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Joseph Chevrolet, Inc. and Local 324, International Union of Operating Engineers, AFL-CIO-CLC.
Case 7-CA-45211

September 29, 2004

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On June 16, 2003, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Respondent filed exceptions, a supporting brief, and an answering brief. The General Counsel filed cross-exceptions, a supporting brief, and an answering 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

I. INTRODUCTION

On March 23, 2001, the Charging Party Union was certified as the collective-bargaining representative of the Respondent's automotive technicians. Prior to the termination of the 1-year collective-bargaining agreement reached between the Respondent and the Union, an employee filed a decertification petition. A decertification election was held on April 30, 2002,³ which eventually resulted in the Union's decertification on August 9. Be-

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. However, in adopting the judge's credibility findings, we find it unnecessary to rely on the judge's comments on the failure of Respondent's attorney, Craig S. Schwartz, to testify.

The Respondent has excepted to two factual errors made by the judge. The judge incorrectly stated that an employee averaged 70 hours prior to his reassignment when the record reveals that he averaged around 70-80 hours and the judge incorrectly stated the disposition of an arbitrator regarding the ballots of two employees in the decertification election. These errors have no effect on the outcome of the decision.

² We shall revise the judge's recommended Order to omit Stevens and Cooper from par. 2(a) because the record reflects, and it is undisputed, that they have already been reinstated. We shall also substitute a new notice to include language that more closely tracks the violations found and narrow cease-and-desist order language instead of the broad order language inadvertently used by the judge in his notice.

³ Unless otherwise stated, all dates occurred in 2002.

fore that, however, the Union instituted an informational picket line. The unfair labor practice allegations in this case involve events occurring during the month of the Union's informational picketing, from May 29 to about June 28. The judge found that the Respondent committed numerous violations of Section 8(a)(1) and (3) of the Act, but he also dismissed several complaint allegations.

Both the General Counsel and the Respondent have excepted to certain of the judge's findings and conclusions.⁴ We affirm the judge's disposition of the issues presented for the reasons set forth in his decision. We disagree with our colleague's views, on the four issues on which he dissents, for the reasons set out by the judge and as discussed further below.

II. THE DISCHARGE OF AMEND

On May 30, the Respondent discharged Amend, an automotive technician, while he was participating in the Union's informational picket line. Amend, who was the assistant shop steward, had been the top performing automotive technician; and he had a clean disciplinary record until the events in issue here. On May 17, St. Charles and two other employees told General Manager Stokes that Amend had billed a customer for parts (specifically, a timing chain cover) and work that was listed on the repair order but not actually performed, resulting in a 4-1/2 hour overcharge for the work. Stokes and master technician Albin examined the repair and confirmed that the cover had not been replaced. Stokes confronted Amend with the accusation and reprimanded and suspended him.⁵ At no time did Stokes ask Amend to explain the situation before he discharged Amend on May 30.⁶ Shortly after Amend's discharge, the Respondent's owner, Hood, told Amend at the bargaining table that Amend's "job got f—ked up at the bargaining table." In finding that the Respondent violated Section 8(a)(3) of the Act by discharging Amend, the judge relied on evidence of disparate treatment, the lack of due process afforded Amend, and Hood's statement. We do not find

⁴ The General Counsel did not except to the judge's finding that the Respondent lawfully reprimanded an employee for talking on the telephone to the Union during business hours and lawfully suspended an employee for conducting a fraudulent automotive repair. The Respondent did not except to the judge's refusal to defer to arbitration.

⁵ Stokes, the Respondent's general manager, suspended Amend, pursuant to the disciplinary provision of the collective-bargaining agreement, "pending the advisability of discharge" and a final decision by the Respondent. Under that disciplinary provision, "fraudulent or unlawful automotive repair practices" are grounds for discharge for a single offense. The judge found no evidence that the suspension was motivated by antiunion animus and, therefore, dismissed the complaint allegation regarding the May 17 suspension. There are no exceptions to this dismissal.

⁶ As we discuss, Amend could have given Stokes a plausible explanation, had he been asked.

merit in the Respondent's exception to the judge's unfair labor practice finding regarding Amend's discharge.

Under *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), once the General Counsel has shown that union animus was a motivating factor in the employer's conduct, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. We find, in agreement with the judge, that the record clearly reflects that Amend engaged in open protected activity, that Amend's protected activity was a motivating factor in the Respondent's decision to discharge Amend, and that the Respondent did not establish that it would have discharged Amend absent his protected activity.

The Respondent's motive for discharging Amend is reflected in Hood's statement to Amend at the parties' last bargaining session on June 12: Hood told Amend that his "job got f—ked up at the bargaining table." Hood made no mention that Amend lost his job because he engaged in fraudulent conduct. Contrary to our dissenting colleague's view, Hood's statement clearly linked Amend's discharge to his union activity. Although this statement occurred after Amend's discharge, the statement was not too remote in time to provide insight into the Respondent's motive. Further, unlike our dissenting colleague, we agree with the judge's finding that the Respondent's true motive was evidenced by its failure to conduct a complete investigation by asking Amend for his position regarding the incident. Amend's position was not revealed until trial.

The record further supports the judge's finding that there were other auto technicians who committed similar offenses and were not immediately discharged. For example, Reitz, an automotive technician who had numerous reprimands, charged a customer for an oil change on two separate occasions but never refilled the oil. He was reprimanded rather than discharged.⁷ There is no record evidence of Reitz's involvement with the Union. Similarly, St. Charles, another automotive technician, charged a customer for new brakes but never installed them. St. Charles, who filed the decertification petition at issue here, was neither reprimanded nor discharged.

Our dissenting colleague agrees with the Respondent's assertion that Amend was discharged because he committed a fraudulent repair and disputes the finding of disparate treatment. First, we reject our colleague's assertion that Amend's conduct was unquestionably fraudulent and was stealing. The ultimate propriety of

Amend's conduct remains an open question due in large part to the Respondent's failure even to ask Amend why he had not installed the new timing chain cover. After the Respondent learned that Amend had not installed a new cover, the Respondent did not ask him why he had not done so, and instead asked him only whether he had completed all of the work on the vehicle. As discussed by the judge in section II,C,2,b of his attached decision, when Amend was able to explain his conduct at the hearing, he offered a plausible explanation for why he had not installed a new timing chain cover although his work order showed that he had. Thus, the record does not support our colleague's assertion that Amend's conduct was unquestionably fraudulent.

Second, contrary to our colleague, we find sufficient evidence of disparate treatment. Charging a customer for an oil change but not replacing the oil and charging a customer for new brakes but not installing new brakes are the same type of offenses as charging a customer for a cover and seal but only installing the seal.⁸ But the Respondent's treatment of Reitz and St. Charles was not consistent with its treatment of Amend, who was actively involved in the Union. See *Ed Morse Auto Park*, 336 NLRB 1090 (2001) (employer did not meet its burden of proving it would have discharged auto technicians due to negligent repair work absent their protected activity because there was evidence of disparate treatment). Based on the disparate treatment of Amend, the unlawful motive revealed in Hood's June 12 statement, and the failure to conduct a complete investigation of the incident, we find that the Respondent's asserted reason for discharging Amend is pretextual. Therefore, unlike our colleague, we agree with the judge that the Respondent failed to prove it would have discharged Amend absent his protected activity. Accordingly, we find that the Respondent thereby violated Section 8(a)(3) of the Act.⁹

III. HOOD'S STATEMENT TO AMEND AT THE JUNE 12 MEETING

On June 12, the Respondent and the Union met for their last negotiating session. During the meeting, Amend asked Hood to reinstate him. The judge credited the testimony of the Union's business representative Booth, and employ-

⁸ Our colleague questions the sufficiency and reliability of the evidence establishing that St. Charles apparently charged a customer for new brakes that he did not install. But the Respondent did not call Service Writer Wright, Service Manager Niver, or St. Charles himself to rebut Amend's testimony about this matter. The evidence in question was thus unchallenged and was credited by the judge.

⁹ The Respondent argued that even if the discharge of Amend is found unlawful, it should not have to pay backpay because Amend was discharged "for cause." This argument is another attempt by the Respondent to assert its rebuttal defense under *Wright Line*, which we reject.

⁷ Reitz was later discharged when he charged a customer for replacing pins that were never replaced.

ees Stevens and Amend, who were present at the meeting. All three testified that in response to Amend's inquiry about reinstatement, Hood made some version of the statement, "your job got f—ked up at the bargaining table." The judge found that the statement violated Section 8(a)(1) of the Act. We agree.

The statement clearly linked Amend's involvement in the Union to his discharge. Hood could have told Amend that he lost his job because he committed fraudulent automotive repairs were that the case. Instead, Hood told Amend that he lost his job because of his participation in bargaining. Unlike our dissenting colleague, we find that this statement is not ambiguous. And in any event, the test for whether a statement violates Section 8(a)(1) is not whether the statement is unambiguous; it is whether, from the standpoint of the employees, it has a reasonable tendency to interfere with, restrain or coerce the employees in the exercise of protected rights. *NLRB v. Okun Bros. Shoe Store, Inc.*, 825 F.2d 102, 105 (6th Cir. 1987); *American Freightways Co.*, 124 NLRB 146, 147 (1959). See *Double D Construction Group, Inc.*, 339 NLRB No. 48, slip op. at 2 (2003) ("The test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction). Certainly a reasonable employee could interpret Hood's statement as linking Amend's discharge to his participation in the bargaining. Therefore, we agree with the judge's finding that Hood's statement violated Section 8(a)(1) of the Act.

IV. THE SELECTION OF STEVENS AND COOPER FOR LAYOFF

On May 30, the same day the Respondent discharged Amend, it selected automotive technicians Stevens, Cooper, and Honeman for layoff. The three technicians were laid off the day after the picketing began. All three were Union members but there is no evidence that Honeman was openly or actively involved in the Union. Stevens was shop steward and Cooper wore a union hat to work and drank from a cup with a union logo while at work. On the same day as the lay off, Cooper was unlawfully interrogated by Stokes.

The Respondent claimed that Honeman was selected for layoff because he had a poor attendance record, and Cooper and Stevens were selected because they had low hours and could not perform front-end work.¹⁰ The judge found that the selection of Stevens and Cooper was

¹⁰ Art. 9, sec. 3 of the parties' collective-bargaining agreement provides that if circumstances warrant a reduction of hours, such a reduction shall take place in accordance with the skill, merit, and ability of employees.

unlawful but that the selection of Honeman was lawful.¹¹ The Respondent excepts to the judge's finding regarding the selection of Stevens and Cooper for layoff.

We find, in agreement with the judge, that the General Counsel met his initial *Wright Line* burden¹² and the Respondent failed to meet its rebuttal defense with respect to the selection of Stevens and Cooper. Our dissenting colleague contends that the Respondent met its evidentiary burden under *Wright Line* by establishing that it would have selected Stevens and Cooper absent their protected activity because of their low hours. The Respondent points out that the two other technicians who also had low hours could perform front-end work. However, we agree with the judge's finding that there were other technicians who could not have had the experience or expertise of Cooper and Stevens and who were not shown in the record to be openly and actively involved in the Union. These employees, in contrast to Cooper and Stevens, were not selected for the layoff.¹³ Furthermore, there were other technicians who had problems other than low hours, such as poor attendance. In fact, one of the newly hired technicians who could perform front-end work had received numerous reprimands for poor attendance before the layoff. Instead, Stevens and Cooper, open and active union members with high seniority, were selected for layoff. In light of all the above, we find that the Respondent did not meet its burden. Accordingly, we find that the Respondent violated Section 8(a)(3) of the Act by unlawfully selecting Stevens and Cooper for layoff.

V. COOPER'S REPRIMAND FOR CONDUCTING A COMPETITIVE BUSINESS

On June 25, the Respondent reprimanded Cooper for conducting a competitive business. General Manager Stokes answered a telephone call for Cooper from a towing company asking whether Cooper was interested in buying a used car for repair or spare parts. Stokes answered the call while he was engaged in conduct with Cooper which the judge found, and we agree, was harassment. The record reveals that the Respondent had no policy preventing employees from receiving personal calls during business hours. Further, the record reveals that it was common knowledge among the Respondent's

¹¹ In agreement with our colleague and contrary to the General Counsel's exception, we affirm the judge's finding that the selection of Honeman was lawful.

¹² In agreeing with the judge's finding, we additionally note that the layoffs occurred on the same day that Cooper was unlawfully interrogated and on the second day of the picketing.

¹³ In finding that the Respondent did not meet its rebuttal defense, the judge stated that, "[I]t strains credulity to conclude that [the four newly hired technicians'] experience and expertise at the facility exceeded that of Stevens and Cooper."

managers that Cooper conducted a competitive business. The judge found that the Respondent would not have reprimanded Cooper absent his protected activity. The judge noted that the reprimand was part of the Respondent's continuing harassment of Cooper while the picket line was still in place.

We agree with the judge's finding. Cooper received a call regarding his side business during the Respondent's business hours, but the Respondent had no policy preventing employees from receiving personal calls. The call was regarding an outside business and thus effectively a personal call. As far as the record shows, the outside call to Cooper was unsolicited and unrelated to anything Cooper had done during his working time. Moreover, Stokes terminated the call without letting Cooper speak to the caller. Cooper can hardly be said to have been conducting a competitive business on his working time by being the subject of an unsolicited telephone call that he was not allowed to answer. The Respondent's characterization of this incident as Cooper conducting a competitive business during his working time for the Respondent is thus a substantial overstatement, and shows the pretextual nature of that characterization. Further, the reprimand occurred in the context of other unfair labor practices, including the unlawful harassment and close monitoring of Cooper on the same day. Finally, the reprimand occurred while the picket line was in place even though the Respondent knew for some time that Cooper was conducting a competitive business. Thus, we find, contrary to our dissenting colleague, that the Respondent did not meet its rebuttal burden under *Wright Line* by demonstrating that it would have reprimanded Cooper absent his protected activity. Accordingly, we find that the Respondent violated Section 8(a)(3) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Joseph Chevrolet, Inc., Millington, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete Larry Stevens and Michael Cooper from paragraph 2(a).
2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. September 29, 2004

Wilma B. Liebman, Member

Dennis P. Walsh, Member
(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting in part.

I. INTRODUCTION

Contrary to my colleagues, I would reverse the judge and find that the Respondent did not violate Section 8(a)(3) of the Act by discharging employee Amend, selecting employees Stevens and Cooper for layoff, and reprimanding Cooper for conducting a competitive business. As to each allegation, I find the Respondent met its *Wright Line* rebuttal defense.¹ I also would reverse the judge's finding that the Respondent violated Section 8(a)(1) by the Respondent's owner Hood's statement to Amend that "your job got f—ked up at the bargaining table." The statement is insufficient to prove a violation of the Act by a preponderance of the evidence. In all remaining respects, I agree with my colleagues' decision to adopt the judge for the reasons stated in his decision.

II. THE DISCHARGE OF AMEND

Amend was discharged on May 30 for committing a fraudulent automotive repair. Amend had been suspended for the offense on May 17. The decision to suspend Amend, the lawfulness of which is not disputed, was made after Respondent's general manager Stokes was informed by three employees that Amend overbilled a customer. Upon investigating, Stokes discovered that Amend charged a customer for a timing cover and seal when he only installed the seal. Installing a timing cover and seal requires 6 hours of labor whereas installing just the seal requires far less time, 1-1/2 hours.

Amend was discharged on May 30 while he was participating in the picket line the Union had set up the day before. Respondent's owner Hood testified that he decided to discharge Amend prior to May 30 but was out of town and unable to notify Amend. Hood testified without contradiction that he notified Union Representative Williamson on May 28 that he intended to discharge Amend. Although Amend had no record of prior discipline, his discharge was consistent with the parties' col-

¹ For a complete explication of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and my views on the burdens in *Wright Line*, see *Shearer's Foods*, 340 NLRB No. 132, slip. op. at 2 fn. 4 (2003).

lective-bargaining agreement. The agreement provided that an employee could be terminated for a single instance of “fraudulent or unlawful automotive repair practices including, but not limited to, making false repair or service claims on customer vehicles.” Amend’s conduct was unquestionably fraudulent, but the judge concluded, and my colleagues agree, that Amend’s discharge was unlawful.²

Assuming, arguendo, that the General Counsel satisfied his burden of proof under *Wright Line*, I find that the Respondent met its rebuttal defense by proving that it would have discharged Amend absent his protected activity.³ Stealing has long been recognized by the overwhelming weight of arbitral authority as a “cardinal” offense for which an employee may be terminated immediately, and has similarly been recognized by the Board as a dischargeable offense. See, e.g., *Greenery Extended Care Center in Cheshire*, 322 NLRB 932, 938 (1997); *Merillat Industries*, 307 NLRB 1301, 1303 (1992). A fraudulent automotive repair is analogous to stealing and, as mentioned, the parties’ collective-bargaining agreement ex-

² Amend had an opportunity to explain his conduct with respect to the fraudulent automotive repair when Stokes asked Amend if he worked on the vehicle in question. However, Amend failed to do so then, offering an explanation only at trial, long after the incident. Unlike my colleagues, I am not persuaded that an explanation for alleged misconduct presented long after an incident by an interested witness leaves the propriety of the conduct an “open question.” Additionally, I do not second-guess the Respondent’s decision to discharge Amend; rather, my sole focus is whether the Respondent’s action discriminated against Amend based on his exercise of Sec. 7 rights. See *Paramount Metal & Finishing Co.*, 225 NLRB 464, 465 (1976).

³ In making this assumption, I note that the General Counsel’s attempt to meet his initial *Wright Line* burden is weak. I do not rely on Hood’s statement at the June 12 bargaining meeting. As will be discussed in greater detail below, I find the statement ambiguous. I also do not rely on the timing of the discharge because, as discussed above, there is record evidence that the Respondent decided to discharge Amend prior to May 29, when the picketing began. Finally, unlike the majority and the judge, I find that Amend was afforded due process because the record reveals that Stokes investigated the allegation about Amend by inspecting the vehicle, checking the repair order, and asking Amend if he worked on the vehicle.

My colleagues, like the judge, place heavy emphasis for finding that the Respondent was motivated by antiunion animus on the fact that the Respondent did not question Amend before it terminated him. The judge states: “No independent investigation was conducted to get Amend’s position as to what occurred regarding the repair order or why he decided only to install the seal instead of the timing chain cover that contained the seal.” I find this reasoning unpersuasive. The repair order speaks for itself. It calls for the installation of a timing cover and seal and allotted 6 hours for the repair. It is irrelevant why Amend installed only a seal; what is relevant is that he charged the customer for work he did not perform.

In any event, it is simply not the Board’s province to dictate appropriate methodologies for workplace investigations. Only where the record evidence reflects either a demonstrable departure from prior standards for investigations of similar misconduct or a sham investigation is an inference of animus warranted.

pressly provided that an employee could be immediately discharged for it. My colleagues, like the judge, find that the Respondent had not similarly disciplined other automotive technicians for the same type of offense. The other incidents involving unit employees Reitz and St. Charles, however, are distinguishable. They do not evidence disparate treatment.

Reitz charged two customers for oil changes but did not refill their oil. The Respondent contends quite plausibly that this was more likely negligence than intentional on Reitz’s part. Forgetting to refill a customer’s oil reserve is certainly not as serious as charging a customer for four and one half hours of work that was not performed.

With respect to St. Charles, contrary to the judge, I am not persuaded that there is credible evidence to support a finding that St. Charles failed to install new brakes for which the customer was charged. Amend, hardly disinterested, was the only witness to testify regarding this incident and his testimony was uncorroborated and largely hearsay. According to Amend, a customer returned his car for a brake problem but new brakes had been recently installed. Amend claimed that Jay Wright, the Respondent’s service writer, told him that St. Charles installed the new brakes but when Amend inspected the car, he found that new brakes had not been installed. Amend said he told the Respondent’s service manager Niver about the incident but no disciplinary action was taken against St. Charles. Amend’s testimony was largely hearsay and neither Wright, Niver, nor St. Charles were called by the General Counsel to corroborate it. Further, no documentation of the repair was introduced. Consequently, I find the evidence insufficient to support a finding of disparate treatment with respect to the incident involving St. Charles.

In the absence of evidence of disparate treatment and with the collective-bargaining agreement expressly permitting the Respondent to immediately terminate employees for engaging in fraudulent automotive repairs, I find that the Respondent met its burden of proving that it would have discharged Amend absent his protected activity.

II. HOOD’S STATEMENT TO AMEND AT THE JUNE 12 MEETING

On June 12, the Respondent and the Union met for their last negotiating session. At the meeting, Hood told Amend that his “job got f—ked up at the bargaining table.” The judge concluded, and my colleagues agree, that the statement related Amend’s discharge to protected conduct and thus violated Section 8(a)(1) of the Act. I disagree. The statement’s meaning is ambiguous and susceptible to a number of innocent interpretations. For

example, the statement could mean that Amend lost his job because the collective-bargaining agreement authorized the immediate discharge of an employee for charging a customer for a repair that was not made. Like my colleagues, I look at whether the statement had a reasonable tendency to interfere with, restrain or coerce the employees in the exercise of protected rights. I find that the statement did not meet this standard because of its ambiguity. In sum, since the statement's meaning is ambiguous and allows for lawful interpretations, the General Counsel has not met his burden of establishing by a preponderance of the evidence that making the statement violated Section 8(a)(1) of the Act.

III. THE SELECTION OF COOPER AND STEVENS FOR LAYOFF

On May 30, a day after the picketing began, the Respondent laid off employees Cooper, Stevens, and Honeman. Stevens and Cooper were recalled to work on June 4 and June 7, respectively, before the picketing ended. The General Counsel charged that these brief layoffs violated the Act.

I note at the outset, as the judge did, that Stokes testified that once he saw the picket line on May 29, he told Niver to select three employees for layoff because he anticipated that the picket line would adversely affect business. In dismissing the allegation that Honeman's layoff was unlawful, the judge found that Honeman was placed on layoff due to a "need to reduce [the] employee compliment [sic] due to the presence of the picket line and its anticipated impact on business." Thus, the judge credited the Respondent's testimony that it anticipated that the picket line would adversely affect business and require layoffs.⁴ The judge found nonetheless that the selection of Stevens and Cooper was unlawful because it was motivated by antiunion animus and the Respondent failed to meet its rebuttal defense. I disagree.

Again, assuming, *arguendo*, that the General Counsel met his initial *Wright Line* burden, I find that the Respondent met its rebuttal defense by proving that it selected Stevens and Cooper for layoff because of their low hours. While four less senior technicians were not selected for layoff, two had more hours than Stevens and Cooper and the other two could perform front-end work that Stevens and Cooper could not perform.⁵ It is a le-

⁴ Like my colleagues, I agree with the judge's finding that the selection of Honeman for layoff was lawful. Therefore, I have omitted a discussion of the facts surrounding Honeman.

⁵ My colleagues note the judge's finding that it "strains credulity" that the four less senior technicians had more skill than Stevens and Cooper. However, the Respondent argued without contradiction that Stevens and Cooper had low productivity levels *and* were unable to perform front-end work.

gitimate business justification and it was consistent with the parties' collective-bargaining agreement⁶ to select employees for layoff based on productivity and skills. See *St. Vincent Medical Center*, 338 NLRB No. 130, slip op. at 7 (2003) (judges are not free to substitute their own reasoning for that of an employer as to how to run the employer's business). Therefore, I find that the Respondent met its burden of proving that it would have selected Stevens and Cooper for layoff absent their protected activity, and thus, it did not violate Section 8(a)(3) of the Act.

IV. COOPER'S REPRIMAND FOR CONDUCTING A COMPETITIVE BUSINESS

On June 25, the Respondent issued a written reprimand to Cooper for conducting a competitive business during business hours. Stokes answered a telephone call for Cooper from a towing company asking whether Cooper was interested in buying a used car for repair or spare parts. While it was common knowledge among the Respondent's managers that Cooper had a business on the side and employees are permitted to receive personal telephone calls during business hours, there is no evidence that the Respondent knew that Cooper or any other employee *conducted an outside competitive business during business hours*. Nevertheless, the judge found and my colleagues agree that the Respondent's reprimand violated the Act. Once again, I must disagree.

Even if the General Counsel met his initial *Wright Line* burden, the Respondent met its rebuttal defense because Cooper was conducting a competitive business during the Respondent's business hours. My colleagues make a leap in judgment by assuming that, because the Respondent knew that Cooper conducted a competitive business, the Respondent knew and approved of Cooper conducting that business during its own business hours. I am unwilling to do the same. That Cooper was not given the opportunity by the General Manager to take the call from the towing company, a fact relied on by my colleagues, does not negate the fact that the towing company felt free to call Cooper on the job. In this regard, there is no evidence that the call was unsolicited by Cooper, as relied upon by my colleagues. The nature of the call coupled with the degree of discipline—a written reprimand—gives little support for the majority's finding that the Respondent was acting out of antiunion animus instead of a legitimate management concern. Further, it supports a finding that the Respondent would have taken the same action absent Cooper's protected activities. Thus, the Respondent had a legitimate reason to reprimand Cooper and did not violate the Act by doing so.

⁶ See fn. 7 of the majority's decision.

Dated, Washington, D.C. September 29, 2004

Peter C. Schaumber, Member
NATIONAL LABOR RELATIONS BOARD

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you about your union support or activities.

WE WILL NOT advise you that you lost your job because of your union support or activities.

WE WILL NOT advise you that you are being harassed because of your union support or activities.

WE WILL NOT discharge, layoff, or otherwise discriminate against you for supporting Local 324, International Union of Operating Engineers, AFL-CIO-CLC or any other union.

WE WILL NOT issue written reprimands to you because of your union support or activities.

WE WILL NOT harass or more closely monitor your work because of your union support or activities.

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

WE WILL, within 14 days from the date of the Board's Order, offer Tony Amend full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Tony Amend, Larry Stevens, and Michael Cooper whole for any loss of earnings and other benefits resulting from their discharge or layoffs, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge, layoffs, and written reprimands of Tony Amend, Larry Stevens, Michael Cooper, and Robert Shelton, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharge will not be used against them in any way.

JOSEPH CHEVROLET, INC.

Amy J. Roemer, Esq., for the General Counsel.
Craig S. Schwartz, Esq., and *G. Michael Meihn, Esq.*, of Bloomfield Hills, Michigan, for the Respondent-Employer.
Allan Booth, of Livonia, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on March 25, 26, and 27, 2003, in Flint, Michigan, pursuant to a complaint and notice of hearing in the subject case (complaint) issued on September 3, 2002,¹ by the Regional Director for Region 7 of the National Labor Relations Board (the Board). The underlying original and amended charge was filed on June 14, and August 29, by Local 324, International Union of Operating Engineers, AFL-CIO-CLC (the Charging Party or Union) alleging that Joseph Chevrolet, Inc. (the Respondent or Employer), has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that Respondent engaged in violations of Section 8(a)(1) of the Act and a number of 8(a)(1) and (3) violations including the issuance of several written reprimands to bargaining unit employees, the layoff of three employees, the suspension and termination of one employee, and harassing and more closely monitoring the work of two employees.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the retail sale and servicing of automotive vehicles at its facility in Millington, Michigan, where it annually derived gross revenues in excess of \$500,000, and purchased goods and materials valued in excess of \$50,000, which were shipped to its facility directly from suppliers located outside of Michigan. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and

¹ All dates are 2002 unless otherwise indicated.

that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Union was certified as the exclusive collective-bargaining representative on March 23, 2001.² Shortly after the certification, employee Gary St. Charles was selected as the steward for the bargaining unit. St. Charles participated as a member of the Union's negotiating committee and the parties' reached a 1-year collective-bargaining agreement effective from May 23, 2001, to May 23 (GC Exh. 3). St. Charles continued as the union steward until in or around September 2001, when he resigned his position. Shortly after the resignation, St. Charles was elevated to the position of used car inspection technician.³

By letter dated March 1, the Union notified the Respondent that it desired to make changes to the current collective-bargaining agreement and offered to meet for the purpose of negotiations (GC Exh. 4). By letter dated March 19, Respondent, by legal counsel, apprised the Union of its intent to terminate and renegotiate all provisions of the existing agreement and requested representatives of the Union to contact counsel to schedule an initial bargaining session (GC Exh. 6). The first negotiation session between the parties occurred on April 15, with subsequent sessions held on April 23, May 3, May 8, May 9, and June 12. The parties were unable to reach a successor collective-bargaining agreement pursuant to these negotiations.

On March 18, St. Charles filed a decertification petition in Case 7-RD-3342, asserting that a substantial number of employees believe that the currently certified bargaining representative no longer represents them. In a series of four memoranda sent by Respondent to its employees, it raised a number of issues that the bargaining unit should consider when voting in the upcoming decertification election scheduled for April 30 (GC Exhs. 8, 9, 10, 11). Upon the conclusion of the election, a tally of ballots was made available to the parties. It showed of the 14 approximate eligible voters that four ballots were cast for the Union and four votes were cast against the participating labor organization. There were six challenged ballots, which

² The unit included "All full-time and regular part-time auto technicians employed by the Employer at its facility located at 9007 South State Road, Millington, Michigan; but excluding professional employees, office clerical employees, guards and supervisors as defined in the Act, employees currently represented by other labor organizations, and all other employees.

³ Prior to the reassignment, St. Charles averaged 70-turned hours every 2 weeks. After his assignment to the new position, he averaged in excess of 100-turned hours every 2 weeks. Thus, his wages dramatically increased commencing in October 2001, and have remained at this elevated level to the present time. Technicians at Respondent are paid on a flat rate system. An industrywide motor book is relied upon to determine how long a car repair should take. For example, if the replacement of a new timing chain cover and seal is scheduled to take 6 hours and the technician is able to complete the repair in less than 6 hours, he is paid the 6 hours times his designated hourly wage rate. Conversely, if the technician takes longer than 6 hours to complete the repair, he is not paid extra for additional hours spent to complete the job.

were sufficient in number to affect the results of the election. On May 3, the Union filed timely "Objections to Conduct Affecting the Results of the Election."⁴ An investigation of the challenges and objections were conducted under the supervision and direction of the Regional Director of Region 7. Based on that investigation, the Regional Director recommended that the Union's objections be overruled in their entirety, the challenges to the ballots of Aaron Gazarek, Brian Brunner, Aaron Begley, and Brent Clark be overruled and their ballots be opened and counted. Additionally, the Regional Director recommended that the ballots of Tim O'Berry and Bruce Aulbert, if still determinative, be deferred to the arbitrator's decision⁵ (GC Exh. 25). By decision and direction, the Board adopted the Regional Director's findings and recommendations (GC Exh. 26). The Regional Director, on August 9, after the rendering of the arbitrator's decision, issued a certification of results of election, finding that a majority of the valid ballots has not been cast for any labor organization and that the Union has been decertified as the exclusive collective-bargaining representative of the employees in the Unit (GC Exh. 27).

B. The 8(a)(1) Allegations

1. Allegations concerning Richard Stokes

The General Counsel alleges in paragraph 7(a) of the complaint that General Manager Stokes, on or about May 30, coercively interrogated an employee about whether the employee was engaging in union activity.

The Board has held that interrogation is not a per se violation of Section 8(a)(1) of the Act. *Rossmore House*, 269 NLRB 1176, (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In determining whether an interrogation is unlawful, the Board examines whether, under all the circumstances the questioning reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Rossmore House*, 269 NLRB at 1177-1178. *Emery Worldwide*, 309 NLRB 185, 186 (1992). Under the totality of circumstances approach, the Board examines factors such as whether the interrogated employee is an open and active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. *Rossmore House*, 269 NLRB at 1178 fn. 20; *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964); *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985).

On May 29, the Union initiated an informational picket line at the Respondent that continued for approximately 30 days until on or about June 29. Both nonemployee union business

⁴ The Union filed, on May 28, an unfair labor practice charge in Case 7-CA-44985, asserting parallel allegations to those alleged in their objections. That charge was subsequently withdrawn by the Union on June 26.

⁵ O'Berry and Aulbert were terminated in March 2002 for allegedly defrauding the Employer while performing services without current state mechanic certifications. The Union filed timely grievances under the then current agreement. The arbitration, however, took place after the expiration of the agreement. The arbitrator determined that the employees did not violate the contract as alleged by the Employer and ordered the two employees reinstated to their prior technician positions.

representatives and employees patrolled the premises carrying picket signs that stated, “Joseph Chevrolet Unfair to Operating Engineers Local 324.” During the first several days of the picketing, the Union erected an inflated twelve-foot rat along the roadside. The rat contained a handmade sign around its neck that read “Joe Hood.”

Employee Michael Cooper worked at Respondent for approximately 10 years and held master and ASE certifications as an automotive technician. He was a member of the Union who always wore his union hat and drank coffee from a mug that contained a union logo affixed thereto.

On May 30, Stokes gave layoff slips to three employees including Cooper. Stokes informed Cooper that because the Union is picketing in front of the facility it will probably be slow for the summer and he would be one of the employees selected for lay off. Cooper requested something in writing but Stokes refused. During the course of the conversation between Cooper and Stokes, the receptionist paged Cooper to take an incoming telephone call. Cooper walked into the parts department to pick up the telephone. Stokes was adjacent to the parts department and asked Cooper if he was calling the Union. Cooper said no, the telephone call was from his wife.

This allegation stands un rebutted, as Stokes did not address the matter during his testimony. I find that Stokes interrogated Cooper about calling the Union because of the presence of the Union’s picket line. Such questioning of an employee tends to be coercive. In this regard, the practice of the parties was to permit employees to receive short telephone calls after being paged by the receptionist without interruption. Respondent did not present any evidence that this was not the method in which employees were permitted to receive telephone calls.

Under these circumstances, I find that Stokes’ questioning of Cooper about whether he was making a telephone call to the Union is coercive interrogation that violates Section 8(a)(1) of the Act.

2. Allegations concerning Joseph Hood

The General Counsel alleges in paragraph 7(b) of the complaint that Owner Hood, on or about June 14, advised an employee that the employee lost his job because of the employees’ union activities.

The parties’ met for their last negotiation session on June 12 in an effort to finalize contract proposals for their successor agreement. Attorney Craig S. Schwartz, Hood, and Luttmann represented Respondent. The union participants included Business Representatives Dave Williamson and Allan Booth and employees Larry Stevens and Tony Amend. During the course of this meeting the parties talked about the discharge of Amend that occurred on May 30, and whether the Respondent would reinstate him. Hood asked Amend whether he wanted to return to work, and Amend replied that, “Yes, I want to come back to work for you. Don’t you want me back?” Booth testified that Hood said, “Your job got fucked up at the bargaining table.” Booth was so taken back by this statement that he memorialized what Hood said on the front of a brown envelope that contained union bargaining proposals (GC Exh. 20). Stevens testified that Hood said, “You fucked up your job because you’re

sitting at the other side of that table.”⁶ Likewise, Amend testified that during the June 12 negotiation session when the topic of the conversation turned to the issue of his reinstatement, Hood said that he had a good job, “but you lost your job right here at this bargaining table.”

Luttmann denied that Hood linked the loss of Amend’s job to his participation in collective-bargaining negotiations but did acknowledge that Hood said, “You fucked yourself up.” Hood denied that he made any remarks that could be interpreted that Amend lost his job because of his negotiation responsibilities, but did admit that he might have said, “You fucked up,” during the course of the meeting.

Based on the forgoing, I am inclined to credit the testimony of Booth, Stevens, and Amend. Each of these individuals testified in a forthright manner with excellent recall as to what occurred during the course of the bargaining session. On the other hand, Luttmann was very vague and evasive as to what was discussed during the course of the meeting and had to be prompted by counsel on a number of occasions in order to elicit testimony on direct examination. Moreover, Luttmann did admit that he recalled Hood used the words, “You fucked yourself up,” which is different than what Hood testified to and much closer to the testimony of the three other individuals concerning what took place during the course of the meeting. I note, that Attorney Schwartz did not testify what he recalled took place during this meeting, despite being present as a negotiator on June 12.⁷ Lastly, I find that immediately after Hood made the remark on June 12, Booth memorialized what was said. Thus, I conclude that the preponderance of the evidence establishes that Hood made the remark as alleged by the General Counsel during the course of the June 12 negotiation session.

Therefore, I find that such a remark interferes with, restrains, and coerces employees in the exercise of the rights guaranteed in Section 7 and is violative of Section 8(a)(1) of the Act.

3. Allegations concerning Gary Niver

The General Counsel asserts in paragraph 7(c) of the complaint that Gary Niver, on or about June 28, advised employees that they were being harassed because of the employees’ union activities.

Niver, as the service manager of Respondent, was the first line supervisor of technicians Cooper, Stevens, and Robert Shelton. Niver, despite never previously socializing outside of work with the three technicians, invited them to have lunch at Cardinal Pizza. While conversing during lunch, Niver told the three employees that he heard a rumor that they might be leav-

⁶ Respondent, in an effort to attack Stevens’s credibility, pointed out that the remarks attributed to Hood at the June 12 negotiation session were not contained in his affidavit that he previously gave to the Board investigator. I credit Stevens’s testimony that the Board agent asked him questions about what happened to him and did not address what took place at the June 12 negotiation session in his affidavit.

⁷ Unlike the courts, the Board does not pass on, and leaves to State bar associations to decide, questions of ethical propriety of a party’s trial attorney testifying in a Board proceeding. When a trial attorney’s testimony is otherwise relevant and competent, it is admissible. *Reno Hilton*, 319 NLRB 1154, 1185 fn. 18 (1995); *Operating Engineers Local 9 (Fountain Sand)*, 210 NLRB 129 fn. 1 (1974).

ing the dealership and he wanted them to know that Hood did not want any of them to leave. Cooper asked Niver whether the harassment of employees would stop. According to Cooper, Niver said that, "Hood couldn't control Stokes' harassment, but as far as he knew, it was going to stop." Niver then said, "Quit biting the hand that feeds us." Stevens and Shelton confirmed that they attended the lunch with Niver on June 28 at Cardinal Pizza. Stevens testified that after Niver informed them that Hood did not want them to leave the dealership, he told the employees that the Union was going to withdraw the unfair labor practice charges, that things would get back to normal, and according to Hood the harassment was going to stop. Shelton also testified that in response to a question by Cooper about employee harassment, Niver said the harassment should be ending very soon.

Niver, who admitted that he invited Cooper, Stevens, and Shelton to have lunch on June 28, primarily to inform them that Hood wanted them to remain at the dealership, he denied that any discussions took place about harassment. My overall impression of Niver's credibility is suspect as he was very vague, did not have a good recollection of overall events during the May and June 2002 time period, and did not address critical aspects of what took place at the June 28 lunch. Indeed, he did not deny that he told the group that Hood could not control Stokes' harassment of the employees or that he made the remark quit biting the hand that feeds us.

I conclude that the testimony of Cooper, Stevens, and Shelton has a ring of truth to it when compared to Niver's recitation of events. Moreover, I note that the union's picketing ceased around this time and true to Niver's prediction the harassment of the employees ceased.

Under these circumstances, I find that the General Counsel sustained the allegations of paragraph 7(c) of the complaint, and conclude that Niver engaged in conduct violative of Section 8(a)(1) of the Act.

C. The 8(a)(1) and (3) Allegations

1. Written reprimand issued to Larry Stevens

The General Counsel alleges in paragraph 8(a) of the complaint that Stokes, on or about May 14, issued a written reprimand to Stevens.

In *Wright Line*, 251 NLRB 1083 (1980), enf'd. 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 decision. On 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 (1993). In *Manno Electric*, 321 NLRB 278 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 chal-

lenged 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 employee had not engaged in protected activity.

(a) The facts

Stevens has been an active union member since the certification of the Union in March 2001, having served on the Union's negotiating team for both the initial and successor collective-bargaining agreements and assuming the union steward position after the resignation of St. Charles in September 2001. Thus, it was common knowledge that Stevens was an active and ardent supporter of the Union.

On May 14, Stokes overheard Stevens talking on the telephone during worktime with Booth about union related business. When asked by Stokes whether he was talking to Booth about union business, Stevens denied it but admitted during his testimony that he lied to Stokes by denying he was talking to Booth. Stokes gave Stevens a written reprimand for talking on the telephone with the Union during duty time, a matter prohibited by the parties' collective-bargaining agreement.⁸

(b) Discussion

I am not persuaded under *Wright Line*, that the General Counsel has made a strong showing that the Respondent was motivated by antiunion considerations when it issued the written reprimand to Stevens. In this regard, at the time of the issuance of the discipline on May 14, the Union's picket line had not been established, Respondent had not committed any independent 8(a)(1) violations of the Act, and other then ongoing collective-bargaining negotiations between the parties, there was no other evidence presented of violative conduct undertaken by Respondent. Indeed, the General Counsel did not allege any other violations in the complaint that occurred around this time period.

Further, Stevens admitted that he was aware of the provision contained in the parties' collective-bargaining agreement that prohibited union representatives from conducting union related business on duty time, and grudgingly admitted that on April 3, he had received a prior written reprimand for the same offense (R. Exh. 24). I also note that St. Charles testified that when he was the union steward, he was informed that routine union business could not be conducted during duty time.

Based on the forgoing, and particularly noting that Stevens admitted that he lied to Stokes about who he was talking to on the telephone, I find that the written reprimand issued to Stevens was for legitimate reasons unrelated to his union activities. If others disagree and determine that the Respondent was motivated by antiunion considerations in issuing the written reprimand to Stevens, I find that the Respondent would have imposed the discipline even in the absence of the employee's protected conduct.

Therefore, I recommend that paragraph 8(a) of the complaint be dismissed.

⁸ Art. 4, sec. 2 states: Unless a grievance requires immediate action for health or safety reasons, grievance discussion and resolution shall be done before or after work hours only.

2. The suspension and discharge of Tony Amend

The General Counsel alleges in paragraph 8(b) of the complaint that the Respondent suspended on May 17, and thereafter terminated Amend on May 30.

(a) *The facts*

Amend commenced employment with Respondent in January 2000, as a certified and master ASE automotive technician. From the inception of his employment, Amend demonstrated that he was an industrious worker and became the highest producer in terms of hours turned. He was elected as the assistant union steward working with Stevens and became a member of the Union's negotiating team for the successor collective-bargaining agreement. Prior to May 17, the date of his suspension, he had no prior discipline on his employment record.

Amend was assigned to repair a chevrolet truck blazer that required him to complete a number of items including the diagnosis of an oil leak, steering and suspension problems, and various mechanical concerns (R. Exh. 4, GC Exh. 13). Amend inspected the vehicle and discerned that a number of parts were necessary to complete the work. He then listed the parts needed to complete the job on the back of the repair order. After receiving the parts, he commenced working on the vehicle. On May 17, St. Charles, along with two other employees, apprised Stokes that Amend was committing warranty fraud by overcharging the customer for work and parts that were listed on the repair order but were not actually performed or installed. In this regard, the repair order noted that the motor book allotted 6 hours to perform the replacement of a front timing chain cover and seal. St. Charles informed Stokes that Amend did not install a new front timing chain cover but merely removed the seal from the new timing chain cover and inserted it in the old timing chain cover. The motor book indicated that just replacing the seal in the timing chain cover should take no more than 1.5 hours. The repair order, however, indicated that Amend was going to charge the customer for 6.0 hours of work. This action inflated Amend's turned hours for the repair and increased his wages earned for the job.

Stokes instructed St. Charles to pull the vehicle into a stall and place it on a rack so they could both inspect the timing chain cover and seal. Stokes and St. Charles observed that the timing chain cover on the vehicle had not been replaced even though the repair order noted that the part had been provided to Amend and that the customer was to be charged for the part and the work. Both Stokes and St. Charles testified that only a new seal had been inserted in the old timing chain cover. Stokes also requested master technician, Micheal Albin, to observe the vehicle while it was up on the rack. Albin confirmed that the timing chain cover was dirty and had not been replaced.

Stokes confronted Amend with his findings and told him he was going to be suspended for performing fraudulent automobile repair practices in accordance with article 13, section 1(b), of the parties' collective-bargaining agreement. Amend was given a written reprimand for this infraction (R. Exh. 11), and a letter was sent to his residence dated May 17, advising that he was suspended pending advisability of discharge (GC Exh.

14).⁹ Hood returned from out of town on or about May 26, and after reviewing the repair order and discussing the matter with Stokes, agreed that Amend should be terminated for engaging in fraudulent automotive repair practices. On May 30, Stokes observed Amend on the picket line and attempted to hand him a letter that confirmed his discharge. Amend did not accept the letter, but, read it and noted that he was being terminated from the Respondent. A subsequent letter to this effect was mailed to Amend's home address (GC Exh. 15).

(b) *Discussion*

I am not persuaded under *Wright Line*, that the General Counsel has made a strong showing that the Respondent was motivated by antiunion considerations when it suspended Amend on May 17. In this regard, Stokes did not independently initiate the action and only became aware of the alleged fraudulent automotive repair practices based on information received from St. Charles and two other bargaining unit employees. Thus, I am hard pressed to find that any Respondent manager including Stokes took the action against Amend because of his union activities. It should be noted that on or before May 17, the record did not establish nor have I found that the Respondent engaged in any Section 8(a)(1) conduct under the Act. The Union's picket line had not been established on this date and the alleged harassment of unit employees had not began. While I note that the parties' were engaged in ongoing bargaining for their successor agreement and Amend was a member of the Union's negotiation team, there are no allegations in the complaint that any infractions occurred during the five bargaining sessions that were held prior to May 17 (GC Exh. 7).

Based on the forgoing, I recommend that the portion of paragraph 8(b) of the complaint relating to the suspension of Amend be dismissed. Further, I find that the Respondent would have suspended Amend for engaging in fraudulent automotive repair practices even in the absence of any union activity.

With respect to the termination of Amend that occurred on May 30, I find that the General Counsel has made a strong showing that the Respondent was motivated by antiunion considerations. In this regard, just prior to the termination, the Union had commenced an informational picket line at Respondent's facility. Due in part to this action, the Respondent laid off three employees as they anticipated that work would be slow due to a high percentage of their customers being from union families who would be unwilling to cross the picket line. Additionally, I credit Booth's testimony that during the June 12 negotiation session when the parties were discussing whether Amend would be returned to work, the subject of the picket line came up and Hood said, "[T]he picket line is ruining my business." Hood did not deny that he made such a statement during his testimony.

Stokes independently made the decision to suspend Amend on May 17, but was not authorized to terminate employees without the approval of Hood who was out of town. Hood

⁹ Stokes was not authorized to terminate an employee without the review and concurrence of Hood who was out of town.

returned to the facility on or about May 26, and after reviewing the repair order and talking to Stokes and Niver about the matter, agreed that Amend must be terminated. While Hood is certainly authorized to make such a decision, I note the lack of due process that was afforded Amend. In this regard, no independent investigation was conducted to get Amend's position as to what occurred regarding the repair order or why he decided only to install the seal instead of the timing chain cover that contained the seal. The decision by Hood was open and shut and did not allow for any input from the aggrieved employee. This is especially noteworthy in that the subject trial was the first time that Amend had a forum to tell his side of the story. Indeed, Amend testified that it was dispatcher Jay Wright that first wrote the 6 hours on the repair order that established how many hours were necessary to complete the repair and Amend merely used this figure when he forwarded the repair order to the parts department. Additionally, Amend testified that he told James Hohman in the parts department that he only needed the seal to complete the repair, but, Hohman informed him that that he did not think you could get the seal separately without the cover. The Board has consistently held that an employer's failure to conduct a fair and complete investigation gives rise to an inference of unlawful animus. *Publishers Printing Co.*, 317 NLRB 933, 938 (1995); *Syncro Corp.*, 234 NLRB 550, 551 (1978).

I also conclude that Amend was not afforded the same treatment when comparing the discipline of other employees who were charged with similar offenses. Amend was terminated based on only one infraction without being afforded progressive discipline unlike other employees. Indeed, the Board has held that if an employer maintains a progressive disciplinary system, the failure to follow it is frequently indicative of a hidden motive for imposing more severe discipline. See, *Fayette Cotton Mill*, 245 NLRB 428 (1978); *Keller Mfg. Co.*, 237 NLRB 712, 713-714 (1978). I also note that Amend had no prior history of discipline on his record unlike other employees. For example, employee Shawn Reitz charged a customer for an oil change on two separate occasions within a 1-week period when he did not put any oil in the vehicle. On both occasions Reitz was given a written reprimand and was not terminated from Respondent until he finally committed a third offense of overcharging a customer (GC Exh. 35, 36). Unlike Amend, Reitz had numerous absence reports and other written reprimands in his personnel file that occurred prior to the two incidents involving the oil change, but, still was not terminated (GC Exh. 37 (a)-(j)). In a separate incident involving St. Charles, a customer complained that he was experiencing a brake problem on a used car that he had recently purchased. Amend was asked to check the vehicle and noticed the brakes were dirty. Wright checked the invoice and noted that St. Charles had recently installed new brakes on the vehicle. This is the same type of fraudulent automotive repair practices that Amend was terminated for but St. Charles was not given any discipline for this incident.

Lastly, and the most telling reason that I find that Amend was terminated because of his protected conduct, is based on my earlier finding that Hood's motivation for the termination was centered on Amend's participation at the bargaining table

when he informed Amend and those in attendance at the June 12 session that, "Your job got fucked up at the bargaining table." Additionally, I note that Hood also said that the picket line was ruining his business and he was aware that Amend appeared on the picket line on the morning of May 30, before the termination letter was shown to him.

For all of the above reasons, I find that Amend was terminated by Respondent because of his activities on behalf of the Union and not for the reason asserted by Respondent of performing fraudulent automotive repair practices. Thus, I find that the Respondent has not established that it would have taken the same action even in the absence of Amend's protected activity.

Therefore, I find that the Respondent engaged in conduct violative of Section 8(a)(1) and (3) of the Act when it terminated Amend on May 30.

3. The May 30 layoff

The General Counsel alleges in paragraph 8(c) of the complaint that the Respondent laid off Keith Honeman, Mike Cooper, and Larry Stevens.

(a) *The facts*

Stokes testified that once he observed the establishment of the picket line on May 29, he instructed Niver to select three employees for layoff as he anticipated that the presence of the picket line would detrimentally impact business. Accordingly, Niver selected the above noted employees for layoff and either he or Stokes notified each of them on May 30, that they would be placed on will call and would be contacted when work picked up.

Honeman was called into Niver's office on May 30, as he was again late for work. Niver informed him because of his poor attendance record and due to the picket line outside the facility that he anticipated would reduce work, he was going to be placed on layoff for several weeks.

Stokes informed Cooper that he would be placed on will call effective May 30, because the Union had established a picket line and work will probably be slow for the summer. Cooper asked for something in writing to this effect but Stokes refused to provide any written documentation. Cooper was off work for 3 days before he was recalled on June 4.

Stokes reached Stevens at home on May 30, and apprised him he would be placed on will call because the Respondent anticipated that work would be slow due to the Union's picket line outside the facility. Stokes instructed Stevens to come to the facility and pick up his toolbox. Stevens did not go into the facility on May 30, but did meet with Nivers on May 31, who told him he could leave his toolbox in the shop. Stevens was called back to work on June 7.

(b) *Discussion*

Honeman did not establish that he was actively involved in the Union nor did the General Counsel elicit such testimony. He did acknowledge that prior to May 30, Respondent counseled him about attendance infractions and his personnel file contained a record of these infractions. Respondent introduced into evidence seven examples of attendance infractions that Honeman received between November 7, 2001, and May 30 (R.

Exh. 13–19). Moreover, the Respondent established that during the Union picket line, net labor sales dropped approximately \$10,000 when compared to prior months when the picket line was not present (R. Exh. 12).¹⁰ Based on the forgoing, I do not find that Honeman was selected for layoff because of his union activities. Rather, I find that he was placed on layoff for legitimate business reasons including his attendance infractions and the need to reduce employee compliment due to the presence of the picket line and its anticipated impact on business. Thus, I find, that even if Honeman had established antiunion sentiment was a motivating factor in the layoff, the Respondent would have taken the same action even if he had not engaged in protected activity.

In regard to the reasons that Stevens and Cooper were selected for layoff, the Respondent asserts that both individuals had a history of low hours turned and neither of them was able to perform front end alignments or front wheel drive transmission work.¹¹

There is no question that the Respondent knew that Stevens and Cooper were ardent union supporters. I am suspect concerning the reasons that Stevens and Cooper were selected for layoff based on the following reasons. First, at no time prior to May 30 has the Respondent routinely laid off technicians due to lack of work. Indeed, employee records show that when comparing hours turned for May 15, 2001, with May 15, fewer hours were turned in 2001, yet no technicians were laid off due to lack of work (GC Exh. 17). Additionally, when comparing hours turned for the pay period ending May 15, just before the establishment of the picket line, the hours turned for Stevens and Cooper are comparable to those of employees Tom Zigoris and Aaron Gazarek. I have examined a provision in the parties' collective-bargaining agreement that is material to the layoff.¹² In this regard, Stevens and Cooper were classified as "A" technicians and paid the highest base hourly rate. Although the Respondent argues that Stevens and Cooper could not perform front-end alignment and front wheel transmission work, only two employees were designated to perform this work. Assuming that it was necessary to keep these two employees gainfully employed, there were other "A" technicians that had less seniority than Stevens and Cooper who should have been laid off in accordance with the parties' collective-bargaining agree-

ment. Moreover, I note that the Respondent recently hired four employees in March 2002. It strains credulity to conclude that their experience and expertise at the facility exceeded that of Stevens and Cooper.¹³ Lastly, aside from Honeman there were other employees who had experienced attendance problems prior to the layoff on May 30. For example, Honeman testified that Niver also counseled employees Brent Clark and Charley Taylor regarding their attendance and Clark was one of the new employees hired by Respondent in March 2002. Likewise, Zigoris had a history of attendance problems at the Respondent dating back to April 2001 including four infractions that occurred in 2002 (GC Exh. 38(a)–(j)). Moreover, two of Zigoris's infractions in 2002 noted that he was not covering his hours, had a lack of production, and a lack of work.

Based on the forgoing, I find that the Respondent's selection of Stevens and Cooper for the layoff on May 30 to be pretextual. The evidence conclusively establishes that there were other employees who either had attendance problems, a history of poor work performance, or should have been selected for layoff under the parties' collective-bargaining agreement rather than Stevens and Cooper. I conclude that both of these individuals were selected for layoff due to their support of the Union and that the Respondent selected them due to its hostility against the Union for establishing the picket line the day before the layoffs.¹⁴ I further note that on June 12, Hood informed the Union that the picket line was ruining his business.

Therefore, I find that the General Counsel has sustained the allegations contained in paragraph 8(c) of the complaint and conclude that Respondent violated Section 8(a)(1) and (3) of the Act.

4. Harassment of Larry Stevens and Michael Cooper

The General Counsel alleges in paragraph 8(d) of the complaint that from about June 24 to June 26, Respondent harassed and more closely monitored the work of Stevens and Cooper.

(a) *The facts*

On June 25, Stevens was completing the replacement of a front axle on a truck when Stokes informed him that he wanted him to do the front-end alignment on a truck. Stokes continued to berate Stevens by telling him "You're getting old," "you are master certified and you're not good," and followed and observed him while he was completing the alignment work. Stokes wanted to know why the repair was taking so long and said, "I thought you were good, I thought you could beat flat rate." Stokes told Stevens that he was going to have Stevens and Cooper clean up other technicians' work areas, but he did not follow through on this threat. Although Stokes admitted that he observed Stevens on this day, he denied that he harassed him or told him he was old and no good. Coworkers Cooper, Shelton, and Honeman testified that on June 25, they observed

¹⁰ Based on the record evidence, I find that the decision to conduct the layoff was not motivated by antiunion animus. Rather, I conclude that Stokes anticipated that business would be slow as the majority of Respondent's customers were union families who would be reluctant to cross a picket line. On the other hand, I find that Respondent's selection of who would be laid off was motivated by antiunion animus as it concerned Stevens and Cooper.

¹¹ Stevens testified without contradiction that on June 25, he performed a front-end alignment repair on a vehicle in a shorter period of time than prescribed in the motor book, and did so, without using the computer. Thus, I find Respondent's reliance on the fact that Stevens could not perform front-end alignment work to be pretextual.

¹² Art. 9, sec. 3, titled Layoff and recall provides in pertinent part that if circumstances warrant a reduction of hours, such a reduction shall take place in accordance with the skill, merit and ability of employees, as determined by the Employer. In cases where skill, merit, and ability are equal in the determination of the Employer, the least senior employee shall be laid off first.

¹³ The parties' collective-bargaining agreement provides for a 90 calendar-day probationary period.

¹⁴ The tally of ballots from the April 30 decertification election showed four votes cast for the Union. I conclude that the Respondent had a good idea who voted to retain the Union (Stevens, Cooper, Amend, and Shelton).

and heard Stokes make the comments noted above concerning Stevens.

(b) Discussion

Both Stevens and Cooper credibly testified that it was unusual for Stokes to remain in the service area and observe a technician for such a long period of time.

It is significant that the only two employees that Stokes closely monitored were Stevens and Cooper who just happen to be active supporters of the Union. As I previously found, Niver told Stevens and Cooper at the June 28 lunch that Hood could not control Stokes harassment of the employees and since the Union was planning on withdrawing the unfair labor practice charges, the harassment would end soon. True to this prediction, the harassment ceased on June 29, about the same time that the Union ended the picket line at Respondent.

For all of the above reasons, I find that Stokes sought out Stevens and Cooper and harassed and more closely monitored their work because of their support for the Union. In this regard I note the written reprimands issued to Stevens and Cooper, discussed below, were given to these employees during the period of time that the Union engaged in picketing of the Respondent. No other employees received such repetitive and harassing treatment during the period the picket line was established. Therefore, I conclude that the Respondent has not established that it would have taken the same action against these employees even in the absence of their protected conduct.

Thus, in agreement with the General Counsel, I find that the Respondent violated Section 8(a)(1) and (3) of the Act by Stokes actions.

5. Written reprimands issued to three employees

The General Counsel alleges in paragraph 8(e) of the complaint that on or about June 24, Respondent issued written reprimands to Robert Shelton, Larry Stevens, and Michael Cooper.

(a) The facts

Around 3 p.m. on June 24, a former employee came into the service area to say hello to a number of the technicians. A conversation ensued with Shelton, Stevens, Cooper, and Aaron Gazarek. Stokes, who asserted he was watching the conversation for 35 minutes before he came over to where the employees were conversing, instructed the former employee to leave the premises and accused the employees of engaging in a work stoppage. Apparently, Gazarek left the group sometime during the conversation but the record is not clear on how long Gazarek remained in the conversation before Stokes came over to the group. Stokes instructed Niver to issue written reprimands to Shelton, Stevens, and Cooper for engaging in a work stoppage. (GC Exhs. 21,22, 23).

(b) Discussion

Article 13, section 1(l), of the parties' collective-bargaining agreement provides that discipline may be issued to employees for "[e]ngaging in strikes, slow downs, or other conduct violative of the No-Strike/No-Lockout Clause or attempting to induce others to do so."

In my opinion the above clause, that was the basis for the written reprimands, was not meant to cover verbal shop floor

conversations among employees. Stokes knew perfectly well that the person his technicians were conversing with was a former employee who they had not seen or talked to for some period of time. Stokes created this situation by casting about and observing the employees talking rather than going over at the inception of the conversation and asking the former employee to leave the premises and instructing the technicians to return to work. As further evidence of pretext, Shelton testified without contradiction that he just started his afternoon break at 3 p.m., and when he joined the conversation Stokes came over to the group of employees. Stokes, on the other hand, denied that he ever walked over to the group or instructed the former employee to leave the premises. That testimony is contrary to the recitations of Stevens, Cooper, and Shelton. Moreover, I find that the issuance of the reprimands to these three employees was a continuation of the harassment that Stokes had embarked upon, and was confirmed by Niver at the June 28 lunch. Likewise, unless Gazarek left the conversation at the outset, it smacks of disparate treatment that he did not receive a written reprimand for his participation in the conversation. In this regard, Stokes testified that when he observed the group he noticed that Gazarek walked away, and that is the reason he did not receive a written reprimand. However, Stokes conveniently did not indicate at what point Gazarek left the discussion and his recitation is contrary to the three other employees who all testified that Gazarek was present during the majority of the discussion. Moreover, Shelton testified that Gazarek was present when he joined the conversation just after he commenced his afternoon break. Stokes rationale does not withstand scrutiny as he stated that he observed the group engaging in conversation for approximately 35 minutes before he instructed Niver to issue written reprimands to Stevens, Cooper, and Shelton. Therefore, Gazarek also should have received a written reprimand for his participation in the conversation. Unlike Gazarek, the three individuals that received the reprimand were known supporters of the Union.¹⁵

Based on the forgoing, I find that Stokes, in instructing Niver to issue the written reprimands to Shelton, Stevens, and Cooper relied upon pretextual reasons to mask the true reason for issuing the discipline. This was a continuation of the pattern of harassment that Stokes used to punish those employees who supported the Union and dared to establish a picket line at Respondent's facility.

Therefore, I find that the Respondent violated Section 8(a)(1) and (3) of the Act when it issued written reprimands to Shelton, Stevens, and Cooper. Accordingly, I find that the Respondent did not establish that it would have issued the reprimands to these employees even in the absence of their protected conduct.

6. Written reprimand issued to Michael Cooper

The General Counsel alleges in paragraph 8(f) of the complaint that Respondent issued Cooper on or about June 25, a written reprimand (GC Exh. 24).

¹⁵ It is noted that prior to the decertification election, Gazarek signed a letter requesting assurances from the Respondent that benefits would remain the same if the Union was decertified, thus, raising the inference that he would vote against retaining the Union as the bargaining representative.

(a) The facts

On June 25, Cooper was just finishing a job in the shop and was pulling the vehicle away from the repair bay. At that time, the receptionist paged Cooper to pick up an incoming telephone call. Stokes, who was in the service area, noticed that Cooper was pulling the vehicle away from the service bay and picked up the telephone. Stokes determined that the third party on the telephone wanted to know if Cooper was interested in buying a used car to either repair or use the spare parts. Stokes, determined that Cooper was running a competitive business on duty time, instructed Niver to issue the written reprimand to Cooper.

(b) Discussion

The record discloses that there was no policy against technicians receiving personal telephone calls while on duty time. Moreover, it was common knowledge among Respondent representatives that Cooper, who had worked for the Employer in excess of 10 years, had a business on the side to purchase and repair used cars. Cooper had been open and notorious about this venture and his outside work after hours and on weekends never interfered with his duties and responsibilities at Respondent. Indeed, he had never been disciplined previously for any conduct related to this outside business.

On June 25, the picket line was still being maintained outside the facility and Respondent was aware that Cooper was an ardent supporter of the Union. Moreover, on June 28, Niver told Cooper and two other employees that Hood could not control Stokes harassment but stated that the harassment would be stopping soon. Shortly thereafter, once the picket line was removed, the harassment ceased.

Based on the forgoing, I find that this was a continuation of the pattern of harassment that Stokes embarked upon during the month of June 2002, against selected employees that supported the Union. I find that Stokes used the telephone call from the third party as a pretext to mask the true reason for issuing the written reprimand.

Therefore, I find that the Respondent violated Section 8(a)(1) and (3) of the Act when it issued the written reprimand to Cooper.

7. Written reprimands issued to Michael Cooper and Gary St. Charles

The General Counsel alleges in paragraph 8(g) of the complaint that Respondent issued, on or about June 7, written reprimands to Cooper and St. Charles.

(a) The facts

On June 7, both Cooper and St. Charles were working on vehicles without wearing their safety glasses. Stokes happened to be in the service area and observed both employees working on vehicles without wearing their safety glasses. Stokes instructed Niver to issue both employees written reprimands for this infraction (GC Exh. 20(a) and (b)).

(b) Discussion

In November 2001, Respondent issued a memorandum to all employees reminding them that safety glasses must be worn in the shop while they were working on vehicles (R. Exh. 6).

Cooper, St. Charles and Amend testified that they knew that this was a requirement but they often forgot to wear the safety glasses and the policy was not regularly enforced by Respondent. I note that both Cooper and St. Charles signed their written reprimands on June 7 but Cooper and other employees refused to sign other written reprimands when they disagreed with their issuance (GC Exhs. 12, 21, 22, 23, 24).

On the date that the written reprimands were issued, I am aware that the picket line was ongoing in front of Respondent's facility. Moreover, I previously found that Stokes had embarked on a pattern of harassment against employees that supported the Union once the picket line was established. I note that while Cooper was an ardent supporter of the Union, St. Charles was the individual who filed the decertification petition and sought the removal of the Union as the exclusive collective-bargaining representative. Thus, I am not persuaded that the written reprimands issued to both employees were due to their protected conduct. Even assuming that antiunion sentiment was a substantial or motivating factor in issuing the written reprimands, I find that the Respondent would have taken the same action even if the employees had not engaged in protected conduct.

Therefore I find that the Respondent did not violate the Act as alleged in the complaint, particularly noting that Respondent maintained a definite policy of wearing safety glasses that was published and acknowledged by employees including Cooper, St. Charles, and Amend. Accordingly, I recommend that paragraph 8(g) of the complaint be dismissed.

III. RESPONDENT'S AFFIRMATIVE DEFENSE

The Respondent asserts in its answer that the allegations alleged in paragraphs 8(a) and (b) of the complaint should be deferred to arbitration pursuant to *Colyer Insulated Wire*, 192 NLRB 837 (1971).

In the subject case, there is no evidence to establish a "long established stable and productive bargaining relationship" as found by the Board in *National Radio Co.*, 198 NLRB 527 (1972), that deferred those complaint allegations to binding arbitration. Moreover, the charges herein involve allegations of union animus and a "pattern of action violative of Section 7 rights." Lastly, I note that the Board in the *The Seng Co.*, 205 NLRB 200 (1973), in similar circumstances to the subject case, declined to defer to arbitration where the Union had been decertified.

For all of the above reasons, I find that Respondent's affirmative defense should be denied.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by coercively interrogating employees concerning their union activity, advising an employee that he lost his job because of his union activities, and advising employees that they were being harassed because of their union activities.

4. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act by issuing written reprimands to employees Robert Shelton, Larry Stevens, and Michael Cooper, discharging employee Tony Amend, laying off employees Michael Cooper and Larry Stevens, and harassing and monitoring more closely the work of Larry Stevens and Michael Cooper.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) 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 laid off Larry Stevens, and Michael Cooper and discharged Tony Amend, 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 their layoff or 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).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁶

ORDER

The Respondent, Joseph Chevrolet, Inc., Millington, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating an employee about whether the employee was engaging in union activities.

(b) Advising an employee that he lost his job because of the employees' union activities.

(c) Advising employees that they were being harassed because of their union activities.

(d) Discharging, laying off, or otherwise discriminating against any employee for supporting Local 324, International Union of Operating Engineers, AFL-CIO-CLC.

(e) Issuing written reprimands to any employee because of their union activities.

(f) Harassing and more closely monitoring the work of any employee because of their union activities.

(g) In any like or related manner 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) Within 14 days from the date of this Order, offer Tony Amend, Larry Stevens, and Michael Cooper full reinstatement to their former jobs or, if those jobs no longer exist, to a sub-

stantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Tony Amend, Larry Stevens, and Michael Cooper 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) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Tony Amend, the unlawful layoffs of Larry Stevens and Michael Cooper and the unlawful written reprimands issued to Larry Stevens, Michael Cooper, and Robert Shelton, and within 3 days thereafter notify these employees in writing that this has been done and that the discharge, layoffs, or written reprimands will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Millington, Michigan, copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 7, 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 30, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that 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.

Dated, Washington, D.C. June 16, 2003

APPENDIX

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

¹⁶ 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 to them shall be deemed waived for all purposes.

¹⁷ If 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."

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 324, International Union of Operating Engineers, AFL-CIO-CLC or any other union.

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 NOT coercively question you about your union support or activities.

WE WILL, within 14 days from the date of the Board's Order, offer Tony Amend, Larry Stevens, and Michael Cooper 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.

WE WILL make Tony Amend, Larry Stevens, and Michael Cooper whole for any loss of earnings and other benefits resulting from their discharge or layoffs, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge, layoffs, and written reprimands of Tony Amend, Larry Stevens, Michael Cooper, and Robert Shelton, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharge, layoffs, or written reprimands will not be used against them in any way.

JOSEPH CHEVROLET, INC.