

**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	)		12-CA-26386
MACHINISTS AND AEROSPACE	)		12-CA-26552
WORKERS, AFL-CIO,	)		
	)		
Charging Party.	)		

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

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Attorneys for Respondents

Respondents Contemporary Cars, Inc., d/b/a Mercedes-Benz of Orlando (herein “MBO”), and AutoNation, Inc. (collectively herein “Respondents”) hereby file this Reply in support of their Exceptions to Administrative Law Judge George Carson’s March 18, 2011 decision. Respondents do not endeavor to rehash the arguments presented in their supporting brief, but instead confine their argument to the limited points discussed below.

**I. The ALJ erred in finding that the General Counsel met his *Wright Line* burden as to the allegedly discriminatory discharge of Anthony Roberts, because there is no evidence that Respondents had any knowledge of Roberts’ alleged union activity.**

The ALJ premised his finding that Respondents had knowledge of Roberts’ union activity on two factors: (1) James Weiss’s testimony that he named Roberts as a union supporter in MBO General Manager Bob Berryhill’s presence; and, (2) the fact that Roberts was the first of twenty employees with whom Berryhill spoke in his office when he reconvened employee meetings (based only on Berryhill’s notebook). Both premises are fatally flawed, and the ALJ’s finding that Respondents “knew” that Roberts supported the union must therefore be rejected.

It is astonishing that the ALJ would base his finding of Respondents’ alleged knowledge of Roberts’ union activity solely on the testimony of James Weiss. For every other purpose, ALJ completely discredited Weiss’ testimony. The ALJ ruled 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).<sup>1</sup> The General Counsel, recognizing Weiss could not be believed, chose not to even bother cross-excepting to that determination. If, as the ALJ determined, Weiss’ testimony “lacked any reliability,” it is simply illogical that he would choose one uncorroborated passing comment on which to base a determination that he shared knowledge of Roberts’ alleged union activity, especially in the absence of any evidence that Roberts had, in fact, openly supported the union.

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<sup>1</sup> The ALJ also found that “Weiss was not credible” (ALJD, p. 28, line 42), and that “the testimony of Weiss defies logic.” (ALJD, p. 13, line 50).

There is no support for the General Counsel's unfounded surmise that – if Roberts' was the first employee who met with Berryhill – it somehow proves “that Berryhill believed that Roberts was behind the Union campaign and that if he could resolve Roberts' grievances, Respondents could nip the Union's campaign in the bud.”<sup>2</sup> (Answering Brief, p. 17). Moreover, the ALJ appears to have made a similar mistake in reasoning. Even if there was absolute proof that Roberts was the first technician with whom Berryhill spoke after union rumors surfaced, the quantum leap to imputing knowledge of Robert's activity is entirely without support. The ALJ and the General Counsel are leaping from an isolated and unsupported event to a conclusion that lacks any foundation.

The ALJ offered no justification for his conjectural determination that Roberts was initially contacted because Berryhill knew that he supported the Union. It could just as easily be argued that Berryhill initially contacted Roberts because he believed Roberts opposed the Union.<sup>3</sup> The ALJ's finding that Berryhill knew of Roberts' union activity prior to the September 25 meeting is also inconsistent with his recognition that “[n]one of the foregoing employees [including Roberts] had openly identified themselves as supporters of the Union as of September 25. Berryhill had been unaware of the organizational activity.” (ALJD, p. 6, lines 46-47).

Observing the tenuous nature of the ALJ's findings as to the basis for Respondents' alleged knowledge, the General Counsel attempts to bolster the ALJ's determination by pointing to other alleged evidence. These attempts also fail. First, the General Counsel suggests that Respondents' knowledge can be imputed by virtue of Roberts' attendance at union meetings

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<sup>2</sup> Moreover, the General Counsel's brief acknowledges that the record evidence shows that Berryhill's meetings with employees were in response to AutoNation Florida region manager Pete DeVita's request that he “find out what was going on regarding union organizing.” (Answering Brief, p. 19). It takes a quantum leap to proceed from an instruction to “find out what was going on” to presuming that Roberts was chosen first based upon alleged prior knowledge that he was a Union supporter.

<sup>3</sup> Respondents do not mean to suggest that Berryhill was actively conscripting employees to undermine the union. Rather, Respondents shine light on the fallacious argument that Berryhill's meeting with Roberts first must mean that he believed Roberts supported the Union. To be sure, the content of the meeting, as testified to by Roberts and as characterized by the ALJ (ALJD, p. 7, lines 16-22), reflects a manager seeking to take the pulse of the shop, rather than summoning a known union supporter.

that were also attended by Alex Aviles, who was later promoted to a team leader position. (Answering Brief, p. 17). But, the General Counsel cites no evidence – because there is none – that Aviles revealed to anyone in management the identities of the meetings’ attendees.<sup>4</sup> Equally speculative is the suggestion that managers learned of Roberts’ union involvement because he spoke about the union and invited employees to meetings, possibly within earshot of management. (Answering Brief, p. 17). There is no proof of this, and the General Counsel conceded the weakness of this argument, when all he could muster was a guess that managers “may have overheard” Roberts’ conversations with employees. (Answering Brief, p. 17).

The ALJ erred by finding that the General Counsel sustained his *Wright Line* burden to show that MBO had knowledge of Roberts’ union activity. None of the suppositions relied upon by the ALJ or presented by General Counsel’s Answering Brief come close to establishing that Respondents knew Roberts was a union supporter at the time he was laid off. The allegation that MBO violated § 8(a)(3) should be dismissed. See, e.g., *A to Z Portion Meats v. NLRB*, 643 F.2d 390, 393-94 (6th Cir. 1980), *denying enf. to* 238 NLRB 643 (1978) (prior knowledge of individual’s union activity must be proven even where there is evidence of union animus).

**II. Even if the General Counsel could somehow meet his *Wright Line* burden, the ALJ erred in finding that Respondents failed to prove that Roberts would have been chosen for layoff absent his protected activity.**

As explained in the supporting brief, even if Respondents could somehow be charged with knowing that Roberts engaged in protected activity, they satisfied the shifting burden by proving that Roberts would have been selected for layoff notwithstanding such knowledge. The

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<sup>4</sup> Indeed, the General Counsel’s argument neglects the unrefuted testimony that on cross-examination, Aviles (who was credited throughout the ALJD) emphasized that he agreed to take a team leader position only upon the condition that, in doing so, he would not be asked to serve as a “snitch” for the Dealership:

Q: “Did you ever speak with any AutoNation or MBO officials about the union sentiments of Mr. Roberts?”

A: “No. When I was given my position, the first thing I asked him was, like, if you need to be snitching who was there and what was said, I’m not the person to be there. And I was told nope, that’s not what we want you to do.”

(Tr. 1370, lines 9-14).

decision to select Roberts was based on a determination that he was, in essence, the “weakest link”<sup>5</sup> in the shop based upon his demonstrated inability to learn and adapt to the increasingly computerized systems required to succeed as a diagnostic technician.<sup>6</sup> Disregarding Respondents’ explanation, the ALJ grasped at other factors, including skill level rating,<sup>7</sup> perceived productivity,<sup>8</sup> and seniority<sup>9</sup> -- all of which Respondents affirmatively showed they did not rely upon – to find that Roberts would not have been selected absent his alleged union activity. The ALJ’s determination was in error.

It is imperative to note that the ALJ never found that Respondents’ proffered reason for choosing Roberts was pretextual. Rather, he simply substituted his own judgment, and determined that if he had the same decision to make, *he* would not have chosen Roberts for layoff. As conceded within the ALJD, any such approach is improper, and should be rejected. (ALJD p. 27, lines 41-44). *See, e.g., Pollock Electric*, 349 NLRB 708, 711-12 (2007) (rejecting judge’s independent comparison of candidates in refusal to hire case; judge erred by rejecting employer’s use of recent hands-on experience as primary criterion for promotion, and instead looking to other reflections of employees’ skills other than recent experience); *Ryder Distribution Resources*, 311 NLRB 814, 816 (1993) (“the Board does not substitute its own business judgment for that of the employer in evaluating whether conduct was unlawfully motivated”).

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<sup>5</sup> It is worth noting that Roberts’ 2007 performance evaluation singled out his technical skills as an area for improvement by stating, “Needs to Continue Developing Electrical Diagnostic Skills.” (R. Ex. 7).

<sup>6</sup> In support of this contention, the Board need look no further than R. Exs. 5, 6 and 9 – a trio of corrective action forms issued to Roberts between 2005 and 2008, all of which accurately portray him as deficient in comparison to his fellow technicians.

<sup>7</sup> Respondents showed at page 21 of their supporting brief that skill level ratings are not a dependable measure of technician competence, because rating increases were freely given over the years, and a long-tenured technician’s skill rating can be artificially high.

<sup>8</sup> That Roberts may have turned more hours than other technicians is not probative. Respondents explained at page 16 of their supporting brief that the greater number of hours that Roberts turned was a function of him being the recipient of routine work that required lesser computerized diagnostic competency than work performed by others, rather than superior productivity.

<sup>9</sup> Despite his own, unsupportable reliance on seniority, the ALJ subsequently credited contradictory testimony that, “Respondents do not use seniority as a factor” in layoffs. (ALJD, p. 27, line 12).

**III. All of the ALJ's Section 8(a)(5) violation findings were in error, because MBO's obligation to bargain with the Union arose on August 23, 2010, and no earlier.**

The ALJ's findings that MBO violated Section 8(a)(5) of the Act are necessarily premised upon the false assumption that MBO's obligation to bargain (or at least an "at-its-peril" risk) dated from the December 16, 2008 representation election. As shown in Respondents' supporting brief, however, the Board's August 23, 2010 Decision and Order conclusively imposed a prospective-only bargaining obligation on MBO as of that date. The General Counsel counters by claiming that the Board has already resolved this issue against MBO (it has not), and that MBO's post-election posture paralleled that of an employer awaiting adjudication of determinative challenges (it did not). Those issues are dealt with in turn below.

**A. Contrary to General Counsel's argument, the Board has not conclusively determined that MBO had a duty to bargain prior to August 23, 2010.**

On June 18, 2010, immediately after the Supreme Court issued its decision in *New Process Steel*, and prior to the commencement of the hearing in this case, Respondents filed a Motion for Partial Summary Judgment ("MPSJ") on all 8(a)(5) allegations. As the Board noted in denying the MPSJ, "Respondents argue[d] that they had no duty to bargain with the Union because [*New Process Steel*] rendered the decisions in the underlying representation proceedings invalid."<sup>10</sup> The Board went on to explain that while the MPSJ was pending, it had set aside its earlier decisions and on August 23, 2010 issued the new Decision and Order (355 NLRB No. 113 (2010)). Tracking the language of that order, the Board explained that it "found that the election was properly held, the tally of ballots is a reliable expression of the employees' free choice, and the Regional Director's certification of representative based thereon was valid."<sup>11</sup> Therefore, the Board determined that the narrow argument presented in the MPSJ –

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<sup>10</sup> Those decisions are the two-member panel's December 15, 2008 denial of MBO's Request for Review and the August 28, 2009 Decision and Order, 354 NLRB No. 72 (2009).

<sup>11</sup> As Respondents explained in their initial supporting brief, the Board's findings that the election was properly held, and that the tally expressed free choice, speak only to the legitimacy of the vote count as an indication of majority support. In denying the MPSJ, the Board said nothing about the date upon which

that *New Process Steel* had invalidated the orders upon which the 8(a)(5) allegations were premised – lacked merit, as the Board had set aside those orders and issued a new one.<sup>12</sup>

Still faced with the prospect of defending refusal to bargain allegations with respect to conduct that preceded the new certification date, Respondents moved the Board to reconsider its denial of the MPSJ. In that reconsideration motion, Respondents raised the inherent incongruity between the dates of the alleged violations and the new certification date. Admittedly, Respondents did not elaborate further in their reconsideration motion. They surely did not articulate the argument presented in their Brief in Support of Exceptions, wherein they make clear that MBO's constructive knowledge of majority support for the Union on the date of the election is traced directly and exclusively to the failure to impound ballots flowing directly from the illegitimate two-member panel's denial of MBO's Request for Review on December 15, 2008, and therefore could not form the basis of a bargaining obligation or an at-its-peril risk.

Preordained to doom by the stringent standard of review within Section 102.48(d)(1) of the Board's Rules and Regulations, Respondents' reconsideration motion was denied without further explanation on November 23, 2010. It cannot be known whether the Board would have ruled differently had Respondents presented the argument now fully articulated on Exceptions.<sup>13</sup> But, what is undoubtedly true is that the Board has yet to hear (let alone rule upon) the argument now presented. The issue has not been conclusively decided. Consequently, the General Counsel's suggestion that the Board "effectively concluded that Respondents' bargaining obligation attached at the time of the election, rather than on August 23, 2010...

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the bargaining obligation attached, and made no reference to footnote 4 of the new Decision and Order, which set August 23, 2010 as the certification date.

<sup>12</sup> The Board concluded that "Respondents have failed to establish they are entitled to judgment as a matter of law." Though not specifically stated in that concluding sentence, it is clear that Respondents' failure derived from the Board's cure of the deficiency cited by Respondents, the then-outstanding invalid two-member awards. The denial of the MPSJ did not speak to the merits of the § 8(a)(5) allegations.

<sup>13</sup> Indeed, because Respondents' barebones argument regarding the August 23, 2010 certification date was interposed as a request for reconsideration of their MPSJ, but in reality presented a new and different argument hinging on the content of the new Decision and Order (which postdated the MPSJ), that unrelatedness alone may well have precipitated the summary denial of reconsideration.

because if there had been no bargaining obligation as a matter of law, the Board would have granted Respondents' motion" (Answering Brief, p. 27), is completely specious.<sup>14</sup>

**B. MBO's obligation to bargain with the Union runs only prospectively from August 23, 2010; imposing a bargaining obligation retroactive to the date of the election would run afoul of *New Process Steel*.**

As explained in Respondents' supporting brief, had the two-member Board panel not undertaken the *ultra vires* act of denying MBO's Request for Review, the ballots cast on December 16, 2008 would have been impounded by operation of Board regulations, and the results of the election would have remained unknown until such time as a full, three-member complement of the Board could lawfully weigh in. Instead, the results were released unlawfully and prematurely on the date of the election, improperly imparting constructive knowledge of the Union's apparent majority support upon MBO. Respondents acknowledge that, in most situations, once an employer learns of majority union support following the tally of ballots on the date of the election, the rule of *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974), provides that the employer acts at its peril in making changes between the date of the election and the date of certification. But, the general rule of *Mike O'Connor Chevrolet* cannot apply here, as MBO's constructive knowledge of the Union's majority support on the date of the election derived from an unlawful act, and should not be accorded the same effect as in the usual circumstance.

The General Counsel does not dispute that the ballots would have remained impounded had the two-member panel not exceeded its powers. Instead, he argues that the situation confronting an employer awaiting the initial tally of ballots following an impound is the same as that of an employer awaiting resolution of determinative challenges, suggesting that the at-its-

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<sup>14</sup> To the General Counsel's credit, he does not go so far as to argue *res judicata*, apparently conceding that the Board has not yet ruled on the question now presented on Exceptions. Moreover, the General Counsel is wrong to suggest that the Board would have granted summary judgment if the theory Respondents now present is correct, as Respondents did not move on those grounds. Under Fed. R. Civ. P. 56(f)(2) (which Respondents acknowledge does not control, but is persuasive to establish sound summary judgment procedure), summary judgment could have issued on unmoved grounds, but only if the Board first gave notice to the General Counsel that it might be entered against the General Counsel

peril risk attaches on the date of the election regardless of whether the initial results are revealed that day. The General Counsel is incorrect; the situations are markedly different.

The General Counsel's misunderstanding can best be understood by examining the reason for the *Mike O'Connor Chevrolet* rule. Where – post-tally, but pre-certification – a union receives a majority of votes or the election is close enough that resolution of determinative challenges will likely result in the union attaining a majority, the employer acquires constructive knowledge of majority support. At that point, the presumption that the employer has the right to act unilaterally is rebutted, and it subsequently acts at its peril in making pre-certification changes. But, the employer does not have such constructive knowledge in the absence of a tally of ballots (e.g., when all of the ballots have been impounded). The employer has no knowledge – one way or the other – as to its employees' support of the union when all of the ballots have been impounded. Therefore, during the period following an election where there is no indication of the result, the employer's presumptive right to act unilaterally has not been rebutted, and the employer is not exposed to any risk by making unilateral changes.<sup>15</sup>

Respondents are not aware of any cases finding a violation of Section 8(a)(5) between the dates of election and certification absent a tally on the election date due to total ballot impoundment. There are cases, however, in which the employer is found to violate Section 8(a)(5) by refusing to bargain *after* the union prevails upon release of impounded ballots following resolution of a request for review. See *Baldwin League of Indep. Schools*, 281 NLRB 981, 982-83 (1986) (company obligated to bargain with union for one year following certification – which occurred after release of impound); *Bob's Big Boy Family Restaurants*, 264 NLRB 432, 433-34 (1982) (all violations occurred after employer's knowledge of union's majority support

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on that basis. Of course, the Board did no such thing here, and simply denied the MPSJ, which was based on grounds different from those presented on Exceptions.

<sup>15</sup> Similarly, in a decertification election where ballots are impounded, the presumption that the employer must continue to refrain from acting unilaterally is not rebutted until the impound is released and the ballots reveal that a majority of employees choose no representation. See, e.g., *Transportation Maintenance Services*, 331 NLRB 1050, 1052 (2000); *Bally's Atlantic City*, 338 NLRB 438, 438 (2002).

following release of impounded ballots). Importantly, in neither *Baldwin League* nor *Bob's Big Boy* did the Board impose a bargaining obligation retroactive to the date of the election.<sup>16</sup> This of course makes sense, because only after an impound is released and ballots are tallied does the employer acquire constructive knowledge of its employees' majority support for the union.<sup>17</sup>

*Baldwin League* and *Bob's Big Boy* are completely distinguishable from cases in the line of *Mike O'Connor Chevrolet* standing for the proposition that, once the initial tally has been released and the employer obtains constructive notice that the union will be certified as representative if a revised count following resolution of determinative challenges favors the union, the employer acts at its peril even prior to the ultimate certification. Thus, the Board's citation to *Han-Dee Pak, Inc.*, 249 NLRB 725 (1980), is unremarkable. That case simply follows *Mike O'Connor Chevrolet's* teaching that the at-its-peril risk attaches as soon as the initial tally places the employer on notice that resolution of the determinative challenges in the union's favor will result in union certification.

Simply put, it is not the date of the election that matters, but instead the date upon which the employer received constructive knowledge of its employees' majority support for the union. Absent other evidence of majority support (of which there is none here), such knowledge can only be acquired after an impound has been released. In this case, that release occurred only as a result of the two-member panel's *ultra vires* act in denying MBO's Request for Review. The only way to undo the unlawful denial of the Request for Review and resulting premature impound release (and to comply with *New Process Steel*) is to deem MBO to have gained constructive knowledge of the Union's majority support on some date after the installation of a new Board member allowed a three-member panel to lawfully rule upon MBO's Request for

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<sup>16</sup> *Baldwin League* is especially clear in showing that a bargaining obligation attaches on the date of impound release, rather than the date of the election, because it analyzes the timing of the union's request for bargaining under § 10(b) of the Act, relying on the post-impound-release certification date to mark the beginning of the employer's bargaining obligation. 281 NLRB at 983.

Review. That did not happen until August 23, 2010. The Board's adjustment of the union's certification to that date necessarily bars the finding of a Section 8(a)(5) violation based on events occurring prior to that date.

#### **IV. Conclusion**

The ALJ's determination that Respondents violated Section 8(a)(3) by selecting Anthony Roberts for layoff is fatally flawed, because they did not know of his union activity, and even assuming such knowledge, they demonstrated that he would have been chosen for layoff anyway. Furthermore, all findings that MBO violated Section 8(a)(5) prior to the adjusted certification date of August 23, 2010 must be rejected, because it would violate *New Process Steel* to impose an "at-its-peril" risk where MBO prematurely acquired constructive knowledge of majority union support due only to the two-member panel's illegitimate actions. For all the reasons discussed in the supporting brief and this reply, the Board should not adopt these and the ALJ's other errant conclusions which are the subject of Respondents' Exceptions.

Filed this 31st day of May, 2011.

Respectfully submitted,

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<sup>17</sup> A corollary to this principle is that a union lacks grounds upon which to request bargaining absent a tally, but has a justification for demanding involvement after a tally provisionally reflects majority support, even when objections or challenges are pending. This is the core of the at-its-peril standard.

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 31, 2011, I e-filed the foregoing RESPONDENTS' REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE ALJ'S DECISION DATED MARCH 18, 2011 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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