

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

<b>CONTEMPORARY CARS, INC. D/B/A</b>	)		
<b>MERCEDES-BENZ OF ORLANDO AND</b>	)		
<b>AUTONATION, INC., SINGLE AND JOINT</b>	)		
<b>EMPLOYERS</b>	)		
<b>and</b>	)	Charge Nos.	12-CA-26126
	)		12-CA-26233
	)		12-CA-26306
<b>INTERNATIONAL ASSOCIATION OF</b>	)		12-CA-26354
<b>MACHINISTS AND AEROSPACE</b>	)		12-CA-26386
<b>WORKERS, AFL-CIO</b>	)		12-CA-26552

**RESPONDENTS CONTEMPORARY CARS, INC. D/B/A  
MERCEDES-BENZ OF ORLANDO AND AUTONATION, INC.’S MOTION FOR  
RECONSIDERATION OF THE BOARD’S ORDER DENYING THEIR  
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Come now Respondents CONTEMPORARY CARS, INC. D/B/A MERCEDES-BENZ OF ORLANDO (“MBO”) and AUTONATION, INC. (“AutoNation” or collectively “Respondents”), by and through undersigned Counsel, and, pursuant to Section 102.48(d) of the Board’s Rules and Regulations, as amended, hereby move for reconsideration of the Board’s August 27, 2010 denial of their Motion for Partial Summary Judgment, filed on June 18, 2010.<sup>1</sup>

**I. The Arguments Presented in the June 18 Motion**

On June 18, following the Supreme Court’s decision in *New Process Steel, L.P. v. National Labor Relations Board*, 564 U.S. 840 (2010), Respondents moved for partial summary judgment on all allegations within the Amended Consolidated Complaint asserting that they violated Sections 8(a)(1) and (5) of the National Labor Relations Act (“NLRA”) to the extent that they presuppose a duty to bargain with the International Association of Machinists and Aerospace Workers, AFL-CIO (the “Union”). Specifically, Paragraph 51 of the Amended

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<sup>1</sup> All dates are in 2010, unless otherwise indicated.

Consolidated Complaint, which gathers the refusal to bargain allegations, refers to no fewer than a dozen sub-paragraphs alleging conduct in violation of Section 8(a)(5) of the Act.

Respondents argued in their June 18 Motion that they are entitled to summary judgment on all allegations in the Amended Consolidated Complaint presupposing a duty to bargain, because the bargaining obligation upon which these allegations are premised is borne out of an illegitimate December 15, 2008 two-member Board ruling denying MBO's Request for Review of the Regional Director's unit determination decision in the underlying certification case, Case No. 12-RC-9344. The Regional Director certified the results of the ensuing election on February 11, 2009. In a subsequent technical challenge of that certification, the same two-member Board entered summary judgment against MBO, finding that it violated Sections 8(a)(1) and (5) by refusing to recognize and bargain with the Union. *See Contemporary Cars, Inc.*, 354 NLRB No. 72 (2009).

MBO denied that it had any such obligation to bargain, and on September 3, 2009, filed a timely Petition for Review, subsequently seeking summary reversal of the Board's final order with the United States Court of Appeals for the District of Columbia in Case Nos. 09-1235 and 09-1248. Respondents filed their June 18 Motion, showing that the 8(a)(5) and 8(a)(1) allegations premised upon a duty to bargain imposed by the two-member Board should be dismissed, as those earlier decisions were effectively nullified by the Supreme Court's ruling in *New Process Steel*.

## **II. The Board's August 23 Decision and Order in Case Nos. 12-CA-26377 and 12-RC-9344**

On August 17, the Board issued an Order setting aside its decision reported at 354 NLRB No. 72, in which it granted the General Counsel's summary judgment motion with respect to the technical certification challenge. On August 18, the Board moved in the D.C. Circuit for

dismissal of MBO's Petition for Review as moot, because the challenged decision had been withdrawn. On August 23, the Board issued a new Decision and Order, reported at 355 NLRB No. 113 (2010). At footnote 4 of the August 23 Decision, the Board stated, in part:

To the extent that the date of the Certification of Representative may be significant in future proceedings, **we will deem the Certification of Representative to have been issued as of the date of this decision.**

355 NLRB No. 113, slip op. at 2, n. 4 (emphasis added). On August 25, the Board applied for enforcement of the August 23 Decision and Order in the United States Court of Appeals for the Eleventh Circuit in Case No. 10-13920-B.

### **III. The Fundamental Inconsistency Between the Board's August 27 Order and Its Prior Decision and Order of August 23**

On August 27, the Board denied Respondents' June 18 Motion for Partial Summary Judgment. In that Order, the Board stated that in its August 23 Order reported at 355 NLRB No. 113, it:

affirmed the decision to deny MBO's Request for Review in the prior proceeding. The Board further found that the election was properly held, the tally of ballots is a reliable expression of the employees' free choice, and the Regional Director's certification of representative based thereon was valid. Finally, the Board granted the General Counsel's Motion for Summary Judgment and found that MBO had unlawfully refused to bargain with the Union.

August 27 Order, slip op. at 2. Based on this description of its August 23 Order, the Board denied MBO's Motion for Partial Summary Judgment.

The August 27 denial of summary judgment should be reconsidered and reversed, because the Board's reading of its August 23 Order neglects a critical detail: that the Union was not actually certified as the exclusive bargaining representative of the service technicians at MBO until the date of that order, August 23, 2010. It therefore stands to reason that, by

operation of law, Respondents could not possibly have been operating under a duty to bargain prior to that date.

Consequently, Respondents are entitled to judgment as a matter of law as to those allegations asserting violations of Sections 8(a)(5) and 8(a)(1) that allegedly took place long before August 23, 2010. Simply put, Respondents cannot have violated the Act by refusing to bargain with the Union over such issues as layoffs (which occurred in April 2009) and by refusing to furnish information for bargaining (also in April 2009), because the Union was not certified as the technicians' exclusive bargaining representative until 16 months later.

#### **IV. Conclusion**

Respondents should not be called upon to defend against allegations that MBO unlawfully refused to bargain with the Union, where the Union was not actually certified until well over a year after the alleged refusals took place. Therefore, Respondents respectfully request that the Board reconsider its August 27 denial of their Motion for Partial Summary Judgment, and find that they are entitled to judgment as a matter of law on all allegations that are premised upon the earlier, now voided, certification of February 11, 2009.

Respectfully submitted this 15th day of September, 2010.

/s/ Brian M. Herman  
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MERCEDES-BENZ OF ORLANDO  
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**CERTIFICATE OF SERVICE**

I hereby certify that on September 15, 2010, I e-filed the foregoing **RESPONDENTS CONTEMPORARY CARS, INC. D/B/A MERCEDES-BENZ OF ORLANDO AND AUTONATION, INC.'S MOTION FOR RECONSIDERATION OF THE BOARD'S ORDER DENYING THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT** using the Board's e-filing system and that it was served by electronic mail on the following:

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