UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CONTEMPORARY CARS, INC., d/b/a MERCEDES-BENZ OF ORLANDO, and AUTONATION, INC.,	)		
Respondents,	)	Case Nos.	12-CA-26126
	)		12-CA-26233
and	)		12-CA-26306
	)		12-CA-26354
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,	)		12-CA-26386
	)		12-CA-26552
Charging Party.	)		

RESPONDENTS' BRIEF IN SUPPORT OF EXCEPTIONS TO THE ALJ'S DECISION DATED MARCH 18, 2011

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A. Preliminary Statement

The decision at issue in this case is rife with erroneous findings of fact and conclusions of law. Specifically, Respondents respectfully submit that the Administrative Law Judge (ALJ) erred in finding that the selection of former technician Anthony Roberts for layoff in December 2008 was motivated by anti-Union animus. The resulting remedial order of reinstatement was also in error. To the contrary, the overwhelming weight of uncontroverted evidence establishes that the layoff was motivated by legitimate business considerations that would have driven the same result regardless of any alleged Union activity. The decision is also erroneous in that it imputes Respondents' knowledge as to Roberts' alleged Union sympathies based solely on the isolated testimony of a single witness who was otherwise found to lack credibility in all respects.

Respondents also except to the legal conclusion through which the ALJ imposed a duty to bargain over the decision to select four technicians for layoff in April 2009. Respondents were not operating under any such duty for a variety of factual and procedural reasons, ranging from the invalid unit certification on which the alleged duty was premised, to the compelling economic circumstances driving that decision. Thus, the imposition of a duty to bargain over other alleged changes addressed herein was also erroneous. Put simply, the facts show that Respondents were doing their best to manage a volatile business during the most challenging of economic times, as evidenced by the ALJ's decision to uphold the April layoff selection process as non-discriminatory, and to dismiss the majority of allegations underlying the Complaint.

B. Procedural Overview

Both of the Consolidated Complaints in this matter were issued on March 31, 2010, and Respondents' Answers thereto were timely filed on April 14, 2010. Respondents filed their First Amended Answer on June 1, 2010. The Complaints were then amended on June 8, 2010, and

Respondents' Answers to the Amended Consolidated Complaints were filed on June 8 and June 14, respectively. Respondents filed a Second Amended Answer on November 1, 2010.

The matter was heard in Orlando before the Honorable ALJ George Carson from November 8-10 and November 30-December 2, 2010. On March 18, 2011, the ALJ issued his decision ("ALJD") in this case, finding in favor of Respondents as to approximately 75% of the Complaint allegation paragraphs[1]. In so finding, the ALJD was supported by proper findings of fact and conclusions of law. But, as set forth within their Exceptions I-XLVII and as further briefed herein, Respondents except to all adverse findings[2] on the basis that they are not supported by the record evidence as a whole, and for other reasons as specified herein.

C. Factual Overview

1. Economic Circumstances Confronting MBO in 2008

Contemporary Cars, d/b/a Mercedes-Benz of Orlando ("MBO," the "Dealership" or the "Store") is an automotive dealership in Maitland, Florida, from which it services Mercedes-Benz and other vehicles (Tr. 26, 130). AutoNation, Inc. ("AutoNation" or the "Company") is a national corporation, established for the primary purpose of owning and operating automotive dealerships throughout the U.S. (Tr. 53-54). Like all dealerships within the AutoNation family, MBO operates as an independent business entity on a day-to-day basis (Tr. 64).

Record testimony established that MBO enjoyed strong performance in 2006 and 2007 (Tr. 1191). By 2008, however, cracks in the economic markets had been exposed, yielding predictions of an epic downturn resulting from myriad financial pressures. The events that shook the financial world in 2008 will likely take place in the history books, with reverberations that

[1] The ALJ recommended dismissal of Complaint paragraphs 13, 15, 16, 17, 19, 20, 21, 22, 23, 24, 26, 27, 28, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41 (b-d), 42, and 43(e).

[2] Respondents except to the ALJ's findings as to Complaint paragraphs 10, 11, 12, 14, 18, 25, 29, 30, 41(a), 43(a-d), 46, 47, and 48.

will continue to be felt for some time (Tr. 1196, 1221, Exs. 31-37). Nothing within the economic collapse that followed could be characterized as "foreseeable" (Tr. 1205, 1232). To the contrary, the sheer scope and precipitous nature of the decline was unprecedented (Tr. 403, 621, 928-29, 1108-12, 1154, 1168, 1192, 1203, 1218, 1420-22). Federal Reserve Chairman Ben Bernanke has since emphasized that this crisis was precipitated by a series of unforeseeable events that conspired to produce a bubble in the housing market.[3] His predecessor, Alan Greenspan, has gone so far as to describe the financial crisis as a one in a "hundred years flood."[4]

AutoNation officials did not even begin to recognize the potential impact on the sales side of the operation until well into 2008 (Tr. 1192-93, 1218, 1420-22). As forecasting sales and service trends is an integral part of any successful retail automotive business, AutoNation officials responded by reaching out to regional groups and dealerships to put them on notice that cost-savings and reduction efforts would need to be initiated (Tr. 1429-30; G.C. Ex. 99, 105, 113 and R. Ex. 48). By that point, MBO General Manager Clarence "Bob" Berryhill, and Controller Collie Clark began to analyze sales, service, and other financial indicators, including monthly Store Operating Reports ("SORs") that offered a daily snapshot of financial performance in the sales, leasing, service and parts departments (Tr. 1211-13).

The economic collapse initially emerged as a slowdown on the sales side of the operation during Spring/Summer 2008 (Tr. 1421). By October, however, performance lags in sales had caught up to the service side of the operation, and the recession was in full swing (Tr. 1202). In response, Clark and Berryhill detailed a series of cost-cutting measures, along with ongoing efforts to closely monitor all operational costs (Tr. 1116-17, 1193, 1195-96, 1432). These efforts

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[3] *See, An Autopsy of the U.S. Financial System, Journal of Financial Economic Policy*, Vol. 2, No. 3 (2010) (referring to Bernanke speeches of March 10th and 14th, 2009).

[4] Greenspan, A., *The Crisis, Brookings Papers on Economic Activity*, Brookings Inst. Washington Press (2010).

encompassed wage freezes, hiring freezes and downsizing measures (Tr. 1118). As of Summer 2008, MBO employed approximately 125 total associates (Tr. 73). Within less than a year, however, that figure would decline to no more than 95 (Tr. 73). Berryhill testified that the economic crisis was unlike anything he had seen, requiring difficult decisions to address the unprecedented market plunge (Tr. 1421). As employees approached him with questions about the likelihood of future layoffs, however, Berryhill could only respond with candid answers such as, "I don't know," and "it depends on the economy" (Tr. 1450).

2. The 2008 Organizing Campaign

A nexus soon emerged between declining economic conditions and the desire to pursue Union representation. Team Leader Alex Aviles, who was an early advocate of IAM representation, testified that service technicians had become "pretty cranky" by the Summer of 2008 (Tr. 1332, 1368). Organizing activity proceeded secretly for two to three months, culminating in the filing of a Petition on October 3 (Tr. 312). Parts Director Charles Miller initially conveyed that information on October 4 to Berryhill, who first saw the Petition when he returned to the office on October 6 (Tr. 137-38). Thereafter, Berryhill reached out AutoNation's legal and human resources departments for guidance (Tr. 145). On October 9, Berryhill met with Bonavia and Vice-President and Assistant General Counsel Brian Davis (Tr. 960-61). Until the week of the election, Berryhill, Davis, and Bonavia periodically met with employees to answer questions, clarifying issues and providing additional information on the voting process (972-73).

3. The December 2008 Layoffs

Between October and December 2008, the SOR for the Service Department declined by almost 40% (Tr. 1110, 1202). Doing away with "free coffee" would no longer be enough, and the Dealership was ultimately compelled to lay off more associates (Tr. 1193, 1206, 1425, 1580).

Although associates in other classifications had already been laid off by December, no technician positions had been eliminated up to that point (Tr. 1207, 1275, 1324, 1448; R. Ex. 49).

On December 8, 2008, the Dealership eliminated the jobs of three technicians, only one of which subsequently gave rise to a Complaint allegation (Tr. 165, 1437). The selection process underlying those decisions will be further developed herein. To allay fears of additional layoffs, Berryhill met with service employees to explain that he hoped this would put an end to the layoffs, but that ultimately it would depend upon the state of the economy (Tr. 1450).

4. The Representation Election

On December 16, 2008, the NLRB conducted an election and tallied the ballots[5], resulting in a narrow vote in favor of representation (Tr. 29). The Board resolved challenges, leading to the issuance of an initial certification on February 11, 2009 (Tr. 29). Months went by before MBO received its first communication from the Union on April 17, 2009 (Tr. 307). MBO declined to recognize and bargain with the Union, pending its test of the certification process.

5. The April 2009 Layoffs

The economic collapse proceeded unabated that Winter (Tr. 1204, 1232). Between the initial certification and the first information request, the Dealership laid off four additional technicians on April 2 and 3, 2009 (Tr. 171). The ALJ determined that the unbiased approach of conducting peer-to-peer comparisons that dictated the selection decisions was nondiscriminatory.

6. The Absence of Substantive Allegations Arising Thereafter

Aside from issuing a "non-disciplinary coaching" to technician Dean Catalano in Fall 2009 for engaging in rude behavior (an allegation that was specifically dismissed by the ALJ), there were no substantive allegations against the Dealership in the following two-plus years (Tr.

[5] As set forth herein, MBO had timely filed a Request for Review of the underlying unit determination, which the Board denied just prior to the election, thereby resulting in the opening and counting of the ballots.

1475-76). Since then, there have apparently been no grounds on which to allege unlawful conduct, despite the fact that numerous Union advocates remain gainfully employed.

D. Issues to be Resolved

The record occupies over 1,600 pages, yet only four substantive issues remain:

I. Whether Respondents violated Section 8(a)(1) of the Act with regard to any conduct in which they engaged over the weeks preceding the representation election, or over the months that followed;

II. Whether MBO's decision to lay off Anthony Roberts in December 2008 was based upon job-related performance criteria, thereby invalidating any claim of discrimination under Section 8(a)(3) of the Act;

III. Whether MBO had a duty to bargain with the Union over the April 2009 layoffs in light of the Board's action to adjust MBO's bargaining obligation date to run prospectively from August 23rd, 2010, and if so, whether compelling economic considerations obviated the duty to bargain; and

IV. Whether the ALJ erred in finding that MBO violated Section 8(a)(5) in various other ways prior to the August 23, 2010 bargaining obligation date.

II. ARGUMENT AND CITATION OF AUTHORITY

A. Respondents Did not Violate Section 8(a)(1) in the Weeks Preceding the Representation Election, or in the Months that Followed

1. There is No Evidence to Establish That MBO Unlawfully Enforced the No Solicitation Policy within its Employee Handbook, nor is there Evidence to Justify Imposition of Any Extraordinary Remedy (Responsive to Exceptions V, XLIV-XLVII)

Counsel for General Counsel asserted that AutoNation and MBO constitute joint and single employers for all conceivable purposes. To streamline the trial, AutoNation and MBO agreed to joint/single employer status for the limited liability purposes associated with the instant Complaint. The ALJD comports with this stipulation, confirming that Respondents' status for these purposes is limited "to this proceeding." (ALJD p. 2, lines 39-40). To the extent that Counsel for General Counsel pursues extraordinary remedial relief on this allegation extending beyond MBO, the ALJD put that notion to rest by virtue of footnote 3, which directs only that

the rule itself be rescinded. (ALJD p. 34, n. 3). Moreover, the record evidence in this case establishes that Respondents never even attempted to enforce the rule as written.

To the contrary, the core standards as to lawful enforcement of no-solicitation policies were followed to the letter. Specifically, in late November 2008, former employee James Weiss began to circulate a petition of his own making (Tr. 350, 667). Apparently, Weiss left his work area and approached other technicians while they were on working time, asking them to sign the petition. One of those employees, Brad Meyer immediately complained to Berryhill, who consulted with Davis (Tr. 351-352). Davis subsequently instructed Berryhill to explain to Weiss that he could no longer engage in this activity during working time, and that he would have to confine such efforts to personal time (Tr. 354-355, 669, 793, 1013-1014).

While the policy language may technically be overbroad, the undisputed record evidence establishes that as applied, the underlying rule is completely lawful, as supported by managerial guidelines confining application of the policy to lawful purposes. (G.C. Ex. 95, Section 8). A technical violation in the language within MBO's Handbook could not possibly justify the imposition of extraordinary remedies. Where, as here, there is compelling evidence establishing the absence of a single incident of unlawful enforcement, there can be no grounds for expanding any remedy beyond conventional relief confined to the entities directly involved.[6]

[6] To do otherwise would create a logistical compliance nightmare, given the potential for significant local variation in solicitation policies. Moreover, there has not been sufficient proof of a technical violation at other locations, which presents due process concerns. *See, e.g., Sure-Tan v. NLRB*, 467 U.S. 883, 900, 104 S.Ct. 2803, 2813 (1984) (the Board's "remedy must be sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practices") (emphasis in original) (citation omitted).

2. There is No Credible Evidence that Former Team Leader Grobler Unlawfully Interrogated MBO Employees in late July and/or August 2008, or Between October and December of 2008; Moreover, Any Such Conduct was Clearly *De Minimis* and Non-Coercive (Responsive to Exceptions VIII, IX, XLIV-XLVII)

Former Team Leader Andre Grobler, who lost his lead position in December 2008, is accused of inquiring into the so-called Union activities of two employees in two limited situations. The former allegation asserts that Grobler created the impression of surveillance at some undefined point in July/August 2008. There is no evidence that reports concerning the earliest stages of organizing activity were ever transmitted to Berryhill or anyone else in management. Nor is there any evidence of coercion or other impact on Section 7 rights.

In the latter case, Larry Puzon, a technician whose credibility is inherently suspect by virtue of his shifting testimony and failure to recall other events (such as employee meetings) with any degree of reliable detail, claims that Grobler asked him on "3 or 4" separate occasions if he had attended any Union meetings (Tr. 496-498). Puzon also claimed that Grobler asked him "right after the[December 16] election" how he voted (Tr. 517-518). But, as Grobler was on "administrative leave" at that time, this allegation appears highly suspect (Tr. 517-518).

Puzon testified that he did not disclose whether he attended Union meetings or how he voted (Tr. 497-498; 517-518). He also volunteered that neither Berryhill nor Davis knew of his position on the Union (Tr. 519). Consequently, there is no evidence that the alleged inquiries were coercive, or that his brief responses were ever passed on to anyone in management. Moreover, there is no hint of any connection between the alleged inquiries and the carefully conducted peer-to-peer evaluations that resulted in Puzon's layoff months later.

3. Counsel for General Counsel Failed to Prove that on or about September 25, 2008, Berryhill Solicited Grievances and Impliedly Promised to Remedy Them to Get Employees to Abandon the Union (Responsive to Exceptions I, III, IV, VI ,VII, XLIV-XLVII)

Berryhill acknowledged that he met with employees over the week preceding the representation petition to check on their morale. To Berryhill's credit, he admitted to seeking out employee concerns, maintaining that it was part of his job as General Manager (Tr. 144, 1482). His actions conformed to his established practice of interacting with all employees.

Consequently, Respondents denied that this conduct rose to the level of a "promise to remedy grievances" as alleged within Paragraph 12 of the Consolidated Complaint. Nonetheless, Respondents freely admitted in answering the Complaint that Berryhill solicited grievances on or about September 25, 2008. Respondents therefore except to the finding that, "The answers of the Respondents deny any violation of the Act," which is inaccurate as to Paragraph 12 (ALJD p. 1).

By the fall of 2008, rumors of organizing activity had persisted at the Dealership for over a decade (Tr. 138, 1499). It was within that context that Berryhill heard rumors of renewed activity in September 2008 (Tr. 1499-50). His reaction was in keeping with scores of similar conversations that he previously had with MBO employees. He was merely acting to identify concerns, pursuant to his duties as General Manager. Evaluated within this context, these discussions were completely lawful. *Cf. Airport 2000 Concessions LLC*, 346 NLRB 958 (2006).

Berryhill acknowledged that he called employees into his office and inquired into lingering concerns at Market President Pete DeVita request (Tr. 1501, 1505-06). While he did not ask about Union sentiments, some did offer information regarding the Union (Tr. 1464, 1485, 1501). With respect to Union affiliation, Berryhill testified that, "I haven't asked them. It's not relevant" (Tr. 1503). These discussions were consistent with his general practice of exploring means for continual improvement. *Cf. Airport 2000 Concessions LLC*, 346 NLRB at 960, n.11.

To the extent that, within these discussions, Berryhill may have solicited grievances that implied a promise to remedy, any such promises were *de minimis*. *See Metz Metallurgical Corp*., 270 NLRB 889 (1984) (interrogation was *de minimis* where it did not interfere with election). The unrefuted evidence establishes that Berryhill's actions were no different prior to or after the petition, and that he did not promise to remedy any grievances.

In fact, hearing testimony offered by witnesses for both parties established that from the moment he first learned of the petition, Berryhill continued to pursue his long-standing approach of open dialogue with employees. In so doing, he was operating entirely within the bounds of the law. *See, e.g., Airport 2000 Concessions, supra,* (overruling ALJ finding of unlawful solicitation and promise to remedy where employees could not reasonably believe that the airing of grievances in response to solicitation would result in desired change).

Berryhill further testified that he maintained a personal notebook since the 1980's, which assisted him in memorializing a wide range of work-related and personal functions, from keeping track of his business appointments and dry-cleaning, to preserving issues that arose at the Dealership for further consideration. In the process, he regularly maintained notes of his interactions with employees (Tr. 157-158). Those pages that were entered into evidence serve only to corroborate his lawful characterizations of the September employee conversations.

Both the notebook and Berryhill's testimony make clear that he did not expressly or impliedly promise to remedy specific grievances. Counsel for General Counsel failed to present any evidence of specific promises of enhanced benefits, or that specific grievances would be resolved in exchange for a rejection of the Union. Again, Berryhill merely communicated with his employees, consistent with his long-standing practice.

In doing so, he brought this case into alignment with *Airport 2000 Concessions*, *supra*, in which managers met with employees one-on-one and asked what they disliked about the company and what could be done to improve it. When an employee complained about benefits, a manager responded that despite the company's size, maybe it could provide better benefits later, and that he would "look into" the issue of holidays. While the ALJ found an implied promise, the Board found that the managers made no promise to remedy any problems raised.

Similarly, Berryhill's actions were a part of his regular management practices, and did not imply any promise to remedy specific grievances. Counsel for General Counsel's witnesses testified that Berryhill did not say he would remedy the issues in the shop, but only that he thanked employees for sharing the issues (Tr. 341, 431). Consequently, the evidence failed to establish that Berryhill was motivated by any desire to utilize the pre-petition conversations to persuade employees to abandon the Union. For all these reasons, the ALJ erred in finding that the meetings held during the week of September 25 were "coercive." (ALJD p. 6, lines 47-48).

Moreover, the ALJ mischaracterizes Berryhill's testimony to the extent he finds that, "Berryhill initially testified that he learned of the Union organizational campaign on October 4 when he was informed that representation had been filed." (ALJD p. 4, lines 33-35). To the contrary, Berryhill made clear that he heard "rumblings" of the most recent organizing activity well before the petition was filed, and freely acknowledged that he would have memorialized any discussions on that issue with unit employees within his notebook (Tr. 1500). Berryhill certainly did not suggest that he was ignorant as to the Union activity prior to October 4. Rather, he testified that he did not learn of *the petition* until that point in time. For these reasons, the ALJ also erroneously discredited Berryhill by virtue of "his failure to admit his earlier

knowledge of the campaign and the actions that he took." (ALJD p. 4, lines 38-39). To the contrary, Berryhill freely admitted to acquiring knowledge of the activity over two weeks before.

4. Counsel For General Counsel Failed to Present Any Credible Evidence that Davis Solicited Grievances and Impliedly Promised to Remedy Them on October 17, or that he Interrogated Persaud in December 2008 (Responsive to Exceptions XI-XIV, XLIV-XLVII)

Davis testified that he first visited MBO on October 9, at the request of DeVita and Berryhill (Tr. 960). As he described it, Davis' role as the head of AutoNation's Labor Relations program includes coordinating employee education and communications efforts in advance of an NLRB-administered election. From the date he first arrived at MBO through the end of 2008, Davis acknowledged that he visited the Dealership over several different days and, while there, that he spoke with managers, supervisors and employees on "many" occasions (Tr. 972-73).

The Union received a narrow majority of votes cast in the December 16, 2008 election, and MBO is testing certification due to the exclusion of other functionally-integrated employees. Neither the Union nor the Dealership filed any Objections. Consequently, any pre-election communications involving Davis are now moot for almost any relevant purpose.

Prior to and during the Hearing, Respondents offered to settle the Section 8(a)(1) claims to expedite hearing the core allegations. Counsel for General Counsel resisted, absent a capitulation on the refusal to bargain allegations, for the admitted purpose of demonstrating alleged anti-Union animus. To that end, the Consolidated Complaint lodges a substantial number of allegations against Davis, including 35 paragraphs alleging misconduct under Section 8(a)(1) alone. In all but three of those cases, Davis was fully exonerated in the ALJD.

Davis, who was routinely and consistently credited by the ALJ, acknowledged that employees offered complaints and brought issues to his attention, yet firmly denied responding by promising to resolve them (Tr. 88-89). Nonetheless, the ALJ refers to a meeting on either

October 15 or 16, in which Davis is alleged to have threatened futility of bargaining. He goes on to dismiss those allegations for "lack of credible evidence." (ALJD p. 10, line 32).

Inexplicably, however, the ALJ proceeds to find that, merely by assuring employees at this same meeting that they "could talk to him at any time," Davis somehow solicited grievances and impliedly promised to remedy them in violation of Section 8(a)(1). (ALJD p. 10, lines 36-37). This finding is reached solely on the basis that the alleged statement "implied that the Respondents would be responsive to employee's complaints." (ALJD p. 10, lines 34-35). Standing alone, however, such conduct is entirely *de minimis*, and falls far short of either an unlawful grievance solicitation, or a promise to remedy such grievances. Consequently, the ALJ's finding of fact on this issue is completely erroneous, and must be overturned.

The ALJD goes on to find that in early December, Davis unlawfully interrogated former employee John Persaud merely by asking how he "felt about the election." (ALJD p. 12, lines 51-52, p. 13 lines 11-12). Notably, the ALJ found that Persaud replied by stating, "I think that the Company is going to learn I think we have a good chance," to which Davis merely "smiled and walked away." (ALJD p. 13, line 1). Without any further evidence, the ALJ found this line of questioning "coercive," on the basis that "Davis did not specifically deny the foregoing conversation" (ALJD p. 13, lines 3, 11). Davis (who was routinely credited), however, firmly denied engaging in any interrogation of unit employees, on that or any other date. (Tr. 1029, 1053). For these reasons, the ALJ's finding is also erroneous, and must be overturned.

5. Counsel for General Counsel Failed to Prove that Berryhill and Davis Informed Employees that Their Grievances Had Been Adjusted by the Demotions of Grobler and Manbahal to Induce Them to Abandon Their Support for the Union (Responsive to Exceptions XV, XVI, XVII, XLIV-XLVII)

Paragraphs 29 and 30 of the Consolidated Complaint contain redundant allegations revolving around a December 9 meeting, at which Davis and Berryhill are alleged to have told

employees that their grievances were being adjusted by the demotions of team leaders Grobler and Oudit Manbahal to induce employees to abandon their support for the Union. This allegation ignores the undisputed fact that technicians had complained about Grobler and Manbahal long before the filing of the petition two months before.

For example, former employee Juan Cazorla complained about Grobler's treatment as far back as June – well before the onset of any alleged Union activity (Tr. 837). Other technicians registered similar complaints regarding work assignments, "favoritism" and "demeaning" conduct (Tr. 440-441). Not a single witness presented by Counsel for General Counsel had positive things to say about Grobler or Manbahal. Cazorla expressed a fear of retaliation from Grobler, to which Davis responded that such actions were "unacceptable" (Tr. 843-844).

MBO's decision to demote Grobler and Manbahal (and to promote Aviles and Rex Strong) lies squarely within the Dealership's prerogative to select a management team of its own choosing. *See, generally, Parker-Robb Chevrolet*, 262 NLRB 402 (1982), *enfd. sub nom. Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983) (the Act imposes few limitations on employer's rights with respect to selection and treatment of supervisors). Moreover, the record establishes that MBO had a long history of changing its Team Leaders for performance reasons, and at least one employee (Catalano) volunteered that he had been demoted from a Team Leader position "long before" the Union issue (Tr. 536). Berryhill and Davis denied advising employees that their grievances would be adjusted by the demotions (Tr. 1001, 1467-68, 1480). Berryhill testified that he personally made the decision to make the management changes in response to complaints leveled against Grobler and Manbahal over an extended period of time (Tr. 1465-66). Under those circumstances, this was an appropriate change falling squarely within Berryhill's management prerogative.

Berryhill conducted a brief meeting in the shop to inform technicians of the changes (Tr. 1466). He did not suggest that they were being made to encourage employee abandonment of the Union, or even in response to employee complaints (Tr. 442, 1467). To the contrary, he specifically refrained from articulating the reason for the decision, as it was none of the employees' concern (Tr. 1467). This meeting was not tied to the Union, but was instead intended to advise employees of the new assignments. After all, it would make little sense to switch Team Leaders without informing the technicians of their new reporting responsibilities.

Consequently, the ALJ's finding that Berryhill and Davis informed employees that their grievances had been adjusted by demoting the team leaders to induce them to abandon Union support is completely erroneous. (ALJD p. 15, lines 15-17). As noted above, the overwhelming weight of record evidence demonstrates that the meeting was simply intended to foster an optimum environment for improving operations. Accordingly, the comments attributed to Davis and Berryhill were not in violation of Section 8(a)(1). *Cf. Airport 2000 Concessions, supra*.

B. MBO's Decision to Lay Off Roberts in December 2008 was Based Upon Legitimate, Job-Related Performance Criteria, Thereby Invalidating Any Claim of Discrimination Under Section 8(a)(3) of the Act (Responsive to Exceptions X, XVII – XXXIII, XLIV-XLVII)

The ALJ acknowledges that MBO was confronting unprecedented economic challenges in Fall 2008, which "had a profound impact upon automobile sales and service." (ALJD p. 24, lines 17-18). He also found that MBO's April 2009 reduction in force "was dictated by economic circumstances." (ALJD p. 24, lines 51-52). Nonetheless, the ALJ inexplicably considered his seniority and productivity to find that MBO discriminatorily singled out Anthony Roberts for discriminatory layoff. (ALJD p. 21, lines 29-30, p.23, lines 42-44).

Remarkably, the ALJ made this finding despite later acknowledging that "Respondents do not use seniority as a factor" in layoff selection decisions. (ALJD p. 27, lines 20-22). Indeed,

the facts establish that neither seniority nor productivity played a role in the three December 2008 layoffs, two of which (Ted Crossland and Ed Frias) were not alleged to be discriminatory.

In the case of Roberts, the evidence further establishes that MBO based its selection decision on the presence of uncontroverted evidence establishing that he was deficient in his electronic and diagnostic skills in comparison to those of his peers in the service department. Against this backdrop, the ALJ somehow found that, "no explanation regarding his alleged unsuitability relative to his productivity was offered." (ALJD p. 22, lines 42-43).

This finding ignores an overwhelming amount of record evidence (much of which was corroborated by Roberts himself) as to Roberts' technical deficiencies. The ALJD finds that Roberts' "productivity confirms that he had [no] deficiencies in his skills." (ALJD p. 23, lines 42-44). This finding was inconsistent with the fact that neither seniority nor productivity played a role in the selection process. Rather, that decision was based upon the fact, as confirmed by Counsel for General Counsel's chief witness, that Roberts had the least "up-side" in terms of electronic skills. Consequently, the fact that he found himself occupied with more routine mechanical work does nothing to alter the fact that his technical skills were deficient when judged against those of his peers. Put simply, productivity and skill set are apples and oranges.

Lastly, there is no credible evidence to establish that Respondents had any knowledge of Roberts' alleged Union sympathies. The only witness offering testimony to the contrary was Weiss, whose own self-serving allegations of constructive discharge were promptly and properly rejected by the ALJ. In so doing, he went out of his way to discredit Weiss. (ALJD p. 28, lines 51-52). Remarkably, however, the ALJ chose to credit Weiss for only one purpose; to establish that he conveyed information to Berryhill concerning Roberts' sentiments—testimony that was

completely uncorroborated, and expressly refuted by Berryhill (who was credited in several other respects) (ALJD p. 22, lines 3-5). Each of these arguments is set forth more fully below.

1. An Overview of the Unprecedented Economic Conditions Compelling the Business Decisions to Down-Size the Workforce in 2008

While the witnesses did not always agree, they certainly acknowledged that the recession that began in 2008 was the "worst" economic period they had seen, and that there was not enough work in the shop to go around (Tr. 403, 621, 928-29, 1108-12, 1154, 1168, 1192, 1218, 1420-22). As confirmed by the ALJD, the downturn had a "profound impact" on the automotive industry in general, and on MBO's service department in particular. (ALJD p. 24, lines 17-18).

The representation petition was filed on October 3, 2008, by which point the automotive sales and service industry was already in the midst of an accelerating decline (Tr. 1192, 1218, 1420-22). Although MBO had not initiated any down-sizing moves among service technicians by that point, Berryhill had already been directed to review cost-cutting options (Tr. 1429-30; G.C. Ex. 99, 105, 113 and R. Ex. 48). He admitted that the Dealership had never before been faced with the need to engage in layoffs, and there was testimony that he was "reluctant" to consider them – even in the face of such serious "economic conditions" (Tr. 284, 1421-22).

Clark provided data documenting the downward slide in available service work, revenue and profitability during the fall of 2008, leaving the Dealership "fighting for our financial lives." (Tr. 1192-93, 1199, 1293-04, 1209-12, 1221). He also testified to constant meetings with Berryhill to review financial information necessary to manage the Dealership through this crisis, including SOR's and related data – locally and industry-wide (Tr. 1188-89; 1221).

Clark testified that 2007 had been a "good year" and that 2006 had been an "even better year" for the Dealership in general, and for Fixed Ops in particular (Tr. 1191). By early to mid-2008, however, he saw that the most important "performance measures" for Fixed Ops were in

substantial decline. For example, monthly average gross profit was already down by 10%, comparing the first quarter of 2007 to the first one of 2008 (Tr. 1192).

The economy in Florida soured more quickly, due to "housing bubble" problems and their impact on employment (Tr. 1196). By Summer 2008, Clark and Berryhill were forced to accept that they were "overstaffed" (Tr. 1197). Nonetheless, Berryhill confessed that he was reluctant to resort to layoffs, blaming himself for an inability to weather the unprecedented economic "meltdown" (Tr. 1432; 1450). Searching for alternative cost-savings measures, MBO changed its loaner car system, reduced overtime, froze hiring, negotiated lower interest rates and even stopped providing free coffee in the used car sales area (Tr. 1193).

Standing alone, however, these measures failed to thwart the accelerating decline in sales and service profitability. Headcount on the sales side of the operation was initially reduced through attrition, and subsequently through job eliminations. In the Fixed Operations department, however, service technicians were not voluntarily leaving the Dealership (Tr. 1197).

"Bank failures" and other warning signs did not emerge as dramatically in Fixed Operations as they did in sales (Tr. 1199-1201). But when the "great collapse" hit MBO's service department, it did so with a vengeance (Tr. 1203; 1223). Based on 2006 gross profit results, MBO staffed service for 2007 at a level that anticipated $466,000 per month in gross profit, thereby providing technicians with an average of 208 flat rate hours per month (Tr. 1199, 1242). In the first quarter of 2007, MBO service actually exceeded that figure (Tr. 1199-1200). By the first quarter of 2008, however, those figures had dwindled to $447,000 (Tr. 1199-1200).

The economic collapse caught up with the service side by October/November 2008, when a catastrophic meltdown led to a substantial shortfall in available service work (Tr. 1200-1202). Maia Menendez, who managed the Dealership's Business Development Center, testified that

starting in October 2008, the number of daily Repair Orders (RO's) halved, and the wait time to "book" service had gone from "two weeks" in advance to "right now" (Tr. 1109, 1110, 1202).

While the Dealership was still able to post gross profit figures of $414,000 that October, those figures fell to $295,000 just one month later (Tr. 1202-1203). In those four weeks alone, the SOR plummeted by 30%, by which point it had become painfully obvious to both Clark and Berryhill that there was "not enough work to go around." (Tr. 1206, 1211). By that point in time, the serious decision-making on needed layoffs had begun (Tr. 1206). Over the weeks that followed, non-unit employees would be laid off or not replaced in Parts (3), Finance (1), Service Advisors (1) and the Business Development Center (2) (Tr. 1207, 1275, 1324; Tr. 1448, R. Ex. 49). When combined with additional reductions among Sales Managers, Sales Associates and F&I Managers, the total employee census at MBO ultimately dropped from 125 to 95 between early 2008 and 2009 (Tr. 73).[7]

2. Factors Precipitating the Service Department Headcount Reduction

By Fall 2008, technicians began leaving due to the dramatic fall-off in available work (Tr. 419-420). Roberts himself testified that, when he met with Berryhill in September 2008, he complained that there was "no work" and that he could "use more money" (Tr. 890). He also confirmed that technicians were leaving early due to lack of work (Tr. 928).

Aviles recalled Fall 2008 as a "downhill" period and he detailed how – after it became the norm that everyone was "waiting around for work," the shop started using an "out-of-work" board on which technicians could place their names when they ran out of assignments (Tr. 1329-

[7] Impacted employees included Business Development Center employees Simone Hazell Briggs, Doreen Sabatino and Paulina Quintanilla, Parts Advisor Anthony Lombardo, Parts Runner Todd Mathre, Service Advisors Daniel Christie and Ken Laxton, Booker/Flagger Jose Mendoza, Used Car Manager M. Taylor, and F&I employee T. Sayler (Tr. 1275, 1324-25, 1430-31, 1444-47, 1579; G.C. Ex. 69; R. Ex. 49). Most of these non-unit employees left before the technicians were laid off, while the remainder left in the same time period as the technicians.

1330). He also stated that the need for layoffs was openly discussed and anticipated among technicians because there "was not enough work to support everybody" (Tr. 1331-1332).

3. The Decision to Lay off Roberts was Based on Objective Factors and an Evaluation of His Skill Set Relative to those of Fellow Technicians

By November 2008, Berryhill had decided that the number of technicians would have to be reduced in order to preserve service opportunities for those who remained, as he felt obligated to provide as much work as possible to his best technicians (Tr. 1205-1207, 1236-1237, 1360, 1437). Recognizing that the election was pending, he was committed to ensuring fairness in the selection process so as to reduce vulnerability to any ULP Charge (Tr. 1442).

Berryhill and Service Manager Art Bullock ultimately decided that three layoffs were necessary (Tr. 1206, 1437-38). As part of that process, the "tire shop" was to be closed for lack of work, resulting in the layoff of one tire technician and one alignment technician (Tr. 165, 1334). On December 8, alignment technician Ted Crossland and tire technician Ed Frias were chosen, as was general technician Roberts. (Tr. 1437-38).[8]

The Dealership had never before been faced with conditions requiring downsizing in the shop (Tr. 281-282). After consulting with Clark, Berryhill discussed the issue with Bullock, who reviewed the technicians by team in consultation with Team Leader Bruce Makin (Tr. 163, 166). At the time of the layoff, Makin supervised the Red team, to which Roberts was assigned (Tr. 882). Makin was described by one of the General Counsel's witnesses as a "very good, very capable" judge of technicians skill and ability. The same witness opined that competent computer skills are probably necessary for "80% of job assignments" at MBO (Tr. 401).

At the conclusion of this process, Berryhill alone made the decision to select Roberts for layoff (Tr. 168-169). There is no evidence to suggest that the factors considered by Makin,

Bullock and Berryhill were unfair or otherwise constituted a departure from standards. To the contrary, credible testimony confirmed that Roberts had the "least upside" in terms of technical skills (Tr. 116). Aviles testified that Roberts' major shortcoming was his apparent inability to master the electronic requirements and skills necessary to succeed as a Mercedes technician in an increasingly electronic world (Tr. 1334-1335). Aviles, who was familiar with Roberts' skill set, testified that Roberts had the "least technical expertise" in the shop (Tr. 1334-1336).

When asked if Roberts' "B+" rating merited more weight, Aviles pointed that it was inflated based on "seniority." He went on to explain that Roberts should have been rated as a "C" or "C+" mechanic, and that he had reached a "plateau on learning" (Tr. 1337-1338). Meyer supported the Dealership's position, agreeing that his own skill set was "more advanced" and that he had a "better" ability to diagnose electronic problems (Tr. 410-411). Even Parts Director Miller was aware that he "was not progressing" as others had, and that he was known for "over-ordering parts" – due to his poor diagnosis skills (Tr. 1276-77). Roberts himself acknowledged that the amount of time he was forced to spend on electronic diagnosis jumped from 7% to 50% or more (Tr. 916). He agreed that working on Mercedes vehicles had become more difficult due to the prevalence of electronics and use of laptop computers, and that his 2007 evaluation referred to the need for improvement in this critical knowledge/skill area (Tr. 925).

The ALJD refers to the 2004 termination of a single, non-unit parts employee, Doug Huff, to establish the existence of some form of "last in-first out" layoff selection policy. (ALJD p. 21, lines 39-46). This finding was based solely on inadmissible evidence: hearsay attributed to an out of hearing declarant (Bullock) (Tr. 903). Such a flawed finding cannot possibly justify imputation of a seniority-based selection policy, particularly when the ALJ himself subsequently

[8] ULP charges were initially filed on both Crossland and Frias as well, and there was testimony that both of them attended Union meetings. Neither layoff, however, is a subject of the Consolidated Complaint.

acknowledged that Berryhill (Bullock's superior at the time of Roberts' selection) had "never gone by straight seniority." (ALJD p. 21, lines 45-46).

4. The ALJD's Reliance upon Seniority and Productivity is Misplaced

As Berryhill emphasized and the ALJ noted, skill ratings were not "a deciding factor at all" relative to Roberts' layoff (Tr. 1441; ALJD p. 22, line 13). As Aviles testified, strict seniority was not deemed to be a useful selection vehicle (Tr. 1345). Consequently, the ALJ also acknowledged that "Respondents do not use seniority as a factor" in layoff decisions. (ALJD p. 27, lines 20-22). Clark emphasized that hours alone do not present an accurate picture of a technician's value, which takes into account such factors as quality, skill set, and progress toward improvement (Tr. 1259). Nonetheless, the ALJD notes that Roberts "had more seniority than 14 of the other technicians," that "there were nine technicians with lower skill ratings than Roberts," and that, "Roberts productivity, as shown by hours sold, was higher than 19 of the other service technicians." (ALJD p. 21, lines 23-24; p. 22, line 14; p. 21, lines 31-32).

All of these findings ignore the fact that the process which gave rise to Roberts' layoff took none of these criteria into account. To the contrary, Berryhill made clear that the process, with input from Bullock and Makin, focused on the relative skill sets of the technicians and their ability to take on electronic tasks. (Tr. 116). Aviles, who was credited throughout these proceedings, confirmed that in that regard, Roberts had the "least to offer" of any technician in the shop (Tr. 1334-1336). Clearly, Berryhill articulated a legitimate basis for his selection decision, and acted in conformity with that basis in selecting Roberts.

5. The Record is Devoid of any Credible Evidence that Roberts' Layoff was Influenced by Considerations of Union Support

a. There is no evidence that Roberts ever openly supported the Union prior to his layoff

According to IAM Representative David Porter, the Union conducted off-site meetings over the summer of 2008, routinely attracting 15-20 MBO employees. Although Porter confirmed that Roberts attended some of those meetings, he did not suggest that Roberts distributed Union cards, helped to conduct Union meetings, spoke up at the meetings, wore buttons or did anything else to distinguish him from fellow attendees (Tr. 313).

Roberts himself estimated that he attended six meetings over a six-month period (Tr. 886). He also recalled taking steps to ensure that there was never any management around "when we were talking Union" (Tr. 888). One of General Counsel's witnesses confirmed that Roberts never held himself out as a Union supporter, adding that he and Roberts were careful to avoid allowing any managers to overhear discussions on the Union issue, and that if Bullock was in the area, "we'd stop talking" (Tr. 358-359, 404). Roberts himself made clear that he never discussed the Union in the presence of management, and that he <u>never</u> engaged in any conduct that could be considered "open" Union support (Tr. 888, 927, 935, 1018). Consequently, there is no evidence to remotely suggest that he was "an outspoken" proponent of the Union (Tr. 28). To the contrary, he (unlike Meyer and Catalano) actively concealed his personal position, doing nothing more than any of the other MBO employees who attended Union meetings.

b. There is no evidence that any manager was aware that Roberts attended Union meetings or otherwise supported the Union

Roberts acknowledged that when he was called to speak with Berryhill and Bullock in late September 2008, neither asked him about the Union (Tr. 890). With the exception of David Poppo, Porter testified that he was unaware that Dealership management knew of any

technician's stance on the Union before the layoffs (Tr. 327). Aviles, who admitted he had attended Union meetings in the summer of 2008, never identified Roberts as a Union supporter (Tr. 1334-1338). Meyer, an outspoken pro-Union technician throughout the relevant time period, testified that Roberts never held himself out as an active Union advocate (Tr. 404). Indeed, no one offered any testimony to suggest that Roberts was an open Union supporter.

For his part, Berryhill maintained that he did not know where Roberts stood on the Union issue at the time of the layoff (Tr. 1443). Berryhill's initial meeting with Roberts only served to corroborate Respondents' steadfast position that they lacked knowledge as to Roberts' Union sympathies. Indeed, the ALJ himself points out that, in response to Berryhill's alleged interrogation on September 25, "Roberts mentioned that he could use 'some more money or a skill level change,'" to which "Berryhill explained that there was 'a raise freeze at the time.'" (ALJD p. 6, lines 21-22). That was the extent of the exchange, and nothing within it even remotely suggests that Roberts volunteered his alleged pro-Union sentiments, or that Berryhill suspected him of such at that point in time. Davis, who had nothing to do with the decision to lay off Roberts, testified that he had no idea what his stance was, and that he actually tried to help Roberts get work at another dealership (Tr. 115, 127).

c. The only witness to link Roberts to the Union was Weiss

Otherwise-discredited witness Weiss was the only person who suggested that Roberts had been identified as a Union "supporter." As part of Weiss' ongoing vendetta against the Dealership, he falsely testified that Berryhill labeled Roberts a "troublemaker" in late October 2008 (Tr. 654). Weiss, however, testified that weeks before this alleged comment, he volunteered Roberts' name to Davis, along with those of four other employees (Meyer, Aviles,

Catalano and Santiago), all of whom remain at the Dealership and have since benefited from favorable treatment[9] (Tr. 654).

The ALJ erroneously chose to credit Weiss' account "that he informed Berryhill and Davis of the individuals whom he believed started the organizational effort" in early October (ALJD p. 21, lines 48-49). In doing so, he found that Berryhill "did not deny that Weiss reported Roberts as having been one of the instigators of the Union organizational campaign." (ALJD p. 22, lines 3-5). Berryhill, however, testified that he was unaware of Roberts' Union sentiments, denying that he characterized Roberts as a "troublemaker" or that Weiss identified him as a Union supporter (Tr. 1484). Nowhere within the 1,600 pages of transcript testimony is there any admission on Berryhill's part that Weiss portrayed Roberts as a Union supporter.

Nonetheless, on the basis of an isolated assertion made by Weiss alone, the ALJ erroneously attributes knowledge of Roberts' alleged Union sentiment to Berryhill and Davis. (ALJD p. 8, lines 30-33, p. 9, lines 11-14). Even if taken as true, this evidence was confined to a completely uncorroborated allegation from a witness who was otherwise discredited throughout the ALJD. Inexplicably, the ALJ seized upon this singular aspect of Weiss' testimony to arrive at a result that imputed knowledge (and therefore animus) to Respondents, when in all other respects, that same witness was found to be completely incredible.

As support for the alleged "troublemaker" comment, the ALJ notes only that, "on June 27, Roberts received a verbal counseling for questioning the merit of a contest relating to 'up-sales' that Roberts felt was selling customers things that they did not need and that such selling would 'run our customers out the door.'" (ALJD p. 22, lines 6-10). Nothing on the face of this

[9] Meyer subsequently received a wage increase via a skill rate review (Tr. 393-94), Aviles was promoted (Tr. 1333), and Catalano was only issued a mere non-disciplinary coaching for his role in a disruptive incident (a Complaint allegation that has since been dismissed) (Tr. 575-576). Even Santiago received favorable treatment to the extent he was not charged for damaging a customer vehicle (Tr. 1119-20, 1468-69).

notice, however, suggests that Respondents suspected Roberts of Union activity, or that they equated an alleged use of the term, "troublemaker" with such activity. Indeed, there is no evidence to suggest that organizing activity was even taking place at that point in time, and the ALJ found that Respondents did not become aware of such activity until months later.

d. For all other purposes, the ALJ could not have made it more clear that Weiss' testimony could not be trusted

Unlike the testimony of Davis or Berryhill, the ALJ routinely chose to discredit Weiss. Indeed, it is fair to say that Weiss was found to be incredible for all purposes, with the exception of his uncorroborated testimony as to a single legal conclusion with the most significant of implications – namely, his assertion as to Respondent's knowledge of Roberts' Union support.

Even a cursory review of the ALJD reveals the ALJ's disdain for Weiss' credibility. For example, the ALJ notes that, "Weiss' contradictory assertions of his motivation and admissions of untruthfulness belie any reliability in his self-serving testimony." (ALJD p. 4, lines 30-31). In one section of the ALJD (pertaining to Weiss' constructive discharge allegation, which has since been dismissed), the ALJ points out that, "Weiss was not credible. He claims that his denial to a Board agent that he was solicited to circulate the anti-Union petition was a lie, as well as his denial regarding whether he showed it to Davis." (ALJD p. 28, lines 51-52). Elsewhere, the ALJ goes so far as to say that, "the testimony of Weiss defies logic." (ALJD p. 13, line 50). It is difficult to argue with that. When judged against that backdrop, however, the ALJ's decision to credit Weiss' assertion that Roberts had been labeled a "troublemaker" and was identified as a Union supporter over credible evidence to the contrary is downright baffling.

Weiss' testimony on this singular issue cannot be credited over the contravening testimony of both Berryhill and Davis. Under similar circumstances, the Board has rejected a trial examiner's finding of violations based on statements attributed to a manager by an

"unreliable witness." *Henriksen, Inc.*, 191 NLRB 622, n.4 (1971) (witness found incredible in other portions of the same conversation, declining to find violations for three other incidents to which the witness testified). *See also, Domsey Trading Corp*., 351 NLRB 824, 836 n.56 (2007) (Board may take independent evaluation of credibility determination where it is based on factors other than demeanor); *Peer Enterprises, Ltd*., 218 NLRB No. 155 (1975) (affirming decision of ALJ in rejecting violation based on uncorroborated testimony of witness found unreliable in other respects, where the testimony was either explicitly or implicitly contradicted).

e. Counsel for the General Counsel wholly failed to satisfy the Wright Line evidentiary standard

Under these circumstances, Counsel for General Counsel clearly failed to satisfy even the minimal proof requirements necessary to show that the Dealership was aware of Roberts' position, or that such knowledge played a role in his layoff. It is important to recognize that Counsel for the General Counsel bore a heavy burden, to the extent that any discriminatory allegations pertaining to the layoffs are governed by the *Wright Line* standard. 251 NLRB 1083 (1980). To establish a violation under that standard, Counsel for the General Counsel had to prove, by a preponderance of the evidence, that Roberts' alleged Union sympathies were a substantial or motivating factor in MBO's decision to select him for layoff.

The burden then shifted to MBO to demonstrate that it would have taken the same action even in the absence of the protected activity. *Krystal Enterprises, Inc*., 345 NLRB 227 (2005). In *Krystal*, the company experienced a 50% decline in sales, and subsequently laid off approximately 80 employees. The Board found there was no disputing the fact that the layoffs were in response to declining sales, and were lawfully motivated. The Board further found that, even assuming the General Counsel had met its burden of demonstrating that the employee's perceived Union activity was a motivating factor, the Company met its rebuttal burden by

showing that it would have included her regardless of her perceived Union activity. *See also United Food and Commercial Workers Union, Local 204*, 338 NLRB 38 (2002) (General Counsel failed to meet its burden where it presented no evidence of anti-Union animus and the layoff was based on economic circumstances, particularly where the employer demonstrated that it would have taken the same action even in the absence of any protected activity).

The record is devoid of any credible evidence suggesting that MBO was aware of Roberts' alleged pro-Union sentiment, or that it suspected him of engaging in Union activity. Absent such evidence, Counsel for General Counsel cannot prove by even a scintilla (let alone the required preponderance) of evidence that Roberts' alleged Union activity (which apparently amounted to little more than attending off-site meetings) was a substantial factor in MBO's decision. Thus the ALJ erred, because, Counsel for General Counsel fell woefully short of making out even an initial case under *Wright Line* sufficient to shift the burden back to MBO.

Even had Counsel for General Counsel managed to sustain its burden, the fact remains that MBO proved that it would have taken the same action, regardless of any alleged Union activity. The record reflects that the Dealership undertook an extensive comparative analysis before arriving at Roberts as the most appropriate candidate for layoff. Consequently, the ALJ's finding that, "Respondents chose not to make any comparison when selecting [Roberts] for discharge because Roberts would not have been selected" is completely erroneous. (ALJD p. 24, lines 1-2). Recognizing his own technical limitations as a General Manager, Berryhill demonstrated sound judgment in his objective decision to consult experienced managers such as Bullock and Makin before finalizing any selection decision. In doing so, he made clear that Roberts was evaluated against the skill sets of all of his peers in the service department.

The facts in this case are therefore similar to those in *Leonardo Truck Lines*, 237 NLRB 1221 (1978). In that case, the Board went so far as to find that the timing of the employer's reduction in force was suspicious, but ultimately upheld it on the basis that there was no evidence to support an inference that the employer knew of the employee's Union activity. Unlike the instant case, the employer in *Leonardo* failed to articulate any reason for the layoffs other than a general "slow down in business," and there was evidence that a leading Union advocate was discharged on the same day. Nonetheless, the Board ultimately found that the General Counsel had failed to sustain its *Wright Line* burden.

Similarly, in *Volair Contractors, Inc*., 341 NLRB 675 (2004), the Board upheld an employee's layoff in the absence of any evidence that the employer knew of his Union affiliation. Although there was evidence that the employer in that case had observed the employee speaking with open Union supporters, there was no evidence that the employer had actually overheard those conversations. Although the employer subsequently failed to recall the employee, the Board noted that such evidence did not necessarily indicate that the underlying reduction in force was based on his Union support at the time of its decision.

Moreover, in *Webco Indus*., 334 NLRB 608 (2001), the Board found no violation in connection with the layoff of an employee in the absence of any evidence that the employer knew of his Union support. This finding was made in the presence of evidence that 11 other laid off employees were interrogated and targeted because of their Union support. The employer in that case had established that economic circumstances led to the layoffs, and the Board noted that the underlying decision (as opposed to the selection process) was not alleged to be unlawful. It went on to note that, "the Respondent may reasonably have deemed Casey an acceptable

employee when business was good, but not when business had turned sour and it was necessary to trim the work force while retaining its best employees." *Id.* (footnote omitted).

This same rationale would certainly apply to Roberts. MBO had the luxury of sustaining his employment and turning a blind eye to his electronic limitations when the economy was strong (as was the case in 2006 and 2007). By Fall 2008, however, MBO had little choice but to include him with Frias and Crossland, so as to provide sufficient opportunities for those who remained. Finally, it should be noted that by early December, a number of MBO technicians had openly identified themselves as Union supporters. Any one of them would have been more logical candidates for layoff during the days preceding the election, if in fact MBO were truly motivated by a desire to select candidates on the basis of anti-Union animus.

MBO's decision to retain those individuals over an employee who admittedly went out of his way to conceal his Union sentiments, and who succeeded in doing so, offers further evidence that its selection process was informed by objective, non-discriminatory criteria. *See, e.g., Children's Svcs. Int'l, Inc.*, 347 NLRB 67, 71 (2006) (Board declined to find unlawful discrimination in connection with the layoff of two pro-Union employees, noting that "the steward and most prominent Union activist, was not laid off, and a third employee, not shown to be a Union activist, was laid off"). *See also, Style of Liberty Pavilion Nursing Home*, 254 NLRB 1299 (1981) (employer did not violate section 8(a)(3) in discharging two nurses for negligent care, where supervisor retained pro-Union employees who were not responsible for accident).

Clearly, record evidence establishes that Roberts' alleged Union affiliation had no impact on the decision to terminate his employment. *See Aero Detroit, Inc.*, 321 NLRB 1101, 1103 n. 16 (1996) ("selections were based on objective standards and...Union sympathies were not an issue in the selection process"); *Consolidated Printers*, 305 NLRB 1061, 1066 (1992) ("there is

no evidence whatever that the employees laid off...were more active in support of the Union than the employees who, rather than being laid off, enjoyed longer and more regular working hours").

C. The ALJ Erred in Finding that MBO Violated Section 8(a)(5) of the Act by Laying Off Four Technicians in April 2009 (Responsive to Exceptions XXXIV, XXXVI-XL, XLIV-XLVII)

The ALJ found that MBO violated Section 8(a)(5) by failing to bargain over the decision to lay off four service technicians in April 2009. (ALJD, pp. 30-31). As set forth below, the ALJ erred because MBO's duty to bargain did not arise until August 23, 2010, some sixteen months thereafter. Even assuming *arguendo* that there was a bargaining prior to that point in time, compelling economic considerations justified MBO's unilateral decision to proceed.

1. As MBO's Duty to Bargain Did not Arise Until August 23, 2010, There was no Duty to Bargain over the April 2009 Layoffs

The ALJD's conclusion that MBO violated Section 8(a)(5) by refusing to bargain over the April layoffs is premised on the notion that MBO had an obligation to do so as of that date. Respondents except to that conclusion and to the ALJ's underlying rationale, as the procedural history of this case and the Board's decision in *Mercedes-Benz of Orlando*, 355 NLRB No. 113 (2010), dictate that MBO had no obligation to bargain with the Union until August 23, 2010 – more than sixteen months later. That the bargaining obligation failed to attach any earlier is the only possible result, as the imposition of a bargaining obligation from the date of the election would be in direct violation of *New Process Steel v. NLRB*, 130 S.Ct. 2635 (2010).

On November 14, 2008, the Regional Director issued a Decision and Direction of Election in Case No. 12-RC-9344, pronouncing that the petitioned-for unit was appropriate. Pursuant to an extension granted by the Associate Executive Secretary, MBO filed a timely Request for Review on December 5, 2008. Then-Chairman Schaumber and then-Member Liebman denied the Request for Review on December 15, 2008, apparently clearing the way for

an election to be held as scheduled on December 16, 2008. As all involved in these proceedings now recognize, however, the two-member panel did not possess statutory authority to act when it denied MBO's Request for Review. Pursuant to *New Process Steel*, the Board lacked authority to rule on it before the swearing in of Members Becker and Pearce five months later.

Had the two-member panel refrained from acting beyond the scope of its statutory authority, instead allowing MBO's Request for Review to remain undecided until a third Board Member was sworn in, the manner in which the election concluded would have been dramatically different. As the Board recognized in its August 23, 2010 Decision and Order, pursuant to Section 102.67(b) of the Board's Rules and Regulations, as amended, employees would certainly have cast their ballots irrespective of whether the Board had addressed MBO's Request for Review, because that rule states:

> The Regional Director shall schedule and conduct any election directed by the decision notwithstanding that a request for review has been filed with or granted by the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of the election or any other action taken or directed by the Regional Director: *Provided, however,* That if a pending request for review has not been ruled upon or has been granted ballots whose validity might be affected by the final Board decision shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such decision.

Therefore, whether or not MBO's Request for Review had been addressed by the Board, the election would have gone forward as scheduled. As the above proviso indicates, however, what was to be done with the ballots upon closing the polls depended directly and exclusively on whether the Board had issued a *valid* Decision and Order. Had MBO's Request for Review properly laid dormant until such time as the Board had sufficient members to address it, ballots would have been "impounded and remain[ed] unopened pending… [a] decision." Section

102.67(b).[10] Because the two-member panel took the now-invalidated action of denying MBO's Request for Review, however, the ballots were prematurely opened and tallied.[11]

Under standard Board procedures, a failure by the Board to properly rule upon the Request for Review prior to the election would have called for impoundment. That is essentially what happened in this case. Technically the Board did render a decision, albeit an invalid one. From a substantive standpoint, however, how is an invalid decision any different from no decision at all? The only proper application of Board procedures in this case compelled the uninterrupted impoundment of ballots until the Board's ruling of August 23, 2010. Under these circumstances, any attempt to impose a bargaining obligation prior to that date cannot stand.

The ballots should never have been opened on December 16, 2008. Rather, they should have remained impounded pending a legitimate decision on MBO's Request for Review. Only after a proper quorum addressed the Request for Review could the Board "direct…the appropriate action to be taken on impounded ballots of [the] election already conducted…." Section 102.67(j). *See, e.g.*, *Red Lobster*, 300 NLRB 908, 912 (1990) ("remand[ing] the case to the Regional Director with directions to open and count the impounded ballots, to issue tallies of ballots, and to take further appropriate action").

The Board's post-*New Process Steel* Decision and Order of August 23, 2010 endeavored to straighten out the election procedure, given its convoluted history. Thus, it recognized that it had to "consider the question of whether the Board can rely on the <u>results</u> of the election[,]" concluding that "the election was properly held and the <u>tally</u> of ballots is a reliable expression of

[10] *See also, Section* 11302.1(a) of the Board's Casehandling Manual, which expressly states that, " If the Board does not rule on a request for review before the election, the Regional Director should proceed to conduct the election *and segregate and impound the ballots, unless the Board specifically directs otherwise*" (emphasis added).

[11] The only way MBO could have prevented the opening and tallying of the ballots at that point would have been to petition a federal court (within hours after the denial of the Request for Review) for a writ of mandamus on the grounds upon which the Supreme Court ultimately ruled in *New Process Steel*. That MBO did not pursue such

the employee's [sic] free choice." 355 NLRB No. 113, slip op. at 1 (emphasis added). The NLRB explained that, "had the Board decided not to issue decisions during the time that the delegee group consisted of two Board Members, the Regional Director would have conducted the election as scheduled and impounded the ballots." *Id.* (emphasis added). Support for this proposition derived from Section 102.67(b), as discussed above.[12] As the Board went on to explain, "[i]n such a scenario, after resolving the representation issues, we would direct that the impounded ballots be opened and counted."[13] *Id.* (emphasis added).

Recognizing that the ballots would have been cast on December 16, 2008 regardless, the Board concluded that "it is clear that the decision of the two sitting Board Members to continue to issue decisions did not affect the outcome of the election." *Id.* (emphasis added). Thus, [w]ith or without a two-member decision on the original request for review, the election would have been conducted as scheduled." *Id.* (emphasis added). While that may be true, it was equally clear that the Board recognized that the failure to impound ballots was a serious anomaly that was directly precipitated by the premature two-member decision.

Unscrambling eggs, the Board crafted a fix: rely on the tally of ballots to avoid the need for a new election, but adjust the effective date of the bargaining obligation so as to undo the error caused by the failure to impound. As it explained, "[s]ince the timing of the election was not affected by the issuance of a two-member decision on the request for review, we find that the decision of the Regional Director to open and count the ballots was, at worst, harmless error that

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extraordinary relief at that point in time is irrelevant. Nothing can change the fact that the two-member panel's denial of the Request for Review on December 15, 2008 was invalid *ab initio*.

[12] The Board also cited to two provisions of the Casehandling Manual, Sections 11274 and 11302.1(a).

[13] Failure to impound ballots is a breach of Section 102.67(b). *Monroe Auto Equipment*, 273 NLRB 103, 109 (1984). The Board did not take action to cure the breach in *Monroe Auto Equipment*, because "no party has placed the issue of the validity of the election results before us at this time." *Id.* Here, though the validity of the election results is not challenged in this proceeding, the date upon which a bargaining obligation attached under the terms of the Board's August 23, 2010 Decision and Order is directly at issue. Nevertheless, it is worth noting that

did not affect the tally of ballots." *Id.*, slip op. at 2 (emphasis added). "Similarly," the Board noted, "we find that the Regional Director's Certification of Representative based on that tally was valid." *Id.* Critically, the Board provided in a footnote that:

> There is no question that a majority of valid ballots was cast for the Union. 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.

Id., slip op. at 2, n. 4 (emphasis added).

MBO does not take issue with the Board's determination that the votes cast on December 16, 2008 remain a reflection of this group of employees' expression of choice.[14] As such, while the outcome of the election (*i.e.*, the results of the tally), was not affected by the timing of the illegitimate two-member decision, the date upon which MBO could potentially be liable for refusals to bargain in violation of Section 8(a)(5) could only be prospective,[15] as the error caused by the failure to impound is only "harmless" if the date of the obligation is adjusted.

The harm caused by the premature opening of the ballots – which has come to fruition in the errant ALJD – is the imposition of a putative bargaining obligation on MBO retroactive to the date of the election (despite the fact that the ballots were not even tallied until several weeks thereafter). MBO was put on notice that the Union had received majority support due only to an improper opening of ballots that should have remained impounded. This is exactly the harm that the Board's adjustment of the date of bargaining obligation sought to cure. Without changing that date, the only basis for imposing a bargaining obligation retroactive to the date of the tally

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Member Dennis would have ordered a new election due to the breach in *Monroe Auto Equipment*, despite the absence of any party's request for a rerun. *Id.* at 109, n. 7.

[14] Section 102.67(b) establishes that notion as a given; the ballots will be cast as scheduled, but if a request for review remains pending, those still-valid ballots will be impounded. Thus, in the related certification-test proceedings pending in the Eleventh Circuit, MBO does not challenge the Board's determination that the ballots reflect those employees' choice, given that the bargaining obligation applies from August 23, 2010 forward only.

would be premised on the illegitimate denial of the Request for Review. Without the two-member panel acting on MBO's Request for Review, the ballots would have stayed impounded. Allowing a bargaining obligation to run retroactive to the date of the election would thus directly violate *New Process Steel*, because it would give effect to the decision of the two-member panel.

Thus, had the correct procedure been followed, and the ballots been impounded, MBO would not have been put on notice of a bargaining obligation on the date of the election. This is particularly poignant (given the razor-thin 16-14 margin) and is precisely why the Board found it necessary to adjust the certification date to impose only a prospective duty to bargain. Indeed, had the Request for Review sat dormant as it should have, and had the ballots not been tallied on December 16, 2008, MBO could not have attempted to bargain with the Union over the April 2009 layoffs. By attempting to bargain, MBO would likely have been acting in violation of Section 8(a)(2) of the Act for bargaining without a showing of majority support.[16]

Moreover, as the Board explained in *Mike O'Connor Chevrolet*, "an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not been made." 209 NLRB 701, 703 (1974) (footnote omitted). In an election where ballots are impounded, however, objections can only be registered *after* the impounded ballots are opened. *Casehandling Manual*, Section 11392.2(a)(4). Thus, absent the improper opening of the ballots (and corresponding failure to impound) due to the two-member panel's illegitimate denial of MBO's Request for Review, the time period in which the "at your peril" standard applies would not have begun.

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[15] Thus, the Board's finding on that MBO refused to bargain was based upon its presumption that MBO would continue to refuse to bargain to test certification, not based upon past conduct. *See* slip op. at 2, n. 5.

[16] MBO hopes that Counsel for General Counsel's answering brief does not misinterpret statements of the Board such as "it is well established that an employer is not relieved of its obligation to bargain with a certified representative pending Board consideration, or reconsideration, of a request for review." *Benchmark Industries*, 262 NLRB 247, 248 (1982). That rule applies to requests for review of on objections and/or challenges, and not of

MBO was still at risk of unfair labor practice findings based upon changes made to terms and conditions of employment during the course of an organizing campaign, but that liability could only derive from Sections 8(a)(3) and (1) of the Act.[17] As the ALJ properly found in this case, MBO's April 2009 layoffs did not violate Section 8(a)(3). *See* ALJD, pp. 24-27. The ALJ also erred by finding that MBO had an obligation to bargain with the Union over the April 2009 layoffs. Though he properly cited the rule "that an employer's obligation to bargain before making changes commences not on the date of certification, but on the date of the election" (ALJD, p. 30, lines 9-10 (quotation and citations omitted)), the Board's actions in adjusting the date of the bargaining obligation removed this case from that rule. Thus, the ALJ was wrong when he rejected MBO's argument that the "'unique facts of this case are completely unprecedented, placing the parties in uncharted territory.'"[18] (ALJD, p. 30, lines 7-8).

As demonstrated above, the ALJ also erred when he rejected MBO's argument that, in the August 23, 2010 Decision and Order, the Board "'manifest[ed] intent to toll MBO's bargaining obligation up to that point in time.'" (ALJD, p. 30, line 25). Any other reading of the Decision and Order would allow the December 15, 2008 two-member denial of MBO's Request for Review to remain in effect in direct contravention of *New Process Steel*.

Moreover, *Indiana Hospital*, 315 NLRB 647 (1994) (ALJD, p. 30, lines 17-22), is inapposite, as the question of whether an employer acts "at its peril" during the pendency of a

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Regional Directors' decisions and directions of election. Of course, the former requests for review are resolved after the employer learns of the election results and after an initial certification, and the latter are resolved prior.

[17] The ALJ commented that "[w]hen shop steward Brad Meyer questioned Team Leader Alex Aviles about why skill reviews were not being done, Aviles answered that the MBO [sic] was concerned about maintaining the status quo." (ALJD, p. 30, lines 12-14). Though the ALJ saw this as MBO's recognition of a bargaining obligation, it is better viewed as reticence to violate §§ 8(a)(3) and 8(a)(1).

[18] The Union understood the import of the Board's adjustment of the bargaining obligation date. As a result, it filed a Motion for Reconsideration with the Board on September 17, 2010, asking that the Decision and Order "be revised because the Certification of Representative should be deemed valid as of the date that it was issued by the Regional Director not the date several years later when the Board issued the instant decision on August 23, 2010." The Board denied the Union's Motion on November 23, 2010.

certification test is not at issue here.[19] Rather, the question presented here is whether a bargaining obligation attached upon the premature opening of the ballots on December 16, 2008. Clearly it did not. Rather, the obligation attached on August 23, 2010, as the imposition of an obligation on any preceding date would necessarily be premised on the opening of ballots resulting from the denial of MBO's Request for Review rendered void by *New Process Steel*.

Furthermore, the ALJ's reliance on the fact that the Consolidated Complaint constituted a "pending" rather than "future proceeding" rings hollow. Regardless of when these proceedings commenced, the bargaining obligation attached on August 23, 2010 and no earlier, making it impossible for MBO to have violated Section 8(a)(5) by failing to bargain with the Union sixteen months before. Whether these proceedings are characterized as "pending" or "future" does not alter the date upon which the Board held that MBO was obligated to bargain with the Union.

Pursuant to the Board's August 23, 2010 Decision and Order, MBO's obligation to bargain with the Union attached on that day and not before. The obligation could not have attached on the date of the election, as the ballots that were later tallied that day (along with the subsequently opened challenged ballots) should never have been opened. The only reason they were opened, and the only reason MBO was put on notice of the Union's majority support, was the two-member panel's denial of MBO's Request for Review – an action that was subsequently invalidated by the Supreme Court. The Board recognized this deficiency, and that is why it imposed a prospective bargaining obligation only as of August 23, 2010. Thus, the ALJ erred, because MBO did not have an obligation to bargain with the Union over the April 2009 layoffs.

[19] MBO recognizes that it acts at its peril in making changes subsequent to August 23, 2010, during the pendency of its certification test.

2. The April 2009 Layoffs Were Motivated by Compelling Economic Considerations, Thereby Obviating any Alleged Duty to Bargain

As discussed above, MBO did not have a duty to bargain with the Union in April 2009. Even had it been operating under such a duty, however, the layoffs were necessitated by compelling economic considerations that obviated that duty. While MBO recognizes that layoffs are a mandatory subject of bargaining, an employer is relieved of any such obligation in the period preceding "a final determination" on majority status if "compelling economic considerations" justify unilateral action. *Mike O'Connor Chevrolet*,[20] 209 NLRB at 703.

a. Factual background surrounding MBO's ominous economic state, which precipitated the April 2009 layoffs

The economic situation confronted by MBO in April 2009 and the preceding months was devastating. As discussed in Section B. above, the Dealership's service business was in a tailspin, necessitating reductions across all classifications, including the layoffs of three other technicians in December 2008. Financial conditions failed to improve following those layoffs, as the gravity of the situation only deepened. Both Clark and Berryhill admitted they were probably overly optimistic as to how quickly the economy might recover and the extent to which additional layoffs would be necessary (Tr. 1432). The dire predictions of the Ward's Automatic article entitled "Will AutoNation Survive?" seemed to be coming true by late 2008 (Tr. 1221). By the following January, monthly gross profits had fallen to an all-time low of $290,000 (Tr. 1204, 1232). The December layoffs had failed to provide enough work for the remaining employees so as to allow them to earn a reasonable living. Clark testified that, as they continued

[20] As discussed in Section C.1., *supra*, the *Mike O'Connor Chevrolet* test should not apply at all, as the parties' entry into the post-election objections period was improperly triggered by the premature tally of votes.

to monitor the trend numbers, he and Berryhill ultimately realized that "service… wasn't going to recover" in the near term and that more layoffs would be necessary (Tr. 1234-1235).[21]

By the time that Berryhill and Clark began discussing the need for more layoffs, the technicians had already begun to anticipate further cuts, and Berryhill was being asked, "when is the next layoff?" (Tr. 1450). As Clark testified without challenge, his and Berryhill's predictions were – unfortunately – proving correct. Had the Dealership not laid off the seven technicians in December 2008 and April 2009, it is an undisputable fact that income levels for remaining technicians would have been dramatically slashed. In the process, the Dealership would undeniably have lost its better technicians, as their abilities to earn living wages would have been negatively impacted in a profound way. As Clark said, "starving out" technicians to see who would give up and leave was never an acceptable option. The Dealership's approach has always been to "retain the best" in order to provide superior service to customers (Tr. 1257).

Examining the downward trends, Clark and Berryhill were correct in their assessment that the downturn in available service work was not going to recover. Even after the April 2009 layoffs, which further reduced the number of technicians sharing work from 32 to 28, monthly profit figures continued to trend downward to a level of $270,000 to $280,000 per month (Tr. 1236-1238). Compared to the 2007 average of $466,000, one can truly appreciate the dramatic degree to which available work for technicians had dried up. Even now, with only twenty-five (25) technicians left to service available customer needs, average monthly flat rate hours remain well below the 2007 standards of 208 hours per month (Tr. 1242). The 40 percent plus drop in available service work did not result in an excess of hours for remaining technicians. Not surprisingly, none of the witnesses complained about "too much" or "too little" work in 2010.

[21] MBO does not undertake to explain the process by which the technicians were selected for layoff in this brief, as the ALJD (at pp. 24-26) adequately does so. The ALJ found that the process was nondiscriminatory.

b. The ALJ erred in failing to find that MBO's refusal to bargain was justified by compelling economic considerations

The April layoffs were necessitated by compelling economic considerations. As the ALJ himself recognized before incorrectly finding a violation, "the reduction-in-force in April 2009 was dictated by economic circumstances." (ALJD, p. 24, line 51). He also found that MBO had "established that a reduction-in-force was necessary." (ALJD, p. 27, line 44). It is therefore difficult to understand how the ALJ could conclude that, despite the fact that the layoffs were "dictated by economic circumstances" and "necessary," MBO had a duty to bargain over them.

The ALJD (at p. 30, lines 49-51) starts from the premise that "a drop in business does not rise to the level of an economic exigency or compelling economic circumstances." *Uniserv*, 351 NLRB 1361, 1369 (2007). But, the ALJ in *Uniserv*, citing *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995), stated the wrong standard and spoke too broadly. *RBE Electronics* is part of a line of inapposite cases, including *Bottom Line Enterprises*, 302 NLRB 373 (1991), discussing changes undertaken by employers <u>during the course of collective bargaining</u>. Therefore, *RBE Electronics*, citing *Bottom Line*, stands only for the proposition that "when…parties are engaged in negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter; rather it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole." 320 NLRB at 81.[22] Here, MBO and the Union were not engaged in collective bargaining. In fact, the Union did not even request bargaining for the first time until two weeks after the April 2009 layoffs. (ALJD, p. 33, lines 44-47).

In essence, the ALJ approached the question of whether MBO presented sufficient evidence to warrant obviating the bargaining obligation an artificially severe threshold. Under

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(ALJD, p. 27).

Bottom Line, it is true that when parties are in the midst of collective bargaining, "economic exigencies" of only the direst nature may excuse the need to bargain over a decision. 302 NLRB at 374. The *Bottom Line* intra-negotiations "economic exigencies" standard is clearly higher than the *Mike O'Connor Chevrolet* pre-negotiations "compelling economic considerations" test.

That a higher standard applies to parties already in negotiations is logical. Where the parties are already engaged in bargaining, an employer's need for action without consulting the Union must be so "exigen[t]" so as to justify sidestepping the bargaining process that is already in place. That being said, where the parties have not yet established a framework for negotiations, and are not in the midst of discussing other subjects, a lower standard applies. The economic considerations that drive the employer prior to commencing negotiations must still be serious, and indeed so serious that they are "compelling;" but they need not be "exigent."

c. Compelling economic circumstances justifying a refusal to bargain need not be "unforeseeable"

After finding that the proffered economic considerations dictated the need for the April layoffs (but were apparently not sufficiently "exigen[t]" to allow the change had bargaining already commenced), the ALJ took a sharp turn and focused on the foreseeability of the need for the layoffs. To reach his conclusion that the need for layoffs must have been unforeseen so as to constitute "compelling economic considerations," the ALJ relies on *Angelica Healthcare Services Group*, 284 NLRB 844, 853 (1987). But, the *Angelica* decision relied in substantial part on *Van Dorn Plastic Machinery Co.*, 265 NLRB 864 (1982), which was later denied enforcement by the Sixth Circuit, 736 F.2d 343 (6th Cir. 1984), and remanded for further consideration. The Board's adoption of the ALJ's reasoning on reconsideration, in *Van Dorn*

[22] Tellingly, *RBE Electronics* and *Bottom Line* do not cite *Mike O'Connor Chevrolet*.

Plastic Machinery Co., 286 NLRB 1233 (1987) ("*Van Dorn II*"), *enf'd*, 881 F.2d 302 (6th Cir. 1989), which post-dates *Angelica*, does not contain the foreseeability requirement.[23]

The ALJ in *Van Dorn II*, affirmed by the Board and the Sixth Circuit, properly rejected the General Counsel's argument that there must be an "*emergency in operations* so compelling that a change…, if not effected immediately, would have been *catastrophic* to the present or future economic health" of the employer. *Id.* at 1240 (emphasis in original).[24] Instead, he held that the *Mike O'Connor* test requires that the action taken "rest on some business circumstances that are discernibly more demanding than calling for mere exercise of sound business judgment…." *Id.* at 1245. It is clear, however, that this "encompass[es] something less than an imminent business collapse, or requiring a demonstrable jeopardy of same." *Id.* Thus, the determination of whether the standard is met turns on "whether there is some real and unavoidable economic driving force behind the advanced business details that should excuse an employer's unilateral act." *Id.* The Sixth Circuit enforced the Board's order, finding that Van Dorn's elimination of paid breaks was merely "a prudent business decision, rather than one made under extraordinary economic compulsion." 881 F.2d at 308 (quotation omitted). There is nothing in *Van Dorn II* – the Board's most thoroughly litigated elucidation of the "compelling economic considerations" test – to suggest that the employer must show not only extraordinary pressure, but also that such pressure was the result of an unanticipated lightning strike.

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[23] The ALJ only partially quotes the dicta he relies on in *Angelica*, which, in full, states: "*I believe* that an underlying reason for not requiring bargaining when there are 'compelling economic considerations' is that an unforeseen occurrence, having a major economic effect, is about to take place that requires the company to take immediate action." 284 NLRB at 853 (emphasis added). One ALJ's belief, not specifically adopted by the Board in that case, does not amount to a pronouncement of Board policy.

[24] *Mike O'Connor Chevrolet* does not speak to emergency economic considerations, but to "compelling" ones. An "emergency" is defined as "an ***unforeseen*** combination of circumstances or the resulting state that calls for immediate action." http://www.merriam-webster.com/dictionary/emergency (emphasis added); *see also* http://dictionary.reference.com/browse/emergency ("a sudden, urgent, usually unexpected occurrence or occasion requiring immediate attention"). The definition does not include unforeseeability the way that "emergency" does.

The employer in *Van Dorn II* failed to show compelling economic considerations where it relied on "a long period of strained profitability brought on by large capital expenditures in recent years and experiencing a period of present rapid growth…." 286 NLRB at 1246. Thus, the economic pinch felt by Van Dorn was not severe, and it was self-propagated. On the other hand, MBO's compelling economic considerations were undoubtedly severe, and they were unquestionably extrinsic.[25] MBO did not experience a simple "drop in business"; it experienced an unprecedented cataclysm. This was not a situation in which MBO had faced similar downturns in the past, such that the Dealership would have been in a position to analyze options, rather than proceed with layoffs immediately. *Cf. Seafood Wholesalers Ltd.*, 354 NLRB No. 53, slip op. at 8 (2009) (two-member decision) ("There is no evidence that the economic circumstances herein were substantively different from previous years."). MBO was motivated by "compelling economic considerations" within the definition of *Mike O'Connor Chevrolet*, and was not required to bargain with the Union prior to laying off the technicians in April 2009.

Even if the ALJ's formulation requiring unforeseeability were somehow deemed to be correct, the record shows that the need for the April layoffs was unforeseeable. Unlike other cases, in which layoffs were cyclical, and bargaining over solutions other than layoffs was possible with the foresight that business could potentially be run differently the next time around, these layoffs were precipitated by a global economic crisis of epic proportions. As the ALJ found, the layoffs were necessary, and driven by economic factors never before faced by MBO.

[25] As the ALJ noted, "The national financial decline in 2008, resulting in bankruptcies and bailouts, had a profound impact upon automobile sales and service." (ALJD, p. 24, lines 17-18).

d. The remedies ordered by the ALJ are improper

Even where an employer operates under a duty to bargain over the decision to lay off employees,[26] it does not have a duty to bargain over the effects prior to final certification. *Sundstrand Heat Transfer, Inc. v. NLRB*, 538 F.2d 1257, 1259 (7th Cir. 1976) ("It seems to us highly illogical to apply the 'at-its-peril' doctrine to failure to bargain, before certification, over the effects of a layoff which was compelled by economic necessity, and for that reason excepted from the 'at-its-peril' doctrine"). Because there was no duty to bargain over the effects – the ALJ's backpay remedy must not stand. *Id.* at 1260 ("Since the function of the Board's remedy is to attempt to restore the situation to that which would have been obtained but for the illegal action, it follows that even if the employer had a duty to bargain, a full backpay remedy must have been predicated on the assumption that bargaining over the effects of the layoff would have kept the employees on the job. This is wholly improbable under the facts of this case where economic considerations dictated the need for the layoffs"). Awarding backpay where economic considerations dictated the necessity for the layoff is an abuse of discretion. *Id.* Because the ALJ already found, "that the reduction-in-force in April 2009 was dictated by economic circumstances" (ALJD, p. 24, line 51), and that MBO "established that a reduction-in-force was necessary" (ALJD, p. 27, line 44), a backpay remedy is inherently inappropriate and erroneous.

Reinstatement is also an improper remedy, as it is incongruous with the ALJ's finding that the layoffs were nondiscriminatory. *See Colonial Corp. of America*, 171 NLRB 1553, 1555, n.5 (1968) (in ordering reinstatement for employees terminated for discriminatory reasons, the

[26] The principal purpose of bargaining over layoffs is to give the Union an opportunity to change the employer's mind. *See Lapeer Foundry and Machine*, 289 NLRB 952, 954 (1988) ("Th[e] requirement [to bargain over layoffs] will ensure that the employees' bargaining representative will have the opportunity to propose less drastic alternatives to the proposed layoff. Moreover, the employer's duty to bargain will require meaningful negotiations concerning the decision to lay off, and not merely the notification to the Union of a decision that is a fait accompli."). But, in accordance with the ALJ's decision, the layoffs were a necessity. The ALJ's decision thus

Board noted that employees "who would have been terminated for nondiscriminatory reasons would, of course, not be entitled to reinstatement. Backpay for such employees would run only to the date that the employee would have been terminated for economic reasons"). MBO's April 2009 layoffs were found to be motivated by economic reasons, and would have occurred "even in the absence of their Union activities." (ALJD, p. 27, line 48). Accordingly, the proper remedy for any violation based on a failure to bargain should not include reinstatement. *Cf. Odebrecht Contractors*, 324 NLRB 396, 396, n.2 (1997) (where an economic layoff obligated the respondent to bargain over the effects of the layoff, the Board held that the ALJ erred in ordering reinstatement and instead ordered a make-whole remedy not including reinstatement).

D. Respondents Were not Operating Under any Bargaining Duty Prior to August 23, 2010, Nullifying any Section 8(a)(5) Allegations Preceding that Date (Responsive to Exceptions XXXVI, XXXVII, XLI-XLVII)

The ALJ found that MBO violated Section 8(a)(5) by: (A) not bargaining with the Union over the suspension of skill reviews in 2009; (B) not bargaining over changes to the way in which technicians were paid for performing prepaid maintenance work; and (C) failing to respond to the Union's April 17, 2009 information request. MBO excepts to these findings, the rationale underlying them, and the remedies imposed, as it was not obligated to bargain at the time of the alleged violations. As discussed in Section C.1, *supra*, the Board's August 23, 2010 Decision and Order establishes that MBO's obligation to bargain commenced on that date, and is not retroactive to the date of the election. Thus, MBO could not have violated § 8(a)(5) at any point in 2009, as there was no bargaining obligation until August 23, 2010. Therefore, the Board should not adopt the ALJ's findings that MBO violated Section 8(a)(5) in any way.

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holds that, though MBO did not bargain over the layoffs, MBO had already shown that whatever bargaining could happen would be confined, essentially, to the effects.

E. Even Assuming *Arguendo* That MBO Had a Legal Duty to Bargain Prior to August 23, 2010, It Did Not Engage in any Conduct Violative of Section 8(a)(5) (Responsive to Exceptions XLI, XLII, XLIV-XLVII)

1. MBO's Alleged Failure to Conduct Performance Appraisals for Technicians Between January and October 2009 Did Not Violate Section 8(a)(5) of the Act (Responsive to Exception XLI)

Paragraph 43 of the Consolidated Complaint alleges that MBO suspended skill level reviews in January 2009 because of the Union, and then reinstated them for various employees in August and October of that year. There was repeated testimony, however, that the practice of conducting skill rate reviews occurred only on a sporadic basis over the course of a given year, if at all. (Tr. 184-187, 504, 924).[27] There is no proof that technicians were uniformly evaluated or reviewed for performance or rate purposes on any set schedule in 2006, 2007 or 2008 (Tr. 187).

Rate adjustments are not conferred upon all technicians whose performance is evaluated. Moreover, no technicians received general "wage increases" as indicated in Complaint Paragraph 43. Throughout 2008, and continuing through the date of the Hearing, a wage freeze has been in effect for MBO employees in all departments (Tr. 1427). Based upon record testimony, it would appear that, aside from Meyer, few if any technicians have received any pay raises since 2008.

Even if MBO had a rigid evaluation schedule, what possible purpose would have been served to adhere to it under such dire economic circumstances? Moreover, Counsel for General Counsel failed to present a single witness to demonstrate that any technician was harmed by the absence of a performance evaluation during the first half of 2009. For all these reasons, the ALJD's conclusion that Respondents violated Section 8(a)(5) of the Act, "by unilaterally suspending skill level reviews and thereby denying promotions to employees who would have been promoted had those reviews occurred," is clearly erroneous. (ALJD p. 32, lines 37-40).

2. MBO's Correction of the Flat Rate Payout for Two AutoNation Warranty Maintenance Menus Did Not Violate Section 8(a)(5) of the Act (Responsive to Exception XLII)

Like all service technicians, MBO technicians perform maintenance and repair services on customer pay and warranty schedules. If a customer's vehicle is "under warranty," there are reduced service charges or no charges at all. Warranty coverage may come from the manufacturer, built into the vehicle price, or through a separate, pre-paid warranty. A dealership like MBO may also directly sell pre-paid service warranty contracts during the sales process.

Until approximately 2005, new Mercedes-Benz vehicles included multi-year warranties at no additional charge to the customer. Such warranties had to be purchased thereafter. For some time, Mercedes-Benz has offered what are known as the Flex A and Flex B service menus for its vehicles, in conjunction with the manufacturer's warranty (Tr. 372-73, 1121-22). These are also included as part of the AutoNation Vehicle Care Program (G.C. Ex. 155).

Menendez testified that, at some point in 2008 or 2009, Finance Director Yvette Lookhoff advised her and Bullock of the discrepancy in payments to MBO for Flex A and Flex B services (Tr. 1122). Specifically, technicians were being paid the higher Mercedes-Benz warranty rates for Flex A and B services, even though the AutoNation warranty was only reimbursing MBO at the $225 or $325 levels. It was determined that the AutoNation warranty never required extra work for <u>its</u> Flex A and B services, which would have accounted for the higher Mercedes-Benz warranty payout (Tr. 1122-1123).

MBO discovered that it was paying technicians according to the higher Mercedes-Benz schedule(s), but was being reimbursed at the lesser AutoNation rates (Tr. 1124). Menendez and Bullock corrected this by explaining that Flex A and B services under the AutoNation warranty

[27] Though Counsel for General Counsel introduced documents reflecting the Dealership's intention to perform reviews twice yearly (G.C. Exs. 86, 87), the record shows that reviews were sporadic, and there is no

required fewer tasks, and would therefore pay a proportionately lower flat rate (Tr. 1123). This generated G.C. Ex. 155, which was designed to close the rate gap in customer-paid time by charging individual service items at rates that had previously been charged.

Menendez properly downplayed the significance of this change, on the basis that MBO merely discovered that it had inadvertently been providing a service to customers at an improper rate, and that they responded by correcting this mistake to bring practices into conformity with AutoNation procedures. In correcting this error, Menendez testified that MBO was operating as it had since before the petition. By making this correction, MBO was advising technicians not to provide these services on the preexisting rate structure. It was not taking money out of their pockets so much as putting them on notice that they should spend their time performing services at proper rates. Consequently, they remained free to utilize their freed up time on other tasks for which they would continue to be fully paid, thereby filling any vacuum with work at appropriate rates. It is worth noting that the rate for individual tasks within the warranty menus remained unchanged. In other words, there was no change in rates paid to technicians on a per-job basis.

There is no evidence to suggest that this isolated correction was motivated by anti-Union animus, or that it was even an appropriate topic for bargaining to begin with (Tr. 1123-1125). It certainly did not represent any departure from the status quo to the extent that MBO did nothing other than to correct a procedural non-conformity. In rendering this *de minimis* change, MBO was not directing technicians to continue providing that service for free (or even at a lesser rate), but instead to devote their time to other tasks for which they would continue to be compensated pursuant to standard rates. Consequently, the isolated correction of this internal practice does not rise to the level of a unilateral change in employment terms or conditions that would render it a mandatory subject of bargaining. For all of these reasons, Respondents take exception to the

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evidence that the deviation from those written aspirations had anything to do with the Union.

ALJ's conclusion that, "Respondents, by unilaterally reducing the specified hours for performing prepaid maintenance work, violated Section 8(a)(5) of the Act." (ALJD p. 33, lines 24-25).

III. CONCLUSION

As set forth herein and within Respondents' attached Exceptions, the findings and conclusions of the ALJD are erroneous and must be set aside, to the extent that record evidence proves that: (1) Respondents did not violate Section 8(a)(1) with regard to any conduct in which they engaged over the weeks preceding the representation election, or over the months that followed; (2) MBO's decision to lay off Anthony Roberts in December 2008 was based upon job-related performance criteria, thereby invalidating any claim of discrimination under Section 8(a)(3) of the Act; (3) At no point was MBO operating under a duty to bargain with the Union over the April 2009 layoffs, in light of the Board's action to adjust MBO's bargaining obligation date to run prospectively from August 23rd, 2010, and given the compelling economic considerations that otherwise served to obviate any such duty to bargain; and, (4) The ALJ further erred in finding that MBO otherwise violated Section 8(a)(5) prior to August 23, 2010.

Filed this 25th day of April, 2011.

Respectfully submitted,

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Contemporary Cars, Inc. d/b/a
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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CONTEMPORARY CARS, INC., d/b/a MERCEDES-BENZ OF ORLANDO, and AUTONATION, INC.,	)		
Respondents,	)	Case Nos.	12-CA-26126
	)		12-CA-26233
and	)		12-CA-26306
	)		12-CA-26354
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,	)		12-CA-26386
	)		12-CA-26552
Charging Party.	)		

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2011, I e-filed the foregoing **RESPONDENTS CONTEMPORARY CARS, INC. D/B/A MERCEDES-BENZ OF ORLANDO AND AUTONATION, INC.'S POST-HEARING BRIEF** with the office of the NLRB's Executive Secretary using the Board's e-filing system and that it was served by electronic mail on the following:

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