

Kasa Associates d/b/a Oak Tree Mazda and Machinists Automotive Trades Local 1101, International Association of Machinists and Aerospace Workers, AFL-CIO. Case 32-CA-16835

May 23, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS
TRUESDALE AND WALSH

On September 28, 1999, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Charging Party joined in the exceptions filed by the General Counsel.

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 exceptions¹ and brief and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Gary M. Connaughton, for the General Counsel.

Robert G. Hulteng and *Karen A. Sundermier (Littler Mendelson, PC)*, of San Francisco, California, for the Respondent.

David A. Rosenfeld (Van Bourg, Weinberg, Roger & Rosenfeld), of Oakland, California, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Oakland, California, on December 2, 1998, and January 7, 1999, and in Birmingham, Alabama, on August 10, 1999. On June 22, 1998, Machinists Automotive Trades Local 1101, International Association of Machinists and Aerospace Workers, AFL-CIO (the Union) filed the charge alleging that Kasa Associates d/b/a Oak Tree Mazda (Respondent) committed certain violations of Section 8(a)(1) and (5) of the National

Labor Relations Act (the Act). The Union filed an amended charge on July 28, 1998. On September 30, 1998, the Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(5), (3), and (1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses,¹ and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a California corporation with a principal place of business in San Jose, California, where it has been engaged in the operation of a Mazda automobile dealership. During calendar year 1998, Respondent derived gross revenues in excess of \$500,000 and purchased and received goods and materials valued in excess of \$5000 from outside the State of California. Accordingly, Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues

Respondent has owned and operated the Oak Tree Mazda dealership in San Jose, California, since May 11, 1998. The previous owners of the dealership had been members of the Santa Clara County Motor Car Dealers Association. By virtue of its membership in the Association, the "old" Oak Tree Mazda was party to a collective-bargaining agreement with the Union covering its service advisors and service technicians employed in its service department. Prior to the purchase of Oak Tree Mazda by Respondent, all 14 service department employees were discharged and invited to apply for employment with the new ownership. All but one of the former employees applied for employment with Respondent. Respondent opened its service department on May 19, 1998, with an initial complement of four service technicians and one service advisor. Of the four technicians hired, three were former employees of the old Oak Tree Mazda. The fourth technician was a highly rated employee from Almaden Mazda, another Mazda dealership owned by the owners of Respondent.

¹ The General Counsel's exception to the judge's recommended dismissal of the 8(a)(1) allegations does not meet the minimum requirements of Sec. 102.46(b) of the Board's Rules. The General Counsel merely cites to the judge's decision and fails to allege, either in its exceptions or its supporting brief, the particular error it contends the judge committed or on what grounds it believes the judge's remedy should be overturned. In these circumstances, we find, in accordance with Sec. 102.46 (b)(2), that the General Counsel's exception on this point may be disregarded. See *Show Industries*, 312 NLRB 447 (1993).

² The General Counsel 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 a clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

¹ The credibility resolutions here have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings here, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

On June 10, by letter, the Union demanded that Respondent bargain with it as the representative of Respondent's service department employees. On June 16, Respondent refused to recognize or bargain with the Union, absent an NLRB election.

In this case, the General Counsel alleges that Respondent failed and refused to hire two employees (Gilbert "Wayne" Daugherty and Kevin Ferguson) because "the employees joined or assisted the Union or engaged in protected concerted activities." More specifically, the General Counsel contends that Daugherty and Ferguson were not hired by Respondent because each had served as a union steward in the past. The complaint also alleges that had Respondent not unlawfully refused to hire Ferguson and Daugherty, Respondent would have been obligated to recognize and bargain with the Union under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). Finally, the complaint alleges that Respondent coercively interrogated an employee during a preemployment interview, told applicants that the dealership would be nonunion, and threatened an employee that he could not be "part of [Respondent's] family" because the employee had picketed Respondent's premises. Respondent denies the commission of any unfair labor practices.

Respondent argues that when it began operation of its service department it employed only five employees and that all of these five employees were union members. Further, Respondent contends that Ferguson and Daugherty were not denied employment due to union animus but rather because Respondent was seeking to operate its service department with all around mechanics rather than specialists. It contends that it choose four other union members based on skill factors. The General Counsel argues that even if the failure to hire Daugherty and Ferguson was lawful in May 1998, Respondent violated the Act by not considering these employees for hire in June, July, and August, when Respondent added seven more employees to its service department.

B. The Facts

The Union represented the service department employees at the old Oak Tree Mazda dealership for at least 4 years prior to Respondent's purchase of the dealership. On May 11, 1998, Respondent purchased the dealership, which consisted of new cars, used cars, a parts department, and a service department. The most recent collective-bargaining agreement between the Union and the Association was effective from January 2, 1994, to January 1, 1999. That agreement has since been extended to January 2002. Respondent's owners also owned another Mazda car dealership, Almaden Mazda, which was, and is, party to the Union-Association bargaining agreement.

Wayne Daugherty worked for the old Oak Tree Mazda as an automotive mechanic from 1972 to 1977 and again from 1981 to May 1998. At the time the dealership was sold and all employees terminated, Daugherty was a journeyman service technician and had been shop steward since 1990.

Otis Cherry, Respondent's service department manager, personally called Daugherty and the other service department employees of the old Oak Tree Mazda and invited the employees to file employment applications with Respondent. On May 12, Daugherty filled out an application for employment with the

new owners of Oak Tree Mazda and scheduled an appointment for an interview.

On May 14, Daugherty was interviewed by Cherry and Jack Hunt, a consultant hired by Respondent to help set up its service department. Hunt had previously consulted with Respondent regarding its service department at Almaden Mazda. Daugherty testified that Cherry asked the employee what work Daugherty had performed for the dealership. Daugherty responded that he did services, timing belts, water pumps, some electric work, transmissions, brake jobs, everything but front end realignment and driveability. According to Daugherty, Cherry stated that Daugherty was the union shop steward and that Daugherty answered that he was. Daugherty told Cherry that employees would come to him about problems in the shop about the Union or about shop equipment. Daugherty further told Cherry and Hunt that he did most of the maintenance and repair to the shop equipment. According to Daugherty, Cherry said that the shop was not going to be affiliated with a union and asked whether Daugherty had a problem working in a non-union shop. At the end of the interview, Cherry said that if Respondent was interested, Daugherty would be called back for a second interview and a drug test.

Cherry testified that he did not ask whether Daugherty was a shop steward. According to Cherry, Daugherty volunteered this information. Hunt also testified that Cherry did not ask Daugherty about the Union. Cherry also testified that Daugherty stated that he did not wish to perform heavy duty work. Hunt testified that in discussing his status as a senior technician, Daugherty mentioned that he was a union steward. Further, Hunt's notes indicate that Daugherty commented "interested in UNION shop only." Further, Hunt's notes also include a notation that Daugherty did not wish to perform "heavy line" work. According to both Cherry and Hunt, Cherry did not say the shop would be nonunion. Rather, Cherry read a letter attached to the application form which stated, "the new Oak Tree Mazda is not party to any union contract." The letter also listed the following benefits: "comprehensive health insurance coverage, dental coverage, a 401(k) plan, paid vacations, and holidays and competitive compensation plans."

I found Hunt to be a very candid, straight forward, and credible witness. I found his version of events to be more reliable than that of Daugherty or Cherry. Further, Hunt is retired and no longer affiliated with Respondent. It is very unlikely that Hunt will perform any further work for Respondent. Finally, I note that Hunt's testimony was consistent with, and corroborated by his business records. I credit Cherry's testimony regarding this interview as it appears consistent with the testimony of Hunt and the letter attached to each employment application.

In the days following this interview, Daugherty visited the dealership and spoke to Cherry. On or about May 16, Daugherty asked Cherry whether he had a job with Respondent. According to Daugherty, Cherry answered that Daugherty was not "all around qualified enough." Daugherty later received a letter from Cherry stating that Respondent did not have any available positions for service technicians, but Respondent would keep Daugherty's application in accordance with its

usual practice. The employment application stated that Respondent would keep the application on file for 30 days.

In late July or early August, Daugherty participated in union picketing in front of the Respondent's dealership. In mid-August, while Daugherty was inside the premises, Shaun Del Grande, one of Respondent's owners, approached Daugherty. According to Daugherty, Del Grande called him aside and said he couldn't be a member of Del Grande's family and walk the picket line too. Daugherty answered that Del Grande had not given him a chance to be a member of his family. Del Grande then asked Daugherty to stay off the property. Daugherty answered that he would retrieve his belongings and then honor Del Grande's request.

According to Del Grande, he asked Daugherty what Daugherty was doing inside the dealership. Daugherty answered that he was visiting friends. Del Grande said, "[Y]ou're outside our dealership holding signs, picketing, jeering customers, shaking rocks and cans, hurting the . . . service department, the service employees, the technicians on duty and now you want to come in and be friends." Del Grande said, Wayne, you can't have it both ways. You can't be outside hurting us and then come inside and decide to be friends. That doesn't work." Daugherty answered, "[W]ell, it hurts that I wasn't hired." Del Grande then told Daugherty that Daugherty should probably just go out and find a job. Daugherty answered that it wasn't easy to find a good union job. According to Del Grande, Daugherty said that it wasn't easy finding a job if you don't do heavy duty work. After Del Grande said Daugherty needed to go find a job, Daugherty said Mazda heavy duty work was not really heavy duty. Del Grande told Daugherty that the employee had to leave the premises. Daugherty said he had some personal belongings to get. Del Grande told Daugherty to pack his things and leave. I found Del Grande to be a more credible witness than Daugherty and rely on his version of the facts.

Kevin Ferguson worked for the old Oak Tree Mazda as a journeymen service technician from August 1997 through May 8, 1998, when he was terminated as a result of the sale of the dealership. Prior to going to work for the old Oak Tree Mazda, Ferguson had worked for Almaden Mazda for 7 or 8 years. Ferguson had been a union shop steward during most of his employment with Almaden Mazda. Ferguson was an active shop steward. He testified that in 1996, Almaden Mazda's general manager counseled him about his contract enforcement activities. Further, Ferguson testified that in 1997, Shaun Del Grande told Ferguson that "everyone" perceived the Union as a problem and that Ferguson was a "troublemaker." According to Ferguson, Del Grande also said that other employees perceived Ferguson as a problem and did not like him and that he needed to get along better with people.

Del Grande testified that he told Ferguson that four or five employees had complained to him that Ferguson had a bad attitude and was "not a pleasure to work with." Apparently these employees had called Ferguson a "bad apple."

Ferguson left Almaden Mazda in August 1997 to work at Oak Tree Mazda. Ferguson testified that he left Almaden Mazda in response to changes that Del Grande was making at that dealership. Almaden Mazda was requiring its mechanics to be all around mechanics and do every kind of work on a car

without specializing. Ferguson preferred to work as a driveability specialist. Driveability is assessing why an automobile isn't working properly or isn't working at all, by tuning the car and assessing problems. Driveability involves some of the most skilled work in the service department. The old Oak Tree Mazda permitted Ferguson to specialize in driveability. However, Almaden Mazda and the new Oak Tree Mazda did not want to operate with specialists. Ferguson was a certified Mazda master technician. At the time of the sale of the dealership to Respondent, Ferguson was earning \$1 per hour more than the contract rate for a journeyman electrician because of his status as a certified Mazda master technician.

Cherry and Hunt interviewed Ferguson on May 13. According to Ferguson, Cherry stated, "You know, this is a non-union shop." Based on the credited testimony of Hunt and Cherry, I find that Cherry said, "[T]he new Oak Tree Mazda is not party to any union contract." According to Ferguson, Cherry said that he and Hunt had reviewed Ferguson's records and that of Ferguson's last 40 repair orders, all but 8 were driveability jobs. Ferguson stated that his primary function at the old Oak Tree Mazda was as a driveability technician. Cherry stated that Ferguson must have been "pretty damn good" and Ferguson agreed that he was good at it. According to Ferguson, Cherry told him that if Respondent hired him, he could make more money under Respondent's compensation plan than under the union contract. Ferguson said that he did not know because he had never worked under a flat rate system.

Approximately 2 days later, Cherry told Ferguson that the technician had not been selected for a job by Respondent. Ferguson replied, "You mean to tell me that a certified Mazda master technician is not qualified to work on the product line?" According to Ferguson, Cherry answered, "[W]e do this by the formula." A few days later, Ferguson received a letter from Cherry, stating that Respondent did not have a position for Ferguson but would keep his application on file in accordance with its usual practice. Ferguson found employment with another car dealership, shortly thereafter.

C. Respondent's Defense

As stated earlier, Otis Cherry, service director, did the interviewing and hiring for the service department. On May 12, 1998, Cherry began interviewing employees to commence work on May 19. Jack Hunt was engaged as a consultant to help Cherry with the hiring of service department employees and in the organization of the department. Hunt had also worked as a consultant for Almaden Mazda and many other Mazda dealerships. Cherry contacted all of the service department employees employed by the previous owners of Oak Tree Mazda and invited those employees to apply for work with Respondent. All of the employees of the former owner, with one exception, applied for work and were interviewed. Of the 14 employees interviewed, 13 were former Oak Tree Mazda employees and 1 was an employee from Almaden Mazda. Employees from other dealerships were not interviewed until after May 19, the opening of the shop.

On May 19, the service department opened with four technicians and one service advisor (service writer). One of the new hires was Alan Carruthers who worked at Almaden Mazda.

Carruthers had received good recommendations from the service manager and owners of Almaden Mazda. Carruthers was hired as a foreman (a bargaining unit position).

During the job interviews, Cherry told employees that Respondent would operate as a flat rate shop and that employees would earn \$23 an hour but could earn more under the flat rate system. He informed the applicants of Respondent's vacation health plan and 401(k) plan. As discussed above, Cherry told the employees that the new Oak Tree Mazda was not party to any union contract. That same statement was contained in a covering letter attached to each employment application.

Cherry and Hunt both testified that because Respondent was opening its service department with only four mechanics, it needed to hire technicians who could perform all kinds of service. Cherry and Hunt referred to this as a turnkey operation. Hunt prepared a spreadsheet in which he ranked the 14 applicants. Hunt included the following categories in the spreadsheet: technician efficiency, "12-month fixed right," 12-month quality of repair, whether a mechanic had a smog license, ASE (automotive service excellence) certificates, attendance, specialties, and the job interview. Hunt gave weighted amounts to these scores and then the spreadsheet program ranked the employees. Respondent offered employment to the top four rated applicants. After one employee chose to go to work for Almaden Mazda, that position was offered to the employee ranked fifth on the spreadsheet. Cherry testified that he utilized the spreadsheet but did not rely exclusively on that document. Hunt testified that Cherry had independently chosen the top four candidates before Hunt showed Cherry the final spreadsheet.

Cherry testified that Daugherty was not hired because he stated in his interview that he did not do heavy-duty repair work. Cherry further testified that Daugherty had the worst attendance record of all the applicants. Finally, Cherry testified that Daugherty had received an oral warning for moonlighting while employed at the old Oak Tree Mazda.

Hunt testified that he would not have hired Daugherty because the employee had received warnings for moonlighting and curbing. Curbing is a practice where an employee seeks to solicit work for himself from a customer of the dealership. While Respondent could not produce a warning for curbing for the hearing, Hunt's notes show that Daugherty had serious warnings in his file. Further, Hunt's notes indicate that Daugherty told Cherry and Hunt that he was only interested in a union shop and that he was not interested in doing heavy line work.

Cherry testified that Ferguson was not hired because Ferguson was a driveability specialist. According to Cherry, Ferguson stated at his job interview that he only wanted to do driveability work. Cherry further testified that he was concerned with Ferguson's behavioral assessment test. According to Cherry, he was concerned that Ferguson's teamwork attitude was actually different than that indicated by his answers to the questions. Finally, Cherry noted that Ferguson sought a pay rate that was higher than any rate that Respondent was going to offer its new technicians.

Hunt testified that Ferguson was not hired because he only wished to do driveability work. Hunt explained that drive-

ability work is highly skilled but a small shop could not afford such a specialist. According to Hunt, such a specialist would make sense in a shop of 12 or more mechanics, but not in a shop with only 4 mechanics. Further, Hunt's notes from May 1998, state, "Not selected for start-up crew. Main reason: *very* narrowly specialized in driveability only." (Emphasis in original.)

Around May 20, Daugherty and Ferguson were notified that there was no position for them and that their applications would be kept on file. Their job applications were kept but Cherry did not look at them again.

Six employees were hired after May 20. On June 1, Cherry hired an employee who possessed a smog certificate and was an all-around mechanic. On that same date Cherry hired another all-around mechanic with eight ASEs who was willing to do all kinds of work including heavy-duty work. On June 8, Respondent hired another service writer. On June 19, Respondent hired an apprentice. On July 29, Respondent hired another experienced all-around mechanic. On August 10, Respondent hired an experienced mechanic with eight ASEs and a smog license. Finally, on August 19, an apprentice technician who also possessed a smog license. Hunt was not involved in any of the hires which occurred after May 19, 1998.

Cherry testified that Daugherty was not considered for employment after May 19 because Daugherty did not do heavy-duty work. Cherry testified that Ferguson was not considered for employment after May 19 because Ferguson only wanted to do driveability work. Cherry maintained he wanted all around mechanics and not specialists.

Analysis and Conclusions

A. The 8(a)(1) Allegations

The General Counsel alleges that Cherry asked Daugherty about his union activities in the job interview. An employer violates Section 8(a)(1) of the Act by interrogating employees about their union activities or that of other employees under coercive circumstances. *NLRB v. Prineville Stud Co.*, 578 F.2d 1292 (9th Cir. 1978); *Bremol Electric*, 271 NLRB 1557 (1984), and *Pacemaker Driver Services*, 269 NLRB 971, 977-978 (1984).

In this case, I find no credible evidence that Cherry questioned Daugherty about his union activities or his activities as a shop steward. Rather, I find that Daugherty mentioned that he was a shop steward when he told Cherry and Hunt that employees came to him about problems in the shop and with problems concerning shop equipment. Accordingly, I find no violation of the Act.

The General Counsel contends that Cherry told the employees that Respondent would be a nonunion shop. In a possible successorship situation, an employer does not know whether it will be a union or nonunion employer until it has hired its work force. The Board has held that when an employer tells applicants that the company will be nonunion before it hires its employees, the employer indicates to the applicants that it intends to discriminate against the predecessor's employees to ensure nonunion status. Thus, such statements are coercive and violate Section 8(a)(1) of the Act. *Kessel Food Markets*, 287 NLRB

426, 429 (1987); *Western Plant Services*, 322 NLRB 182, 195 (1996).

In this case, the credited evidence shows that Cherry did not tell the employees that Respondent was a nonunion shop. Rather, Cherry read from the cover letter which stated that the new Oak Tree Mazda was not party to any union contract. This statement was a truthful statement of the facts. Respondent had not yet hired a full complement of its employees. Thus, its status as a successor was in doubt. Even if it later became a *Burns* successor, Respondent would be obligated to recognize and bargain with the Union. However, Respondent would not be required to adopt the collective-bargaining agreement with the Union. As Respondent's truthful statement contained no threats or promises of benefit, I find that it is protected by Section 8(c) of the Act. Accordingly, I shall recommend dismissal of this allegation of the complaint.

The General Counsel alleges that Shaun Del Grande told Daugherty that Daugherty could not be part of Respondent's family because the mechanic had engaged in picketing Respondent's dealership. This conversation took place when Respondent was still hiring employees for its service department. Thus, the General Counsel alleges that Del Grande was threatening Daugherty that the employee could not be hired by Respondent in the future because he had engaged in protected concerted activities.

The credible evidence shows that Del Grande asked Daugherty what the mechanic was doing inside Respondent's service department. Daugherty answered that he was visiting friends. Del Grande said that Daugherty had picketed the facility and jeered customers. Del Grande said that Daugherty had hurt the family at the service department. Del Grande said that Daugherty couldn't engage in such activity outside the facility and then come inside to be friends. Daugherty answered, "[W]ell, it hurts that I wasn't hired." Del Grande then told Daugherty that Daugherty should probably just go out and find a job. Daugherty answered that it wasn't easy to find a good union job. Daugherty said that it wasn't easy finding a job if you don't do heavy duty work. After Del Grande said Daugherty needed to go find a job, Daugherty said Mazda heavy duty work was not really heavy duty. Del Grande told Daugherty that the employee had to leave the premises. Daugherty said he had some personal belongings to get. Del Grande told Daugherty to pack his things and leave.

Under these circumstances, Respondent was under no obligation to permit Ferguson free access to its premises. I find that the substance of this conversation was Del Grande's request that Daugherty not enter the shop. He permitted Daugherty to retrieve the mechanic's personal belongings. Nothing Dal Grande said interfered with Daugherty's right to picket the premises outside the shop. While Del Grande did state that Daugherty should find a job, he said that in a context where Daugherty had applied for work and was not hired for legitimate business reasons. While the General contends that Del Grande's statement implied that Daugherty would never work for Respondent, I draw the inference that Del Grande was implying that Daugherty would be better off working than picketing Respondent's premises or hanging around Respon-

dent's shop. Accordingly, I recommend that this allegation of the complaint be dismissed.

B. *The Failure to Hire*

The General Counsel alleges that Respondent failed to hire Daugherty and Ferguson because of their activities on behalf of the Union, i.e., their activities as union shop stewards.

An employer has no obligation to hire all or any of the employees of a predecessor employer. *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 261-262 (1974); *NLRB v. Burns Security Services*, 406 U.S. 272, 280-281 (1972). However, a new owner cannot refuse to hire the employees of a predecessor because those employees are affiliated with and represented by a union. An employer's refusal to hire for such reasons constitutes discrimination in violation of Section 8(a)(3) and (1) of the Act. *Kallman v. NLRB*, 640 F.2d 1094 (9th Cir. 1981), enfg. as modified 245 NLRB 78 (1981); *Packing House & Industrial Services v. NLRB*, 590 F.2d 688 (8th Cir. 1978), enfg. as modified 231 NLRB 735 (1977).

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983). In *Manno Electric*, 321 NLRB 278, 280 at fn. 12 (1996), the Board restated the test as follows: The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity.

As the Board stated in *U.S. Marine Corp.*, 293 NLRB 669, 670 (1989):

The Board has held that the following factors are among those that establish that a new owner has violated Section 8(a)(3) in refusing to hire employees of the predecessor: substantial evidence of union animus; lack of a convincing rationale for refusal to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force to avoid the Board's successorship doctrine.

It is unquestioned that the General Counsel must establish unlawful motive or union animus as part of his prima facie case. If the unlawful purpose is not present or implied, the employer's conduct does not violate the Act. *Abbey Island Park Manor*, 267 NLRB 163 (1983); *Howard Johnson Co.*, 209

NLRB 1122 (1974). However, direct evidence of union animus is not necessary to support a finding of discrimination. The motive may be inferred from the totality of the circumstances proved. *Fluor Daniel, Inc.*, 311 NLRB 498 (1993); *Asociacion Hospital del Maestro*, 291 NLRB 198, 204 (1988).

I do not find substantial evidence of union animus present in this case. First, Respondent owns another Mazda dealership which is party to the Association-Union collective-bargaining agreement. Second, Respondent invited all the old Oak Tree Mazda employees to apply for work. Cherry called each employee to insure that the employees had an opportunity to interview with the new ownership. Third, the first four technicians hired by Respondent were all employees who had worked for Oak Tree or Almaden Mazda under the union contract. For a period of approximately 1 month, all of Respondent's service department technicians were union members. Fourth, Respondent's desire to operate with all around mechanics and not to employ specialists was consistent with its practice instituted at Almaden Mazda, its union shop, in 1997.

Respondent's defense that it desired all-around mechanics and not specialists was consistent with the recommendations made by Hunt at Almaden Mazda in 1997 and again in 1998 at Oak Tree Mazda. In the context of opening a shop with only four mechanics, it is reasonable for Respondent to look for employees willing and able to do all types of jobs in the service department.

It can hardly be argued that Respondent discriminated against hiring the employees of its predecessor when Respondent interviewed 13 employees from the predecessor's shop and only 1 other employee, a highly rated employee from its other dealership. Three of Respondent's first four service technicians were former employees of the predecessor and all four were union members.

I now turn my attention to the issue of whether Respondent violated the Act by not hiring Daugherty and Ferguson in its second wave of hiring during the summer of 1998. On June 1, Cherry hired an employee who possessed a smog certificate and was an all-around mechanic. On that same date Cherry hired another all-around mechanic with eight ASEs and who was willing to do all kinds of work including heavy-duty work. On June 8, Respondent hired another service writer. On June 19, Respondent hired an apprentice. On July 29, Respondent hired another experienced all-around mechanic. On August 10, Respondent hired an experienced mechanic with eight ASEs and a smog license. Finally, on August 19, an apprentice technician who also possessed a smog license. Hunt was not involved in any of the hires after May 19, 1998.

While the applications of Ferguson and Daugherty were still pending in June, Cherry did not reconsider either mechanic.

However, there was nothing to change his earlier conclusion that Ferguson only wanted to do driveability work and that Daugherty did not want to do heavy-duty work. Cherry's hiring in June, July, and August, appears consistent with his earlier practice of hiring all around mechanics. As the shop became larger he was able to hire employees with smog certificates and to hire two apprentices.

For the reasons stated above, I cannot find substantial evidence of union animus. Further, I cannot find that Respondent failed to hire Daugherty or Ferguson because of such animus. Accordingly, I shall recommend that these allegations of the complaint be dismissed.

As mentioned above, on June 10, the Union requested recognition and bargaining from Respondent. The General Counsel contends that had Respondent not unlawfully refused to hire Daugherty and Ferguson, a majority (five out of eight) of the bargaining unit employees would have been employees of the old Oak Tree Mazda. However, I have found that the General Counsel has not established that Respondent unlawfully refused to hire the two technicians. Accordingly, I find no merit to this allegation.

CONCLUSIONS OF LAW

1. The Respondent, Kasa Associates d/b/a Oak Tree Mazda, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, Machinists Automotive Trades Local 1101, International Association of Machinists and Aerospace Workers, AFL-CIO, is a labor organization within the meaning of the Act.

3. Respondent has not violated Section 8(a)(3) and (1) of the Act by refusing to hire "Wayne" Daugherty and Kevin Ferguson.

4. Respondent has not violated Section 8(a)(1) of the Act as alleged in the complaint.

5. Respondent has not violated Section 8(a)(5) of the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The complaint is dismissed in its entirety.

² All motions inconsistent with this recommended order are hereby denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's 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 of them shall be deemed waived for all purposes.