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' ANSWERING BRIEF TO
GENERAL COUNSEL'S CROSS-EXCEPTIONS

FISHER & PHILLIPS LLP
STEVEN M. BERNSTEIN
2300 SunTrust Financial Centre
401 E. Jackson Street
Tampa, Florida 33602
Telephone: (813) 769-7500
Facsimile: (813) 769-7501

FISHER & PHILLIPS LLP
DOUGLAS R. SULLENBERGER
BRIAN M. HERMAN
1075 Peachtree Street, NE
Suite 3500
Atlanta, Georgia 30309
Telephone: (404) 231-1400
Facsimile: (404) 240-4249

Attorneys for Respondents

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I. PRELIMINARY STATEMENT.

The procedural history of this case is already well-documented. Following a six-day evidentiary hearing between November and December of 2010, Administrative Law Judge George Carson ("the ALJ") issued a decision ("ALJD") on March 18, 2011, in which he found against Respondents Mercedes-Benz of Orlando ("MBO," or "the Dealership") and AutoNation, Inc. ("AutoNation") on multiple counts, but also dismissed a substantial number of allegations to which the General Counsel did not except, including those pertaining to Consolidated Complaint paragraphs 15, 16, 17, 19, 20, 21, 22, 26, 27, 28, 32, 33, 34, 35, 36, 37, 38, and 39.

Nonetheless, Counsel for the General Counsel did file Cross-Exceptions ("GCCE") to a number of additional findings within the ALJD on May 16, 2011, including those pertaining to Consolidated Complaint paragraphs 10, 23, 24, 31, 41, and 42. On that same day, he also filed a Brief in Support of Cross-Exceptions ("GCB"). This Answering Brief responds to pertinent portions of both filings.

II. THE ALJ'S ORDER DIRECTING RESCISSION OF RESPONDENT MBO'S NO SOLICITATION POLICY WAS MORE THAN ADEQUATE TO REMEDY THE ALLEGED VIOLATION.

Paragraph 10 of the Consolidated Complaint alleges that Respondents promulgated and maintained an overly broad no-solicitation policy. The ALJ agreed, directing Respondents to "rescind the unlawfully broad rule prohibiting all solicitation on company property" (ALJD p. 34, lines 37-38). Because the record was bereft of any evidence establishing that the rule was enforced against (or even applied to) employees at other AutoNation locations, the ALJ stopped short of imposing a "nationwide" remedy. Indeed, while he acknowledged that, "Counsel for the General Counsel requests that I impose a 'nationwide remedy' with regard to the AutoNation

Associate Handbook," he properly confined the scope of his Order to MBO by emphasizing that, "My recommended order directs recession [sic] of that rule" (ALJD p. 34, n. 3).

Counsel for the General Counsel has since persisted in seeking a "nationwide remedy with respect to" this rule (GCCE 2). The fact remains, however, that the existing Order, as set forth within page 34 of the ALJD, is more than adequate to remedy the alleged violation, particularly given the fact that there is no evidence to even remotely suggest that Respondents attempted to enforce the rule as written.

As applied, the undisputed record evidence establishes that the rule is completely lawful, as confirmed by managerial guidelines confining application of the policy within lawful parameters (G.C. Ex. 95, Section 8). This comports with the only record evidence pertaining to policy application. Specifically, the record establishes that when Respondents were called upon to review an actual report of solicitation, they applied Board standards for policy enforcement to the letter. Consequently, when MBO was advised that former employee James Weiss was circulating a petition of his own making in the midst of his shift, it reminded him that such activity was to be confined to non-working time (Tr. 354-355, 669, 793, 1013-1014). There is absolutely no evidence to suggest that the solicitation policy was ever applied differently.

A technical violation in the language within MBO's Handbook could not possibly justify the imposition of a nationwide remedy against unrelated AutoNation facilities in other parts of the country, particularly in the absence of any evidence that employees outside of MBO were even subjected to the rule in question.[1] Where, as here, there is compelling evidence establishing

[1] This point is underscored by the testimony of Brian Davis, who when called as an adverse witness, testified that, "there are different policies that existed at different stores depending on the needs of those stores with respect to the types of workforces that they have and the way that their mangers use discretion in terms of how they enforce those rules. This[solicitation policy] may be a starting point for many dealerships and maybe it isn't, but it does not necessarily mean that at every dealership this is the only thing that would apply." (Tr. 70-71).

the absence of a single incident of unlawful enforcement, there can be no grounds for expanding any remedy beyond conventional remedial measures calling for a restriction in scope to MBO – the only entity directly involved.[2] For these reasons, Cross Exception 2 must be dismissed.

III. THERE IS AN OVERWHELMING AMOUNT OF RECORD EVIDENCE UPHOLDING THE LAWFUL NATURE OF BRIAN DAVIS'S CONDUCT AT A GROUP MEETING THAT TOOK PLACE IN LATE NOVEMBER, 2008.

Paragraphs 23 and 24 of the Consolidated Complaint pertain to the same November, 2008 group meeting at which AutoNation Assistant General Counsel Brian Davis is alleged to have: (1) promised to redress grievances; (2) threatened employees with job loss if they selected the union; (3) threatened employees with discharge if they engaged in union activities; and, (4) told employees that it would be futile to select the union. After sifting through all the evidence, the ALJ properly found that Davis did not convey "any threat related to union activity," and therefore dismissed Paragraphs 23 and 24 in their entirety (ALJD p. 12, lines 43-44).

Counsel for the General Counsel cross-excepted to that finding, insisting that Davis, "threatened employees with job loss and discharge" (GCCE 5, 6). A review of the economic context in which Davis's statements were made, however, fully establishes that the ALJ reached the only logical conclusion available to him, based upon all the evidence in the record.

A. The ALJ Accurately Characterized the Comments Attributed to Davis.

There is actually little dispute over the remarks that have been attributed to Davis, as he freely admits to making the following statement: "Look around you. Take a look at the people

[2] 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 (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).

next to you. There's a good chance that person may not be here in six months. There's only one person in the room whose job is safe, and that's this man right here [referring to General Manager Bob Berryhill]" (ALJD p. 12, lines 34-37, Tr. 984). As the ALJ accurately points out, Davis paused within his testimony long enough to make clear that he pointed to Berryhill rather than identifying him by name (ALJD p. 12, line 37, Tr. 984).

The ALJ makes clear that Davis continued his remarks at the meeting by referring to the dire economic circumstances confronting the Dealership at that point in time (which were excessively documented throughout the hearing, leading the ALJ to properly conclude that the ensuing April layoffs were implemented "for economic reasons") (ALJD p. 12, line 37; p. 24. line 51). Specifically, Davis went on to emphasize that, "This is serious business, okay. *This is not about a union campaign. This is about an industry on the verge of collapse.*"[3] If anything, such blunt remarks may well have understated the situation, given the dreadful economic state of the retail automotive industry at that point in time.

B. The Economic Context in Which Davis's Comments Were Made Cannot Be Ignored.

It is worth noting that the meeting in question was not confined to bargaining unit employees.[4] To the contrary, other service employees who by that point in time had been excluded from the bargaining unit by virtue of the Region's Decision and Direction of Election were also in attendance, and for good reason. Together, these service employees shared something in common. All of them were operating under severe economic pressures that had

[3] Counsel for the General Counsel strains to find significance in a lack of quotation marks within the official transcript (GCB 6). In and of itself, however, it would be absurd to read anything into the punctuation utilized by a Court Reporter under such circumstances. He further argues that "an experienced attorney" would have inserted the terms, "I said" before his testimony regarding this statement, offering a tortuous and similarly preposterous interpretation of what remains clear record testimony.

[4] General Counsel witness John Persaud volunteered that Davis directed his remarks at everyone in "fixed ops," not just technicians (Tr. 601).

prompted rumors of layoffs over a period of several weeks preceding this meeting.[5] By late November, MBO's service employees were keenly aware that many Dealership employees had already been laid off, while others had not been replaced. The economy dominated discussion.

It was within that context that Davis made the remarks at issue. Service Sales Manager Maia Menendez and H.R. Manager Bobbie Bonavia testified that emotions were running high because a nearby AutoNation-owned Pontiac-GMC dealership had closed only days before, and that the reality of those job losses "hit close to home" (Tr. 1113). Even Counsel for the General Counsel recognized the dramatic external circumstances surrounding this meeting, during which Bonavia "was extremely upset, crying insofar as she had not been able to place all of the employees [at the nearby GMC dealership] who had lost their jobs" (ALJD p. 12, lines 28-29).[6]

For his part, Davis conceded that he made the "look around" comment. Nonetheless, he also emphasized that his message must be viewed in the context of what was taking place within the Service Department at that point in time (Tr. 981-983). Specifically, Davis realized that as the work available to technicians continued to erode, he and Berryhill were seeing serious signs of in-fighting among employees. Consequently, Berryhill was forced to issue a written "No Retaliation" pledge to all employees in order to combat persistent rumors that they would be fired if the union failed to win the representation election (G.C. Ex. 65).

The internal economic challenges confronting MBO by that point in time are well-documented, as further described under Section V. below. Moreover, one cannot ignore the grim *external* circumstances confronting the Dealership by that point. *Crain's Automotive News*, the

[5] Indeed, testimony suggested that the representation petition may have been a by-product of this pent-up anxiety.
[6] Footnote 6 to Counsel for the General Counsel's Brief reinforced this point, acknowledging that his own witnesses corroborated Menendez' testimony that this meeting took place shortly after the closing of a nearby AutoNation Pontiac/GMC dealership. (GCB 19). Remarkably, however, Counsel for the General Counsel proceeds to completely disregard the implications of the economic circumstances that gave rise to Menendez's comments.

industry's leading weekly periodical, covered the economic crisis in graphic detail. On October 6, 2008, it led with a story entitled, "The Great Collapse." (R. Ex. 34). Just one week later, the same periodical ran a story entitled, "Nardelli warns of industry collapse" (R. Ex. 35).[7] On November 10, the *Automotive News* led with a story entitled, "The options: Bailout now or collapse" (R. Ex. 36).

As one of the largest automotive retailers in the U.S., AutoNation was not spared in the least, as MBO's service employees were well aware. On November 6, 2008, Bloomberg published reports that AutoNation had sustained quarterly net losses of $1.41 billion (R. Ex. 33). That same article referred to sales declines of 15 percent within AutoNation's premium luxury car segment, which included Mercedes.

On November 14, 2008 (less than one week prior to the meeting at issue), *Today's Financial News* ran a story entitled, "Retail Bottom Fishing: Will AutoNation or Sonic Automotive Survive?" (R. Ex. 32). This was far from hyperbole. At that particular point in time, it was a fair question planted firmly on the minds of the retail automotive industry, not to mention those of AutoNation's own employees. To underscore that point, *Automotive News* ran another story just one week after the meeting at issue, entitled, "Ch. 11 would hit dealers hard – fast" (R. Ex. 37).

C. The Inconsistent, Self-Contradictory Testimony Offered by Counsel for the General Counsel Failed to Establish That Davis Couched His Remarks in the Context of Union Organizing.

As one might expect given the two years that had since passed, those witnesses who attended the late November meeting (one of several conducted by Davis during the ten weeks that preceded the election) offered varying, and often conflicting accounts as to its date, time,

[7] At the time, Nardelli was CEO of Chrysler LLC.

content, and duration. As the meeting was neither taped nor transcribed, an accurate picture of Davis's statements and the context in which they were made can only be obtained by reviewing his testimony, along with that offered by witnesses for the General Counsel.

Interestingly, Counsel for the General Counsel's star witness Brad Meyer specifically recalled the "look around" comment, but he also recalled Davis expressly stating that, "*union or no union*," steps were needed to "fix the problems" (Tr. 349). Meyer confirmed that Davis advised attendees that only Berryhill's job was "safe," including himself among those whose jobs could be eliminated in response to economic pressures (Tr. 349-350). Similarly, David Poppo quoted Davis as stating at this meeting that Davis wanted to "open up dialogue" on the importance of working together, emphasizing that the economic pressures were going to impact everyone "*union or no union*" (Tr. 434-435). Another technician, Michael DeCosta, testified that he attended a number of meetings, yet he never heard any threats, statements or implications that union supporters would be "fired" or "laid off" (Tr. 1151-1152).

Counsel for the General Counsel attempts to portray the testimony of his witnesses as corroborating one another regarding allegedly unlawful threats by Davis. Even a cursory review of that testimony, however, demonstrates that there is nothing "corroborative" as to their individual recollections. To the contrary, Counsel for the General Counsel's witnesses often appeared confused over the sequence of meetings preceding the one in question.

For example, while it was generally acknowledged that only a single video was shown prior to the election, Larry Puzon testified that he attended three meetings at which three different videos were shown (Tr. 515). For his part, Davis accurately recalls the meeting taking place on November 20, 2008 (Tr. 978-980). Perhaps this helps to explain why the ALJ generally

chose to credit Davis, and to refrain from crediting Counsel for the General Counsel's own witnesses in connection with their conflicting accounts of the November meeting.

There can be no doubt that Davis uttered the "look around" comment. This was confirmed by Meyer, who also made clear that the remark was made without any nexus to union organizing activity or the representation election. Ignoring the ALJ's careful review of witness testimony, Counsel for the General Counsel attempts to cobble together a selected patchwork of his own witnesses' statements. Such self-serving efforts must be soundly rejected.

For example, page 7 quotes Poppo as testifying that Davis (who in his estimation was an "experienced" attorney) preceded the "take a look around" comment by stating that, "we are going to find out who's bringing this upon us and they are going to be finding a job somewhere else." None of the other witnesses called by Counsel for the General Counsel recall the same threat, which would seem inherently implausible given Davis's acknowledged experience.[8]

Counsel for the General Counsel goes on to quote Anthony Roberts, who recalled Davis stating that, "there were going to be many changes for employees and that they were either part of the solution or part of the problem, and if they were part of the problem they could just get up and leave" (GGB 8-9). From there, he offers the conflicting testimony of John Persaud, who testified that at this same meeting, Davis said that, "those employees who did not support Respondents and the 'troublemakers' would lose their jobs." In a further effort to offer "similar" testimony, Counsel for the General referred to more incongruous statements from James Weiss, who quoted Davis as saying that, "it would be years before anyone saw a contract" (GCB 9).

[8] Counsel for the General Counsel asserts that Davis conducted educational employee meetings "once per week until the election" (GCB 5). The General Counsel proceeded to allege multiple violations in connection with these meetings in an effort to establish anti-union animus. It is worth noting, however, that the ALJ found in favor of Respondents with regard to virtually every allegation directed against Davis in the context of a captive audience meeting, generally without exception.

While the ALJ may not have "specifically discredited" them as asserted by Counsel for the General Counsel, the basis for his failure to credit these accounts could not be more obvious. They conflicted and contradicted themselves on multiple occasions, rarely if ever offering a consistent account of the meeting in question. Counsel for the General Counsel can argue that these varying accounts are "similar" all day long, but the actual testimony suggests otherwise.

There is no denying that Davis's remarks were direct, but so too were the challenges confronting MBO (and service departments generally) by that point. It must be emphasized, however, that the "look around" statement was never couched in terms of organizing activity or the pending election (Tr. 434; 1113). To the contrary, Davis went out of his way to maintain that the statement was being made *without* regard to the organizing campaign, focusing instead upon external economic factors and the need to pull together to combat them.

The ALJ, who sat through six days of hearing testimony, correctly decided that Davis's remarks did not violate Section 8(a)(1) of the Act, considering the non-coercive context in which they were made. In doing so, he upheld the point that Davis was making permissible teamwork incitements to enable the Dealership to survive at a time of financial distress, and were therefore non-coercive within the meaning of Section 8(a)(1) of the Act. *See Children's Center for Behavioral Development*, 347 NLRB 35 (2006) (no violation to encourage employees to avoid distractions and keep working together in the face of union actions that affected the employer's bottom line). For all these reasons, Cross Exceptions 3-6 must be rejected.

IV. THERE IS NO CREDIBLE EVIDENCE TO EVEN REMOTELY SUGGEST THAT DAVIS COERCIVELY INTERROGATED JAMES WEISS.

James Weiss was the subject of a unique theory of constructive discharge that was soundly rejected by the ALJ (a decision to which Counsel for the General Counsel chose not to

cross-except). In so holding, the ALJD discredited Weiss on multiple occasions. For example, the ALJ notes that, "Weiss's 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, 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).

Rejecting the ALJ's obvious disdain for Weiss, Counsel for the General Counsel tries to claim that Weiss should be believed concerning allegations of interrogation within Paragraphs 31(a) and (b) of the Consolidated Complaint. His inherent lack of credibility notwithstanding, the fact remains that Weiss could not possibly have been subject to any form of coercive interrogation from Davis by that point in time, given his consistent penchant for coming forward and affirmatively volunteering information to Davis over the months leading up to the election.

Even if Weiss could somehow be believed, this allegation remains meritless. It must be emphasized that a bald allegation that Davis questioned Weiss as to the sympathies of his co-workers (or their efforts to vote) would be insufficient to establish a violation of Section 8(a)(1) of the Act, absent evidence of coercion. *See, e.g.*, *Rossmore House*, 269 NLRB 1176 (1984) (to establish a violation, the General Counsel must prove that, under all the circumstances, the questioning reasonably tended to restrain, coerce, or interfere with employees in the exercise of their Section 7 rights). The element of coercion is completely absent from the allegations attributed to Davis vis-à-vis Weiss.

Interrogations alone do not constitute a per se violation of the Act. Rather, "To fall within the ambit of Section 8(a)(1), either the words themselves or the context in which they are

used must suggest an element of coercion or interference." *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1267 (7th Cir. 1980), and cited cases. Consequently, the test is whether the challenged conduct has a reasonable tendency, *under all of the circumstances*, to interfere with employees' Section 7 rights . *Sunbelt Mfg., Inc.*, 308 NLRB 780 fn. 3 (1992), enf'd. mem. 996 F.2d 305 (5th Cir. 1993).

Applying this test, employees who go out of their way to openly express their union opposition reasonably would not be restrained or coerced by an act of interrogation. In other words, the act itself is not inherently coercive in this context, particularly when taking into account Weiss's long-term habit of volunteering information on an unsolicited basis.

Counsel for the General Counsel argues that, "the mere fact that an employee is a widely known adherent or opponent of a union does not validate otherwise coercive interrogation" (GCB 12). While that may be true, the fact remains that he failed to adduce a shred of evidence that the alleged acts of interrogation in this case were "otherwise coercive." Consequently, if the focus is to be on the alleged exchange between Weiss and Davis as urged by Counsel for the General Counsel, then one must factor in Weiss's long-standing role as an eager purveyor of information on his fellow co-workers, along with his inherent lack of credibility.

There is no disputing the fact that Weiss freely volunteered information about the union sympathies of his co-workers throughout the campaign, as conceded by Counsel for the General Counsel (GCB 12). Counsel for the General Counsel has suggested that "Weiss had the Section 7 right to stop providing that information at any time," but Weiss never made any attempt to do so. (GCB 12). To the contrary, he continued to share it with Davis and other managers long after the election ended.

Counsel for the General Counsel failed to adduce a shred of evidence that the allegations of interrogation were inherently coercive. At no point was Weiss forced to waive his right to remain silent or otherwise coerced into volunteering information. Indeed, where an employee such as Weiss has already publicly proclaimed his anti-union sentiments, the right to remain silent is not even implicated in the first place.

There is no allegation that Weiss was forced or compelled to participate in the alleged line of questioning. Had Davis done so, then concededly an alleged Section 8(a)(1) violation would lie. Had he required Weiss to take a public stance against the union, then perhaps a similar argument could be made. Absent such allegations, however, we are left to ponder how the instant claims, even if taken as true, could possibly be sufficiently coercive so as to violate the Act. For these reasons and as set forth below, Cross Exceptions 7 and 8 must be dismissed.

A. Weiss Began Voluntarily Providing Information to Management Long Before the Representation Election.

Days after the filing of the petition, Weiss sent an e-mail to his former General Manager, Pete DaVita, offering "total support" in any efforts to keep the union out of MBO, and informing him that he was in "total disgust" over what he had just "learned was going on here" (R. Ex. 4). As he himself admitted, Weiss went out of his way to remind him of his prior "history" of opposing unions at MBO, providing his personal cell phone number (Tr. 731, R. Ex. 4).

Weiss first met Davis later that same day (Tr. 651). By that point in time, his history of supporting management in opposition to the union was no secret (Tr. 1459). From that point forward, Weiss was perpetually "reaching out" to management, initiating anti-union conversations "all the time" (Tr. 1004-1006, 1008). Weiss's fervent desire to openly support MBO's position never wavered (Tr. 794-795, 1004). As Davis testified, Weiss was "a soldier.

He wanted us to know he was a soldier, that he was going to do whatever he could to make sure the union did not get in" (Tr. 1008).

Weiss admitted that he had told Berryhill and others "a number of times" that he would resign if the Union was to win the representation election (Tr. 753). Berryhill testified that Weiss made this threat to quit long before the election (Tr. 1460). Other employees, including Poppo, were well aware that Weiss had threatened to quit if the Union won (Tr. 484). In his actual resignation letter, Weiss bragged that the "first two times [the Union tried to organize] I was the first tech to tip off the management team," and he based his subsequent resignation on the "Union garbage" (Tr. 735, G.C. Ex. 167).

As the ALJ found (without exception), "An October 13 email from Weiss to Berryhill advising that employee Larry Puzon was concerned about job security confirms that, shortly after telling Berryhill that he 'wanted to offer his support,' Weiss began volunteering information about his fellow employees" (ALJD p. 11, lines 16-18). The ALJ went on to note that, "Berryhill and Davis deny questioning Weiss, explaining that he regularly volunteered information to them. *I credit their denials.* Weiss had been voluntarily providing information to his fellow employees for well over a month [as of November, 2008]" (ALJD p. 11, lines 51-52, p. 12, lines 1-2). Consequently, the ALJ concluded (again without exception):

> As my findings with regard to the 8(a)(1) allegations reflect, Weiss, at the outset of the union organizational campaign, pledged his support to the Company and thereafter provided information relating to the union sympathies of his fellow employees to the Company. He initiated an antiunion petition and solicited his fellow employees to sign it. There is no credible evidence that his actions were directed by the Company, and even if there were such evidence, there is no evidence that he refused any directive given to him. Weiss, during the organizational campaign or thereafter when employed, never complained or commented that any thing he did was motivated by anything other than his antiunion sentiment.

> He made no contemporaneous complaint of any threat, any coercion, or any solicitation to lie.

(ALJD p. 28, lines 1-9). Clearly, by the date of the election on December 16, Weiss's fervently anti-union leanings rendered him virtually incapable of being interrogated, from the standpoint that there could be no inherent coercion within the alleged line of questioning.

B. Davis Did Not Interrogate Weiss as to the Sympathies of His Co-Workers on December 16, 2008, as His Alleged Conduct Was Not Otherwise Coercive.

Paragraph 31(a) of the Consolidated Complaint alleges that Respondents (through Davis) interrogated employees about the union sympathies of their co-workers on December 16. In support of this allegation, Counsel for the General Counsel offered only the uncorroborated testimony of Weiss, who suggested that Davis asked him how a pair of co-workers was likely to vote in the election to be held later that day. When he allegedly responded by asserting that he did not know how they planned to vote, Weiss claimed that Davis asked him to speak with each of them (ALJD p. 15, lines 34-35).

As the ALJ correctly pointed out, however, "Weiss…had been providing the Company with information for 2 months" by that point in time (ALJD p. 15, lines 40-41). On that basis, the ALJ properly concluded that Davis's alleged inquires were non-coercive. Counsel for the General Counsel cross-excepted on the basis that Weiss was coercively interrogated (GCCE 7). As set forth above, however, nothing could be further from the truth. Weiss's established track record for volunteering information rendered any such interrogation, even if taken as true, completely immaterial.

C. Davis Did Not Coercively Interrogate Weiss as to Whether His Co-Workers Had Voted in the Election on December 16, 2008.

Paragraph 31(b) of the Consolidated Complaint alleges that Davis interrogated employees as to whether their co-workers had participated in the representation election on December 16. Once again, Counsel for the General Counsel offered only the uncorroborated testimony of Weiss, who claimed that Davis asked who he had seen ascending the stairwell leading to the polling area (along with other portions of the building) on the day of the vote (ALJD p. 15, lines 35-36). This allegation was expressly denied by Davis (ALJD p. 15, line 37).

In dismissing this allegation, the ALJ correctly pointed out that Weiss could not possibly have ascertained the purpose behind an employee's going up the stairs, let alone confirm that the employee had in fact voted (ALJD p. 15, lines 42-44). He added that there was no allegation that Weiss was engaged in list keeping (ALJD p. 15, line 44). Consequently, he dismissed that allegation as well (ALJD p. 16, lines 35-36).

Once again, Counsel for the General Counsel cross-excepted on the basis that Weiss was coercively interrogated (GCCE 8). Again, however, nothing could be further from the truth. By the date of the election, Weiss had been volunteering information on an unsolicited basis for months, if not years, thereby nullifying any coercive element to the alleged interrogation. For all these reasons, Cross Exceptions 7 and 8 must be dismissed.

V. THE ALJ PROPERLY FOUND THAT THE LAYOFFS IMPLEMENTED BY MBO IN APRIL, 2009 DID NOT VIOLATE SECTION 8(A)(3) OF THE ACT.

The Consolidated Complaint alleges that Respondents violated Section 8(a)(3) of the Act by selecting four technicians for layoff in April, 2009 on the basis of their alleged union activity. Referring to an extensive amount of unrefuted evidence pointing to the distressed economic condition of MBO's service department by that point in time, however, the ALJ correctly

concluded that the April layoffs were "dictated by economic circumstances" (ALJD p. 24, line 52). He then sifted through the evidence to conclude that, with the exception of Poppo, the selected technicians engaged in no more than "minimal" union activity (ALJD p. 27, line 4).

The ALJ did determine that the General Counsel carried its initial *Wright Line* burden. Respondents take issue with that finding. As indicated in their underlying Exception XXXV, there is no probative evidence to suggest that Respondents were aware of the alleged union sentiments of any of the other three technicians. Consequently, the *Wright Line* burden never appropriately shifted to Respondents for purposes of compelling a showing that the same action would have been taken. Ultimately, however, the ALJ did properly conclude that Respondents satisfied their burden to show that the four technicians would have been selected even in the absence of any union activities, noting that "the issue herein is whether the selection of employees to be discharged pursuant to the reduction-in-force was discriminatory" (ALJD p. 27, lines 11-12, 47-48).

It was clear that in reaching this determination, the ALJ thoroughly credited the testimony of Aviles, who maintained without rebuttal that neither seniority nor prior evaluations played a role in the rigorously objective selection process (ALJD p. 27, lines 13-19). Indeed, the ALJ emphasized that, "I have credited the testimony of Aviles regarding the manner in which the Respondents decided to evaluate the technicians" (ALJD p. 27, lines 25-26). It is precisely that "manner" that led directly to the selection of the four technicians at issue, and the General Counsel has wholly failed to prove otherwise. Consequently, its exceptions on this point hinge entirely on a desire to overturn the ALJ's well-conceived credibility determinations.

Nonetheless, Counsel for the General Counsel cross-excepts to the ALJ's finding that "Cazorla, Puzon, Poppo and Persaud would have been discharged even in the absence of their

union activities" (GCCE11). In doing so, he attempts to directly confront the testimony that was so extensively credited by the ALJ, in which Aviles established that neither he, nor any of his fellow participating team leaders, took union sympathies into account. He also fails to explain how "Respondents" (presumably referring to Davis and/or Berryhill) engaged in unlawful discrimination, when the unrefuted facts show that no one had any influence over the actual decisions aside from the team leaders who directly participated in the selection process. Moreover, the team leaders applied a series of objective, job-related criteria, and there is no evidence to even remotely suggest that they took impermissible factors into account.

The ALJ also gave considerable weight to the fact that those technicians who most openly supported the union were spared without exception. As he pointed out, "none of the technicians who openly supported the Union during the campaign, and none of the technicians who Weiss identified as being suspected of harassing him, were rated as one of the bottom six, the number of technicians that the team leaders expected to be affected" (ALJD p. 27, lines 29-32). To that point, the final scoring form ranked James Weiss, who prior to his resignation remained openly anti-union, five positions below Dean Catalano, who by that point in time was among the most openly pro-union technicians at MBO (Tr. 1022, 1443-44).

In the end analysis, however, it was the ALJ's credibility determination with regard to Aviles that carried the day: "Any misgiving that I have regarding a discriminatory motive in the evaluations are resolved by the credible testimony of Aviles that a technician's union sympathies played no part in his ratings and that he agreed upon the ratings given each technician" (ALJD p. 27, lines 36-39).[9] Consequently, the General Counsel cannot undo the ALJ's determination on this issue, absent a reversal of the ALJ's well-supported credibility determination.

[9] The ALJ's finding that Aviles did not take into account technicians' union sympathies is particularly poignant, given the record evidence that Aviles was a supporter of the Union prior to his elevation to team leader.

Remarkably, Counsel for the General Counsel also cross-excepts to the ALJ's finding that the reduction in force was "dictated by economic circumstances" (GCCE 9). In doing so, Counsel for the General Counsel ignored what can only be described as an overwhelming amount of compelling evidence, none of which was refuted or rebutted, which established that the service department remained in the midst of a rapidly deteriorating economic crisis.

Counsel for the General Counsel also cross-excepted to the ALJ's finding that, "Respondents do not use seniority as a factor." In so doing, he attempts to raise an isolated and completely uncorroborated claim, based upon hearsay testimony involving a parts department employee who had been laid off some five years before as evidence of some form of "last in, first out" policy. Aside from that one isolated incident, through which Counsel for the General Counsel attempted to introduce hearsay testimony attributed to an out-of-hearing declarant (Service Director Art Bullock), Counsel for the General Counsel failed to introduce any evidence to even remotely suggest that the Dealership applied such a policy with respect to layoff selections in the service department.[10]

Counsel for the General Counsel would substitute his own judgment for that of the ALJ, where there is no indication that those findings were flawed in any way. To the contrary, the ALJ exercised proper restraint in declining to substitute his own business determinations for those of Respondents, for purposes of evaluating whether their conduct was unlawfully motivated (ALJD p. 27, lines 41-43). Instead, he drew upon his own credibility determinations to conclude that: (1) the layoffs were "necessary;" (2) only "the four lowest rated technicians" were selected for those layoffs; (3) there was "no probative evidence" that the ratings were related to "minimal" union activities; and that, (4) the four technicians "would have been

[10] With regard to AutoNation, Bonavia made clear when summoned at the behest of Counsel for the General Counsel that seniority was only one of many methods utilized in conjunction with the layoff process. (Tr. 304).

discharged even in the absence of their union activities" (ALJD p. 27, lines 44-49). Under those circumstances, the ALJ had little choice but to dismiss all allegations pertaining to the April layoffs arising under Section 8(a)(3) of the Act.

A. The April Layoffs Were Clearly Dictated by Economic Circumstances.

1. The Deteriorating Economic Circumstances Confronting MBO.

The events that shook the financial world in 2008 will take their place in the history books, with reverberations that continue to be felt today (Tr. 1196, 1221, Exs. 31-37). The sheer scope of the decline was unprecedented (Tr. 403, 621, 928-29, 1108-12, 1154, 1168, 1192, 1203, 1218, 1420-22). Berryhill testified that the economic crisis was unlike any he had ever seen, requiring difficult decisions to address the unprecedented market plunge (Tr. 1421).

Respondents did not fully comprehend the potential impact on the sales side of the operation until well into 2008 (Tr. 1192-93, 1218, 1420-22). AutoNation officials initially 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, Berryhill and Controller Collie Clark began to analyze sales, service, and other financial indicators, including monthly Store Operating Reports ("SORs") that offered a snapshot of Dealership financial performance (Tr. 1211-13).

By October, 2008, performance lags in sales had begun to catch up to the service side of the operation (Tr. 1202). In response, Clark and Berryhill detailed a series of cost-cutting measures, along with efforts to monitor all operational costs (Tr. 1116-17, 1193, 1195-96, 1432). These efforts encompassed wage freezes, hiring freezes and downsizing measures (Tr. 1118).

Clark testified to constant meetings with Berryhill to review financial information necessary to manage the Dealership through the economic crisis, including local and industry-

wide data (Tr. 1188-89; 1221). By the date of the October 3, 2008 representation petition, Berryhill had already been directed to review cost-cutting options within the service department (Tr. 1429-30; G.C. Ex. 99, 105, 113 and R. Ex. 48). Because of the size and speed of the unprecedented worldwide down-turn , Berryhill acknowledged that the Dealership had never been faced with the need for substantial layoffs, and that he was "reluctant" to initiate them even in the face of such serious conditions (Tr. 284, 1421-22).

2. The Undeniable Impact of the Unprecedented Downturn.

The economic collapse hit the service department hard by the fall of 2008, leading to a substantial shortfall in available service work (Tr. 1200-1202). As confirmed by the ALJ, 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). Consequently, witnesses confirmed that, by that point in time, there was no longer enough work in the shop to keep everyone appropriately "busy" (Tr. 403, 621, 928-29, 1108-12, 1154, 1168, 1192, 1218, 1420-22).

Clark provided data documenting a corresponding downturn in revenue and profitability, leaving the Dealership "fighting for our financial lives" (Tr. 1192-93, 1199, 1293-04, 1209-12, 1221). 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 2008 and 2009 (Tr. 73).[11]

[11] 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.

3. The Continued Decline in Available Service Work.

Between October and November alone, gross profit figures declined from $414,000 to $295,000, by which point it had become painfully obvious to both Clark and Berryhill that there was "not enough work to go around" (Tr. 1202-1203, 1206, 1211). Technicians soon began leaving due to the dramatic shortfall (Tr. 419-420). Maia Menendez, who managed the Dealership's Business Development Center, testified that starting that October, the number of daily Repair Orders dwindled by 50%, and that the wait time to "book" service had gone from "two weeks" in advance to "right now" (Tr. 1109, 1110, 1202).

Aviles recalled that everyone was "waiting around for work" toward the late stages of 2008, and that in response the shop established an "out-of-work" board on which technicians could place their names when they ran out of assignments (Tr. 1329-1330). 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).

Counsel for the General Counsel's own witnesses underscored the lack of available work. As early as September, 2008, Roberts began to complain 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). Meyer recalled that technicians were "bored" and leaving early because of the lack of work, stating that he had never seen a year as bad as 2008 (Tr. 402-403, 419-420). Counsel for the General Counsel's other witnesses, Poppo and Wasiejko, also testified to a dramatic decline in work that fall (Tr. 469, 621).

Bonavia, who was summoned by Counsel for the General Counsel at the outset of the hearing, offered particularly compelling testimony on this point:

> Q: Was AutoNation's or MBO's decision to terminate MBO service technicians solely based on AutoNation's or MBO's economic condition at that time?

A: Yes, the economic condition of the business.
Q: Okay.
A: Also, the technicians, as I said, were upset that they were not getting enough work to do. They were, in general, the technicians themselves were very upset that they felt they had too many technicians there for the amount of work that was coming in.
Q: How do you know that?
A: Well, I do remember at the meetings, at several meetings technicians talking about running out of work and feeling like they didn't really have anything to do after about 3:00 in the afternoon and that they just didn't have enough work to do and, therefore, were not making enough money.

(Tr. 286).

4. Factors Precipitating the April, 2009 Layoffs.

The flow of service work into the shop continued to plummet over the last quarter of 2008. By year's end, service SOR had dropped by another 19.9% (Tr. 1238). The economic collapse proceeded unabated into 2009, by which point the situation confronting MBO had reached a level where action had to be taken (Tr. 1204, 1232). By January, 2009, monthly gross profits had declined to an all-time low of $290,000 (Tr. 1204, 1232). The layoff of three technicians the previous December had failed to free up enough available service work to allow technicians to sustain their livelihoods. As a result, technicians began to ask Berryhill, "when is the next layoff?" (Tr. 1450).

The Dealership's approach has always been to "retain the best" in order to provide superior service to customers (Tr. 1257). It soon became apparent, however, that there was not enough work to offer technicians a reasonable income level. As Clark testified, "starving out" technicians to see who would give up and leave was never an acceptable option. Clark and Berryhill testified that they had been overly optimistic as to the state of the economy, recalling that their hopes for a rebound in 2009 failed to materialize (Tr. 1211, 1232, 1432, 1449). Once it became apparent that "service…wasn't going to recover," management explored the notion of

additional layoffs (Tr. 1234-1235). Following extensive discussion, Berryhill concluded that more cuts would be necessary (Tr. 1234-1235).[12]

B. Respondents Based Their Layoff Selection Decisions on the Implementation of a Fair and Objective Rating Process Designed to Withstand Claims of Unlawful Discrimination.

Clark and Berryhill began to discuss the need for additional layoffs in early 2009. By that February, Bullock began asking each of the team leaders to select a pair of candidates from their respective teams for layoff (Tr. 1342-1343). Aviles expressed concerns over such a rigid approach, on the basis that the technicians assigned to his team may have been more qualified than their counterparts on other teams. As an alternative, he suggested that the Dealership rank all technicians without regard to their team assignments (Tr. 1343-1344).

Aviles subsequently played the lead role in structuring an objective process for selecting the technicians, testifying that he was instructed to approach it as if he "owned the place" (Tr. 1345). Aviles possessed a solid understanding of technicians' skills, abilities, strengths and shortcomings, having previously worked as a technician alongside those to be evaluated (Tr. 1385). He immediately rejected any reliance upon existing evaluation forms, explaining that they were not "*my* judgment" (Tr. 1345-1346). Aviles went on to explain that did not want to rely exclusively on the prior evaluations of other supervisors for such an important process.[13]

Aviles testified to the methodical approach that was taken to create a specific form for peer-to-peer review, and the extra care taken to ensure that the process was unbiased. He emphasized that the team leaders initially considered a sample form from another Dealership,

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[12] Counsel for the General Counsel asserts that Respondents "did not achieve any significant cost savings by laying off service technicians," completely disregarding the unrebutted fact that they stood to lose their most valuable technicians through attrition in the face of a protracted decline in available service work. Notwithstanding Counsel for the General Counsel's false claims to the contrary, Respondents never wavered from this position.

[13] Thus, extraneous and outdated information were deemphasized in favor of a current competency analysis.

ultimately opting instead to create one of their own (Tr. 1347). Aviles took the lead in revamping the form, testifying that he "lost a lot of sleep over this" (Tr. 1376, 1378).

Ultimately, Aviles and the other two team leaders agreed on a more "comprehensive" format that would give all technicians a "better shot" at a fair evaluation (Tr. 1282, 1347). The Dealership did not give them a "deadline" to design the form, leaving them to "brainstorm" on their own over a format of their choosing (Tr. 1379, 1381). Aviles subsequently led the team leaders in devising an objective form that rated the technicians on the following characteristics: (1) Attitude and Personal Characteristics; (2) Attendance; (3) Teamwork, Cooperation and Dependability; (4) Job Performance; and (5) Training and Development (R. Ex. 40). While Counsel for the General Counsel is quick to offer his lay opinion that other criteria should have been considered, the fact remains that each of these factors are tied directly to job performance.[14]

The team leaders worked side-by-side with the technicians, and were therefore uniquely qualified to conduct the rankings that directly led to the selection decisions. Even Meyer agreed that the three team leaders were well suited to perform the evaluations (Tr. 380-381, 397). Consequently, any suggestion that the team leaders were somehow unqualified to evaluate technicians on other teams because they did not supervise them directly is entirely off the mark. Taken to its logical extreme, the only individuals capable of evaluating the technicians under Counsel for the General Counsel's tortured analysis would have been the technicians themselves.

Berryhill testified that MBO wanted the most objective format possible, as he fully expected that he would ultimately have to defend the selection decisions (Tr. 1442). To that end, the March 26-27 evaluations were specifically designed to rate technicians on a peer-to-peer basis, so as to achieve a consensus on the lowest rated performers. There is no means by which

any of the evaluators could have known where each technician would ultimately end up on the final rating sheet. Certainly, there was no evidence to suggest that Davis, Berryhill, or any other member of management reached into the deliberation room to jerry-rig the evaluation results for purposes of "targeting" the lowest-rated technicians.

C. Counsel for the General Counsel's Attempted After-the-Fact Introduction of Alternative Approaches to Layoff Decision-Making Were Soundly Rejected by the ALJ, and Any Attempt to Alter His Decision is Misplaced.

Counsel for the General Counsel's consistently-rejected attempts to insert alternative approaches to layoff decision-making, such as productivity, seniority and older skill ratings (and even "technician of the year" awards) are nothing more than smoke screens designed to obfuscate what was an incredibly well-designed and straight-forward selection procedure conducted by those who knew the technicians best. There is no evidence to suggest that technicians were regularly evaluated during the weeks leading up to the selection process. To the contrary, witnesses suggested that the evaluation process had only been conducted on a sporadic basis up to that point (Tr. 502, 924). Moreover, two of the former team leaders responsible for those prior evaluations had since been demoted in response to allegations of mistreatment and favoritism (Tr. 440-41, 836-37). Against that backdrop, it is easy to see why Aviles was reluctant to rely on the perceptions of others.

Aviles explained his rationale for dispensing with straight seniority as the litmus test, testifying that in his opinion, seniority should never be considered as a measuring stick to decide which technicians are "better" than others (Tr. 1345). As Aviles testified, strict seniority was not deemed to be a useful selection vehicle (Tr. 1345). Instead, he suggested a rating system that

[14] Moreover, while Counsel for the General Counsel insists that these criteria are "highly subjective and can easily be manipulated," the fact remains that when Respondents were presented with an opportunity to "manipulate" the scores to the disadvantage of union advocate Meyer, they went out of their way to do the opposite. (GCB 32).

accurately compared and ranked employees on a peer-to-peer standard (Tr. 1350). Consequently, the ALJ properly acknowledged that "Respondents do not use seniority as a factor" in layoff decisions (ALJD p. 27, lines 20-22).

Outdated skill reviews and length of service considerations, as urged by Counsel for the General Counsel, simply cannot establish pretext (or anything else of relevance) in this case. Obviously, the ALJ rejected Counsel for the General Counsel's alternative layoff decision-making theories because there was never any evidence to demonstrate that his preferred factors had been utilized in the past. Counsel for the General Counsel may have his own self-serving preference for those factors now, but that alone is of no probative value.

The ALJ sat through all six days of the hearing, during which time he had full opportunity to weigh the credibility of Aviles and other witnesses who offered testimony as to the objective nature of the layoff selection process. He appropriately chose *not* to substitute his own business judgment for that of the team leaders who were called upon to evaluate their technicians over the better part of a full day and then some.[15] Counsel for the General Counsel, on the other hand, premises his entire argument upon a misguided attempt to do just the opposite.

D. As Aviles and Miller Credibly Testified, the Team Leaders Went About the Selection Process in a Fair, Consistent and Impartial Manner, Without Regard to Union Sentiment.

After the proposed evaluation form was completed, team leaders Aviles, Rex Strong and Bruce Makin reviewed it with Parts Director Charlie Miller (filling in for absent Service Director Art Bullock), and set aside a full day to complete the evaluation process (Tr. 1346-1347). Before beginning, they received specific directives from Davis and Berryhill, who emphasized the importance of confining their evaluations to job-related criteria, making clear that they were

prohibited from allowing any perceptions of union sentiment to influence their ratings (Tr. 1059, 1283, 1350-51). Aviles confirmed that they were expressly advised that any feelings they had – pro- or anti-union – could not come into play as part of the rating process (Tr. 1351).[16]

On March 26, 2009, the team leaders met in private to conduct the evaluations (Tr. 1292). To safeguard the integrity of the process, they selected the only alignment technician in the shop (Jorge Amaya) as the first review candidate. As Amaya's position was "secure" from layoff, he was utilized to establish grading "benchmarks" for each of the components on the evaluation form (Tr. 1353). Once rating standards were established for each of the five criteria, the review process began in earnest. (Tr. 1353).

Each team leader played a lead role in discussing his respective team members, devoting "20 minutes" or more to each of them (Tr. 1282, 1288). The other team leaders then weighed in, at which point the three would agree upon a final numerical rating (Tr. 1354-1357).

The process was designed to ensure that the rating score card was "blind" to any personal feelings (negative or positive). To facilitate that process, Miller maintained a separate "tally sheet" that included the final scores (Tr. 1287, 1358; R. Ex. 40). He also kept the team leaders focused on the rating standards they had previously established (Tr. 1357). Once completed, the scores were immediately entered into an Excel ranking sheet, which was not reviewed until all ratings were completed (Tr. 1358).

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[15] Granted, Respondents contend that the ALJ was not quite so restrained with respect to his finding of discrimination involving the prior layoff of Anthony Roberts, a finding to which Respondents have excepted.

[16] Consequently, Counsel for the General Counsel's assertion that, "since Aviles admittedly was biased against the Union, it is reasonable to conclude that the Union sentiments of the technicians that he appraised was a factor that he considered" was dubious at best (GCB 30). The ALJ made abundantly clear on more than one occasion that he fully credited Aviles's account of the process, which rejected any notion that union sentiment was taken into consideration. Furthermore, Aviles had previously been a technician who attended Union meetings, and he expressly conditioned his acceptance of a team leader position upon the Dealership guaranteeing that he would not be asked to "snitch" on union supporters. (Tr. 1370).

When the final spreadsheet was completed, Miller was surprised by the relatively low placement of Meyer, a staunch union supporter. Following further discussion with the team leaders, he recomputed Meyer's rating only to discover that he had made a math error (Tr. 1296-1297). Upon correcting that error, Meyer rose in the rankings by several spots. Miller then recalculated all of the ratings to ensure against any other mistakes (Tr. 1297).[17]

The overall process occupied a full day on March 26, spilling into the morning of March 27. Aviles testified that his reaction to the process was that it was a "fair" evaluation of technicians' relative value to the shop (Tr. 1359). Miller agreed, volunteering that the results were fair, and that the system was "very ethical" (Tr. 1297-1298).

All of the most openly pro-union employees survived the process, simply because their cumulative scores were better than those of the four selected. On March 28, Miller conveyed the results to Berryhill, which dictated the outcome of the selection process (Tr. 1455). Because Berryhill knew the last four names would be laid off, he asked the raters if they were "100% comfortable" with their decisions (Tr. 1456). The team leaders, who were under the impression that six technicians were likely to be laid off, confirmed that they stood by them (Tr. 1350).

E. Counsel for the General Counsel's Alternative Layoff Argument is Nothing More Than a Transparent Attempt to Substitute His Own Uninformed Business Judgment for That of the Fully Credited Witnesses.

While it may not be necessary to rebut every alternative approach offered by Counsel for

[17] If the Dealership's anti-union intentions were as blatant as Counsel for the General Counsel now claims, the opportunity to end Meyer's career at the Dealership would not have been "corrected." Moreover, his suggestion that Respondents could somehow manipulate the outcome of the ratings makes even less sense in the context of this admitted math error. If Respondents were "pulling invisible strings" to guarantee the desired outcome, why would Miller and the Team Leaders have been given latitude to make their own numerical judgments, and to correct mistakes when discovered? Moreover, if the Dealership's goal was to rid itself of known union supporters, why did it not jettison Wasiejko, who served as the union's election observer, wore IAM buttons and admitted he was one of a small number of "open" union supporters (Tr. 620). Wasiejko actually volunteered to take one of the layoff slots, but the Dealership rejected that offer to preserve the integrity of the process (Tr. 616-617, 1600).

the General Counsel, the unmistakable fairness inherent in Aviles's approach must be vindicated – when contrasted with the various options proposed by Counsel for the General Counsel.[18] Indeed, Counsel for the General Counsel somehow manages to assert that Respondents' failure to take employee productivity (in the form of "booked hours") into account supports an inference of discriminatory motive, when in fact the opposite is actually true. After all, Respondents were never bound to consider the hours logged by individual technicians, which merely reflect the extent to which they are occupied within their own range of technical discipline.

Counsel for the General Counsel's attempts to advance his own after-the-fact theory should be rejected. There is nothing in the record to support any alternative theories as to how layoffs should have been conducted, and there is certainly no "litmus test" evidenced through the documentary or testimonial evidence to suggest that Respondents departed from past practice in their efforts to apply an objective analysis to the selective decisions. By acknowledging that these factors were never taken into account, Counsel for the General Counsel makes the case for Respondents that this factor is entirely irrelevant, and therefore unworthy of further discussion. Moreover, there is no proof that any of the alternatives advanced by Counsel for the General Counsel would have resulted in a more objective decision-making process. Consequently, there is nothing to suggest that the ALJ's rationale was flawed in any way.

1. Use of Most Recent Existing Performance Evaluations.

Aviles testified that the prior evaluations would not represent "his" decisions, as he had not completed them (Tr. 1345). He also testified that those evaluations were never designed for

[18] Counsel for the General Counsel's second-guessing also came in the form of suggesting, through introduction of G.C. Exs. 91 and 92, that the Dealership should have placed laid off technicians with other dealerships. Any attempt to draw a parallel between the layoffs at MBO and the wholesale shuttering of multiple AutoNation-owned Chrysler stores is, of course, comparing apples and oranges. The selective, performance-related layoff of MBO technicians bears no resemblance to the sudden shutdown (wholly outside of AutoNation's control) of entire dealerships.

peer-to-peer comparison, or for purposes of ranking the technicians against one another. Rather, the existing formats were intended for regular review of individual progress and to evaluate technicians for raises commensurate with their skill levels.

Under these circumstances, the existing forms were inadequate and patently "unfair" for the evaluation task at hand. Moreover, there is record evidence that the regularity and frequency of performance evaluations "ran behind a lot" (Tr. 923). Consequently, there is no evidence that contemporaneous evaluations even existed for all technicians under consideration.

Of course, many of the existing evaluations were also tainted by the fact that they were authored by Grobler and Manbahal, both of whom were later demoted due in part to perceptions of favoritism. Cazorla complained about Grobler long before the union petition, and continued to complain about his reputation for retaliation (Tr. 835; 843). Poppo testified that Grobler was "demeaning" while he was his team leader (Tr. 440-441). Puzon testified that Grobler unfairly distributed available work (Tr. 497-498).

2. Use of Straight Seniority.

Berryhill testified that seniority had never been used as a consideration for personnel actions (Tr. 1441). Aviles was more critical, condemning seniority as an unreliable and meaningless measure of how well a technician can learn to and actually perform his tasks (Tr. 1345). Other than an isolated and clearly irrelevant claim that a parts employee may have been selected for layoff on the basis of seniority years before, there is absolutely no evidence that the Dealership ever relied upon (or even considered) straight seniority.

3. Requiring a Constant Number of Technicians to Share in a Rapidly Decreasing Amount of Available Work Would Have Been Completely Wrong-Headed.

This "option" has already been addressed and rejected. Such an approach not only ignores the fact that the Dealership needed to retain the best technicians, but would inevitably have given rise to additional workplace tension.

F. With the Exception of Poppo, There is No Credible Evidence That Any Member of Management was Aware of the Union Sympathies of Those Ranked in the Bottom Four.

1. There is No Evidence That Cazorla, Persaud or Puzon Ever Demonstrated Open Support for the Union.

Unlike Meyer, Catalano, and Wasiejko, there is no credible evidence in the record to demonstrate that Cazorla, Persaud or Puzon were open, active or even known Union supporters. Union Representative David Porter admitted that he knew of *only* one laid off technician who had engaged in open activity (Poppo) – and that was only after he was designated as a "steward" in mid-February 2009 (Tr. 327-328). Puzon testified only that he attended a union meeting, at which point he recalled seeing Strong and Aviles (before they were team leaders) (Tr. 489). He also testified that he never said anything to suggest that he supported the union (Tr. 519).

Persaud, likewise, testified that he attended a union meeting and signed a union card in August 2008 (Tr. 587). Like the rest, however, he never shared that he had signed a card with Berryhill, Davis or any member of management. He also acknowledged that he never wore union insignia, etc., or otherwise spoke up for the Union (Tr. 597-599). In fact, Persaud testified that Berryhill was under the impression that he had been a "no" vote (Tr. 589). That is likely because, as Persaud testified, he *told* Berryhill and Davis he was "for the Dealership" (Tr. 597).

Cazorla also concealed his preferences from management. In fact, he testified that he was unsure how he would vote "until the very end" (Tr. 873). Indeed, Cazorla was careful to avoid indicating, even at the hearing, whether he had ever voted for the union. Other than that, Cazorla testified that he had "maybe" worn an "IAM pin" on one or two occasions (Tr. 847). Regardless of whether Cazorla did, in fact, wear a union pin to work or to an off-site union function, no one in management recalled seeing him wear such a pin.

Counsel for the General Counsel also elicited testimony from Cazorla regarding an alleged interaction with Miller around the time of the March 26 technicians' evaluation (Tr. 848). With no other anti-union "nexus" to exploit, Counsel for the General Counsel claims that Miller somehow retaliated against Cazorla because Catalano, acting as a "steward," had supported him in registering a complaint.

Apparently, Cazorla was upset because someone had put one of his uniform shirts in a toilet (Tr. 546; 847). Catalano testified that he agreed to help him garner Miller's attention on the issue. However, Cazorla's testimony seems to be that his handwritten notes about the "toilet" incident were delivered to Miller on April 2, by which point the ratings had long since been completed (Tr. 848-850).

Even had Miller been approached beforehand, the record demonstrates that he had nothing to do with rating the individual technicians. Counsel for the General Counsel had Cazorla's rating in evidence, and certainly could have quizzed Miller as to whether he attempted to alter Cazorla's ratings before they were placed on the score sheet. In any event, the notion that Miller would "retaliate" against Cazorla for complaining about the uniform is ludicrous.

2. The Only Evidence to Demonstrate Poppo's Union Support was His Designation, in February, 2009, as One of Three "Union Stewards."

At the Hearing, Meyer confirmed his role as principal leader of the organizing effort (Tr. 407). He also offered his personal opinions on other technicians such as: Roberts (not an open union supporter); Catalano (an outspoken supporter); and Weiss (not a union supporter) (Tr. 353, 404, 407). Yet, he said nothing about Poppo's alleged role as an open union advocate.

Poppo was first identified by the Union as a "steward" in a February 19, 2009 letter (G.C. Ex. 151). Berryhill testified that he first learned Poppo was a union supporter when he saw him wear a steward button that same day (Tr. 1518). Berryhill made clear that, "it doesn't make any difference to me" (Tr. 1517-1518). Moreover, Berryhill played no role in the rating process that gave rise to the layoff selections. Although he confessed that he was "anxious" to learn who the bottom four would be, he was not informed until March 27 or March 28 (Tr. 1455). By March 31, the layoff decisions had already been made.

3. Other Than Poppo, the Record is Devoid of Credible Evidence That Any Member of Management was Ever Aware That the Laid Off Technicians Had Attended Union Meetings, Voted for the Union or Had Otherwise Been Active Supporters.

The pro-union advocates took great pains to conceal their sentiments, with the exception of Meyer, Catalano, Wasiejko and later, Poppo. Meyer testified at length as to the details of how he, Catalano and others took precautions to prevent anyone in management (including the team leaders) from learning of their true positions – even after the petition was filed (Tr. 359, 414).

Meyer confirmed that he never said anything to Berryhill (or even in his presence) about the sentiments of others (Tr. 414). In their admitted conversations with Berryhill, none of the technicians laid off in April said or did anything to alert the General Manager as to their stance on the Union (Tr. 430, 519, 597, 873).

G. Counsel for the General Counsel's Wild Speculation, Attempting to Impute Unlawful Motivation Into the Objective Decision-Making Process, is Unsupported by Any Evidence and Must Be Rejected.

There was absolutely no testimony that the process described by Aviles was tainted by anti-union animus or unlawful interference. Aviles's testimony was properly credited by the ALJ on every point, and his rationale for developing the layoff score sheet approach was untouched by Counsel for the General Counsel.

Aviles testified that no one in management *ever* asked him about technicians' pro- or anti-union beliefs, and that he *never* volunteered such information (Tr. 1370-1372). There is no proof that Aviles, who led the rating effort, considered any of the laid off technicians to be more pro-union than others. Aviles rightfully exhibited pride in the evaluation format. He was adamant, and uncontradicted, in his testimony that union sympathies had nothing to do with the ratings (Tr. 1383). Miller corroborated Aviles's recollections, testifying that a "more objective" form was needed because the "integrity" of the process had to be demonstrable (Tr. 1281).

Aviles regularly attended union meetings, but then again, so did almost everyone else within the Service Department at any given time (Tr. 1368). He acknowledged that he was among the first union supporters during the period preceding the petition, and was identified by Weiss as one of its top leaders (Tr. 809). Prior to the election, Aviles was promoted to team leader, testifying that he conditioned his acceptance on a "no snitching" agreement (Tr. 1370).

Counsel for the General Counsel makes the unbelievable assertion that, "Respondents selection of Cazorla, Poppo, Persaud and Puzon *reveals their* unlawful motives." The murky nature of Counsel for the General Counsel's theory in this regard can be seen through his constant usage of terms such as "they" and "their" when he attributes unlawful motive to Respondent's actions. Never once in the six-day hearing, however, did Counsel for the General

Counsel present any evidence that any of the team leaders entered into the selection process with a pre-determined effort to "get" the four technicians who were ultimately laid off.

His elaborate conspiracy theories notwithstanding, Counsel for the General Counsel failed to offer any proof to buttress his theory that the selection process was designed to target union supporters. Lacking any evidence, he was forced to construct a Rube Goldberg-like theory of discrimination. The simple suggestion that the four technicians proved their alleged "union activities" merely by virtue of attending a union meeting is ludicrous (GCB 16). As previously stated, it appears that every employee short of James Weiss attended at least one meeting.

Likewise, the mere fact that a couple of the laid off individuals testified that they had refused to sign an anti-union petition is no more compelling. There was no credible testimony that anyone in management ever saw that petition prior to the hearing.

Counsel for the General Counsel's unsupported theory of alleged betrayal by one or more of the laid off technicians is simply laughable. He would ask that the ALJ's decision be overturned on pure conjecture, without any supporting evidence whatsoever. He would also ask us to believe that unidentified managers were upset that one or more of the laid off technicians had voted for the union, after previously indicating that they were against representation. There is no evidence to support any prongs of this argument, and the persistent efforts by Counsel for the General Counsel before, during and after the hearing have yet to supply a shred of evidence that the raters were influenced by improper motives, or that the process was designed as pretext.

Following the election, Counsel for the General Counsel suggests that one of the technicians (Poppo) was elected shop steward, while another (Cazorla) allegedly wore a union pin "once or twice" (GCB 17). He also refers to an incident in which Cazorla complained that his uniform had been stuffed into a toilet, to which a manager responded by advising him to put

the complaint in writing. He then adds that Cazorla ultimately furnished a written grievance on April 2, moments before he was advised that he had been selected for layoff (GCB 18).[19]

Piling circumstantial evidence upon conjecture upon pure supposition, Counsel for the General Counsel leaps to the unfounded conclusion that all four technicians were selected "because Respondents believed them to be no votes, or voters who were on the fence, and, in Respondents' view, they lacked trustworthiness and betrayed the company by voting for the union" (GCB 21).[20] He goes on to offer the speculative notion that the Dealership "believed they betrayed Respondents by voting for the Union" (GCB 28). Even more preposterous is Counsel for the General Counsel's overreaching suggestion that Respondents had "the ability to manipulate the outcome in order to insure that technicians were punished for their union activities" (GCB 29). Of course, he stops well short of explaining exactly how Respondents actually engaged in such manipulation, and who among MBO's management team orchestrated this covert effort.

These tortured theories are fatally flawed for any number of reasons, not least of which are the facts that: (1) none of the team leaders (who were the only ones to offer direct input into the selection process) were implicated by any of these circumstances; (2) none of the circumstances had anything to do with the objective process by which they went about ranking the technicians; and that, (3) neither Davis nor Berryhill took part in the selection process, other than to strictly admonish the participating team leaders against considering union sympathies.

Of course, this conspiracy theory also fails for the simple reason that there is not a shred of evidence to support it. Indeed, had Respondents discarded their blind and methodical process

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[19] Notably, this incident appears to have occurred long *after* the selection process had been completed.

[20] It is worth noting that had Respondents truly felt betrayed by the bargaining unit, then it stands to reason that they would have sought to maximize the number of employees to be laid off. Yet in March, 2009, Counsel for the General Counsel acknowledges that Berryhill did the opposite, reducing the final figure from six to four (GCB 34).

for one that took some vague combination of seniority, skill ratings and productivity into account, or had they simply retained the method of allowing each team leader to select two technicians for layoff, there can be little doubt that they would find themselves in this same situation – defending against frivolous allegations. Consequently, Counsel for the General Counsel's suggestion that MBO's attempt to create a more objective process to select employees for its first extensive service layoff "was further evidence of their unlawful motivation" could not be further from the truth (GCB 30). To the contrary, the thoughtful nature by which they approached this important process established that Respondents were committed to a fair and objective process through which senior management was truly "blind" to the ultimate outcome.

H. The Reasons Proffered by MBO Management for the Layoffs and the Underlying Selection Decisions Confirm the Legitimacy of the Process That Gave Rise to Them, and Those Reasons Never Shifted.

In addition to the clear-cut evidence that the April layoff procedures were "blind" and unbiased toward active "union supporters," it is important to recognize that not one of the four laid off employees complained that their placement on the final evaluation tally sheet was unfair. Nonetheless, Counsel for the General Counsel attempts to draw significance from the absence of evidence that Respondents had informally counseled the four selected technicians. The fact remains, however, that there is no evidence that Respondents engaged in conventional performance counseling with regard to any of the technicians, including those who were retained, presumably because it simply was not a customary practice within MBO.

Similarly, Counsel for the General Counsel refers to an alleged lack of formal discipline issued against some of the selected technicians. Of course, the team leaders would not have necessarily had such information at their disposal, as they were considering other job-related criteria. Moreover, there is also no evidence to establish that those who were retained had been

formally disciplined, or more importantly, that the team leaders were aware of that at the time they participated in the selection process.

There is also no evidence to suggest that Respondents subsequently conveyed anything differently to those technicians who were selected, or that their articulated rationale shifted thereafter. To the contrary, Counsel for the General Counsel's own Supporting Brief makes clear that Respondents articulated the basis for their selection decisions in a manner that was entirely consistent with the underlying process, and with their testimony adduced at the hearing.

For example, he acknowledges that Respondents advised Cazorla "that they were going to have to let him go" because of the "economic situation" (GCB 18). Poppo was advised "that Respondents had done a point scale evaluation involving different categories and that Poppo was one of the lowest on the scale, so that they had to let him go" (GCB 19). Berryhill told Persaud "that because of the economy, he had to let Persaud go" (GCB 19). He then told Puzon, "sorry I have to let you go; business is slow" (GCB 20). During the shop meeting that followed, Respondents advised the remaining technicians "that there wasn't enough work in the shop to keep everyone busy so MBO let four technicians go" (GCB 20). Despite being speciously characterized by Counsel for the General Counsel as "shifting," Respondents articulated reasons for the layoffs remained consistent from the date they were contemplated through the hearing.

I. Under All These Circumstances, the April Layoffs Were Entirely Non-Discriminatory.

Had the Dealership truly been motivated by a desire to "weed out" perceived union supporters in the spring of 2009, it stands to reason that those harboring such a desire would have retained full discretion over the selection process. Yet in retaining those technicians who openly supported the Union, Respondents chose to do the exact opposite. Whether they did so out of recognition that they would ultimately be forced to defend these decisions before this forum or

simply to ensure fairness, the fact remains that the process was fully transparent, informed only by objective criteria, and confined to then-current performance factors. Moreover, the Dealership chose to delegate the process to those members of the front-line supervisory team who knew their technicians best, all of whom had previously worked side-by-side with these same employees for a considerable length of time.

In that regard, the facts in this case are analogous to those in *American Coal Co.*, 337 NLRB 1044 (2002), where the employer satisfied its *Wright Line* rebuttal burden by demonstrating that it would have selected the same employees for layoff even had they not engaged in protected activity. The Board reasoned that the employer had applied a neutral set of objective criteria to select 33 employees for layoff (based upon number of disciplines, average absences, and specific evaluations prepared for the purpose of selecting employees for the layoffs). The facts in that case showed that the employer compiled a spreadsheet format for statistical ratings, and that the underlying data was completely untainted by information pertaining to union sentiment. The Board went on to note that, even had the CEO in that case harbored anti-union animus, the fact remained that he was not directly involved in the process.

One fact distinguishing the instant case from *American Coal* is the lack of any evidence establishing that the employees selected for layoff (with one arguable exception) supported or voted for the union months before, or that they supported the union as of the date of the selection process. Of course, no such information could have been taken into consideration, pursuant to the strict directives of Davis and Berryhill.

Another decision worth noting is *Chromalloy American Corp*., 286 NLRB 868 (1987). In that case, the Board overruled an 8(a)(3) violation where the layoff was driven, as here, by a lack of work. In response, the employer implemented a meticulous process to determine which

15 employees would be selected for layoff. The record in that case contained extensive evidence describing the method utilized for selecting employees, which included the use of recent performance appraisals along with a point system for each category, which ultimately led to the selection of the lowest-ranked employees. The Board concluded by finding that, "Apart from these economic considerations, we find that Respondent's economic defense is strengthened by the manner in which the layoff was implemented." *Id.* at 870. Certainly, after review of the ultimate integrity interest in the layoff processes, the same conclusion must be drawn here.

For all these reasons, Cross Exceptions 9-13 must be rejected. There is simply no credible evidence to support them, and they run directly up against the ALJ's well-reasoned credibility determinations.

VI. THE ALJ PROPERLY FOUND THAT THE NON-DISCIPLINARY COACHING ISSUED TO CATALANO DID NOT VIOLATE SECTIONS 8(A)(1) OR (3) OF THE ACT.

Paragraph 42(c) of the Consolidated Complaint alleges that, on October 13, 2009, Respondents issued a documented coaching form to Dean Catalano in violation of Sections 8(a)(1) and (3) of the Act. The incident revolved around Catalano's conduct during an October 2 educational meeting, which was convened at Catalano's request to cover various hygienic and health-related issues (Tr. 555; R. Ex. 11). The meeting was attended by approximately half of the Dealership's employees (Tr. 1132-33; R. Ex. 11).

An outside spokesperson for the County Health Department conducted the meeting. At the conclusion of the session, the presenter asked if there were any questions. Catalano immediately raised his hand. According to Menendez, he proceeded to berate the speaker, insisting that her presentation was not what *he* (as opposed to the group) had personally asked for, as she had failed to cover hand-washing techniques to his liking (Tr. 1135). The

representative suggested that Catalano direct his concerns to management, to which he brazenly replied, "I did, and this is what I got." These events were corroborated by a number of co-workers in attendance, and by Catalano himself.

Ironically, the meeting was convened at Catalano's request, in response to concerns pertaining to the unsanitary restroom habits of a fellow employee (who received the same level of non-disciplinary coaching for his role in the issues that gave rise to Catalano's request) (R. Ex. 47). Catalano's remarks were not directed to a member of management, but rather to a guest of the Dealership who could not have been in a position to understand the nature of his concerns (ALJD p. 29, lines 38-43).

For his part, Catalano was expressing his personal frustrations over the extent of information provided. It was for that outburst alone that he received his coaching, and there was nothing about it that even remotely suggested that he was speaking on behalf of or acting in concert with anyone but himself. Indeed, the ALJ credited the testimony of witnesses who recalled Catalano's statements being directed toward the representative (who was in no position to resolve any issues on behalf of the Dealership), rather than to the group as a whole. In doing so, Catalano was criticizing the speaker for her presentation – rather than complaining about the health and safety of the workplace.

Counsel for the General Counsel attempts to cloud the issue by arguing that Catalano occupied the role of "shop steward" at the time of his outburst.[21] The fact remains, however, that Catalano did nothing to draw attention to that status in the context of his rude comments, or to refer to the union in any way (Tr. 574). He admits that he did not refer to his steward status or

[21] In addressing this allegation, Counsel for the General Counsel disingenuously suggests that, "Catalano was an elected union steward at the time of the meeting and he *wears* a Union button on his work uniform" (GCB 40). There is no evidence, however, that he was wearing any such button during the meeting in question.

don a steward pin, and there is nothing in the record to suggest otherwise (Tr. 570).[22] Rather, Catalano simply maintained that the content of the program was not what he (Catalano) wanted.

Not surprisingly, the ALJ concluded that Catalano's behavior was not protected, and therefore, that the non-disciplinary coaching did not violate the Act. (ALJD p. 29, lines 46-47). Counsel for the General Counsel excepts to that finding. The Board should reject that exception.

A. Counsel for the General Counsel Disregards the De Minimis Nature of the Non-Disciplinary Coaching.

As an initial matter, the General Counsel's allegations are wholly misplaced, given the *de minimis* nature of the form issued to Catalano. As the ALJ specifically observed, "The coaching states that it will not be part of the employee's permanent record…." (ALJD p. 29, line 32). Accordingly, the informal counseling cannot give rise to liability under Section 8(a)(1) or 8(a)(3). *See Lancaster Fairfield Community Hosp.*, 311 NLRB 401, 403-404 (1993) ("The General Counsel has failed to prove that the conference report is part of the Respondent's formal disciplinary procedure or that it is even a preliminary step in the progressive disciplinary system. As used by the Respondent, the conference report merely warns an employee of potential performance or behavior problems. Because the issuance of the conference report… did not affect 'any term or condition of employment' within the meaning of Section 8(a)(3), we reverse the judge's finding of a violation of that provision of the statute."); *Altercare of Wadsworth Center for Rehabilitation*, 355 NLRB No. 96 (2010) ("[W]e find that the General Counsel has not established that the verbal directions in this case constituted disciplinary action sufficient to support a violation of Section 8(a)(3) of the Act.").

[22] Even if taken as true, "an employee's status as a steward does not insulate him or her from the lawful discipline imposed upon all employees." *Miller Brewing Company*, 254 NLRB 266, 267 (1981).

As Berryhill explained, MBO employees are brought in for "documented coaching" sessions "all the time," and no one considers them as "disciplinary action" (Tr. 1475-1476). Rather, as Berryhill testified, "life goes on" (Tr. 1478). Even Catalano admitted that he understood that the form would be "purged from his files," and that no one in management has brought it up since then (Tr. 576, 579). He also admitted that he had previously received formal discipline from the Dealership, and that he understood the difference between the two concepts (Tr. 578, R. Ex. 1).

Moreover, the coaching form itself does nothing to remotely chill the notion of concerted activity. To the contrary, it goes out of its way to invite it: "Should you have a concern or issue that needs to be addressed, *bring it to the attention of management* in an appropriate setting" (G.C. Ex. 93).[23] Consequently, Catalano had every right to surface his concerns, so long as he directed them to management as opposed to an outside guest of the Dealership who was in no position to understand (let alone respond to) his concerns.

B. Catalano Forfeited Any Protection by Attacking a Third Party.

Counsel for the General Counsel dwells on the "this is what I got!" comment in isolation, to the exclusion of Catalano's comments leading up to that remark, the context in which it was made, and the identity of the individual to whom they were directed. He also attempts to downplay the severity of Catalano's outburst by suggesting that, "He merely voiced his displeasure with management…" (GCB 43).[24] Of course, that ignores the fact that Catalano chose to direct that "displeasure" at a third party by launching a disruptive verbal attack.

[23] Respondents' respect for Catalano's expression of concerted interest for the mutual benefit of his co-workers is essentially conceded by Counsel for the General Counsel in his description of their reaction to his initial concern: "Bullock and Menendez thought it was a good idea and Menendez scheduled the session" (GCB 39).
[24] Nonetheless, Catalano admitted that he later wrote a letter of apology to the Health Department (G.C. Ex. 171).

As stated on the face of the form itself, "The presenter told you [Catalano] to speak with your manager about the specific situation, but you *continued to insist* that she address the situation to the group" (G.C. Ex. 93). In other words, it was Catalano's persistence in attempting to compel a response from a guest of the Dealership that brought about his coaching. Consequently, the coaching form points out that, "After speaking with several associates that attended the information session, your behavior was perceived as being rude, antagonistic and persistent *towards the guest speaker*."

C. Even if Catalano Had Directed His Remarks Toward a Member of Management, Their Rude and Discourteous Overtones Would Have Eradicated Any Protection.

According to Menendez, Catalano's demeanor was so "rude, belligerent and disrespectful," that she felt the need to personally apologize to the speaker thereafter (Tr. 1135).[25] A number of attendees also expressed concerns over Catalano's conduct after the meeting (Tr. 1144). Three to four employees specifically commented that Catalano had acted in a "ridiculous" way (Tr. 1146). Catalano did not refute these characterizations. On cross-examination, he agreed that Menendez was never rude to him, and that she had honored his request by scheduling the meeting (Tr. 564-568). When asked if he had been "rude" or "raised his voice," Catalano simply responded, "not that I recall" (Tr. 557).

Regardless of whether Catalano's conduct was concerted, the ALJ properly found that it was not protected. It is well-established that the "fact that an activity is concerted . . . does not necessarily mean that an employee can engage in the activity with impunity." *American Steel Erectors, Inc.*, 339 NLRB 1315, 1316 (2003) (quoting *NLRB v. City Disposal Systems*, 465 U.S.

[25] When asked why she felt the need to apologize on behalf of the Dealership, Menendez responded that, "Because I just thought it was very inappropriate, especially in a room full of people, at a person that was there on our request. And she really had nothing to do with our personal workings" (Tr. 1135).

822, 837 (1984)). In this case, the ALJ properly concluded that the *Atlantic Steel* [26] analysis was inapplicable because Catalano's conduct was not directed at a member of management. Even assuming that the *Atlantic Steel* analysis applies however, the factors in that decision weigh heavily against any finding that Catalano's actions were protected.

The first factor considers the place of the discussion. This factor weighs heavily against any finding of protected activity. While Counsel for the General Counsel argues that the incident occurred in a non-work area and did not cause any disruption, he ignores the fact that "the public nature of the misconduct which commenced in plain view of employees under [the supervisor's] authority" militates against a finding of protection. *Starbucks Coffee Co.*, 354 NLRB No. 99, slip op. at 3 (2009); *see also Postal Service*, 350 NLRB 441, 459 (2007).

Here, Catalano's conduct occurred during a group employee meeting. Far worse, however, Catalano's conduct occurred in the presence of an invited guest. *Compare Wal-Mart Stores, Inc.*, 341 NLRB 796, 808 (2004) (considering whether customers were exposed to the alleged misconduct).

The second factor also weighs against protection. As the ALJ alluded, the subject matter at issue was Catalano's criticism of the representative's speech – it was not, as Counsel for the General Counsel suggests, Respondents' alleged failure to protect worker health and safety.

The third factor also weighs against protection. Counsel for the General Counsel attempts to minimize the impact of Catalano's rude and discourteous behavior by citing a Board decision holding that, "merely speaking loudly, raising one's voice, or using intemperate remarks" is insufficient to bring an employee's outburst outside the protection of the Act, and that Catalano should be credited for refraining from profanity or derogatory remarks.

[26] *Atlantic Steel Co.*, 245 NLRB 814 (1974).

An employee's actions, however, need not be boisterous nor contain profanity to forfeit protection. In *American Steel Erectors, Inc.*, 339 NLRB 1315 (2003), the Board found an employee's public statement at a council meeting "was sufficiently extreme to warrant forfeiture of his Section 7 protection." The Board observed that the employee's comments were not made in the heat of the moment, nor in response to unlawful or provocative employer behavior. Nonetheless, it went on to find that, "Although [the employee] did not use obscenities and was not loud or threatening, [his] statement warrants loss of the protection of the Act."

The fourth factor also weighs against protection. Counsel for the General Counsel does not dispute that Catalano's actions were completely unprovoked. Nevertheless, he contends that this factor is somehow neutral. To the contrary, where an employee's actions are unprovoked by an employer's unfair labor practices, that factor weighs *against* protection. *See Starbucks Coffee*, 354 NLRB No. 99, slip op. at 3 (fourth factor weighs against protection where no other unfair labor practices directed at disciplined employee); *DaimlerChrysler Corp.*, 344 NLRB 1324, 1330 (2005) ("[T]he fourth factor also weighs against protection. There is no finding that [the employee] was provoked by any unlawful conduct by [the employer].").

For all these reasons, Cross Exceptions 14-16 must be dismissed in their entirety. There is simply no evidence to warrant overturning the ALJ's well-reasoned conclusion that Catalano directed unprotected attacks against a third party, for which he properly received a *de minimis* non-disciplinary coaching.

VII. CONCLUSION

The findings to which Counsel for the General Counsel cross excepts are supported by an overwhelming amount of testimonial and documentary evidence, much of which lies completely unrebutted. In response, Counsel for the General Counsel attempts to undo well-reasoned

credibility determinations based solely upon self-serving theories that he personally constructed well after the fact.

Indeed, the Cross Exceptions themselves are premised upon a tenuous house of conjectural cards that cannot possibly withstand the weight of record evidence bearing down upon them. For all these reasons and as set forth above, Respondents submit that Counsel for the General Counsel's Cross Exceptions are without merit, and respectfully request that they be dismissed in their entirety.

Filed this 7th day of June, 2011.

Respectfully submitted,

/s/ Steven M. Bernstein
Steven M. Bernstein
Douglas R. Sullenberger
Brian M. Herman
For Fisher & Phillips LLP

Counsel for Respondents
Contemporary Cars, Inc. d/b/a
Mercedes-Benz of Orlando and
AutoNation, Inc.

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 June 7, 2011, I e-filed the foregoing **RESPONDENTS CONTEMPORARY CARS, INC. D/B/A MERCEDES-BENZ OF ORLANDO AND AUTONATION, INC.'S ANSWERING BRIEF TO GENERAL COUNSEL'S CROSS EXCEPTIONS** 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:

Rochelle Kentov
Regional Director
National Labor Relations Board, Region 12
201 East Kennedy Blvd., Suite 530
Tampa, FL 33602
Rochelle.Kentov@nlrb.gov

Rafael Aybar
Counsel for the General Counsel
National Labor Relations Board, Region 12
201 East Kennedy Blvd., Suite 530
Tampa, FL 33602
Rafael.Aybar@nlrb.gov

David Porter
Grand Lodge Representative
100 Bent Tree Drive, Apt. 110
Daytona Beach, FL 32114
dporter@iamaw.org

International Association of Machinists
and Aerospace Workers, AFL-CIO
Christopher T. Corsen
General Counsel
International Association of Machinists
and Aerospace Workers, AFL-CIO
ccorsen@iamaw.org

/s/ Steven M. Bernstein