired Higgins absent his union affiliation. Use of the word "pretty much," clearly suggests that there were other reasons why Higgins was not hired. The other reason is Higgins well-documented temper and inability to get along with co-workers, a problem that prevented Higgins from being hired by Respondent fewer than six months earlier. As the judge found, Zaheri did not believe Higgins would change (Tr. 1173:23-25; ALJD 6: 6-7). Thus, the judge's finding that Higgins would not have been hired in the absence of union activity is fully supported by the record. *See FES*, 331 NLRB at 12.

¹¹ General Counsel argues that a statement by Well's in his pre-trial affidavit regarding the rationale for Respondent's refusal to hire Higgins should be considered corroborative evidence. However, Wells recanted his pre-hearing affidavit at the hearing, conceding he had made the statements but that he had not told the truth. The judge therefore discredited Well's testimony and his pre-trial affidavit. The Board should defer to the judge's credibility resolution.

V. IMPRESSION OF SURVEILLANCE¹²

General Counsel argues that the judge erred in failing to find that the Respondent violated Section 8(a)(1) by creating the impression of surveillance in its employees when Garcia informed Blanco, Bumagat and Baybayan that he knew of the union lunch, telling employees that Richard Breckenridge was a union organizer and suggesting that he knew union authorization cards were handed out and that employees signed them, citing *United Charter Service*, 306 NLRB 150 (1992) (Tr. 630-31, 690-691, 695).

Contrary to the General Counsel's assertion, the judge did not err in failing to find that Garcia created the impression of surveillance. The Board's test for determining whether an employer has created an impression of surveillance is whether an employee could reasonably assume from the statement that its activities are under surveillance. An employee could not reasonably assume his activities were under surveillance in the instant case. First, the evidence suggests that Garcia learned of the union meetings from a statement from unit employee Ron Adamson. Union ring leader Mike Lane testified that shortly after the March 2 meeting a dispute erupted between Adamson and a couple of technicians regarding the Union. Lane went over to learn what the dispute concerned and Adamson asked Lane if he had gone to lunch and talked about the Union. Lane conceded that he had and shortly thereafter Adamson came back stating that Garcia needed to see Lane in his office (ALJD:23-34; Tr. 139:1-14, 21-25). Thus, the employees would not believe that Garcia's questioning of employees March 2 was because their activities were under observation. *RCE Fabricators, Inc.*, 352 NLRB No. 88 (2008)(Board found that employer did not create an impression of surveillance by

¹² This section relates to General Counsel's Exception 5.

asking unit employees about a union meeting where employer learned of the meeting prior to work where a number of unit employees discussed the meeting).

Second, Garcia failed to provide employees with extensive details about the union meetings that the Board finds creates an impression of surveillance. In *United Charter Service*, above, cited by General Counsel, the Board found that the employer created the impression of surveillance because the employer provided extensive details of the union meetings. Specifically, the employer informed an employee that the employer was tired of hearing the drivers complain about the company and that based upon what his many friends told him, he knew the drivers wanted more money, improved benefit and were trying to organize some sort of organization. The employer followed this up by informing another employee he had lots of friends, that the employer knew about the meetings, that the employees had trying to get a petition going, and the employer informed the employee that he had a copy of the petition and thereafter named items contained in the petition. The instant case is readily distinguishable as the judge found only that Respondent asked Baybayan, Blanco, Lane and Seefeld who was at the meeting and whether the employees had signed authorization cards (ALJD 3:36-49; 4:21-24; Tr. 630-31, 690-691, 695). Such a statement shows only that Respondent heard of the union meetings. Even assuming Garcia informed the employees that he knew that Breckenridge was at the meeting, that authorization cards had been handed out and employees signed the cards, Respondent would not have conveyed sufficiently detailed information for employees to reasonably assume their activities were under surveillance. Thus, the judge correctly found that Garcia did not create an impression of surveillance when it interrogated unit employees regarding the union meeting.

VI. SOLICITATION OF GRIEVANCES¹³

The judge appropriately found that the Respondent did not violate Section 8(a)(1) by soliciting and promising to remedy employee grievances during an organizational campaign because Respondent had a past practice of soliciting grievances and because Zaheri never promised to remedy any grievances (ALJD 7:47-50). General Counsel has excepted to this conclusion.

General Counsel contends that Respondent's very act in soliciting grievances raises the inference that Respondent is promising to remedy the grievances and that it was unnecessary to find that Respondent promised to remedy a particular grievance citing *Center Construction Co.*, 345 NLRB 729 (2005).

While it is true the Board may draw an inference that Zaheri promised to remedy grievances based on his solicitation of employees grievances, that inference is rebuttable. *Uarco*, 216 NLRB 1, 2 at fn.9 (1974). In *Center Construction Company*, above, the Board held that the employer violated 8(a)(1) by soliciting grievances because it directed employees to bring grievances to the employer in the context of an organizational drive and indicated that the employer would resolve his grievances. The Board noted the employer had no past practice of soliciting grievances. Here, as the judge found, Zaheri had an open door policy (ALJD 7:50-53). Garcia testified that technicians would regularly talk to him (Garcia) about things in the shop (Tr. 987:24-988:1). And in *Uarco*, above, the Board found that the employer did not unlawfully solicit grievances in violation of 8(a)(1) because it never promised to remedy the grievances. In the instant case, Zaheri said nothing that could be construed as a promise to remedy. He merely said

¹³ This section relates to General Counsel's Exceptions 9, 12-14.

he would listen and said nothing about whether any action would be taken. Thus, this case is distinguishable from *Center Construction Company* because Respondent had a past practice of permitting employees to speak with management and is more analogous to *Uarco* where the employer made no promise to remedy grievances. As such, the judge correctly found that Respondent did not violate Section 8(a)(1) by soliciting grievances and impliedly promising to remedy them.

VII. ADDITIONAL 8(A)(1) VIOLATIONS¹⁴

General Counsel also argues that the judge erred in failing to find that Respondent violated Section 8(a)(1) in a number of other instances (discussed below) by interrogating and threatening Respondent's employees (*See* GC Br. p.42). General Counsel contends that in these instances the judge did not discredit its witnesses' testimony but simply neglected to discuss and find the violations. Respondent contends that General Counsel is in error because the judge stated that he considered the entire testimonial record and exhibits and that any testimony in contradiction to his findings has been discredited (ALJD 2:45-50).

General Counsel contends that Respondent violated Section 8(a)(1) by interrogating and threatening unit employees in the following situations:

- Nickerson questioned Rocha about his union membership (Tr. 315).

Respondent disagrees with General Counsel's assertion and argues that the Board should affirm the judge's implicit finding that Nickerson's questioning of Rocha did not under all the circumstances reasonably tend

¹⁴ This section relates to General Counsel's Exceptions 3, 4, 6-8, 10, 11, 16, 18, and 28.

to interfere with, restrain, or coerce Rocha in the exercise of his Section 7 rights (ALJD 5:20-24;6:25-34). Nickerson made no threats or promises at the time of the questioning (Tr. 315:7-15). It is clear Nickerson knew Rocha had been a union member by his questioning Rocha whether he was still in the union (ALJD 5:22; Tr. 315:7-15). Nickerson did not request that Rocha leave the Union, but rather Rocha volunteered that he had withdrawn from the Union (Tr. 315-12-14). At most Nickerson can be accused of telling Rocha the shop was non-union (Tr.315:16-17). And Nickerson, who is much more credit worthy than Rocha, denied inquiring about any employee's union membership (Tr.922:11-12). Finally, Rocha and Nickerson had worked together before and apparently were on friendly terms (Tr. 311:5-19). Under these circumstances, Nickerson's questioning of Rocha was non-coercive. See *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985); *Rossmore House*, 269 NLRB 1176, 1177 (1984); *Shen Automotive*, 321 NLRB 586, 592 (1996).

- Zaheri threatened employees with plant closure at a group meeting by stating that it would cost him \$100,000 to defend against the charges brought by the Union and that this could cause Respondent to lose the business (Tr. 272-273, 1283-186). Respondent disagrees. Lane's testimony is inconsistent. Lane on cross examination admits that Zaheri did not actually state, but only inferred that his legal defense could cost him the dealership (Tr. 275). Further, Lane denied that Zaheri specifically stated that \$100,000 would cost him his dealership (Tr. 275). Therefore,

the judge reasonably found that Respondent did not threaten that union activity could cause him to lose his business in violation of Section 8(a)(1).

- Zaheri coercively interrogated employees at a group meeting on May 11 about a recent union meeting (Tr. 1289, 1293-1295). Specifically, Lane stated that Zaheri asked the group about who bought and paid for the pizza and who had the money for it. First, Zaheri denied ever questioning the employees about who bought and paid for the pizza (Tr. 1197:17-1198:1; 1201:1-21). Second, even if the Board finds Zaheri did ask the question, it is unclear how questioning of this nature would be coercive and thereby violate Section 8(a)(1). The question does not ask which unit employees attended the meeting, what the union was proposing, and there is no threat attached or implied by the question contain. *See Rossmore House*, 269 NLRB 1176 (1984). Further, the statement in no way suggests Zaheri had any detailed knowledge of the event such that a reasonable employee would believe his union activities were under surveillance. *United Charter Service*, above.
- Garcia threatened Bumagat, Baybayan and Wells with loss of wages by telling them that joining a union would cause a pay cut (Tr. 630; GC-20). The judge did not err in failing to find this violation. The judge explicitly discredited Wells' and Bumagat's affidavits and implicitly discredited Baybayan's testimony that joining a union would cause a pay cut. The judge also implicitly credited Garcia's testimony that he never threatened

employees with a reduction in wages because of their union activities (Tr. 996). Thus, Baybayan's testimony is uncorroborated and the Board should uphold the judge's implicit credibility resolution.

- Garcia threatened Avelar with unspecified reprisal in May by telling Avelar that Wells and Seefeld were quitting the union and that they were no longer going to attend union meetings, suggesting that management was monitoring employees' activities by counting support for and against the Union, implying that the Union would not win, and remaining Union supporters should also abandon their support. Garcia denied engaging in surveillance and threatening employees either directly or indirectly concerning their attendance in union activities (Tr. 996). Further, even if the Board concludes Garcia made the statements attributable to him, he did not imply that participation in or membership in the Union was futile. All those statements imply is that Garcia informed Avelar that two former union supporters no longer engaged in union activities or supported the union. The statements do not directly state, nor do they imply, Garcia is tallying the amount of support the union has. No reference is made to other employees that support or oppose the union, so it is unclear how Garcia is communicating the union will lose. Further, the statement does not support a finding that Garcia engaged in surveillance or created an impression of surveillance because Garcia's statements indicate that Wells and Seefeld volunteered they were leaving the union. It only appears that Seefeld and Wells abandoned the Union for personal reasons and that they

relayed their decision to Garcia. Thus, no inference can be drawn that Garcia was engaged in surveillance. See *United Charter Service*, above. Finally, *Genesee Family Restaurant & Coney Island*, 322 NLRB 219, 224 (1996), upon which General Counsel relies, is distinguishable from the instant case. In *Genesee Family Restaurant* the judge noted that the basis for his finding the violation was that the respondent communicated both the present ability and the future ability to gain information about how employees would vote in the union election. Specifically the judge noted that respondent communicated he had enough votes to “beat them” and that he can find out how they voted when an employee refused to communicate such information. In the instant case, Garcia is alleged only to have stated that two former union supporters abandoned the union. There was no indication Garcia solicited the information, that he was counting votes or that would acquire additional information about unit members union activities in the future.

- Garcia threatened employees by repeatedly telling them that Respondent would not build a new facility if the shop went union (GC-20). The judge did not err in failing to find this violation as the judge explicitly discredited Bumagat’s affidavit and testimony. Given this allegation is based solely on Bumagat’s affidavit; the Board should dismiss this allegation.
- Zaheri threatened employees at a group meeting with implied termination when he told them “I own you” and that they were replaceable (Tr. 152-

53, 383, 443, 597, 632-33, 701). Zaheri denied making these statements (Tr. 1226:8-1227:23). Zaheri testified that he informed the technicians that if he could get them to make \$8,300-\$12,000 a month they would never leave him, but that he never said “I own you.” Zaheri also indicated that he informed his managers that they were replaceable if they did not get their jobs done, not the technicians (Tr. 1226:8-1227:23). Garcia confirmed Zaheri’s testimony that he never stated that he “owned” the technicians and that his only statement with respect to employees being replaceable was directed at managers, not the technicians (Tr. 1078). Even if the Board concludes these statements were made, no violation should be found because these statements have not been placed in their proper context. Unit employee Avelar testified that Zaheri stated “I own you and you are not going anywhere” after discussing the money he invested in the service technicians training (Tr. 383, 701). Thus, the statement is not a threat of job loss in violation of 8(a)(1). Rather, the statement was intended to remind employees to be loyal and not to consider going to work for another employer after Zaheri has invested money in training them.(Tr. 383, 701). Avelar later stated that he also understood the words to mean that Zaheri would not fire a service technician if he flunked a test. Further, the statement that the employees were replaceable was not directed at the employees because of their union activity. According to Avelar, Zaheri informed all his employees that if they did not do their jobs he could replace them (Tr. 383-384). He first

directed his comments at Garcia, then Frontella, and then the service technicians. The comments concerned the employees' productivity and not their union activity. Thus, there is no threat of job loss in connection with Union activity, and the Board should decline to find the violation.

- Frontella coercively interrogated Wells prior to the commencement of his employment by asking him if he had a union withdrawal card (ALJD 6:22-28; GC-20). The judge clearly discredited Wells' statement that he was coercively interrogated by Frontella. The judge explicitly discredited the testimony and affidavit of Wells because he recanted on the stand. Thus, the judge merely made a clerical error in finding Wells was interrogated. And to the extent this allegation is based on Bumagat's affidavit, it should also be dismissed because the judge discredited Bumagat's affidavit. Thus, the Board should defer to the judge's credibility resolution and find no violation here.
- Lane's testimony that Nickerson called Lane on his cell phone on March 2 and asked Lane who was behind the organizing drive (ALJD 4:8-9). The judge correctly found that Nickerson did not violate 8(a)(1) in questioning Lane about the organizing drive because Nickerson's questioning was not coercive under the totality of the circumstances. Nickerson and Lane knew each other for approximately twenty years (Tr. 121). Additionally, Lane was a union member at times during his employment and, therefore, Nickerson probably was aware of Lane's union membership (Tr. 119). Finally, Nickerson's and Lane's conversation was over the phone and not

in Nickerson's or another supervisor's office. Under these circumstances the judge properly found no violation. *See Rossmore House*, 269 NLRB 1176 (1984).

Even if the Board determines that these alleged statements were made, the Board should decline to find the alleged violations because the judge has already found that the Respondent violated the Act on a number of occasions by threatening and interrogating employees. As such, finding these additional violations would serve no remedial purpose.

VIII. REMEDIAL BARGAINING ORDER¹⁵

General Counsel contends that the judge erred in failing to find a bargaining order was warranted in this case because the union possessed the signed authorization cards of a majority of the unit as of March 2 and because the chances of traditional remedies undoing the effects of Respondent's unfair labor practices were slight irrespective whether Respondent unlawfully discharged Rocha. General Counsel notes in particular that Respondent unlawfully granted wage increases and threatened employees with plant closure and the loss of jobs, and that the Board has found the effects of this type of violation are not easily remedied or quickly forgotten. Moreover General Counsel asserts effects of Respondent's unfair labor practices are heightened because of the bargaining unit's small size and all of Respondent's management participated in the violations. General Counsel thereafter asserts that the following cases support its position that a bargaining order is warranted:

¹⁵ This section relates to General Counsel's Exceptions 1, 2, 19, and 56.

Contrary to the General Counsel's assertion, the judge correctly found a bargaining order was not warranted. First, there is no showing that the Union ever represented a majority of the petitioned for unit. The judge's decision reflects only that the Union possessed the signed authorization cards of 9 unit employees as of March 2. The judge never discussed, nor determined the size of the unit. Therefore, the Board has no basis to impose a *Gissel* bargaining order because it is unclear that the Union ever represented a majority of the unit. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

Second, even assuming the Board finds that at one point the Union did have the support of a majority of the unit employees, it lost that support for reasons other than Respondent's alleged unfair labor practices. The vast majority of the unfair labor practices the judge found and General Counsel alleges occurred before the Union's May 16 filing of an election petition (even the unilateral wage increase occurred two days before the filing of the petition). (*See generally* ALJD 2-6). Clearly the Union felt it had sufficient support to win the election as of that date or it would not have filed the petition. Yet weeks later the Union withdrew its election petition. Absent a loss of unit support, the Union would not have withdrawn recognition. Given that the loss of support occurred during a period where Respondent is not alleged to have committed the vast majority and the most serious of its alleged violations, it stands to reason that the cause of the Union's loss of disaffection was something other than Respondent's unfair labor practices. As such no *Gissel* bargaining order is warranted because Respondent's unfair labor practices did not taint the election process.

Third, assuming once the Board finds a majority of employees signed authorization cards and that Respondent's unfair labor practices did taint the election

process, Respondent contends that a remedial bargaining order is not warranted because the Board's traditional remedies are sufficient to erase the effects of Respondent's unfair labor practices. *Id.* As the judge properly noted, a *Gissel* bargaining order is an extraordinary remedy, and the Board's preferred method is to hold an election after the unfair labor practices have been cleansed by the Board's traditional remedies. *Hialeah Hospital* 343 NLRB 391, 395-396 (2004). In determining whether traditional remedies are adequate, the Board considers the number of employees directly affected by the violations, the size of the unit, extent of the dissemination among employees, and the identity and the position of the individuals creating the unfair labor practices. *Intermet Stevensville*, 350 NLRB No. 94 (2007).

Here the judge found that Respondent committed a number of 8(a)(1) violations including requiring employees to withdraw their union membership, threatening plant closure and job loss, interrogating employees, threatening not to hire an applicant because of his union affiliation and by unlawfully granting eight unit employees a wage increase (ALJD 11:20-23). However, Respondent's two most egregious violations: the threat of job loss and plant closure was conveyed to a single employee (ALJD 7:27-30) and the unilateral grant of wage increases was not conditioned on the unit or the employee's rejection of the Union. Moreover, the judge did not find, and the evidence does not support a finding by the Board, that Respondent discriminatorily discharged or refused to hire any employee or job applicant (ALJD 11:23-24). Thus, the judge appropriately found no bargaining order was warranted.

The judge appropriately cited a number of cases where the Board has found on similar facts that a bargaining order is not warranted. In *Burlington Times, Inc.*, 328

NLRB 750, 752 (1999), a case analogous to the instant case, the Board declined to issue a bargaining order where an employer threatened to close the plant, made non-economic grants of benefits, promised to improve wages and other benefits and solicited grievances in a unit of 11 employees. In *Hiialeah Hospital*, 343 NLRB 391 (2004), the Board declined to impose a bargaining order against an employer that unlawfully surveilled a unit employee, subsequently discharged that employee in retaliation for his union activities, and committed a number of 8(a)(1) violations that directly affected the entire unit, including creating the impression of surveillance, threats of discharge, futility and unspecified reprisals, promises of benefits and the removal of benefits in a unit of 12 employees. In *Dessert Aggregates*, 340 NLRB 289, 294-295 (2002), the Board declined to impose a bargaining order in a unit of 11 employees where the employer discriminatorily laid off two union supporters and solicited and promised to remedy grievances.

The cases relied on by General Counsel in support of his contention that a bargaining order is warranted are distinguishable from the instant case because of the nature and/or quantity of the violations found. For instance, *Evergreen America Corp.*, 348 NLRB No. 12 (2007), involved a far greater number of serious unfair labor practices that were directed at a larger percentage of the unit. The Board found that over the course of a three-month period the employer in *Evergreen* engaged in three separate sets of hallmark violations, unlike the three instances of hallmark violations in the instant case. These hallmark violations included threatening employees with plant closure and job loss as well as unlawfully promoting employees, providing across the unit wage increases and making eight separate grants of other benefits to unit employees before and

after the election, many of which were granted in response to the employer's unlawful solicitation of grievances. Additionally, the employer committed 13 separate instances of unlawful interrogation, 15 separate instances of implied promises to remedy solicited grievances, 8 instances of actual promises to remedy solicited grievances, 2 instances employees instructed not to read union literature, and 1 instance of creating the impression of surveillance. Finally, *Evergreen* is distinguishable from the instant case because the employer in *Evergreen* continued to commit unfair labor practices even after the union lost the election. The Board found this clearly demonstrated the employer's continued propensity to violate the Act, and suggests that effects of the employer's unlawful conduct may linger. In the instant case, there has been no union election and nothing to suggest that Respondent would commit unfair labor practices following an election.

Big Horn Beverage Company, 236 NLRB 736, 754 (1978), is also distinguishable on the facts. First, the unit in that case included just four employees. Second, the employer unlawfully discharged one of the unit employees --- or one quarter of the unit. Third, that discharge was sufficient to eliminate the union's majority support. Finally, the employer interrogated every unit member. In the instant case, the Respondent committed no discriminatory discharges, let alone discharged a quarter of the unit. Nor did Respondent unlawfully interrogate the entire unit. As such, Respondent's actions were not as pervasive and would not have as lasting an impact on the bargaining unit.

Gerig's Dump Trucking, Inc., 320 NLRB 1017 (1996) is also distinguishable from the instant case. Although the employer committed fewer unfair labor practices than Respondent committed in the instant case, the nature of the violations committed in *Gerig*

are more serious and more likely to prevent a fair election from being conducted. In *Gerig's*, the employer explicitly conditioned the grant of increased benefits on the unit renouncing the union. Further exacerbating the lingering effect of that promise was the employer's grant of increased benefits upon the unit's renunciation of the union. In the instant case, Respondent's wage increase was not dependent on the employee's renunciation of the union, but depended instead on the employee's performance evaluation. Finally, in *Gerig* the employer's threat of plant closure and job loss was more menacing than that in the instant case as the employer gave its employees 24 hours to return to work from their strike or the employer would close the plant and the employees would lose their jobs. In the instant case, the threat was vague and the employees were under no deadline to make a decision.

Red Barn, 224 NLRB 1586 (1976) is also distinguishable from the instant case. In *Red Barn* the employer discriminatorily delayed rehiring a union ringleader until she agreed to renounce the union. Thereafter, the one-time union ringleader tape recorded union meetings for the employer, observed the election on behalf of the employer and shortly after the election was promoted to a managerial position. In addition, the employer threatened to withdraw benefits many unit employees depended upon and unlawfully granted new health and life insurance benefits the employer learned employees wanted as a result of its unlawful interrogations. In the instant case, Respondent never discriminatorily delayed rehiring employees, threatened to withdraw benefits from employees or granted a benefit that Respondent uncovered through its unlawful interrogation.

Color-Tech Corporation, 286 NLRB 476, 476-477 (1987), is also distinguishable from the instant case. First, the unit in *Color-Tech* was comprised of only four employees. Thus, the effect of the employer's unfair labor practices would certainly be felt by all unit employees unlike the instant case where the unit is considerably larger. Second, the employer in *Color-Tech* unlawfully solicited and promised to remedy grievances and promoted and supported an employee letter repudiating the union. Finally, the most significant difference between the two cases is that in *Color-Tech*, the employer explicitly conditioned the grant of wage increases on the employees' abandonment of the union. In the instant case, Respondent's wage increases were not conditioned on rejection of the union, but were instead a performance review that was accelerated because one unit member had a job offer and Respondent wished to retain him (Tr. 1025:3-1027:4).

Given that the Respondent has not discriminatorily discharged or refused to hire a union supporter and Respondent has only been found guilty of a few hallmark violations (threatening a single employee with plant close and loss of jobs (ALJD 7:27-30) and granting benefits to service technicians which were not conditioned on the rejection of the union), the nature and quantity of the violations are not sufficient to justify the imposition of a bargaining order.

IX. DERIVATIVE 8(A)(5) VIOLATIONS

General Counsel contends that the judge erred in not ordering the Respondent to bargain with the union because the union held signed authorization cards from a majority of the bargaining units employees and Respondent's subsequent unfair labor practice were such that it was unlikely that any traditional methods would remedy the unfair labor

practices and permit a fair election. General Counsel then argues that because a bargaining order was warranted, the judge erred in failing to find that the Respondent violated Section 8(a)(5) of the Act by not furnishing the union with requested information and by not bargaining with the union over the effects of the Respondent's subsequent decision to unilaterally eliminate the lube technician.

The judge correctly found that the Respondent did not violate Section 8(a)(5) in any respect because Respondent had not committed unfair labor practices sufficiently pervasive, egregious, or lasting to justify the extreme remedy of providing a bargaining order. Thus, Respondent had no duty to bargain with the union or furnish information.

X. CONCLUSION

It is respectfully submitted that the judge's credibility rulings were correctly based on witness demeanor and should not be disturbed, and that the judge's finding of facts and conclusions of law were fully supported by the record evidence. For this reason, the Decision and Recommended Order should be adopted by the Board.

Date: September 23, 2008

Respectfully Submitted,

GORDON & REES LLP


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CERTIFICATE OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: Gordon & Rees LLP 275 Battery Street, Suite 2000, San Francisco, CA 94111. On September 23, 2008, I served the within documents:

➤ **RESPONDENT STEVENS CREEK CHRYSLER JEEP DODGE INC.'S ANSWERING BRIEF**

- by transmitting via facsimile, with their permission, the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in United States mail in the State of California at San Francisco, addressed as set forth below.

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The undersigned hereby certifies that the above document was duly served upon the Office of the Executive Secretary of the NLRB in Washington D.C. pursuant to Part 102.46 by transmitting **via electronic filing** the document listed above on this date before 4:00 p.m., e.s.t.; AND

X pursuant to Part 102.46, the **ORIGINAL** and **8 copies** of the above document was enclosed in a sealed envelope, at a station designated for collection and processing of envelopes and packages for **overnight delivery by FedEx** as part of the ordinary business practices of Gordon & Rees LLP described below, addressed as follows:

NLRB

Office of the Executive Secretary

Lester A. Heltzer

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Washington, DC 20570-0001

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 23, 2008 at San Francisco, California.


Bob Lieberman