

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
SAN FRANCISCO, CALIFORNIA

T-WEST SALES & SERVICE, INC.,  
d/b/a DESERT TOYOTA,  
Respondent

and

28-CA-18478  
28-CA-18496  
28-CA-18503  
28-CA-18699  
28-CA-18726

INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE WORKERS,  
LOCAL LODGE 845, AFL-CIO, (formerly  
Local Lodge 744),  
Charging Party Union

*Joel C. Schochet*, Esq.,  
for the General Counsel  
*James M. Walters*, Esq.,  
for the Respondent  
*Dennis London*,  
for the Charging Party Union

DECISION<sup>1</sup>

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<sup>1</sup> This matter was heard at Las Vegas, Nevada on July 1-2 and 17, 2003. By letter dated November 4, 2003, the Regional office notified the undersigned that the Board had authorized the Region to seek 10(j) injunctive relief in cases that included cases considered in this decision.

Albert A. Metz, Administrative Law Judge. This case involves issues of whether the Respondent violated Section 8(a)(1), (3), (4) and (5) of the National Labor Relations Act.<sup>2</sup> On the entire record, including my observation of the demeanor of the witnesses, and after considering the parties’ briefs, I make the following findings of fact.

**I. JURISDICTION**

The Respondent, a corporation, operates a car dealership at its facility in Las Vegas, Nevada. 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 that the Union is a labor organization within the meaning of Section 2(5) of the Act.

**II. BACKGROUND**

On November 13, 2002, Administrative Law Judge, Lana H. Parke, issued her decision in JD (SF)-92-02 involving the same parties as this case. She found that since the latter part of February 2002 the Union had been designated by a majority of the Respondent’s employees as their collective-bargaining representative in the following appropriate unit:

All full-time and regular part-time service technicians, including Toyota technicians, used car technicians, accessory installers, and lube technicians employed by Respondent at its Las Vegas, Nevada facility; excluding all other employees, office clerical and professional employees, guards and supervisors as defined in the Act.

Judge Parke recommended that the Board issue a bargaining order directing the Respondent to bargain with the Union as the representative of the unit employees. She also found that the Respondent had committed various unfair labor practices, including that the Respondent

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<sup>2</sup> 29 U.S.C. §§157, 158 (a)(1), (3), (4) and (5):

**RIGHTS OF EMPLOYEES**

Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection....

**UNFAIR LABOR PRACTICES**

Sec. 8. [§ 158.] (a) It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization...,

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) to refuse to bargain collectively with the representatives of his employees....



On March 27, 2003, Wardle sent the Respondent another request for the names, addresses and telephone numbers of recently hired unit employees. The Respondent did not reply to his request.

5 It is axiomatic that an employer acts at its peril in refusing to bargain with a union while the union’s status is being contested. *L. Suzio Concrete Company*, 325 NLRB 392, 396 (1998), enf. 173 F.3d 844 (2d Cir. 1999); *Clements Wire & Manufacturing Company*, 257 NLRB 1058, 1058 (1981). To hold otherwise would punish employees while benefiting the violator of the Act. As the Board stated in *Maywood Donut Co.*, 256 NLRB 507, 508 (1981):

10 With respect to Respondent’s request to...stay these proceedings pending a determination in [the earlier unfair labor practice case] by the United States Court of Appeals for the Ninth Circuit, the request is denied. It is settled law that the pendency of collateral litigation does not suspend a respondent’s duty to bargain under Section 8(a)(5) of the Act. (citations omitted)

15 An employer’s obligation to bargain in good faith includes providing a union with necessary information that is relevant to the performance of its obligations as the employees’ bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). The Board and the courts apply a liberal, discovery-type standard of "probable or potential relevance" in determining whether a bargaining representative is entitled to requested information for these purposes. *Acme Industrial Co.*, supra.

20 The Respondent has been obligated to bargain with the Union since February 2002 the date that Judge Parke determined that a majority of the employees had designated the Union as their collective-bargaining representative. Based on this majority status she held that a *Gissel* bargaining order was part of an appropriate remedy for the Respondent’s unfair labor practices. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614-615 (1969) (“If the Board finds that the possibility of erasing the effects of past unfair labor practices and ensuring a fair election (or fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.”) The Respondent has not challenged the necessity or relevance of the information that the Union requested and I find that the information clearly deals with the employees’ wages, hours and working conditions and is relevant and necessary to the Union’s representative duties. *Watkins Contracting Inc.*, 335 NLRB 222 (2001); *Children’s Hospital*, 312 NLRB 920, 930 (1993), enf., 87 F.3d 304 (9th Cir. 1996); *Crown Coach Corp.*, 243 NLRB 984, 985 (1979). I conclude that the Respondent violated Section 8(a)(1) and (5) of the Act by refusing to provide the requested information to the Union and by refusing to bargain with the Union.

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### B. Unilateral Changes

45 The Government alleges that several acts of the Respondent are unlawful unilateral changes that involve the unit employees’ wages, hours and working conditions. The Respondent contends that most of the “changes” were nothing more than a reemphasis of existing rules, and in any case were not material, substantial and significant. It is undisputed that the Respondent did not notify or bargain with the Union about the following changes.

## 1. Performance Improvement Process

5 In a communication dated September 2002 the Respondent's parent company, AutoNation, informed its general managers that it had instituted "an important new program" at all of its dealerships called the AutoNation Performance Improvement Process (PIP). The purpose of the program was "to provide guidance on how to properly improve associate performance and document corrective action conversations." The letter was signed by the parent company's chief executive officer and its president and chief operating officer. None of AutoNation's general managers participated in the PIP's development. Part of the "rollout" of the PIP directed senior managers to hold meetings with managers and supervisors no later than 10 November 1, 2002, to explain the plan to them. All managers and supervisors were then required to complete computer-based training in the PIP by December 31, 2002.

15 The Respondent argues that the PIP was not a new program, but rather a reiteration of its old disciplinary system. The Government alleges that the documentation announcing the PIP clearly states it was a new program, and, importantly, the PIP added grounds for disciplining employees.

20 The 2000 edition of the AutoNation Associate Handbook (Human Resources Policies & Procedures) lists examples of 20 offenses that would subject an employee to discipline. The PIP contains a list of 35 such disciplinary offenses. Some of the new offenses added to the list included, "Poor attitude, including rudeness or lack of cooperation"; "Using company telephones for non-company purposes (except emergencies)"; "Wasting time, material, or effort, or interfering with others by action, excessive noise, or non-work related conversations" and 25 "Citations for DUI or DWI of any associate whose duties may include operation of Company vehicles, even if infraction occurred in a personal vehicle on his/her own time."

30 A unilateral change in represented employees' terms and conditions of employment is a mandatory subject of bargaining and is unlawful if the change is "material, substantial and significant." *Flambeau Airmold Corp.*, 334 NLRB 165 (2001). The Board has held that an employer's creating new grounds for discipline represented "material, substantial, and significant" unilateral changes from the status quo of employment conditions. *Bath Iron Works*, 302 NLRB 898, 902 (1991) (Adding discipline for employee offenses involving possessing drug paraphernalia and being convicted of a drug or alcohol related crime, mandatory subjects of bargaining. The Board additionally noted that the new offenses "introduced potential sanctions that could logically apply to conduct having no manifestation at all on the Respondent's premises, e.g., a drunk driving conviction arising from an incident during vacation."); *Sigma Network Corp.*, 317 NLRB 411, 415 (1995) (Respondent's addition of policies and increasing the discipline for violating previous policies were unlawful unilateral changes.) I find that the PIP was a material, substantial and significant change in the terms and conditions of employment of unit employees and was thus a mandatory subject of bargaining. *King Soopers, Inc.*, 340 NLRB No. 75, slip op. at 1-2 (2003) (Work rules that can be grounds for discipline are mandatory subjects of bargaining.); *Praxair, Inc.*, 317 NLRB 435, 436 (1995); *Tenneco Chemicals*, 249 NLRB 1176, 1180 (1980) (Performance standards that can be enforced by discipline have an effect on employees' job security and are therefore a mandatory subject of bargaining); *Murphy Diesel Co.*, 184 NLRB 757, 762 (1970), enfd. 454 F.2d 303 (7th Cir. 45

1971). I conclude, therefore, that the Respondent’s unilateral implementation of the PIP with regard to unit employees is a violation of Section 8(a) (1) and (5) of the Act.

**2. Discipline Pursuant to the PIP**

5           The Government alleges that because the Respondent’s institution of the PIP was an unlawful unilateral change, it follows that disciplining employees pursuant to the PIP also was unlawful. In addition, it is argued that the Corrective Action Record (CAR) – a written disciplinary form used to record corrective and disciplinary matters – was introduced as part of  
10 the new PIP, and, therefore, the issuance of CARs should likewise be a violation of the Act. The Respondent argues that there is no evidence that the PIP/CARs resulted in discipline that the employee would not have received before the PIP program was announced to management.

15           The CAR is a part of the new progressive disciplinary procedure instituted by the PIP. The worker is to be given the opportunity to sign the CAR and it is then made “a permanent part of the associate’s personnel record.” Since the Respondent has refused to recognize and bargain with the Union, it has had no say in negotiating about either the creation or implementation of the CAR as it relates to unit employees. I find, therefore, that the Respondent’s use of CARs to record discipline of employees as an integral part of its PIP program is a violation of Section  
20 8(a)(1) and (5) of the Act.<sup>3</sup>

**3. Passing out paychecks**

25           On December 20, 2002, the employees received a memo informing them that the Respondent was changing the time that they would receive their paychecks to 5:00 p.m. This change adversely effected service technicians because their work days ended before that time. The prior practice was to give service technicians their paychecks before 5:00 p.m. The change caused some technicians to have to remain after the end of their shifts in order to receive their checks. After a period of several weeks, and complaints from employees, the Respondent  
30 changed back to the prior practice of distributing paychecks before 5:00 p.m.

35           The Respondent explained that the change had been initiated to avoid department heads constantly calling in the afternoon to see if their checks were ready – a distraction that had caused problems for the payroll department. When it was called to Respondent’s attention that the new practice was presenting problems for the technicians the paycheck distribution was again revised to accommodate them. Thus, the Respondent argues the change was de minimis.

40           The Government proved that the change in the paycheck distribution policy did have an adverse effect on some employees. While the policy was ultimately modified, I do not agree with the Respondent that the change was thereby de minimis. Rather, I find that because of the inconvenience caused unit employees for a period of weeks the unilateral change was a material, substantial and significant change. I conclude that the Respondent did violate Section 8(a)(1) and  
45 (5) of the Act by unilaterally changing the paycheck distribution time.

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<sup>3</sup> See footnote 4 for the remedial breadth of this ruling.

**4. Mopping work areas**

5 The Government’s complaint alleges that in November 2002 the Respondent began requiring unit employees to mop up their service bays under threat of discipline. The Respondent defends against this allegation by arguing that the employees had always been responsible for keeping their service areas clean.

10 Respondent’s Service Department Director, Vincent Casucci, sent a reminder notice to employees in November 2002 reiterating the Respondent’s policy to keep their work areas clean. He noted that some of the technicians were “getting a little sloppy” and testified that problem resolved itself shortly after his memo.

15 Employees Clayton Lamoya, Richard Drugmand and Thomas Pranske testified that they had always been aware of the Respondent’ policy that they were responsible for keeping their service bay areas cleaned up. Employee Charles Frankhouse began working for the Respondent on August 12, 2002. He testified that no one had ever told him he had to mop his area. On December 5 Frankhouse was given a warning for failing to mop up his bay.

20 I find that the preponderance of the evidence shows that the Respondent did not make an unlawful unilateral change by enforcing its long standing policy of requiring employees to keep their service bays cleaned. I conclude that the Respondent did not violate Section 8(a)(1) and (5) by reiterating the policy in November 2002. I do, however, find that the CAR form given to Frankhouse for this infraction is an example of the unlawful implementation of the PIP plan and must be expunged from his personnel record.

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**5. Test drive route**

30 On January 3, 2003, Casucci distributed a memo to unit employees in which he discussed certain policies. One point stated that the Respondent was establishing a required route for test driving cars. The memo informed employees that if they deviated from the prescribed route they would be subject to discharge. No evidence was presented that test routes had ever been dictated before or subject to discharge

35 The Respondent argues that most technicians already used the same or similar route it prescribed. The Respondent explained that it had been in the process of acquiring property adjacent to the dealership, and some area residents had complained about dealership traffic in their neighborhood. In an effort to appease the neighbors the Respondent decided to prohibit test drives in the residential area south of the dealership.

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The record establishes that service employees had driven various routes when testing vehicles. There was no evidence presented that prior to the memo an employee would be subject to discipline because he drove a self-determined test route. The threat to discharge an employee for ignoring the restricted route is an important consideration in determining whether that unilateral change is material, substantial, and significant. I find that the Respondent’s unilateral implementation of the mandatory test route, which carried with it a penalty of termination, was a substantial unilateral change. I conclude, therefore, that the Respondent did thereby violate Section 8(a)(1) and (5) of the Act. *King Soopers, Inc.*, 340 NLRB No. 75, slip op. at 1-2 (2003).

**6. Prohibiting side work**

The Government alleges that the Respondent violated the Act by unilaterally establishing a policy against employees using its facilities to do private work on other person’s vehicles (“side work”). Casucci’s January 3, 2003, memo told employees that doing such private work was not permitted at any time. The memo’s prohibition ended with the pronouncement that, “Any Service Technician caught performing side work on any vehicle will be terminated on the spot.”

Employee Clayton Lamoya testified that he and a couple of other employees had done side work prior to the issuance of the memo. He testified that he ceased doing such work after receiving that document. The Respondent presented no evidence that it had a written rule pertaining to side work prior to Casucci’s memo. Casucci, however, credibly testified that the Respondent had always had a policy against such activity because it amounted to employees using company facilities, supplies and equipment for their personal gain. Casucci testified that the item dealing with side work was published due to his learning that some employees were engaged in such activity. I credit Casucci’s testimony that his memo was restating an established policy prohibiting side work. The additional element of the side work memo, however, was the threat that employees would be fired “on the spot” for engaging in such activity. The Respondent offered no evidence that this punishment had ever been a part of its existing side work policy. I find that this punishment proclamation is a substantial, material and significant change in the Respondent’s policy and is a mandatory subject of bargaining. I conclude, therefore, that the Respondent’s unilateral change in dictating immediate discharge for side work did violate Section 8(a)(1) and (5) of the Act. *King Soopers*, supra.

**7. Changing employees’ work schedule**

Casucci’s January 3 memo also stated that employees’ work hours would start at 7:00 a.m. and conclude at 4:30 p.m. Prior to this date some unit employees worked schedules that differed from these hours.

Work schedule changes are mandatory subjects of bargaining. *Pepsi-Cola Bottling Co. of Fayetteville*, 330 NLRB 900, 902 fn. 19 (2000); *Our Lady of Lourdes Health Center*, 306 NLRB 337, 339 (1992). I find, therefore, that the Respondent’s change in unit employees’ work hour schedules without providing the Union notice and an opportunity to bargain about the subject was unlawful. I conclude that the Respondent thereby violated Section 8(a)(1) and (5) of the Act. *Indian River Memorial Hospital, Inc.* 340 NLRB No. 58 slip op. at 2-3 (2003) (Unilaterally changing shift schedules and on-call procedures found to be 8(a)(5) violation.)

### 8. Assignment of extended warranty work

5 The complaint alleges that the Respondent violated Section 8(a)(5) of the Act when on or about February 19, 2002, it began assigning extended warranty work to used car technicians. The evidence shows that employee Charles Frankhouse wanted to do extended-warranty work, which gave him the opportunity to earn more money while working fewer hours. Casucci had agreed to this assignment for Frankhouse when he hired him. Around February 2002 Frankhouse observed that some other technicians were doing extended warranty work. When he complained about the matter, Casucci explained to him that the others had gotten the work because he had not finished a job on a Dodge vehicle. Frankhouse replied that he had finished his work on the car, and Casucci said he would then tell Frankhouse’s supervisor to give him the extended warranty work. No further assignments of extended warranty work were made to other employees thereafter through the remainder of Frankhouse’s employment with the Respondent.

15 I find that this short assignment of work was not substantial or material enough to constitute an unlawful unilateral change under the provisions of the Act. I find that the Respondent did not violate Section 8(a)(1) and (5) of the Act by this temporary assignment of extended warranty work.

### 9. Changing employees’ paydays

20 The Government alleges that the Respondent unlawfully changed unit employees’ paydays. On March 20, the Respondent issued a memo changing its semi-monthly paydays from the 5th and the 20th of each month to the 10th and the 25th. Paydays are a mandatory subject of bargaining, and I find that by unilaterally changing the paydays the Respondent violated Section 8(a)(1) and (5) of the Act. *Abernathy Excavating*, 313 NLRB 68, fn. 1 (1993); *American Ambulance*, 255 NLRB 417, 421 (1981), enfd. 692 F.2d 762 (9th Cir. 1982).

### 10. Requiring employees to use the time clock

30 The Government alleges that the Respondent unilaterally required employees to punch time clocks. The Respondent contends it has always maintained a time clock policy. Several employees testified that they had not regularly punched the time clock when coming to and leaving work. This is contrary to the Respondent’s written policy as demonstrated by a signed statement that employees are required to sign upon being hired --“all personnel punch in and out on the time clock daily.” The record does not demonstrate that the Respondent had a general disregard for its time clock policy prior to the union activity at the facility. I find that the Government has failed to prove by a preponderance of the evidence that requiring employees to use the time clock was an unlawful unilateral change. I conclude that the Respondent did not violate Section 8(a)(1) and (5) of the Act by enforcing its existing time clock policy.

## IV. THE RESPONDENT’S ACTIONS AGAINST PRANSKE

45 The Government alleges that various actions that the Respondent took against employee Thomas Pranske violated the Act. The Respondent argues that it only imposed discipline against Pranske because of legitimate concerns surrounding his work.

### A. Brake Rotors

5 On January 24, 2003, Casucci gave Pranske a CAR for disputed work Pranske had done on some brake rotors. Casucci told Pranske that the vehicle's owner had brought it back, claiming that it was not fixed. Frankhouse worked on the vehicle when it was returned and reported to supervision he found that the rotors were warped, and they were cut under specifications. Thus, the dispute centered on whether Pranske should have replaced warped and under specification brake rotors. In addition, the CAR stated that Pranske had missed diagnosed a noisy drive shaft spline binding which was caused by dried grease. Pranske had worked on the vehicle 40 days prior to the warning and the vehicle had traveled 337 miles in the interim.

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15 Casucci questioned Pranske as to whether he had measured the rotors. Pranske told him that he did not because he had been a technician long enough to know when rotors were too thin. Pranske also argued that because of the time and mileage that had elapsed since he worked on the vehicle any problems with the brakes or driveline could not be attributed to him. Casucci told Pranske that he was giving him a warning because he was taking a harder stand for customer satisfaction index purposes.

20 Pranske was upset about receiving the warning and walked out of Casucci's office after signing the warning. Pranske then retrieved the rotors and measured them with his micrometer. He determined that the rotors were over spec. Pranske subsequently went to Casucci's office and told him that he had a problem with the write-up. He invited Casucci to check the rotors. Pranske measured the rotors in front of Casucci and they were over specification. Pranske also questioned whether they were warped. The men went to the brake lathe to see if the brakes were warped. Before the brakes were tested for warping, Casucci borrowed another technician's micrometer. Casucci measured the rotors and they were thicker than when they had been measured with Pranske's micrometer. Casucci was unsatisfied by this measurement and stated that the micrometer was not zeroed out. After the micrometer was adjusted, Casucci again measured the rotors and they measured even thicker.

30 Pranske then put one of the rotors on the lathe, where it showed that it was not warped. Pranske asked Casucci if he should test the second rotor, and Casucci said that it was not necessary. Casucci said he wanted to discuss the matter with Frankhouse as he was the employee who had reported the problem.

35 After lunch on Monday, January 27, Pranske met with Casucci, Service manager, Dave Pedersen and Frankhouse. Casucci said that he had checked the rotors with Frankhouse's micrometer and one of the rotors was under spec. Casucci said that he had changed Pranske's warning to reflect that only one rotor was under spec. Pranske had Casucci bring technician Ted Gardner to the office to discuss the spline binding problems. Gardner had worked on the vehicle after Pranske and he told the men he did not recall hearing any noise, and that if he had, he would have examined the vehicle on a lift. Despite Gardner's recollection, Casucci did not remove the comments about the drive shaft binding from the warning. Casucci, however, did give Frankhouse a CAR for not having his micrometer properly calibrated.

### B. Inspection and Insubordination Warnings

On January 29 Casucci summoned Pranske to the office to receive an additional CAR. Casucci told Pranske the warning was being issued because he had performed a safety check on a used vehicle and it was sold with leaks. Pranske explained that New Car Manager, Steve Velasquez, had told him to do a bare-bone inspection of the vehicle, and that Pranske had followed that direction. Pranske said that Velasquez, assistant used car manager Francisco Novoa and Company Car Buyer, Steve Candelaria, had gone to Pranske and asked him how much it would cost to do a full inspection on a 1992 Saturn. Pranske explained that it would cost over \$100 for an hour-and-a-half inspection, plus another half hour for a smog inspection. Velasquez told Pranske to go ahead but just to do the safety items. Pranske did the inspection as instructed and wrote up the job for one and half hours, plus the half hour for smog inspection. Pranske testified that had been asked to do quick safety inspections before, and he had recorded them in the same manner. Casucci was not satisfied with Pranske’s explanation and said that there was not enough documentation concerning the car. Pranske went and got Novoa and Candelaria, they then met with Casucci. Novoa and Candelaria told Casucci that Pranske had done exactly what Velasquez had told him to do. Casucci said that he could not believe that. Pranske became angry at Casucci’s response and told him the warning was a bunch of “b.s.,” that Casucci should quit “screwing” with him, and that he was getting the warnings because of “union bullshit.” Casucci told him that he was taking a harder stance and that type of behavior was not going to be tolerated. The men went into an office and at the conclusion of their discussion Pranske left the office and slammed the door. Casucci went to Pranske on the floor and told him to go home for the rest of the day.

On January 31 Casucci gave Pranske a second CAR for his “insubordinate” behavior in response to having received the warning concerning the safety check. The CAR notes Pranske’s protesting the earlier warning by stating, “This isn’t fucking right.”

The General Counsel has the initial burden of establishing that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support such a showing of discriminatory motivation are union activity, employer knowledge, timing, and employer animus. Once such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Electromedics, Inc.*, 299 NLRB. 928, 937 (1990), enfd. 947 F.2d 953 (10th Cir. 1991). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. sub nom. 705 F.2d 799 (6th Cir. 1982). Violations of Section 8(a)(4) of the Act are also analyzed using the *Wright Line* test. *McKesson Drug Co.*, 337 NLRB 935, 936 (2002).

An Employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *GSX Corp. v. NLRB*, 918 F.2d 1351, 1357 (8th Cir. 1990).  
 5 Furthermore, if an employer does not assert any business reason, other than one found to be pretextual by the judge then the employer has not shown that it would have disciplined the employee for a lawful, non-discriminatory reason. *Aero Metal Forms*, 310 NLRB 397, 399 fn. 14 (1993); *T&J Container Systems, Inc.*, 316 NLRB 771 (1995).

10 Pranske’s union activities were known to the Respondent because his signed union authorization card was a matter of record in the hearing before Judge Parke. Additionally, he had given testimony in that earlier proceeding which was adverse to the Respondent. The timing of the warnings Pranske received were two months after Judge Parke’s decision. The Respondent has employed Pranske as a used car mechanic for three years and he had not received any  
 15 warnings prior to the incidents described above. Finally the element of union animus was established by the Respondent’s unlawful conduct that Judge Parke found violative of the Act and Respondent’s actions found to violate the Act in this decision. I find, therefore, that the Government has established the necessary preliminary showing that the discipline given to Pranske was motivated by his union activities and his having given testimony against the  
 20 Respondent.

The Respondent argues that Pranske was not discriminated against and merely received disciplinary warnings that resulted from his work related problems. With regard to the first warning that centered on the disputed brake work the evidence shows that the matter arose when  
 25 a fellow employee, Frankhouse, questioned Pranske’s work. The warning given to Pranske was eventually modified to reflect Casucci’s reassessment of the matter in light of new evidence called to his attention. Frankhouse also received a warning for his perceived misreporting of part of the problem. I find that the Government has not shown by a preponderance of the evidence that the January 24 warning given to Pranske was motivated by his union activities or because of  
 30 his testimony. I conclude, with respect to that warning, that the Respondent has presented sufficient evidence that Pranske would have received that CAR regardless of his union or other protected concerted activity.<sup>4</sup>

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 4 I have found above that CARs were unlawfully implemented as part of the PIP program. I restrict that finding to the actual issuance of the CARs and distinguish the Respondent’s right to discipline employees for nondiscriminatory reasons. The Respondent is normally privileged to correct or punish employees for poor work or similar problems that occur in the  
 40 ordinary course of business. *Barnard College*, 340 NLRB No. 106 (2003) (“[T]he fact that one party has violated the Act in a particular way does not give the other party carte blanche to engage in any conduct that he chooses.”) Thus, to the extent that this decision finds the Respondent disciplined employees for nondiscriminatory reasons, I find those disciplines are not subject to remedial correction except for the expunging from the Respondent’s records of  
 45 all CARs issued to unit employees and not, in any way, using them as part of the Respondent’s unlawful implementation of its PIP program.

5 The second and third warnings that Pranske received flowed from his being asked to perform an abbreviated inspection of a used car. I find that the Respondent has not satisfactorily explained Casucci’s actions in rejecting the corroboration stated by Novoa and Candelaria that Pranske had done precisely what he had been instructed to do by higher authority. Based on demeanor and the record as a whole, I do not credit Casucci that he was merely disciplining Pranske for faulty work performance relating to the used car inspection. Likewise, the third warning that resulted from Pranske’s frustration about receiving the undeserved second warning was a continuation of what I find was discriminatory action taken against him because of his union activities and his testimony. I find that the Respondent has not proven it would have given these warnings to Pranske regardless of his protected activities. I conclude, therefore, that the Respondent did violate Section 8(a)(1), (3) and (4) of the Act by giving Pranske the January 27 and 31 warnings.

15 **V. FRANKHOUSE**

Charles Frankhouse had previously worked with Casucci at a California Toyota dealership. Both men were members of the Union while working at that dealership. Frankhouse subsequently met Casucci by chance in Las Vegas and Casucci solicited him to come to work for the Respondent. Frankhouse accepted and commenced work on August 12, 2002.

**A. October 2002**

25 Frankhouse started attending Union meetings after he began work for the Respondent. Frankhouse also had a Union sticker displayed on his toolbox at work. In approximately October 2002 some employees noticed the sticker and talked to him about union benefits. Frankhouse subsequently inquired of Casucci whether the Respondent had a pension plan for the service technicians. Frankhouse testified that Casucci told him that the Respondent did not have such a plan but did offer employees a 401(k) plan. Casucci asked Frankhouse why he wanted to know about the pension plan and Frankhouse told him that some employees had asked him about union benefits. Frankhouse testified that Casucci told him that it was not a good idea to talk about the Union and that the employees in the shop were not interested in the Union. Casucci said that if Frankhouse continued to speak to employees about the Union, he would be segregated from other employees.

35 Casucci testified that he recalled discussing benefits with Frankhouse who had asked him about a pension plan. Casucci recalled informing him of the 401(k) but did not recall them discussing anything about the Union.

40 Based on the demeanor of the witnesses while testifying about this incident, Casucci’s admission that he did not “recall” any discussion about the Union and the persuasive recollection exhibited by Frankhouse, I credit Frankhouse’s version of events.<sup>5</sup>

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5 It is noted that while Frankhouse’s testimony is credited in this instance, that is not the case regarding some of the rest of his testimony discussed in this decision. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 754 (2d Cir. 1950) (“Nothing is more common in all kinds of judicial decisions than to believe some and not all [of what a witness says”]); *Champion*

Continued

The test of whether an employer’s remarks or actions violated Section 8(a)(1)'s prohibition against interference, restraint or coercion is not whether it succeeds or fails, but, rather, the objective standard of whether it tends to interfere with the free exercise of employee rights under the Act. *NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1044 (4th Cir. 1997); *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 490 (1995). Having credited Frankhouse, I find that the Casucci’s remarks to him did tend to interfere with employee’s Section 7 rights. I conclude, therefore, that the Respondent did violate Section 8(a)(1) of the Act by warning Frankhouse about discussing the Union and threatening that he would be segregated from other employees.

**B. December 5, 2002**

On December 5, 2002, Frankhouse received a written warning for having a sloppy work area and was told to clean it up daily. Frankhouse testified that he had never been told he was required to mop his service bay, and the only employees he observed mopping the bays were service porters (who are not part of the bargaining unit). Other employees testified that they had been told to keep their service bays clean. Frankhouse did not deny that his work area was in need of cleaning. I find that this warning was a routine work matter and was not shown to have anything to do with Frankhouse’s union or protected concerted activities. I find that the Respondent did not violate Section 8(a)(1) and (3) of the Act by disciplining Frankhouse for not keeping his work area clean.

**C. January 28, 2003**

On January 28 Casucci gave Frankhouse the previously discussed warning for not accurately measuring the brake rotor for which Pranske was also disciplined. I find that warning has not been shown to have had anything to do with Frankhouse’s union or protected concerted activities, rather the evidence demonstrates that it was given as a routine matter for what was perceived by the Respondent to be poor workmanship. I conclude, therefore, that the Respondent did not violate Section 8(a)(1) and (3) of the Act by issuing this warning to Frankhouse.

**D. February 25, 2003**

The Government alleges that on February 25 the Respondent threatened Frankhouse with an unspecified reprisal because he made a request to have a fellow employee represent him at a disciplinary hearing. It is further alleged that Frankhouse was discriminatorily discharged on this date. The Respondent denies any threat occurred and Frankhouse’s February 25 discharge was solely the result of his work misconduct.

The events surrounding the February 25 incident started with Frankhouse and Used Car Manager, Aaron Morey, getting into an argument outside of the reconditioning office. Several

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*Papers, Inc. v. NLRB*, 393 F.2d 388, 394 (6th Cir. 1968) (“A factfinder - jury, judge or administrative agency - is not barred from finding elements both of truth and untruth in a witness’ testimony.”); *NLRB v. Pat Izzi Trucking Co.*, 395 F.2d 241, 244 (1st Cir. 1968) (“That part of a witness’ testimony is not believable does not of itself destroy the rest.”)

witnesses testified about this situation, and the following are my findings of what the credible evidence shows occurred. Frankhouse was very loud and swearing during the argument. Casucci was in another part of the shop and heard the commotion. Casucci and Service Manager, Dave Pedersen, ran to the reconditioning office to investigate what was happening. After discussing the dispute with the men, Casucci invited Frankhouse into an office. Frankhouse asked to have a representative present with him and Pranske was summoned. Frankhouse was still very upset during the meeting. During the discussion in the office Pranske tried to persuade Casucci to only give Frankhouse a suspension because of his conduct. Casucci, however, decided to discharge Frankhouse. Approximately a week later Frankhouse was reinstated following a review of the matter by Layla Holt, Human Resource Manager for AutoNation.

Frankhouse testified that when he requested a representative be present on his behalf that Casucci told him that it was going to be harder on him if he had a witness in the meeting. Casucci testified that when Frankhouse made his request he said, “Charlie, come on. Let’s go in the office. Let’s just talk about it. We’ll fix whatever it is.” Frankhouse, insisted on having a witness and Casucci recalled saying, “Fine. No problem.” Pranske was nearby during all of the events surrounding the argument and he testified that Frankhouse was using abusive language. Frankhouse asked Pranske to accompany him into the meeting. Casucci told Frankhouse that he really did not need Pranske. Frankhouse insisted, however, and Pranske recalled that Casucci said if it was all right with Pranske to serve in that capacity he could join them in the meeting. Pranske testified that at no point did he hear Casucci say anything to Frankhouse to the effect that it would be harder on him if he had a witness.

Pranske testified that in the subsequent meeting he tried to intervene on Frankhouse’s behalf, by suggesting that Frankhouse only be suspended. Casucci and Pedersen said they needed 15 minutes to think it over. Casucci testified that Frankhouse continued to make “a big ruckus” as he left the office. Pranske’s recollection was similar:

And on the way out the door, Charlie was...still being abusive, and telling Vinnie and David that nothing is going to change. “Aaron’s still not going to treat me fair.”... [H]e wouldn’t stop being disruptive in the...meeting, when I was trying to get him out of the door so they could talk. And I finally...kind of like grabbed on to his shoulders, “come on Charlie, let’s go.” And we left the room.

Casucci testified that he was willing to consider Pranske’s suggestion concerning a suspension in lieu of termination, but even as Pranske was guiding him out of the office, Frankhouse was “still ranting. . . .And you know, pretty much at that point, I just threw my hands up in the air. I can’t help no more.” Frankhouse and Pranske were subsequently recalled to the office and Casucci told Frankhouse that he was being terminated. Pranske testified that he told Frankhouse, “I’m sorry, I tried, but you wouldn’t shut-up.”

Considering the demeanor of the witnesses I found Casucci and Pranske to have the more accurate recollection of what was said on February 25. I credit their testimony and find that the Government has failed to prove by a preponderance of the evidence that Casucci threatened Frankhouse for having requested a witness. I conclude, therefore, that the Respondent did not violate Section 8(a)(1) of the Act as alleged in the complaint regarding the February 25 incident.

Regarding Frankhouse’s discharge, the Government has shown that Frankhouse was a known union supporter and that the Respondent (through its violations of the Act set forth in this decision) did demonstrate union animus. The timing of Frankhouse’s February 25 discharge was contemporaneous with his union activities. I find, therefore, that the Government has established the necessary prerequisite to determining Frankhouse’s termination under *Wright Line*. In considering the Respondent’s defense to the discharge I find that it proved that Frankhouse was being loud and abusive in the shop to the extent that it was easily observable by shop employees and possibly the public. Casucci attempted to calm the situation and investigate the matter. Frankhouse remained loud and uncooperative and this ultimately resulted in his temporary termination. I find that the Respondent has met its burden of showing that it would have discharged Frankhouse on this occasion regardless of his union or other protected concerted activities. I conclude that the Respondent did not violate Section 8(a)(1) and (3) of the Act when it discharged Frankhouse on February 25, 2003. *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

**E. April 2, 2003**

On April 2 Casucci and Pedersen held an employee meeting during which technicians were told that, for safety reasons, they should leave work by 6:30 or 7:00 p.m. Frankhouse retorted that he would leave work when he wanted to. Frankhouse received a written admonishment for insubordination as a result of his uncooperative attitude at the meeting. This warning is not alleged by the Government to have violated the Act.

**F. April 17, 2003**

The Government alleges that on April 17 the Respondent promulgated an overly broad and discriminatory no-solicitation rule by telling “employees” they:

1. Could not talk to any other service technicians, customers, and anyone else, including outside of work,
2. They had to inform their supervisor, Aaron Morey, that they were leaving their workstation; including leaving for lunch and the length of time they would be away from their workstation,
3. They had to secure permission from Aaron Morey to leave their workstation, and,
4. They were prohibited from going to other auto dealerships.

Additionally, the Government alleges that the Respondent unlawfully isolated and imposed onerous working conditions on Frankhouse. The Respondent denies that it unlawfully engaged in any of these acts.

On approximately April 17 Frankhouse was working on a Honda vehicle. He decided on his own that it would be helpful for him to drive the car to a local Honda dealer to perform diagnostic tests. Frankhouse did then take the car to the other dealership without telling Respondent’s supervision what he was doing. While at the Honda shop he telephoned the owner to ask her about the car’s problems. He then returned to the Respondent’s dealership.

At some point before Frankhouse took the car to Honda, the vehicle’s owner telephoned Service Manager Dave Pedersen to inquire about the progress of the repairs. Pedersen told her that he was watching Frankhouse work on the car at that moment. Casucci testified that Pedersen reported to him that approximately 20 minutes later the owner had called back and said that there was no way he had seen Frankhouse working on the car because Frankhouse had just telephoned her from the Honda dealership.

Casucci testified that Respondent’s General Manager, Bob Carmendy, had been contacted by the owner and he brought he complaint to him. Casucci recalled that Frankhouse’s action had created a “very uncomfortable situation” because nothing was making sense to the customer and she was irritated and frustrated. Casucci testified that as a result of the incident he told Frankhouse he did not want him talking to customers. He also told him not to take cars to other dealers because, “I can’t have somebody unauthorized bringing a vehicle to another facility, that I might be charged.” Casucci also noted that Frankhouse had been “disappearing a lot.” Casucci told Frankhouse that if he had a problem with a vehicle that he could not fix, he was to inform supervision who would get the car to the manufacturer dealer under controlled circumstances. Casucci recalled that a few minutes later Frankhouse came up to him and Pedersen and, in a scenario that reminded him of the “Twilight Zone”, voiced to Pedersen that Casucci had just told him he could not talk to customers, people at work, friends or technicians. Casucci questioned Frankhouse as to what he was talking about, and reiterated, “Just please, don’t talk to Desert Toyota customers. That’s it. I don’t care what you do after work. Talk to your co-workers, but please do not talk to customers.”

Frankhouse stated that normally the service writer would speak to customers, but he would do so “on occasion.” He remembered that the vehicle’s owner was upset when he told her that he was working on the car at the Honda dealership and she told him that somebody is “lying to me.” Frankhouse testified that when he returned to the Respondent’s shop Casucci was angry about him speaking to the customer and going to Honda with the car. Casucci told him that he was not to speak to anyone in or out of the dealership, and not to go anywhere without clearing it with Morey, and “he said he didn’t want me going to any more dealerships.” He recalled that a few days later, Casucci came to him and said he only had to tell Morey when he was going to test drive a car or go to lunch.

The respective demeanor of the witnesses leads me to credit Casucci as to what he told Frankhouse about restrictions on his activities and the reasoning behind those restrictions. I find that the Respondent’s reaction to Frankhouse’s unauthorized taking of the vehicle to another dealer, and the resulting customer distress this caused, was a legitimate business response to the situation that Frankhouse had created. The Government has not shown by a preponderance of the evidence that the restrictions given to Frankhouse were the result of his union or other protected concerted activity, and, therefore, I conclude that the Respondent did not violate Section 8(a)(1) and (3) of the Act by imposing the restrictions upon him.

**G. April 24, 2003**

5 The Government alleges that on April 24 the Respondent gave Frankhouse an undeserved CAR. The Respondent argues that the personnel action was issued to Frankhouse only because of his careless work and record keeping.

10 Frankhouse was written up on April 24 regarding a vehicle that was returned for service after he had worked on it. The car had additional oil leaks that he apparently had not detected. He was notified that he should dedicate more time to quality control of his repairs, use a 5 mile test drive route to check on his engine repairs and be sure to record his in/out miles in the designated place on the Respondent’s repair records. I find that the preponderance of the record evidence does not establish that this written warning was motivated by Frankhouse’s union or protected concerted activities. I conclude that the Respondent did not violate Section 8(a)(1) and (3) of the Act by giving Frankhouse the April 24 warning.

**H. Frankhouse’s termination**

20 On May 7 Casucci called Frankhouse into the office to reprimand him about his poor work on a car that had been returned with continuing brake problems. Casucci also intended to chastise him for his continued disregard of instructions to record mileage when he took a vehicle out of the shop. Also present at the meeting were supervisor Pedersen and employee Pranske, who was present to represent Frankhouse. It is undisputed that Frankhouse became agitated as the men discussed the work problems and he eventually walked out in the middle of the meeting. Frankhouse then went to his toolbox, locked it and left the premises. Pranske testified that he sarcastically commented on Frankhouse’s behavior to the two supervisors by stating, “Well that went real well.”

30 Approximately a day later Frankhouse returned to the Respondent’s dealership to pick up his pay check. Casucci and Pedersen talked to him and Casucci told Frankhouse that he would telephone the next day to let him know what was going on with his employment situation. Pedersen asked Frankhouse for his phone number and Frankhouse replied that Pedersen could get it from the personnel department. Casucci testified that Pedersen said, “Come on Charlie; just give me the phone number.” Frankhouse asked if Pedersen was “too lazy to go up there and get it.” Casucci then intervened and told Frankhouse, “Charlie, please go. I’m going to go to personnel...to... get your telephone number. . . . [J]ust please leave.” Finally Casucci testified that he discharged Frankhouse and told him, “Charlie, you know, we just can’t have it anymore...I just can’t stick up for you anymore.”

40 Pedersen subsequently wrote in Frankhouse’s personnel records that the termination resulted because:

45 Differences are irreconcilable – Charles has made the decision to commit acts of insubordination too many times and has shown absolutely no remorse or effort to refrain from this behavior. For this reason we have decided to terminate his employment.

As noted above, I found that the Government met its burden of making a preliminary showing that is sufficient to analyze the Respondent’s actions concerning Frankhouse under the

5 *Wright Line* standards. With regard to his final termination in May, the Respondent has proven by the credible evidence that Frankhouse walked out of a disciplinary meeting and left the premises. Upon his return he uncooperatively would not give Pedersen his home phone number. The record demonstrates that this was the final event in a long series of confrontations and work problems that the Respondent attributed to Frankhouse. Despite numerous warnings and Casucci’s efforts to tolerate Frankhouse’s idiosyncrasies, matters had not worked out to the Respondent’s satisfaction and Frankhouse was terminated. I find that the record as a whole demonstrates that the Respondent has proven that it would have discharged Frankhouse on this second occasion without consideration for his union or protected concerted activities. I conclude that the May 2003 discharge of Frankhouse did not violate Section 8(a)(1) and (3) of the Act.

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**VI. EMPLOYEE WORK OPPORTUNITIES**

**A. Decreasing the Work of the Unit as a Whole**

15 The Government’s complaint alleges that the Respondent hired new employees into the unit in an unlawful effort to diminish work opportunities for union supporters. From September 2002 to June 25, 2003, the Respondent hired 15 unit employees. During that same period, 13-14 unit employees left the Respondent’s employ. The Government’s post-hearing brief concedes that, “In light of this evidence produced at the hearing showing that both the unit and the available work remained fairly constant, there is little support for this allegation.” I concur and find that the Respondent did not violate Section 8(a)(1) and (3) of the Act by hiring employees for work within the collective-bargaining unit.

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**B. Reducing Flag Hours of Union Supporters**

25 The Government alleges that from January 1, 2003, through May 31, 2003, the Respondent reduced the flag or flat rate hours earned by employees who had signed cards with the Union. “Thus, although it does not appear that the Respondent decreased the average work given to technicians, it decreased the amount of work assigned to Union supporters, thereby lowering their income.” (G. C. Brief, at 23)

30 The Government points out that the Respondent had knowledge of which unit employees supported the Union because their union authorization cards were introduced into evidence in the hearing before Judge Parke. The Government argues that based upon this knowledge the Respondent set about retaliating against union supporters by decreasing the number of flag hours (flat rate hours) assigned to them. The Government bases this argument on a work hour comparison with other employees who did not sign union cards including Jim Stidham and Jim Breeden. The Government prepared a table of work hours of the months of January through May for the years 2002 and 2003 (G. C. Brief, Attachment A). The Government concludes that this flag hour comparison demonstrates unlawful discrimination in the work assignments. I cannot agree with that conclusion.

35 The table does show that some card signers did work noticeably less hours in 2003 (Bryant and Pranske); that employees Contreras, Halter, Nabizada and Stidham only worked 2-3 of the months used for the 2003 comparison; and that union supporters Miller, Schwarz, and Wilson worked significantly more hours in the comparative 2003 period. The table also shows that Breeden, who apparently did not support the Union, worked significantly more flag hours in

2003. For the same 2003 period, however, Stidham worked less in one month, more in two months and no longer worked for the Respondent in the remaining two months of the comparison period.

5 Since Pranske is included in this group and did work less flag hours in 2003, I have particularly scrutinized his situation in light of the finding that he was given unjustified warnings for his protected activities. Pranske’s 2003 reduced flag hours were very similar in three of the months as those of Stidham whom the Government argues was unjustly rewarded because of his antiunion attitude. The same conclusion results when comparing Pranske with Gardner, who did not sign a union card. Thus, while Pranske’s 2003 reduced hours are suspicious, it is much less so when his 2003 monthly hours are compared with these two nonunion supporters as well as the unit employees as a whole.

15 The Respondent argues that it did not discriminatorily change the work assignments of employees who supported the Union. The Respondent points out that the number of flag hours available for assignment varies greatly on a monthly basis. Importantly, the total shop hours also dropped from 9,000 in January of 2002 to 7,000 in May of 2003. Casucci testified that he attributed this decrease to the opening of Centennial Toyota, a fourth Toyota dealership in the Las Vegas area. An analysis of the comparative total monthly flag hours (using the General Counsel’s Attachment A figures) shows that all the listed technician employees worked 17% fewer flag hours in the 2003 period.

MONTH	2002 FLAG HOURS	2003 FLAG HOURS
January	3181	3120
February	2913	2746
March	3525	2633
April	3314	2876
May	3568	2698
<b>Total</b>	<b>16501</b>	<b>14073</b>

30 In sum, the evidence shows that the comparative periods are relatively short, the records demonstrate a mixed picture of some union supporters working more hours in 2003 while some worked less, there was a decrease in total flag hours worked between the 2002 and 2003 periods, and there is no substantial evidence that the Respondent had motivation to assign less work to union supporters generally. I find the General Counsel has not met the weighty initial burden of showing that the Respondent discriminated against technician employees who supported the Union by decreasing their flag hour assignments in the designated 2003 period. I conclude the Respondent did not violate Section 8(a)(1) and (3) of the Act in its assignment of flag hours to its unit employees. *Wright Line*, supra.

40 **CONCLUSIONS**

45 1. T-West Sales & Service, Inc., d/b/a Desert Toyota, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The International Association of Machinists and Aerospace Workers, Local Lodge 845, AFL-CIO, (Formerly Local Lodge 744), is a labor organization within the meaning of Section 2(5) of the Act.

5 3. The Respondent has violated Section 8(a)(1), (3), (4) and (5) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

10 5. The Respondent has not violated the Act except as herein specified.

**ORDER** <sup>6</sup>

15 The Respondent, T-West Sales & Service, Inc., d/b/a Desert Toyota, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from:

20 (a) Giving undeserved disciplinary warnings to employees because they engage in union or protected concerted activity or because they filed charges or have given testimony under the Act.

(b) Unilaterally implementing the Performance Improvement Plan for unit employees, including giving Corrective Action Records to unit employees.

25 (c) Refusing to bargain in good faith with the International Association of Machinists and Aerospace Workers, Local Lodge 845, AFL-CIO, (Formerly Local Lodge 744), including refusing to supply the Union with all relevant and necessary information it requests for purposes of representing employees in the collective-bargaining unit described below.

30 (d) Unilaterally making material, substantial and significant changes in employees' terms and conditions of employment, including plans and procedures for correcting and disciplining employees, changing the distribution time for pay checks, changing employees' work hour schedules, and changing pay days.

35 (e) Threatening employees with discharge for not following its unilaterally imposed work rules, including failure to comply with a set test drive route and doing side work.

(f) Threatening employees about discussing union activity.

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

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45 <sup>6</sup> The Respondent filed a post-hearing motion to correct various errors in the transcript. The motion is unopposed. I, hereby, grant the Respondent's motion and receive it into evidence as Respondent's exhibit 36.

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

5 (a) On request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

10 All full-time and regular part-time service technicians, including Toyota technicians, used car technicians, accessory installers, and lube technicians employed by Respondent at its Las Vegas, Nevada facility; excluding all other employees, office clerical and professional employees, guards and supervisors as defined in the Act.

15 (b) Promptly provide the Union with all relevant and necessary information it has requested for purposes of representing unit employees.

(c) Remove from its files all Corrective Action Reports given to unit employees and not use these records in any manner against them.

20 (d) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix." <sup>7</sup> Copies of the notice, on forms provided by the Regional Director for Region 28, 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 October 1, 2002. *Excel Container, Inc.*, 325 NLRB 17 (1997).

30 (e) 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.

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45 <sup>7</sup> 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."

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

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Dated: December 3, 2003

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Albert A. Metz  
Administrative Law Judge

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**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 had 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**, on request, bargain in good faith with the International Association of Machinists and Aerospace Workers, Local Lodge 845, AFL-CIO, (Formerly Local Lodge 744), as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time service technicians, including Toyota technicians, used car technicians, accessory installers, and lube technicians employed by Respondent at its Las Vegas, Nevada facility; excluding all other employees, office clerical and professional employees, guards and supervisors as defined in the Act.

**WE WILL NOT** give undeserved disciplinary warnings to employees because they engage in union or protected concerted activity or because they filed charges or have given testimony under the Act.

**WE WILL NOT** unilaterally implement our Performance Improvement Plan for unit employees, including giving Corrective Action Records to unit employees.

**WE WILL NOT** refuse to bargain in good faith with the International Association of Machinists and Aerospace Workers, Local Lodge 845, AFL-CIO, (Formerly Local Lodge 744), including refusing to supply that Union with all relevant and necessary information it requests for purposes of representing employees in the collective-bargaining unit.

**WE WILL NOT** unilaterally make material, substantial and significant changes in unit employees' terms and conditions of employment, including plans and procedures for correcting and disciplining employees, changing the distribution time for pay checks, changing employees' work hour schedules, and changing pay days.

**WE WILL NOT** threaten unit employees with discharge for not following unilaterally imposed work rules, including failure to comply with a set test drive route and doing side work.

**WE WILL NOT** threaten employees about discussing union activity.

**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.

5 **WE WILL** promptly provide the Union with all relevant and necessary information it has requested for purposes of representing unit employees.

**WE WILL** remove from ours files all Corrective Action Reports given to unit employees and will not use these records in any manner against them.

10

**T-West Sales & Service, Inc., d/b/a Desert Toyota,  
Inc.,**  
\_\_\_\_\_  
(Employer)

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Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

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The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board’s Regional Office set forth below. You may also obtain information from the Board’s website: [www.nlr.gov](http://www.nlr.gov).

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2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004-3099  
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

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***THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE***  
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE’S COMPLIANCE OFFICER, (602) 640-2146.

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