

Baron Brothers Auto Group, Inc. d/b/a Baron Honda-Pontiac and Local 259, United Automobile, Aerospace and Agricultural Implement Workers of America. Cases 29-CA-16573, 29-CA-16637, 29-CA-16854, 29-CA-16874, 29-CA-17134, and 29-CA-17273

February 28, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND BROWNING

On April 26, 1994, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an exception and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

The General Counsel excepts to the judge's finding that the Respondent did not violate Section 8(a)(5) of the Act by failing to remit contributions to the Union's Pension Fund and Health and Welfare Fund. We find no merit to this exception.

In its answer to the consolidated complaint, the Respondent denied the allegations relating to its failure to make fund payments. In its answer to the amended consolidated complaint, however, the Respondent did not specifically reference the paragraphs that set forth the fund payments allegations. At trial, the General Counsel did not adduce any evidence concerning the fund payments issues, but argued to the judge that a violation should be found because the allegations were not denied by the Respondent.

We agree with the judge that dismissal of these allegations is appropriate. The allegations relating to the

fund payments are substantially the same in both the consolidated complaint and the amended consolidated complaint. Where, as here, a respondent has denied an allegation in the initial complaint, the Board will not deem the allegation admitted based on a subsequent failure to answer an amended complaint's substantially unchanged allegation. *Media One Inc.*, 313 NLRB 876 (1994); and *Miami Rivet of Puerto Rico*, 307 NLRB 1390 (1992).

Further, it is apparent from its answer to the amended consolidated complaint that the Respondent intended to deny the fund payments allegations in that answer as well. In the consolidated complaint, the specific allegations concerning fund payments are set forth in paragraph 22. In the amended consolidated complaint, however, the specific allegations concerning fund payments are set forth in paragraphs 23(a) and (b). The Respondent's answer to the amended consolidated complaint specifically denies paragraphs 22(a) and (b), but does not mention paragraph 23 at all. Paragraph 22 in the amended consolidated complaint does not have an "(a) and (b)." We believe it obvious that the Respondent meant to deny paragraphs 23(a) and (b), but inadvertently typed 22(a) and (b).

Accordingly, as the Respondent denied the fund payments allegations in its original answer and intended to deny the fund payments allegations in its subsequent answer, and as the General Counsel did not introduce any record evidence concerning the Respondent's failure to make fund payments, the judge properly dismissed the fund payments allegations.³

AMENDED REMEDY

The Respondent shall be ordered to make its employees covered by the collective-bargaining agreement whole for any loss of earnings or other benefits suffered as a result of the Respondent's failure to apply the collective-bargaining agreement, such compensation or other payments to be computed as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁴

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We shall modify the judge's remedy and recommended Order to provide the standard remedial language for the 8(a)(5) violations found by the judge. We shall modify the judge's recommended Order to conform the cease-and-desist language concerning the Respondent's discrimination against employees Parisi, Chilicki, and Chiavola to that in the notice, and we shall add to the expungement order reference to the unlawful warnings as well as the unlawful discharges. We shall also modify the judge's notice by deleting language traditionally used in 8(b)(2) cases.

³ Chairman Gould finds it unnecessary to pass on the General Counsel's exception. The Respondent has been found to have violated Sec. 8(a)(5) and (1) by failing to honor the collective-bargaining agreement. The question of whether the Respondent violated the agreement by failure to make the fund payments can be resolved at the compliance stage.

⁴ Because we adopt the judge's finding that the Respondent did not violate the Act by failing to remit certain specified contributions to the Pension Fund and Health and Welfare Fund, the above-amended remedy shall not be construed as requiring the Respondent to remit such contributions to those funds.

modified below and orders that the Respondent, Baron Brothers Auto Group, Inc. d/b/a Baron Honda-Pontiac, Patchogue, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(j).

“(j) Discharging or otherwise discriminating against employees for supporting Local 259 or any other union.”

2. Insert the following as paragraph 2(a) and reletter the subsequent paragraphs.

“(a) Adhere to the terms of the collective-bargaining agreement with Local 259 and make employees covered by that agreement whole for any loss of earnings and benefits suffered as the result of the Respondent’s failure to adhere to the terms of the agreement in the manner set forth in the remedy section of this decision.”

3. Substitute the following for newly lettered paragraph 2(e).

“(e) Remove from its files any reference to the unlawful warnings and discharges, and notify the employees in writing that this has been done and that the discharges and warnings will not be used against them in any way.”

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against employees for supporting Local 259, United Automobile, Aerospace and Agricultural Implement Workers of America, or any other union.

WE WILL NOT repudiate our collective-bargaining agreement with Local 259 nor will we inform our employees that we do not recognize Local 259 as the representative of our employees in the following appropriate unit:

All service shop employees employed by Baron Brothers Auto Group, Inc. d/b/a Baron Honda-Pontiac, excluding office clerical employees, new and used car salesmen, guards, watchmen, professional employees and supervisors as defined in the Act.

WE WILL NOT direct employees to sign authorization cards and medical benefit applications for Amalgamated Workers Local 88, Retail, Wholesale and Department Store Union, AFL-CIO (Local 88).

WE WILL NOT direct employees to refrain from joining or supporting Local 259, nor direct employees to refrain from signing Local 259 membership and dues-checkoff applications.

WE WILL NOT deal directly with employees or solicit employees to enter into individual agreements for the purpose of modifying the terms of the collective-bargaining agreement.

WE WILL NOT fail to pay employees vacation pay according to the terms of the collective-bargaining agreement.

WE WILL NOT delay in furnishing information to Local 259 necessary for the investigation and processing of grievances.

WE WILL NOT direct employees to refrain from filing grievances with Local 259 nor will we direct employees to present grievances directly to us.

WE WILL NOT threaten employees with reprisals unless they withdraw their grievances.

WE WILL NOT threaten employees with discharge if they sign authorization cards for Local 259 nor will we confiscate those cards.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL adhere to the terms of the collective-bargaining agreement with Local 259 and make our employees covered by that agreement whole for any loss of earnings and benefits suffered as the result our failure to adhere to the terms of the agreement.

WE WILL offer Louis Parisi Jr., Bartosz Chilicki, and George Chiavola immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL offer Louis Parisi Jr., Bartosz Chilicki, and George Chiavola equal training and consideration upon their reinstatement.

WE WILL notify each of them that we have removed from our files any reference to his warning and discharge and that the warning and discharge will not be used against him in any way.

WE WILL make our employees whole for vacation pay unlawfully computed in 1992 and 1993, with interest.

BARON BROTHERS AUTO GROUP, INC.
D/B/A BARON HONDA-PONTIAC

Sharon Chau, Esq., for the General Counsel.
Denise Pavlides, Esq., of Hicksville, New York, for the Respondent.
Stephen E. Appell, Esq. (Sipsers, Weinstock, Harper & Dorn), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in Brooklyn and New York, New York, on October 19, 20, and 22 and November 29, 1993. The complaint alleges that Respondent engaged in numerous violations of Section 8(a)(1), (2), (3), and (5) of the Act, including the discharge of three employees. As will be seen below, Respondent admitted certain of the allegations, but Respondent denies that the discharges of employees violated the Act, that it threatened employees with discharge if they joined Local 259 and confiscated Local 259 membership and dues-checkoff applications, that it failed to remit contributions to the Local 259 Pension and Health and Welfare Funds, and that it failed to pay average pay rates for vacations.

On the entire record, including my observations of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent on January 28, 1994, I make the following¹

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, with its principal place of business in Patchogue, New York, is engaged in the retail sale of automobiles and the maintenance and repair of automobiles. Respondent annually derives gross revenues in excess of \$500,000 and purchases products valued in excess of \$50,000 directly from outside New York State. The parties agree, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that Local 259, United Automobile, Aerospace and Agricultural Implement Workers of America, and Amalgamated Workers Local 88, Retail, Wholesale and Department Store Union, AFL-CIO are each labor organizations within the meaning of Section 2(5) of the Act.

¹ Respondent Baron's brief contains matter dehors the record which I shall disregard. Many of the cases cited in Respondent's brief are inapposite or have been overruled and I shall not discuss them.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Facts stipulated and admitted by the parties

The facts summarized in this section are based on a stipulation agreed to by the parties and on those portions of the complaint admitted by Respondent Baron.

On about February 13, 1992, Respondent Baron purchased a company known as Leitner Pontiac Honda, Inc., an auto dealer and repair establishment with a repair shop in Patchogue, New York.² Leitner was a member of the Automobile Dealers Industrial Relations Association of New York; the Association and Local 259 were parties to a collective-bargaining agreement with a term from July 1990 to June 1994. When Respondent purchased the Leitner Company, it agreed to adopt the collective-bargaining agreement and to abide by it with respect to the service and parts department employees at the Patchogue facility.³ Baron began operating the facility on February 24, 1992.

The unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act is:

All service shop employees employed by Respondent, excluding office clerical employees, new and used car salesmen, guards, watchmen, professional employees and supervisors as defined in the Act.

The parties agree that Local 259 is the exclusive representative of the unit employees and that the contract in effect between Baron and the Union contains a grievance and arbitration procedure and provisions requiring Baron to remit contributions on behalf of unit employees to the Local 259 Pension Fund and the Health and Welfare Fund.

In the spring of 1992, Baron released three mechanics who had been employed by Leitner and who had continued on the Baron payroll: Louis Parisi Jr. had been a B-mechanic for about 3-1/2 years and was laid off by Baron on March 5, 1992; Bartosz Chilicki had been a B-mechanic for about 22 years and was discharged by Baron on April 3, 1992; and George Chiavola had been an A-mechanic for about 22 years and was discharged by Baron on May 1, 1992.

On at least 10 occasions between April and July 1992, John Calicchio, the service manager of the Patchogue repair facility, informed unit members that Baron did not recognize Local 259 as the exclusive collective-bargaining representative of the employees and that Baron did not have a contract with Local 259.⁴ In a letter dated July 21, 1992, Stephen Baron informed unit employees that Baron did not recognize Local 259 as the exclusive representative of the unit and that

² Stephen Baron is the president of Respondent. His brothers Ronald and David Baron are also associated with Respondent.

³ Stephen, Ronald, and David Baron executed a stipulation recognizing Local 259 and adopting the collective-bargaining agreement on February 13, 1992.

⁴ Calicchio was a supervisor and agent of Baron during this time.

Baron did not have a contract with Local 259.⁵ Respondent's conduct constituted a repudiation of its collective-bargaining relationship with Local 259 and interfered with its employees' rights under the Act in violation of Section 8(a)(5) and (1) of the Act.

In April, May, and June 1992, Calicchio directed the unit employees to sign authorization cards and medical benefit applications of Amalgamated Workers Local 88, even though Baron had no collective-bargaining relationship with Local 88 covering the unit employees.⁶ In May and June 1992, Cutaia urged the unit employees to join Local 88. Local 259 was the exclusive collective-bargaining representative of Respondent's unit employees and Respondent was a party to the collective-bargaining agreement with Local 259. I find that Respondent rendered unlawful assistance and support to Local 88 in violation of Section 8(a)(2) and (1) of the Act. *Shenandoah Coal Co.*, 305 NLRB 1071 (1992).

On at least 10 occasions from April to July 1992, Stephen Baron and Calicchio directed unit employees to refrain from joining or supporting Local 259 and to refrain from signing Local 259 membership and dues-checkoff applications. In late May and early June 1992, Joseph Cutaia, the general manager of the Patchogue facility, directed unit employees to refrain from joining or supporting Local 259 and to refrain from signing Local 259 membership and dues-checkoff applications.⁷ Respondent's directions interfered with the rights of the employees in violation of Section 8(a)(1) of the Act and, viewed with the illegal assistance to Local 88 and the repudiation of its collective-bargaining relationship with Local 259, the directions were designed to undermine Local 259 as the collective-bargaining representative of the unit employees in violation of Section 8(a)(5) and (1) of the Act.

On August 10, 1992, Baron reinstated Parisi, Chilicki, and Chiavola pursuant to a partial settlement of the grievance filed by Local 259 with respect to the layoff and discharges, respectively, of these employees. On August 18, 1992, the arbitrator hearing the grievance issued an opinion and award which required Baron to make whole Parisi, Chilicki, and Chiavola, with certain amounts of backpay and required Baron to give "training and equal consideration and assistance" to the three men. As set forth in detail below, beginning right after the three employees were reinstated, Baron began issuing warning notices to the employees. On September 21, 1992, Baron discharged the three employees. Since that date, Baron has refused to reinstate Parisi, Chilicki, and Chiavola.

In August, September, and October, Local 259 requested route sheets and mechanics' timecards, and Reynold time tickets and repair orders for June, July, August, and September 1992. The parties agree that this information was necessary for Local 259 to investigate and process grievances relating to warnings issued to Parisi, Chilicki, and Chiavola and relating to the failure to provide job training and assistance to these employees. Baron did not furnish Local 259 with this information from August 23 until December 2, 1992. Respondent provided no explanation for the delay in furnishing the information. I find that Respondent violated

⁵ Stephen Baron is an agent of Baron.

⁶ Local 88 is the collective-bargaining representative of employees at some other entities owned by Stephen Baron.

⁷ Cutaia is a supervisor and agent of Baron.

Section 8(a)(5) and (1) of the Act. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).

On February 19, 1993, Stephen Baron warned and directed the unit employees to refrain from filing grievances with the Union concerning rates of pay, wages, hours of employment, and other terms and conditions of employment and directed employees to present their grievances directly to Respondent. This attempt by Respondent to bypass Local 259 and deal directly with the unit employees violated Section 8(a)(5) and (1) of the Act.

In February or March 1993, Cutaia threatened the unit employees with hiring additional mechanics and reduction of earnings, elimination of incentive pay, and withdrawal of permission to use the shop and equipment for the maintenance of employees' personal cars unless the employees withdrew grievances relating to Baron's failure to pay average pay rates for holidays and vacations and in order to induce employees to abandon their activities on behalf of Local 259 and their other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Respondent's actions interfered with the unit employees' rights and coerced them in the exercise of their rights and were intended to erode the status of Local 259 as the bargaining representative of the unit employees in violation of Section 8(a)(5) and (1) of the Act.

On March 5, 1992, Cutaia bypassed Local 259 and dealt directly with the mechanics in the unit by meeting with them and soliciting them to enter into individual agreements for the purpose of modifying the terms of the collective-bargaining agreement relating to holiday pay and vacation pay; holiday pay and vacation pay are mandatory subjects of collective bargaining. By its actions in bypassing Local 259 and dealing directly with the unit employees, Respondent violated Section 8(a)(5) and (1) of the Act.

2. Facts in dispute

a. Confiscation of cards and threat of discharge

John Calicchio, the service manager for Respondent Baron during the period relevant to these proceedings, testified that in April 1992, he was in Stephen Baron's office with Baron and General Manager Joseph Cutaia, when Baron said he did not want Local 259 in his place and that he wanted to bring in Local 88. A few days later, Baron instructed Calicchio to give out Local 88 cards to the men, including any new hires; Baron gave Calicchio some Local 88 cards to hand out to the men. In May 1992, Stephen Lakeman was hired by Stephen Baron as a mechanic. Calicchio told Lakeman that he could not join Local 259 and that he should throw away his Local 259 authorization card. If he joined Local 259 he would not be working at Baron. Lakeman kept talking to Calicchio about Local 259 and its medical benefits, but Calicchio told him not to join Local 259 because if he did he would not work at Baron much longer. After Lester Vellia was hired as a mechanic in June 1992, Calicchio told him that if he filled out the Local 259 card, he would not work at Baron any longer. Vellia said that he wanted benefits and Calicchio responded that he would belong to Local 88 and get benefits from Local 88. Calicchio testified that he had similar conversation with unit employees Ralph Grasso, Steven Singotiko, and Jack Anderson. Calicchio denied that he

had ever told Stephen Baron or Joseph Cutaia that the men did not want to sign cards for Local 259.

Lester Vellia testified that Carlo Oliveri, the business representative for Local 259, gave him Local 259 membership cards in the summer of 1992. Vellia spoke to Calicchio several times about the cards. Calicchio told him that he would not go into Local 259 and should not sign the cards; if he signed he could not work at Baron. When Vellia showed Calicchio the Local 259 cards, Calicchio took them away from Vellia and said that he would take care of the cards.

Steven Lakeman testified that he began work at Baron in April 1992. Carlo Oliveri, the Local 259 business representative, gave him a membership card, but John Calicchio told him not to sign it. Calicchio had seen Oliveri come into the shop and Calicchio later went around and collected the Local 259 cards from the men who had them.

General Manager Joseph Cutaia testified that before Respondent took over the dealership from Leitner, he had worked for the Baron family group for 7-1/2 years. Cutaia stated that at least one other Baron company has a contract with Local 88. At a meeting with Carlo Oliveri, Cutaia heard Oliveri tell Stephen Baron that Respondent had a collective-bargaining contract with Local 259. Baron denied that he had a contract with Local 259, but then Cutaia got a copy of the contract from Respondent's safe and showed it to Stephen Baron.

Contrary to the stipulation entered into by Respondent, Cutaia denied that he gave out cards for Local 88 and he denied that he directed employees in the unit not to join or support Local 259 and not to sign cards for Local 259. When confronted with the signed stipulation, Cutaia admitted that he gave the employees Local 88 cards. Cutaia testified that he had heard that the employees told Calicchio that they did not want to belong to Local 259.

b. *Failure to remit contributions to the funds*

The General Counsel's brief asserts that Respondent has admitted that it failed to make certain contributions to the Local 259 Pension Fund and the Health and Welfare Fund. However, I cannot find any admission by Respondent in the record concerning this subject. The General Counsel did not provide any evidence concerning this matter during the hearing and there is no basis for finding a violation of paragraphs 23 and 24 of the consolidated amended complaint issued on March 29, 1993. I note that in an undated answer submitted in response to the consolidated complaint of February 22, 1993, Respondent had denied various allegations relating to fund payments.

c. *Discharge of Parisi, Chilicki, and Chiavola*

The repair facility is run on an incentive basis. Simply put, this system provides that the mechanics are guaranteed 40 hours' pay per week and are expected to charge 40 hours labor each week. Any mechanic who is able to charge more than 40 hours labor for the jobs he has performed will receive additional compensation. A mechanic who is not able to charge for 40 hours worth of labor in a week will be paid his 40-hour guarantee by Baron, but in that week he is losing money for the Company. As a result, great emphasis is put on the ability of a mechanic to "make his guarantee" or "make his hours." Each job performed by a mechanic is

"worth" a specified amount of labor. The time that may be charged for warranty work is specified by the factory and is generally regarded as being inadequate. It is sometimes difficult to complete factory warranty work in the time allowed by the factory specifications. Nevertheless, the mechanic may charge, and the factory will pay, only for the time allotted for the warranty job. In contrast the time chargeable for customer paid labor is taken from various manuals and is generally regarded, with some exceptions, as being more generous than warranty work.⁸ Thus, customer paid labor is more lucrative than warranty work; there is more likelihood that the job can be completed in the chargeable time allotted and it is even more likely that an efficient mechanic can do the job in less time than the job is charged for to the customer.

General Manager Cutaia testified that when Baron took over the facility from Leitner he found that certain men could not perform their assigned tasks and he fired them.

As stated above, Parisi, Chilicki, and Chiavola were terminated in the spring of 1992. Local 259 took the matter to arbitration and, during one of the days of the arbitration proceeding, Stephen Baron walked out of the hearing. Local 259 called a strike and the former Leitner employees who were members of Local 259 picketed on July 28, 1992. These included Parisi, Chilicki, Chiavola, Frank Amodeo, Joe McGarty, Robert Beck, Jack Scott, and Frank Lopriore. A partial settlement was eventually entered into whereby the three terminated employees were reinstated as of August 10 and the arbitrator proceeded to issue an award. The award found that Baron had violated those portions of the collective-bargaining agreement which provide that a mechanic who does not meet the minimum number of chargeable hours of labor may be discharged only upon 30 days' written notice to the employee and the Union in order to afford an opportunity to improve production.⁹ The arbitrator also found a violation of the layoff by order of seniority provision. The arbitrator stated that Respondent Baron had chosen "not to coexist with the Union but rather to . . . disregard the CBA." The award provided that the three employees who were reinstated should not view the award as preventing "future discipline for lack of productivity. These employees must be given training and equal consideration and assistance if they are to become and remain productive technicians. If after such effort by the Employer . . . an employee continues not to meet his guarantee, then in all likelihood he would be subject to warnings which may result in termination for deficient production."

Service Manager Calicchio testified that he had many conversations with Stephen Baron about the reinstatement of the three employees. Before they were actually reinstated, Calicchio and Cutaia met with Baron in his office, and Baron listed the unit employees' names on a sheet of yellow paper to see if he "could vote the Union out." The names Baron listed as being in favor of Local 259 included Chilicki,

⁸ Work called an "oil and lube job," although it is customer paid, is not regarded as lucrative because the mechanic has only 18 minutes to complete all the tasks, including fetching the car from the lot and returning it.

⁹ The section also provides that there shall be no discrimination in the allocation of work.

Chiavola, and Parisi.¹⁰ Some time after this meeting, Baron informed Calicchio that the Company had lost the arbitration and was forced to take Chilicki, Chiavola, and Parisi back. Baron told Calicchio and General Manager Cutaia that he did not want anyone who had picketed outside working in his building. On this occasion, Baron told Calicchio that he had 30 days to get the three reinstated men out of there.

Although, the arbitrator's award had specified that the men must be given training and assistance, Calicchio testified that on several occasions Stephen Baron told him and Cutaia that they should not send the three men to any schools and should not let anyone help them in the shop. Calicchio explained that car manufacturers conduct schools for mechanics. Every month a manufacturer's representative comes into the shop with a schedule of classes being offered, and Calicchio and the representative decide whom to send to school.¹¹ Each manufacturer requires a certain amount of training per year for each authorized repair shop. Calicchio was certain that both Honda and Pontiac were conducting classes in August and September 1992. Calicchio stated that in either August or September 1992, mechanic Ralph Grasso was sent to Honda air-conditioning school and Steven Lakeman was sent to school.

Stephen Baron testified that he had many conversations with Cutaia and Calicchio during which he discussed the reinstatement of Chilicki, Parisi, and Chiavola. He denied telling Calicchio to give them work they could not do and he denied telling Calicchio that he had 30 days to get them out of the shop. Baron stated that he did not issue any instructions about training the men, and he said that Cutaia did not give Calicchio any instructions about training. On cross-examination, Baron said that he was not aware of the arbitrator's decision that the men should be trained after their reinstatement. Baron could not recall whether he told anyone to write down the names of the employees who picketed Respondent's premises; he could recall that Calicchio videotaped the picket line but he could not recall if he instructed Calicchio to do so. Baron denied that he discharged Chilicki, Parisi, and Chiavola because they supported Local 259 or because they picketed on July 28, 1992. The men were fired because they could not make their 40-hour guarantee. Baron gave an affidavit to a Board agent in December 1992. The affidavit denies that he told his employees that he did not recognize Local 259, denies that he told employees not to join Local 259, and denies that he told them not to sign papers for Local 259. The affidavit was taken by the Board agent in the agent's own handwriting, but Baron inserted into the affidavit in his own hand the following about Local 259 Business Agent Oliveri: "Carlo O. is a mischievous, lying troublemaker who is incessantly harassing Baron Honda Pontiac. I wish for this to stop."

Cutaia denied that Stephen Baron told Calicchio he had 30 days to fire the three men. Instead, according to Cutaia, Baron told Calicchio that he wanted the three men to have help and to make their 40-hour guarantee. Calicchio was told to teach the three men in-house and to give them video train-

ing tapes. He was told to send them to school if there was school. However, Cutaia also testified that there was no manufacturer-sponsored school in August and September, and that Respondent could not send anyone to school then because it was the busy season and other technicians would be away on vacation. Cutaia stated that there are training tapes in the shop which can be watched on the television in the customer waiting room. However, Cutaia acknowledged that he did not tell the three men to watch the tapes on the VCR. A bit later in his testimony, Cutaia stated that he told Chilicki there were tapes for him to watch; in fact, he talked to the men about the tapes "all the time." Cutaia testified that he believed that there was training going on among the technicians, but he could not give any details concerning this matter. Although Cutaia said that he walks around the service department from 12 to 15 times daily for a total of 2 to 3 hours and speaks to the mechanics daily, he testified that he never asked the three men whether Calicchio was giving them training nor whether they needed any assistance. Cutaia testified that he met with Business Agent Oliveri three times after the men were reinstated. On the first occasion, Oliveri expressed concern over the warning notices that were being issued: he asked Cutaia to drop the warning notices, but Cutaia refused to do this. Oliveri also said the three men must be sent to school. Cutaia testified that he agreed, but there was no school at this time. Cutaia also told Oliveri that the men were trained mechanics and should know their jobs.¹² At first, Cutaia could not recall anything about his third meeting with Oliveri, but he was then prompted by leading questions from counsel for Respondent to deny that he said the men should take 10 days' pay and get out of the shop.

Calicchio testified that attending a factory-run school was considered training. Similarly, if he himself had gone through a job step by step with a mechanic and showed him exactly what to do, that would be considered training. However, helping a mechanic with a task is not considered training. All the mechanics in the shop occasionally help each other with tasks, but that is not equivalent to training.

Local 259 Business Agent Carlo Oliveri testified that on about August 18 he spoke to Calicchio about Parisi, Chilicki, and Chiavola. He said the men complained that they were not getting a fair share of the work. Oliveri reminded Calicchio that the Company was obligated to train the men. After several more occasions during which he discussed the situation with Calicchio, Oliveri met on August 24 with both Calicchio and General Manager Cutaia. Oliveri protested about the fact that the three men had begun receiving warning letters as soon as they were reinstated and he asked that Respondent rescind the letters. Cutaia refused. Oliveri said that the arbitrator's award required that the men should be trained, but Cutaia said, "We're not running a training center, we don't send any people to school." Cutaia said a technician should know what he is doing. According to Oliveri, Cutaia got very excited and said the three men should take 10 days' pay and "get the hell out of here."

¹⁰The others in favor of Local 259, according to Baron, were Joe and Frank from the parts department, and Robert Beck, Kevin, and John Scott.

¹¹General Manager Cutaia also helped decide who should attend factory training.

¹²Cutaia contradicted himself about the timing of this conversation with the Local 259 agent: he stated that it was when Stephen Baron first took over and then he said that it occurred when the three men were reinstated.

Calicchio testified that in December 1992, long after Chilicki, Chiavola, and Parisi had been discharged, he asked the other mechanics in the shop to write letters stating that the three discharged employees had bothered them in the shop by asking them for help that took them away from their own work. After Calicchio received handwritten letters from Steven Singotiko, Steven Lakeman, Ralph Grasso, George Pertusiello, and Lester Vellia, Calicchio gave the letters to Stephen Baron who dictated other letters to the secretary, changing the original language as composed by the men. The letters, which Baron caused to be typed, stated, in general, that the signers had trained and taught Chilicki, Parisi, and Chiavola to perform specified tasks. Calicchio then gave the typed letters to the men and directed them to sign the typed documents "or they would not be there any more." After the men had signed, Calicchio gave the signed letters to the office manager of Respondent and she stamped and notarized them. Vellia testified that the typed letter he signed was not accurate; contrary to the letter, Vellia did not teach his fellow employees to do any work. He assisted them and would tell them if a job looked right, but he did not teach the other person by doing the job with him step by step. Singotiko testified that after he was given the typed letter to sign he protested that it was not the same letter he had written, but Calicchio told him not to worry about it. Singotiko stated that he helped the three discharged men with transmission jobs, but that he did not train them. On one occasion he worked on a transmission that had been pulled out by Beck, Parisi, and Chiavola but they were not present when he did the job. Pertusiello testified that he never trained the three men and did not teach them to do any jobs. Pertusiello stated that he was forced to sign the typed letter even though it was inaccurate and did not accurately reflect the facts. Pertusiello testified that he knew why the letter was being written: he knew that Respondent was trying to get rid of the three men and he could see the type of work that they were being given. In particular, Pertusiello could see that Chiavola, who worked right next to him, was being given mostly warranty work. Lakeman testified that he did not agree with the typed letter but that Calicchio told him to sign it anyway. Lakeman testified in detail about inaccuracies in the letter; although he showed Parisi a few things, Lakeman did not actually stay with Parisi while he did the work, nor did he train anyone else.

At about the same time that Stephen Baron was composing letters for the unit employees to sign, he wrote a letter dated December 7, 1992, and told Calicchio to sign it. The letter states that Calicchio saw to it that Chilicki, Parisi, and Chiavola were trained but that they were incapable of improvement. Calicchio testified that the letter was contrary to fact.

Vellia, who has been an A-mechanic with Respondent since June 1992, testified that a mechanic must go to school for updating at least four times a year.¹³ Although training by video is common, schooling is 100 percent better than the video method because a person actually shows the student how to do the job. On-the-job training means "learning by doing" in the shop, but this is not as good as attending a manufacturer's school. Vellia stated that if he is given a job

¹³ Vellia has been sent to school at least five times since he began working for Respondent.

with which he is unfamiliar, he gets a manual in the shop and reads about the item in the book. Vellia recalled that in the summer of 1992 when he was helping Chilicki under a car, Calicchio paged him to the office and told him to "let the man die"; Calicchio said he was not running a charity and had given Chilicki the job so Respondent could get rid of him. On another occasion, Vellia was helping Chiavola with a steering column when Calicchio paged him and told Vellia to leave Chiavola alone because Chiavola had been given the work so that he would fail to make his hours on the job. Singotiko, a B-mechanic since July 1992, testified that in 1992 he was sent to school five or six times by Respondent. Lakeman, an A-mechanic since April 1992, testified that Respondent has sent him to school two or three times. He stated that Honda has school every day of the week.

According to Calicchio, when Stephen Baron told him that he had 30 days in which to get the three reinstated men out of the building, Baron told him to give the men work that they could not do and to give the men a lot of warning letters. Calicchio occasionally assigned work to the unit employees, but most of the time the work was assigned by Neil Gogel, a service writer. Gogel was Calicchio's subordinate.

Beginning on August 11, the day after the three men were reinstated, Calicchio began issuing warning letters to them in compliance with Stephen Baron's instructions.

On August 11, Calicchio gave Chiavola a transmission overhaul job because Calicchio knew he could not do the job. In fact, Chiavola told Calicchio that he could not complete the job in the time allotted to it because he had never done this type of overhaul before. The warning letter issued by Calicchio to Chiavola stated that an "'A' technician should know how to do transmission overhauls."¹⁴ Calicchio testified that employee Steven Singotiko is the transmission specialist in the shop.

On August 11, Calicchio assigned Chilicki an air-conditioning job because he knew that Chilicki would not be able to do it. In fact, Calicchio had to show Chilicki how to recharge the air-conditioner. Calicchio's warning letter to Chilicki states that as a "B technician, this is something you should know."¹⁵

On August 14, Calicchio assigned Chiavola a certain engine repair because he knew that Chiavola could not do the job in the chargeable time allowed. Calicchio issued a warning letter to Chiavola, who had told him that he could not complete the work in the time allotted.

On August 14, Chilicki was given a warning letter relating to a number of factory recalls he was assigned to perform on a car although management knew that Chilicki could not do the work. The chargeable time allowed was 12 hours, but it took Chilicki 1 week to do the job. The warning letter mentions that Calicchio found grease on the brake pads of

¹⁴ An "'A'" technician or mechanic is supposed to be competent on all types of jobs and is expected to be able to do any job that comes into the shop, but an "'A'" mechanic is not expected to be able to deal with a new feature on which he has never been trained. Chiavola was paid at the level of an A-mechanic.

¹⁵ A B-technician or mechanic is supposed to be competent on all but a few highly demanding jobs such as computer problems, electrical problems, and transmission work. B-mechanics are not expected to work as quickly as A-mechanics. Chilicki and Parisi were B-mechanics.

the car, an extremely dangerous condition. A second letter about the identical problem was issued to Chilicki on August 19. Chilicki had no idea how the grease got on the brakes and both he and Calicchio denied Respondent's suggestions that Chilicki had deliberately placed it there.

On August 17, Chilicki was asked to diagnose a "no start" condition on a car. The warning letter issued to him on August 18 stated that he could not use the diagnostic machine and had no basic electronics and that he had spent hours trying to find the cause for the malfunction. Calicchio testified that he knew Chilicki could not do this work when it was assigned to him.

On August 20, Calicchio issued a warning letter to Chiavola stating that the latter had failed to notice that a car on which he had repaired a transmission needed new brakes and his failure placed the customer in a dangerous situation. The letter stated that another technician noticed the brakes and that the job was "sold" to the customer; it faulted Chiavola for the dangerous situation and for "losing money." Chiavola stated that he recalled that the brakes were fine and seemed to have 4000 to 6000 miles of travel remaining. He accused Calicchio of writing the letter to make him look incompetent.

On August 20, Calicchio issued a warning letter to Chilicki stating that he had erroneously diagnosed a leaky windshield and that the dealership called in a glass company and spent an unnecessary \$35 as a result of Chilicki's incompetence.

On August 21, Calicchio issued identical letters to Chiavola and Chilicki which stated:

Due to your last few weeks performance of not making you hours and poor workmanship, you are on 30 days notice as of Friday, August 21, 1992. If your performance doesn't improve and you do not make your hours, we shall be forced to terminate your employment in 30 days.

On the same date, Calicchio gave Parisi the same letter, but the words "poor workmanship" were crossed out in the text.

On August 28, Calicchio issued identical letters to Chilicki, Chiavola, and Parisi. The letters stated, "You failed to meet your guarantee of 40 hours for the pay periods of August 19th and August 26th. This cannot continue." Calicchio testified that the three men could not make 40 chargeable hours because of the type of work they were given.

On August 31, Calicchio issued a letter to Parisi faulting him for failing to fix a car that was brought in with a stalling problem. Calicchio testified that the car had a computer problem that was beyond Parisi's capacity to repair and that Neil Gogel had assigned this work to Parisi because Gogel knew Parisi could not do it. On the same day, Calicchio issued a second letter to Parisi stating that Parisi had done other work on the car but had failed to fix it and that eventually others had done the work. Calicchio testified that Parisi did not know how to fix the car.

On August 31, Calicchio issued a letter to Parisi for failing to fix a car that needed a carburetor overhaul and sending the car back "worse than before." Calicchio testified that

management knew that Parisi could not do the job and it was assigned to him for that reason.

On September 4, Calicchio gave identical letters to Chilicki, Chiavola, and Parisi, stating that they had not met their 40-hour guarantee for the pay periods of August 20, August 27, and September 2, respectively, and threatening termination if the situation continued. Calicchio testified that the three men could not make their 40-hour guarantee because of the type of work they were being given.

On September 4, Calicchio gave Parisi a warning letter setting forth Parisi's mistake in diagnosing a car and the fact that the car had to be towed back to the shop and repaired a second time. Calicchio testified that Parisi had been given the work because they knew it was over his head; the car had a faulty computer and Parisi would not be able to figure it out.

On September 11 and 18, Calicchio again sent warning letters to Chilicki, Chiavola, and Parisi informing them that they had not met the 40-hour guarantee for the pay periods since August 20, and threatening them with discharge if they did not improve. Calicchio testified that September 18 was a Friday and that Stephen Baron told him that day to fire the three men the next Monday morning.

Calicchio testified that both Chiavola and Chilicki should have been able to do some of the jobs that were assigned to them, but management was aware that they could not perform up to standard when they were given various assignments. When the shop had been owned by Leitner, Chilicki had been assigned to do little else but oil changes, even though he should have been able to do many other tasks. Calicchio said that on one occasion he did train Chilicki; on August 11 he showed Chilicki how to recharge an air-conditioner. But neither he nor the other mechanics trained any of the three men at any other time. Calicchio stated that Respondent has video training tapes that the men can watch and can take home; video tapes are a common method of training people.

Vellia, who was named shop foreman after Calicchio was fired, testified that it is not improper for a B-mechanic to ask the service manager to assign an A-mechanic to a job that is beyond the B mechanic's capabilities. Lakeman testified that he has asked his service manager and other employees for help and that he has never been given a warning letter for requesting assistance. Brian Robinson, the service manager of Respondent since April 1993, testified that he does not knowingly assign work to a mechanic that is beyond the man's ability or training. Robinson would not force a technician to do a job he was not trained for, but would send him to school if the employee showed an interest in learning the task.

All the employees in the shop wear uniforms provided by Respondent. Chilicki, Parisi, and Chiavola had been required to turn in their uniforms when they were terminated in early 1992, and they were thus entitled to new uniforms when they were reinstated on August 10, 1992. Calicchio testified that shortly after the three men were reinstated, Stephen Baron told him not to order uniforms for Chilicki, Parisi, and Chiavola because "they're not going to be there that long." Calicchio testified that other new employees hired about this time received their uniforms promptly. Local 259 Business Agent Oliveri testified that he reminded Calicchio that Chilicki, Parisi, and Chiavola needed uniforms about 2

weeks after they were reinstated. Calicchio replied that they had not yet been measured although Oliveri remarked that some newly hired employees already had their uniforms.

d. *Failure to pay average rate for vacations*

As discussed above, unit employees of Respondent are paid on an incentive basis and may increase their weekly earnings above the 40-hour-per-week rate. The collective-bargaining agreement provides that employees shall receive a certain number of weeks of vacation with pay depending on seniority. It states, "Incentive employees shall be granted vacation pay on the basis of average earnings." Business Agent Oliveri testified that the industry practice was to calculate the average weekly earnings on the basis of an individual employee's W-2 form from the previous year. Oliveri stated that the men in the shop informed him that they were receiving vacation pay but that the amounts had not been calculated properly. Shop Steward Frank Amodeo was employed as a mechanic with Leitner and continued to work for Baron. Amodeo testified that the employees' vacations were paid on average weekly pay based on their W-2 forms while Leitner owned the dealership. Amodeo spoke to General Manager Cutaia and Office Manager Gilda Tricarico about Baron's failure to compute vacation pay based on the previous year's W-2 form. These two supervisors told Amodeo that they would not use the W-2 form but would base vacation pay on what the employees were averaging currently. Employee George Pertusiello testified that his vacation pay had been calculated on the basis of his last year's W-2 form while he was employed by Leitner for over 4 years. However, when Baron took over the shop, his vacation pay was no longer calculated on the proper basis. Tricarico testified that the 1992 and 1993 vacation pay for the unit employees was not calculated based on the previous year's W-2 form. In 1992, the employees received vacation pay based only on straight time and in 1993 the average weekly pay was calculated based on the 52 weeks before the employee went on vacation. These employees included Scott, Pertusiello, Lakeman, Singotiko, Vellia, and Grasso. Further, Respondent did not pay Chilicki, Parisi, and Chiavola any vacation pay when it discharged them on September 21, 1992.

B. *Discussion and Conclusions*

1. *Credibility of the witnesses*

I find that the unit employees of Respondent, both past and present, testified in a credible and forthright manner. They were cooperative on cross-examination and did not seem to tailor their answers to achieve any particular result. I shall credit their testimony. I find that Oliveri testified in a credible manner and I shall rely on his testimony.

Respondent has mounted a strong attack on Calicchio's testimony. Calicchio gave two affidavits to a Board agent before the instant hearing. The first was given in December 1992; Calicchio testified that he drove to the Regional Office with Stephen Baron on this occasion and discussed the case during the ride. Calicchio's affidavit stated that Chilicki, Parisi, and Chiavola were fired in September because they were unable to do their work. In January 1993, Stephen Baron discharged Calicchio because the repair shop had received a poor customer satisfaction index rating in a survey conducted by the manufacturers. Calicchio denied the sug-

gestion put to him by counsel for Respondent that he was fired because Stephen Baron had accused him of stealing. After his discharge, Calicchio went to work for another car dealership. Some time after this, Calicchio gave a second affidavit to a Board agent in which he supplied much of the evidence described by his testimony here. In the spring of 1993, Cutaia called Calicchio at his new job and offered Calicchio a car for his son's use if Calicchio would forget about testifying; however, Cutaia never called again about this offer.¹⁶ Instead, a few weeks later, Cutaia called Calicchio and offered him his old job with Respondent. Calicchio refused. Calicchio testified that some time after he left Respondent he heard that Stephen Baron had accused him of stealing. He called neither Cutaia nor Baron to speak to them about this. Cutaia gave an entirely different version of these events: although denying that Calicchio ever threatened to fabricate testimony to favor Local 259, Cutaia stated that Calicchio called him and threatened to testify on behalf of the Union if Stephen Baron did not stop telling people that Calicchio had taken money from body shops with which Respondent did business. I found that in general Cutaia had a poor recollection, gave inconsistent descriptions of events at different points in his testimony, gave testimony that sounded contrived, and that his testimony differed from the documentary evidence in the record. As I observed Cutaia, I formed the impression that he was determined to give only the type of testimony that would favor Respondent Baron. I do not find that Cutaia is a credible witness and I shall not rely on his testimony where it is contradicted by reliable evidence. In contrast, I find that Calicchio gave consistent testimony which in many cases was confirmed by the testimony of other witnesses. I credit him that he gave his first affidavit containing inaccurate statements in order to favor Respondent and preserve his job. Thus, I credit Calicchio's testimony and I shall rely on it.

Stephen Baron gave testimony that contradicted the documentary evidence here and that was contrary to the stipulation entered into by Respondent. Further, his testimony was inconsistent and shifting and he professed not to recall matters that were central to the instant case, such as the fact that the arbitrator's award required Respondent to give training to Chilicki, Parisi, and Chiavola. I do not credit Stephen Baron's testimony.

Gilda Tricarico gave testimony that was contrary to the documentary evidence here and she could not recall many matters which she would be expected to know. I shall not credit her testimony where it is contradicted by more reliable evidence.

2. *Confiscation of cards and threat of discharge*

I credit Calicchio that he threatened unit employees that they would be discharged if they signed authorization cards for and joined Local 259. I credit Vellia and Lakeman that Calicchio confiscated Local 259 cards from employees in the shop. By these acts, Respondent restrained and coerced its employees and interfered with their rights in violation of Section 8(a)(1) of the Act. The threats and confiscation of cards, viewed with the unfair labor practices already found

¹⁶In August 1992, Calicchio had leased a car for his son from a company controlled by the Baron brothers. The car was later repossessed when the payments were 2 weeks in arrears.

above, were designed to destroy the majority status of Local 259 among the unit employees in violation of Section 8(a)(5) and (1) of the Act.

3. Discharge of Chilicki, Parisi, and Chiavola

As set forth above, Respondent has admitted many facts which establish animus against Local 259. Respondent has admitted taking actions which were designed to oust Local 259, the representative of the unit employees, and replace it with Local 88. Respondent, which sought to disavow its relationship with Local 259, has admitted to threatening its unit employees if they exercised their rights under the Local 259 collective-bargaining agreement, and Respondent has admitted bypassing Local 259 and dealing directly with its unit employees. Further, the testimony shows that Stephen Baron was calculating how many votes he could garner to get Local 259 out of the shop, and that Baron had stated to his supervisors that he did not want anyone who had joined the Local 259 picket line working in his building. I find that the General Counsel has provided more than ample evidence of Respondent's animus against Local 259.

The arbitration award found that Respondent had chosen not to coexist with Local 259 but rather to disregard the collective-bargaining agreement. The arbitrator found that Respondent had violated the contract in its discharges and lay-off of the three men, but warned that they could be subject to discipline for deficient production if Respondent made an "effort" to give them "training and equal consideration and assistance." The evidence shows that Stephen Baron determined that he would not make the effort called for by the arbitrator; instead he told his supervisors that they had 30 days to get Chilicki, Parisi, and Chiavola out of the shop. The conclusion is inescapable that Baron gave these instructions because the three employees had exercised their rights under the Local 259 collective-bargaining agreement, because they had joined the picket line at Respondent's premises and because he knew that they supported Local 259.

The evidence shows that from the first day Chilicki, Parisi, and Chiavola were reinstated, Respondent gave the three men jobs they could not perform or jobs they could not perform in the chargeable hours allotted, told other mechanics not to help them and denied them the training required by the arbitration award.¹⁷ The testimony of all the witnesses taken together shows that in the industry, training means learning by doing or by seeing the job done step by step. The credible evidence shows that, although there were factory training school sessions available, and although other unit employees attended these schools in August and September 1992, Respondent did not send Chilicki, Parisi, and Chiavola for training. Further, on several occasions, Service Manager Calicchio prevented other mechanics from helping Chilicki and Chiavola. Calicchio himself trained only Chilicki and only on one occasion. The record shows that the most effective and most common way of training the unit employees was to send them to the manufacturers' schools; the employees who testified have all been sent to school several times since they began working for Respondent. Although Respondent attempted to show that the mechanics could watch

training tapes, I find that neither Cutaia nor any other supervisor ever told Chilicki, Parisi, or Chiavola that they should watch training tapes at the shop or at home. Although Business Agent Oliveri asked Cutaia to provide training to the three men, Cutaia refused and said that the men should take 10 days' pay and "get the hell out" of the shop. Respondent's current service manager testified in accord with the testimony of the General Counsel's witnesses: it is not proper to assign a technician a job which he has not been trained to accomplish. Yet the record shows that Respondent constantly assigned work to Chilicki, Parisi, and Chiavola that was beyond their training or that they were not quick enough to finish in the chargeable time allotted. This was done so that the three men would repeatedly fail to make their 40 hours and so that Respondent could immediately begin to issue warning notices in accordance with the collective-bargaining agreement. In addition, the record shows that warning letters were occasionally issued for failings that were arguably not the fault of the mechanic involved. Because one of the grounds cited by the arbitrator for reinstating the three men was that warning notices had not been sent to the employees and Local 259 as required by the contract, Stephen Baron was determined that there would be a plethora of warning notices this time around.

I find that the General Counsel has met the burden imposed by *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), and has shown that Respondent harbored animus against Local 259 and against the three men because of their support for and activities in behalf of Local 259. The General Counsel has also shown that this union animus was a motivating factor in the failure to train the men and give them equal consideration in the assignment of work, in the decision to issue them with a multitude of warning notices and in the discharge of the three men on September 21, 1992. The burden thus shifts to Respondent to show that it would have failed to send the men for training and assigned jobs disparately, issued warning notices, and discharged the men even if they had not supported Local 259. I find that Respondent has failed to carry this burden. Respondent argues that the three men could not do jobs that are reasonably expected of "A" and "B" mechanics and that they could not complete tasks in the chargeable hours and so make their 40-hour guarantee per week. I have found, however, that it was Respondent's own actions that prevented Chilicki, Parisi, and Chiavola from having a fair opportunity to show what they could do. It was Respondent's own actions that denied the men the training that they concededly required and it was Respondent's own actions that ensured they would be given tasks beyond their capabilities. It is possible, as Respondent urges, that the three men could not be trained or would not be trained, but Respondent itself has made it impossible to determine whether under lawful circumstances the three men were incapable of improvement. Respondent was under an arbitrator's order to give training and equal consideration and assistance to the men, but from the day of their reinstatement Respondent determined to rid itself of the men because they supported Local 259 and to use denial of training and assignment to inappropriate jobs as tools in gaining its object. Respondent, having created the situation where it cannot be fairly determined whether the men would have been fired

¹⁷ Stephen Baron also instructed that the three men were not to receive uniforms because they would not be in the shop for any length of time.

even in the absence of their protected activity, cannot be heard to complain when no such finding is made. Thus, I find that Respondent violated Section 8(a)(1) and (3) of the Act when it failed to give training and equal consideration, when it issued warnings notices and when it discharged Chilicki, Chiavola, and Parisi. This conduct on the part of Respondent constituted a breach of the arbitrator's award and I also find that Respondent violated Section 8(a)(5) of the Act.¹⁸

4. Failure to pay average rate for vacations

The collective-bargaining agreement in effect between Respondent and Local 259 provides that unit employees shall be entitled to vacation with pay for a number of weeks which varies with the length of service, and that, "Incentive employees shall be granted vacation pay on the basis of average earnings." It is evident that in order to calculate the pay due per week to a vacationing employee one must calculate the weekly pay earned by the employee. Here, the contract provides that the weekly pay for purposes of vacation shall be computed on the basis of "average earnings." The credible evidence in the record is that the contract has been interpreted in the industry so that the average weekly pay of a unit employee is calculated by figuring the average earnings per week of the employee based on the W-2 form for the last year. Respondent's witness admitted that for the year 1992, vacation pay had been paid on a straight-time basis without regard to average earnings of the incentive employees. Furthermore, no prorated vacation pay was paid to Chilicki, Parisi, and Chiavola when they were discharged in September 1992. For the year 1993, Respondent calculated vacation pay on the basis of the individual's earnings for the prior 52 weeks and not based on the prior year's W-2 form. The failure to pay vacation pay according to the terms of the collective-bargaining agreement was a unilateral change in the wages and terms and conditions of employment and constituted a violation of Section 8(a)(5) and (1) of the Act.

5. Deferral to arbitration

Respondent urges that all of its actions which are alleged to violate the Act as well as to constitute violations of the collective-bargaining agreement should be deferred to arbitration under the contract. The General Counsel urges that the failure to pay proper vacation pay, taken together with the bypassing of Local 259, the direct dealing with employees, and the threats of reprisal against employees for their attempts to enforce the contract amount to a repudiation of the collective-bargaining agreement in violation of Section 8(a)(5). The General Counsel cites *Caamano Bros.*, 304 NLRB 24 (1991). In *Collyer Insulated Wire*, 192 NLRB 837 (1971), the Board stated that it would defer a dispute relating to the interpretation of a collective-bargaining agreement where the parties had a "long and productive" relationship and no claim was made of enmity by the employer to the employees' exercise of protected rights. In the instant case, by contrast, Respondent has admitted to a long list of actions which constitute attempts to coerce and restrain employees in the exercise of their Section 7 rights and which constitute attempts to undermine the position of Local 259. Indeed, Ste-

phen Baron, who had personally signed the document adopting the Local 259 contract, began his ownership of the shop by stating that he had no contract with the Union and by declining to enforce many provisions of the contract. Moreover, Respondent has admitted threatening the employees with reprisals for their exercise of grievance rights under the contract. Under these circumstances, deferral would be highly inappropriate.

CONCLUSIONS OF LAW

1. Local 259, United Automobile, Aerospace and Agricultural Implement Workers of America is the exclusive collective-bargaining representative of the employees of Baron Brothers Auto Group, Inc. d/b/a Baron Honda-Pontiac, in the following appropriate unit:

All service shop employees employed by Respondent, excluding office clerical employees, new and used car salesmen, guards, watchmen, professional employees and supervisors as defined in the Act.

2. By informing its employees that it did not recognize Local 259 as the exclusive collective-bargaining representative of its employees in the appropriate unit and by informing its employees that it did not have a collective-bargaining agreement with Local 259, Respondent violated Section 8(a)(5) and (1) of the Act.

3. By directing its unit employees to sign authorization cards and medical benefit applications of Amalgamated Workers Local 88, Retail, Wholesale and Department Store Union, AFL-CIO, Respondent violated Section 8(a)(2) and (1) of the Act.

4. By directing its unit employees to refrain from joining or supporting Local 259 and to refrain from signing Local 259 membership and dues-checkoff applications, Respondent violated Section 8(a)(5) and (1) of the Act.

5. By dealing directly with the unit employees and soliciting them to enter into individual agreements for the purpose of modifying the terms of the collective-bargaining agreement relating to holiday pay and vacation pay, Respondent violated Section 8(a)(5) and (1) of the Act.

6. By failing to pay vacation pay according to the terms of the collective-bargaining agreement in 1992 and 1993, Respondent violated Section 8(a)(5) and (1) of the Act.

7. By delaying in furnishing necessary information to Local 259 for the investigation and processing of grievances, Respondent violated Section 8(a)(5) and (1) of the Act.

8. By directing unit employees to refrain from filing grievances with Local 259 and by directing them to present their grievances directly to Respondent, the Respondent violated Section 8(a)(5) and (1) of the Act.

9. By threatening unit employees with reprisals unless they withdrew their grievances, Respondent violated Section 8(a)(5) and (1) of the Act.

10. By threatening unit employees with discharge if they signed authorization cards for Local 259 and by confiscating these cards from employees, Respondent violated Section 8(a)(1) of the Act.

11. By failing to give training and equal consideration to and by issuing warning notices to and discharging Louis Parisi Jr., Bartosz Chilicki, and George Chiavola, Respondent violated Section 8(a)(1), (3), and (5) of the Act.

¹⁸ See *Electronic Reproduction Service Corp.*, 213 NLRB 758 fn. 2 (1974).

12. The General Counsel has not proved that Respondent engaged in any other violations of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent must also make whole the employees, with interest, for its failure to pay vacation pay in 1992 and 1993 in accordance with the provisions of the collective-bargaining agreement.

Because of the Respondent's egregious and widespread misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁹

ORDER

The Respondent, Baron Brothers Auto Group, Inc. d/b/a Baron Honda-Pontiac, Patchogue, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Repudiating the collective-bargaining agreement with Local 259 and informing its employees that it does not recognize Local 259 as the representative of its unit employees.

(b) Directing its unit employees to sign authorization cards and medical benefit applications of Local 88.

(c) Directing its unit employees to refrain from joining or supporting Local 259 and to refrain from signing Local 259 membership and dues-checkoff applications.

(d) Dealing directly with unit employees and soliciting them to enter into individual agreements for the purpose of modifying the terms of the collective-bargaining agreement.

(e) Failing to pay vacation pay according to the terms of the collective-bargaining agreement.

(f) Delaying in furnishing information to Local 259 necessary for the investigation and processing of grievances.

(g) Directing unit employees to refrain from filing grievances with Local 259 and directing them to present their grievances to Respondent.

¹⁹If no exceptions are filed as provided by Sec. 102.46 of the Boards Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(h) Threatening unit employees with reprisals unless they withdraw their grievances.

(i) Threatening unit employees with discharge if they sign authorization cards for Local 259 and confiscating cards from employees.

(j) Failing to give training and equal consideration to and issuing warning notices to and discharging Louis Parisi Jr., Bartosz Chilicki, and George Chiavola.

(k) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make its unit employees whole for vacation pay it unlawfully computed in 1992 and 1993, with interest, in the manner set forth in the remedy section above.

(b) Offer Louis Parisi Jr., Bartosz Chilicki, and George Chiavola immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Offer equal consideration and training to Parisi, Chilicki, and Chiavola upon their reinstatement.

(d) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its facility in Patchogue, New York, copies of the attached notice marked "Appendix."²⁰ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

²⁰If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."