

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

HOWARD ORLOFF IMPORTS, INC.

and

Cases 13-CA-44188  
13-CA-44377

AUTOMOBILE MECHANICS LOCAL 701,  
INTERNATIONAL ASSOCIATION OF  
AEROSPACE AND MACHINE WORKERS,  
AFL-CIO

*Elizabeth S. Cortez, Esq.*, for the  
General Counsel.  
*Joshua D. Holleb, Esq. (Klein, Dub & Holleb,  
Ltd.)*, for the Respondent.  
*Kenneth Malette*, for the Charging Party.

DECISION

Statement of the Case

IRA SANDRON, Administrative Law Judge. The second amended consolidated complaint dated February 14, 2008, as further amended at trial on February 29, 2008, stems from unfair labor practice (ULP) charges that Automobile Mechanics Local 701, International Association of Aerospace and Machine Workers, AFL-CIO (the Union) filed against Howard Orloff Imports, Inc. (Respondent or the Company). The alleged violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) relate to Respondent's technicians (mechanics) whom the Union unsuccessfully attempted to represent in 2007.<sup>1</sup>

Pursuant to notice, I conducted a trial in Chicago, Illinois, on February 25-29, 2008, at which the parties had full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The General Counsel and Respondent filed helpful posthearing briefs that I have duly considered.

Issues

Did Respondent violate Section 8(a)(3) and (1) of the Act by the following conduct asserted by the General Counsel:

1. Terminated Juan Delgado on August 1.
2. Terminated Kevin Hobday on August 13.

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<sup>1</sup> All dates hereinafter occurred in 2007 unless otherwise indicated.

3. Granted a general pay increase to technicians on about October 15, as a reward for their having withdrawn support for the Union, and to discourage them from engaging in further union activity.

5 Did Respondent violate Section 8(a)(1) by the following conduct of its named agents:

1. Body Shop Manager Robert McConico, in about late June or early July, interrogated employees about their union membership, activities, and sympathies.

10 2. Parts & Service Director Lido Petrucci, in about late June or early July (when he was service manager), impliedly threatened employees with termination due to stricter enforcement of its attendance policies if they voted in the Union.

15 3. Vice President and coowner Jeffrey Orloff (J. Orloff, to be distinguished from David Orloff (D. Orloff), his brother), in about July, threatened employees with demotions and wage reductions if they voted in the Union.

20 4. Vice Presidents D. Orloff and Joseph Coletta, at a late September meeting, solicited employees to disavow the Union and disparaged the Union by blaming it for Respondent's inability to increase wages and benefits.

Has Respondent also violated Section 8(a)(1), since on about October 12, by this statement contained in its personnel change of status form: "Please note that Howard Orloff Imports, Inc. discourages the discussion of salary information with co-workers."

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#### Witnesses and Credibility

30 The General Counsel's witnesses were Delgado and Hobday; Luis Gonzalez, shop foreman or leadman (stipulated not to be a statutory supervisor); Nicola Ruggieri, technician; Bryan Larsson and Joseph Montgomery, former technicians; and Kenneth Malette, union business representative. The General Counsel also called Nicholas Cowan, a technician, but contended that he was a hostile witness.

35 Respondent called D. Orloff and J. Orloff (sons of Respondent's founder and president, Howard Orloff), Coletta (their brother-in-law and Respondent's general counsel), Petrucci, McConico, Service Manager Gregory Urban, and Assistant Service Manager Charles Dziak.

40 Credibility resolution is the key to deciding the allegations herein. Bluntly put, on certain points, either the General Counsel's or Respondent's witnesses lied, because their testimony was wholly irreconcilable. This was most evident in their divergent testimony on two critical points concerning the oil leak on the Volvo X670 that Hobday serviced on August 9 (the Volvo), the precipitating cause for his termination. Both concern what was said on the morning of August 13, when Urban, Dziak, and Petrucci met with Gonzalez. The first was whether Gonzalez told them that the cause of the leak was installation error (Urban, Dziak, and  
45 Petrucci), or that there was no way to determine with certainty whether the leak was due to installation error or a manufacturing defect (Gonzalez, whose testimony on this was indirectly supported by Ruggieri). The second was whether or not Hobday came by and admitted fault ("I screwed up."). Urban, Dziak, and Petrucci all testified he did; he testified that he did not. Gonzalez did not recall hearing Hobday make any such statement.

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More weight is ordinarily accorded the testimony of employee witnesses, such as Gonzalez and Ruggieri, who have no direct stake in the outcome of the proceedings. Both are

long-term employees; Ruggieri since 1997, and Gonzalez for about 6 years. Significantly, Respondent has recognized their expertise as technicians; Gonzalez was made shop foreman or leadman about 1-1/2 years ago, and Ruggieri was a team leader, assisting other technicians with diagnosing problems, from approximately 1999 until January 1, 2008, when that position was abolished. Gonzalez has achieved the designated status of a Volvo “expert,” and the parties stipulated that he is a master Volvo technician. Both Gonzalez and Ruggieri testified consistently and credibly, and I have no reason to doubt the reliability of their testimony, either on technical issues or otherwise. I note that Ruggieri was the employee who faxed to Malette on October 3 the petition in which a majority of technicians expressed their withdrawal of support for the Union.

I draw no adverse credibility inference against Gonzalez from the fact that his NLRB affidavit of November 27 does not mention the conversation he testified he had with Ruggieri on August 13.<sup>2</sup> Indeed, nothing in the affidavit addresses any conversations that Gonzalez had concerning the Volvo. Rather, the affidavit covers only Gonzalez’ inspection of the vehicle and his opinion of what occurred—in rather conclusory fashion, I would add.

Accordingly, I credit Gonzalez and Ruggieri. This brings me to my overall conclusion: any defects in the credibility of General Counsel’s witnesses except Cowan paled in comparison with the unreliability of Respondent’s witnesses other than Coletta and D. Orloff. This was especially evident in Urban’s, Dziak’s, and Petrucci’s often ambiguous and shifting—sometimes evasive—and not always consistent testimony on the terminations of Delgado and Hobday. The same holds true for J. Orloff as to the latter’s discharge.

Management’s testimony was that Delgado and Hobday were terminated not only because of immediately preceding specific events (Hobday’s was mentioned above; Delgado’s was a “no-call, no-show” on July 31), but also because of their prior job conduct, as contained in their personnel files that management reviewed. The believability of such testimony was undermined by company documents showing a long pattern of lax and inconsistent application of the employee handbook’s provisions on misconduct, including progressive discipline. Thus, technicians with repeated performance infractions have received lesser discipline than termination or suspension. As to no-call, no-show policies, Respondent’s records demonstrate a consistent practice of discharging employees for 3 or more consecutive days of no-call, no-show, deeming that job abandonment, but no documents show that anyone other than Delgado has been terminated for violating the policy on 1 day. In fact, the only disciplinary report in the record for 1 day of no-call, no-show reflects that a technician received a warning for not calling in sick in May 2005. As for tardiness, the other major alleged basis for Delgado’s termination, Respondent’s records reflect that in March 2006, a technician had been tardy 8 days, year-to-date, but there is no evidence that he received any discipline for his last such offense. Nor do any of Respondent’s records establish that any other employee has ever been terminated, or even suspended, for tardiness.

Aside from being undermined by Respondent’s own records, the testimony of Urban, Dziak, Petrucci, J. Orloff, and McConico was itself flawed.

Urban, Dziak, and Petrucci were inconsistent among themselves regarding the terminations. As to Delgado, Urban and Dziak testified that management held one meeting, in the Orloffs’ office. Although Urban testified that both J. Orloff and Coletta attended, Dziak’s

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<sup>2</sup> R. Exh. 12.

version did not have Orloff present. In contrast to Urban's and Dziak's testimony that there was only one meeting, Petrucci testified that he, Urban, and Dziak met together first in Urban's office and "decided we should go talk to one of the owners about the situation,"<sup>3</sup> afterward meeting with Coletta in the Orloffs' office.

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Similarly, Urban and Dziak testified about only one management meeting about Hobday, again in the Orloffs' office with J. Orloff present. In contrast, Petrucci again testified that he, Urban, and Dziak first met together in Urban's office and "decided to . . . bring it up to Jeffrey Orloff,"<sup>4</sup> which they did in a subsequent meeting with him.

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In this regard, I find far-fetched and highly implausible the testimony of Urban, Dziak, and Petrucci that Urban played the principal role in the decisions to terminate Delgado and Hobday. Urban's first day of employment was July 23, and I find it incredible that he would have possessed such authority on August 1 and 13, after so little time with the Company. This is especially so when J. Orloff or Coletta, as well as Petrucci, a manager for Respondent for approximately 40 years, were direct participants in the disciplinary process. This conclusion is buttressed by Petrucci's testimony above that he, Urban, and Dziak felt it necessary to consult with the owners in both cases.

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As to deficiencies that management allegedly uncovered in Delgado's work history, Urban testified that Delgado "regularly" missed days from work without explanation and also had "some" tardiness and negligence issues. Petrucci, on the other hand, made no mention of negligence, and he conceded near the end of his testimony that he could recall no instances prior to July 31 when Delgado was a no-call, no-show.

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Urban testified that on the afternoon of July 31, everyone at the management meeting agreed that Delgado should be terminated unless he had a good reason for his no-call, no-show that day, and they further agreed to reconvene the following morning (August 1) and see if Delgado had come to work or not. However, Urban prepared Delgado's termination letter after the meeting was concluded, and he dated it July 31. Delgado did come to work the next morning, but no management meeting took place. Moreover, when Delgado tried to show Urban his medical excuse for July 31, Urban refused to even look at it. In contrast to Urban's version, Petrucci testified that they all decided that if Delgado did not call in by the end of the day (July 31) with a good excuse, he would be terminated.

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Dziak testified that he and Urban were present in the Human Resources (HR) office when Hobday was terminated and that Hobday said he did not think it fair he was being dismissed because he had improperly installed a seal. His version did not have Petrucci present. Petrucci, however, testified that he and Urban, but not Dziak, were present for Hobday's termination and that Hobday said nothing. Urban did not specifically testify about this interview, so the record contains two varying managers' accounts.

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Aside from inconsistencies between themselves, their testimony taken separately leads me to find incredible much of what J. Orloff, Urban, Dziak, and Petrucci said, and I therefore do not credit their accounts when they conflicted with those of the General Counsel's witnesses.

Even though J. Orloff is an executive and, by his own testimony, has experience dealing with upset customers, he demonstrated observable nervousness and paused for long periods

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<sup>3</sup> Tr. 1095.

<sup>4</sup> Tr. 1112.

before answering many simple questions. Apart from my observations of his demeanor, his testimony itself reflected his unreliability as a witness.

5 Thus, Orloff first testified more than once that the August 15, 2006 memorandum he placed in Hobday's file was a "written" warning.<sup>5</sup> Later, however, when I suggested the apparent inconsistency of his testimony, he then testified that "[M]aybe it could be interpreted as an oral warning, as well, and I'm documenting it in writing" and, soon thereafter, that "It was an oral warning that I documented in a written memo to put in his file."<sup>6</sup> He also contradicted himself on the consistency in which Respondent applies its work rule guidelines, eventually  
10 conceding that the documentation of disciplinary actions is "informal."

Further, Orloff was extremely vague, even evasive, on the matter of Hobday's termination. When asked who made the decision to terminate Hobday at the August 13 management meeting, he merely answered that it was a "group" decision but averred that he  
15 could not recall any specifics of who said what. He stated that Hobday's work record was taken into account but could not recall whether Hobday's personnel file was looked at or distributed at such meeting. His explanation of why Hobday was terminated was little more than a mere recital of Respondent's summary of its defense, suggesting that his testimony was tailored to support Respondent's stated position rather than based on genuine recall. Moreover, although  
20 Orloff first testified that Respondent absorbed "most" of the \$8,868 cost for the new engine for the Volvo, he then conceded that Respondent paid only the \$2,500 deductible and that insurance paid the rest (or over 70 percent).

Urban testified that he determined that Hobday had installed the oil filter housing  
25 incorrectly, based on visual inspection of the automobile and his own experience. This testimony is unbelievable in light of other evidence. First, Urban earlier testified that he asked Gonzalez what had happened, a question that would have been unnecessary if Urban had been able to make the determination on his own. Second, Urban's August 13 e-mail memorandum states that when Gonzalez said the seal for the oil filter engine was "rolled over," Urban asked  
30 him what that meant. Third, Dziak testified that J. Orloff specifically stated that he wanted Gonzalez to look at the Volvo after it was brought back, reflecting that diagnosis of the problem was not a simple task. Finally, Gonzalez testified that the defect in the o-ring was difficult to see and assess and that he called on Ruggieri for a second opinion.

35 Dziak testified incredibly that customer service ratings (CSI's) do not play any role in evaluating employees for raises and benefits because, he explained, so few customers respond. This is not only contrary to common sense but is belied by Urban's testimony and the frequent references that Urban made to CSI's in his December performance reviews of technicians, as well as comments about CSI's contained in reviews in years past.<sup>7</sup> Further  
40 contradicting this testimony was management's promulgation of a bonus system in September 2005 for technicians who received high CSI ratings.

Dziak also contradicted his own testimony as follows. He first testified that while the Volvo was on the rack on August 13, Gonzalez said that the oil filter o-ring or seal to the oil filter  
45 was incorrectly installed. Later, however, he testified that about an hour after that event, he

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<sup>5</sup> Tr. 922, 940.

<sup>6</sup> Tr. 943.

<sup>7</sup> See, e.g., GC Exh. 54 at 4 (May 9, 2006 review; "Needs improvement in . . . CSI"); GC Exh. 55 at 2 (December 12, 2005; "CSI must improve"); GC Exh. 58 at 5 (December 18; "Needs improvement in CSI"); and GC Exh. 64 at 12 (December 18; "Great CSI").  
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asked Gonzalez if the o-ring had been improperly installed or not, because he needed to know if Respondent was going to be able to warranty the repairs, and Gonzalez responded that it had not been properly installed. Had Gonzalez earlier stated such, Dziak would not have needed to ask. Moreover, Dziak later changed his account of this second incident by testifying that  
 5 Gonzalez volunteered the information that the oil filter was improperly installed.

On whether Hobday was terminated for the Volvo work or because of that and his prior record, Dziak was evasive. He first testified that Urban stated that Hobday should be terminated “because of his work ethic and his negligence” and that “[E]verybody agreed we  
 10 should terminate [his] employment because of the negligence on [sic] improperly installing the seal.”<sup>8</sup> However, he then elaborated with the ambiguous statement that “[W]e took everything that had been, you know, the good and the bad in [Hobday] and weighed out if it was sheer negligence or it was an ongoing trend to make our decision.”<sup>9</sup> In this regard, Dziak testified rather curiously that he told Gonzalez on August 14 that Hobday had been terminated not just  
 15 because of the Volvo incident but because “[T]here was an ongoing trend that there was a lot of negligence in his file that nobody knew about. But it was documented.”<sup>10</sup> Such a statement is equivalent to an oxymoron.

Petrucci was very vague on many points, often equivocal, and even evasive, most notably on the alleged negative background factors in Delgado’s record that management used as a basis for his termination. He first testified that they were tardiness and absenteeism. Later, when my dialogue with Respondent’s counsel apparently led Petrucci to believe that it would favor Respondent to minimize the former, he then testified that absenteeism was the  
 20 primary problem. However, still later, he equivocated by stating, “Well, of course, the tardiness, also, you know, I was concerned with the tardiness, because everybody is tardy here and there. But it’s not, that was not the main thing. The main thing why he got dismissed . . . was because of . . . his not [sic] phone and no-show.”<sup>11</sup> As noted earlier, Petrucci admitted that he could recall no instances prior to July 31 when Delgado was a no-call, no-show.

Although Petrucci first testified that a technician such as Hobday would have “absolutely” observed the improper installation of the o-ring at the time he was installing it, he then testified that the o-ring could have been correctly installed but then slipped or come down because of improper lubrication, meaning that it would not necessarily have been observable at the time of  
 30 installation.

Petrucci’s answers were laced with qualifiers, as opposed to being unequivocal. For example, as to what he said at the first management meeting regarding Hobday, he testified that he mentioned that he had “kind of reprimanded” Hobday several times for not getting back to work on his stall.<sup>12</sup> Petrucci’s credibility was also undermined by his professed inability to recall who said what at this meeting.  
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Finally, I find improbable the testimony of Urban, Dziak, and Petrucci that when they were examining the Volvo on August 13, Hobday walked over and spontaneously volunteered the statement that he had “screwed up.”  
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<sup>8</sup> Tr. 1038.

<sup>9</sup> Ibid.

<sup>10</sup> Tr. 1043.

<sup>11</sup> Tr. 1135.

<sup>12</sup> Tr. 1111.

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I now turn to McConico, who is alleged to have committed 8(a)(1) violations but had no involvement in either of the terminations. He professed to have virtually no recollection of any incidents, exhibited defensiveness bordering on hostility, and struck me as making no effort to further the evidentiary process. I therefore accord his testimony little weight.

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In contrast to most of management's witnesses, the General Counsel's witnesses except Cowan were generally credible, and none of them appeared to be evasive or testifying from script. Their testimony was for the most part generally consistent both internally and with each other. Delgado and Hobday evinced what struck me as genuine distress in describing their discharges. They appeared to answer questions readily and without attempts to slant answers in their favor, and their testimony on cross-examination was very similar to what they stated on direct-examination.

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Based on all of the above factors, I credit the General Counsel's witnesses other than Cowan whenever their testimony conflicted with that of Respondent's witnesses.

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Cowan, the General Counsel's sole witness regarding the September meeting, was not fully credible. He testified that the NLRB affidavit he gave on November 7 (approximately 3 months prior to the hearing) was truthful yet professed not to recall many of the statements he had made therein. In view of the recentness of the sworn statement and the fact that Cowan is a young man without any demonstrated mental or emotional impediments, his stated failure of recall was unbelievable. Moreover, his testimony about the September meeting he attended was vague and evasive.

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The testimony of Coletta and D. Orloff was essentially limited to the September meetings they held with employees. I note that Respondent's counsel did not question Coletta about Delgado's discharge, even though Urban, Dziak, and Petrucci all testified that Coletta was present at the management meeting in which the decision to terminate him was made.

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I credit as follows the consistent but not identical testimony of Coletta and D. Orloff, who both answered questions readily and without an apparent effort to give rehearsed responses. At the September meetings, technicians brought up the subject of the Union, saying they were frustrated with the process and wanted to sign a petition withdrawing support for representation. They also asked about getting a pay increase. Coletta and Orloff responded that union representation was the employees' choice and that management could not get involved in the petition or grant any increase in benefits while representation proceedings were pending.

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The General Counsel has contended that under Federal Rule of Evidence 803(5), portions of Cowan's affidavit should be admitted as substantive evidence, as past recollection recorded. I need not get into a legal analysis of whether that would be appropriate. Even crediting portions of the affidavit over Cowan's testimony, the former was not necessarily inconsistent with the testimony of Coletta and Orloff. Thus, the affidavit was silent on who initiated mention of the Union at the September meeting that Cowan attended, and it equivocated on exactly what Coletta and Orloff said, finally concluding, "[They] kept their wording in the meeting fairly vague."<sup>13</sup> In any event, I would not find violations of Section 8(a)(1) based only on the contents of an affidavit, when its maker's testimony is contrary, and in the absence of any corroboration from other witnesses.

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Cowan was also the only General Counsel's witness on the alleged unlawful motivation

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<sup>13</sup> GC Exh. 77 at 4.

behind Respondent's October pay increase. More specifically, he testified what Urban said when notifying him he would be getting such. On that, as opposed to his testimony on the September meetings, he twice testified consistently and without equivocation. As I stated earlier, Urban was generally not a credible witness. Accordingly, I credit this portion of Cowan's testimony. I note the well-established precept that a witness may be found partially credible; the mere fact that the witness is discredited on one point does not automatically mean that he or she must be discredited in all respects. *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 799 (1970). Rather, a witness' testimony is appropriately weighed with the evidence as a whole and evaluated for plausibility. *Id.* at 798-799; see also *MEMC Electronic Materials*, 342 NLRB 1172, 1200 fn. 13 (2004), quoting *Americare Pine Lodge Nursing*, 325 NLRB 98 fn. 1 (1997); *Excel Container*, 325 NLRB 17 fn. 1 (1997) (it is quite common in all kinds of judicial decisions to believe some, but not all, of a witness' testimony).

### Facts

On the entire record, including witness testimony, documents, and the parties' stipulations, I find the following facts.

Respondent, an Illinois corporation, with an office and place of business in Chicago, Illinois, is engaged in the business of retail sales and repair of Volvo, Jaguar, and Land Rover automobiles, and the repair of preowned vehicles. Jurisdiction has been admitted, and I so find.

A family enterprise established in 1959 by Howard Orloff, the Company employs about 145 employees, including approximately 40 technicians. In the organizational structure,<sup>14</sup> four managers, including Petrucci and Service Manager Urban report to Vice Presidents D. and J. Orloff and Coletta. Dziak is the assistant service manager. The technicians directly report to Urban and Dziak and are classified as journeymen, semiskilled, or apprentices. Their work area is divided by type of vehicle serviced. Volvo technicians work solely on Volvos.

Respondent provides an employee handbook to new hires. It includes a section entitled "Conduct Guidelines" that states, inter alia:<sup>15</sup>

The circumstances of each case are different, and we reserve the right to impose appropriate disciplinary action for any form of disruptive or inappropriate behavior.

The level of discipline to be given in any specific circumstances will be determined with regard to a number of factors, including, for example: (1) the seriousness of the offense; (2) the repetitive nature of the offense; (3) the employee's length of service with the company; and (4) the employee's work and/or disciplinary record. Based upon these and other factors, in some instances, an employee may be suspended or terminated on the first offense.

The three levels of discipline specified in the section are verbal reprimand (reprimand), written warning (warning), and termination. The one reference to suspension is set forth in the immediately preceding paragraph.

Three groups of offenses are set out. Group I, the least serious, includes, inter alia, "Willful neglect and mishandling of equipment or any company or customer property" and

<sup>14</sup> See R. Exh. 13, organizational chart.

<sup>15</sup> GC Exh. 24.

“Chronic absenteeism and/or tardiness.” For such offense, “Recommended Corrective Action” is reprimand for the first offense, warning for the second, and termination for the third.

5 Group II includes, inter alia, the offense of “Repeated absence without a reasonable excuse.” For violations in this category, the recommended action is a warning for the first offense, and termination for the second.

10 Finally, for group III violations, including, inter alia, “Deliberate destruction or damage of company property . . . or property of fellow employees or customers in any manner,” the recommended action is immediate termination.

The section concludes by stating that a written record of each infraction “may be placed” in the employee’s file.

15 Respondent also issued a memorandum on April 7, 2005, setting out a new tardiness policy, in addition to the disciplinary provisions in the handbook: 1st offense, verbal warning; 2nd offense, written warning; 3rd time and thereafter, not allowed to receive an inspection job for that day.<sup>16</sup>

20 The record clearly demonstrates that, through the years, Respondent has very loosely applied its written policies on discipline, to the point where they cannot be considered to accurately reflect the disciplinary system in practice. This is shown by the following documents that Respondent provided regarding the discipline of technicians since June 1, 2005, both preceding and following the terminations of Delgado and Hobday:

25 Juan Galleo received a 3-day suspension in October 2005, for hitting a car on the street with a customer’s car and failing to report it. The termination box is checked for the next occurrence. Yet, about 3 weeks later, he received only a warning for damaging another customer’s vehicle. Further, in February 2006, he received another warning for leaving cable in a customer’s car and also ordering a wrong part.<sup>17</sup>

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In June 2005, Michael Gibbons received a warning for violating safety rules by excessive speeding in the shop. For the next offense, the penalty is given as possible suspension, up to dismissal. In August 2007, he received a reprimand for not properly securing a hood, and in February 2008, he received a warning for unsatisfactory work quality, to wit, not installing a needed bolt and causing damage to the vehicle and making the car unsafe to be driven.<sup>18</sup>

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40 John Hosman had an accident in July 2007, as J. Orloff notated,<sup>19</sup> but Respondent provided no documentation that he was disciplined in any way.

45 Pawel Kopec received a warning in October 2004, for failure to inspect all brake pads in a used-car inspection. The next penalty is given as a possible 3-day suspension. He received another warning in February 2005, for leaving nuts loose on a customer’s car. The next penalty is listed as another warning or 3-day suspension. However, when he had a third performance problem in December 2005—leaving an oil filter loose and causing “oil rot” and rental

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<sup>16</sup> R. Exh. 4.

<sup>17</sup> GC Exh. 46 at 2–4.

<sup>18</sup> GC Exhs. 47–49.

<sup>19</sup> GC Exh. 50.

expense—he did not receive even a warning but instead suffered only reversal of technician time.<sup>20</sup>

5 Helson Munoz received a 3-day suspension in June 2006, for not completing service on a vehicle but reporting that he had done all the work, and for performing unsatisfactory work on another vehicle. The next penalty is given as dismissal. A November 2, 2007 memorandum from Urban reflects that he reprimanded Munoz for admittedly forgetting to install a navigation system, which he left in the back of a customer's vehicle, with the result that the customer had to return to the shop. Finally, later that same month, Urban issued Munoz a warning and a 30-day probation (a penalty not mentioned in the conduct guidelines) for not tightening the lug nuts on a tire rotation, causing the wheel to fall off when the vehicle pulled up for a customer.<sup>21</sup>

15 General Counsel's Exhibits 26–40, records of discharges of employees after January 1, 2006, for attendance, evince a policy of termination for three or more unexcused absences or no-call, no-show. The only disciplinary report in the record for 1 day of no-call, no-show is from May 2005, when Juan Gallo received a warning for not calling in sick.<sup>22</sup> As for tardiness, the other alleged basis for Delgado's termination, the back shop tardy report for March 22, 2006, states that Pawel Kopec was tardy for the eighth time, year-to-date, but there is no evidence any action was taken against him, even though he lost maintenance work for his seventh such tardy the previous week.<sup>23</sup> No records show that any other employees have been suspended or discharged for tardiness.

25 In sum, Respondent submitted no documents showing that any technician other than Delgado has been terminated, or even suspended, for 1 day of no-call, no-show, or for tardiness, or that any technicians other than Hobday have been terminated for negligence or other job performance derelictions, at least since June 1, 2005. No technicians other than Delgado and Hobday have been discharged since Urban started as service manager on July 23, 2007.

### 30 2007 Union Organizing

In late May, Larsson and Montgomery contacted the Union, and Malette held several meetings with technicians in early June, at Chicago park locations. An average of 25 technicians attended them.

35 Thirty technicians (including Delgado and Hobday) signed, either at the meetings or at the shop, a petition for union representation.<sup>24</sup> On June 7, the Union filed an NLRB petition, and on June 20, the Company and Union signed a stipulated election agreement for a unit of all full-time and regular part-time mechanics, including journeymen, apprentices, semiskilled, lube rack technicians, tire technician, and paint technicians at the Company's facility.<sup>25</sup>

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<sup>20</sup> GC Exh. 51 at 1 & 3–4.

<sup>21</sup> GC Exh. 52 at 1, 4–5.

<sup>22</sup> GC Exh. 46 at 1.

<sup>23</sup> GC Exh. 51 at 5–6.

<sup>24</sup> GC Exh. 2.

<sup>25</sup> GC Exhs. 18–19.

At the July 19 election, 23 employees voted for representation and 16 against, with 1 challenged ballot.<sup>26</sup>

#### Preelection Conversations

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The General Counsel has not alleged as violations of the Act anything contained in Respondent's preelection propaganda or anything that management said at formal group meetings with employees.

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The following facts are based on the credited versions of the General Counsel's witnesses. All named employees were technicians.

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In about the first week of July, Montgomery was at his service stall or work station in the early afternoon, with Sean Gagnon at the adjoining stall. McConico came over and stood between them. He gave Montgomery a vote-no flyer and then asked Montgomery what the issues were and why he wanted a union. Montgomery responded that he did not want to discuss it with him and that McConico already knew the issues.

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About a week before the election, McConico approached Delgado at his stall, in the afternoon. He asked Delgado, "[S]o, what do you think about this union stuff that's going on? Do you think it would benefit you?"<sup>27</sup> Delgado replied yes. McConico asked how. Delgado responded that if he got married, he wanted better health insurance benefits, and that he liked the Union's pension plan.

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On about the same date, Montgomery was at his stall in the morning, when he overheard J. Orloff speaking to Rashe (Shane) Subying. The latter did not have the Automotive Service Excellence (ASE) certification normally necessary to receive journeyman pay but was nevertheless being paid that amount. Orloff told him that if the Union was voted in, he could be knocked down to an apprentice or semiskilled technician, lower-paying positions.

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Also on about the same date, again in the morning, Larsson was at his station across from Al Metejka, when he overheard J. Orloff tell Metejka to vote "no." Orloff then stated that if Metejka voted for the Union, and the Union was brought in, Metejka would be demoted to lube technician (which paid about half of what Metejka was making). Metejka retorted that if his pay was cut, he would be out of there.

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On the early evening of July 16, Delgado was working late, when Petrucci came over, put his arm around him, and walked him outside. Petrucci told him that if the Union came, they would control everything, and that "I hope you guys know what you're doing with this whole union stuff . . . because the union controls all the tardiness. It will be easier to fire you guys."<sup>28</sup> Delgado interjected that he had not missed any days or been tardy. Petrucci stated, "Well, I'm just saying if this union comes in, we don't control that. I've given you a lot of chances but with the union in, it's going to be easier to fire you guys."<sup>29</sup>

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In the early afternoon on July 18, the day before the election, Hobday was at his stall, when Dziak distributed vote-no flyers. He told Hobday that the owners could help the

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<sup>26</sup> GC Exh. 20.

<sup>27</sup> Tr. 111.

<sup>28</sup> Tr. 115.

<sup>29</sup> Tr. 115-116.

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technicians more than the Union could. Hobday responded that he did not agree and that he saw the Union as a big plus. He explained that he came from a very large union family and that unions were there to help, not hurt, employees. Dziak replied that he disagreed.

5 Postelection Events

The Company filed timely objections to the election. On August 31, with the Union's concurrence, the Region ordered a rerun election.<sup>30</sup> However, by letter of September 11, the Union withdrew its agreement to set aside the earlier election and instead requested certification or, in the alternative, a hearing on the Company's objections.<sup>31</sup> On September 24, the Region issued an order revoking its earlier report, and a notice of hearing.<sup>32</sup>

Based on D. Orloff's and Coletta's credited testimony, which was substantially similar but not suspiciously identical, I find the following. At the end of September or the beginning of October, Respondent fired long-time Parts Manager Jan Lewis. In early October, over the course of 2 days, Orloff and Coletta held four or five meetings, each with eight or nine technicians, in the Orloffs' office. They explained why Lewis had been terminated. At one or more meetings, technicians initiated mention of union matters and the NLRB, asking what they could do to withdraw their petition and if the Company could promise them certain benefits. At the same or a different meeting(s), employees asked if the Company could change the service schedule back to 5 days-8 hours. Coletta replied that management could not promise or guarantee them anything during the pendency of NLRB proceedings and could not tell them what to do or not do, but in his opinion, they would be much better off without a union. Similarly, Orloff responded that management could not promise anything but hoped that the technicians would give them another chance to do their job and not have the Union represent them.

On October 3, Ruggieri faxed to Malette a petition signed by a large majority of technicians (not including Delgado and Hobday), stating that they no longer wished union representation.<sup>33</sup> On about that date, the Union submitted a request to withdraw its NLRB petition, and the Region approved it.<sup>34</sup>

Delgado's Termination

Delgado was hired on about March 23, 2005. At all times relevant, he was a certified Volvo technician. Petrucci was his supervisor until Urban took over as service manager on about July 23. On June 5, he attended the second union meeting with technicians and signed the petition for representation. He also talked at the shop in favor of the Union to coworkers and distributed three different prounion flyers to other technicians. In addition, he wore a union button for 2 entire workdays during the week following June 5 but stopped wearing it because it got caught on equipment.<sup>35</sup> There is no direct evidence of management knowledge of these activities. However, as previously described, he told McConico the week before the election on July 19 that he was for the Union, and why, and 3 days before the election, Petrucci threatened him with termination for tardiness if the Union was voted in.

45 <sup>30</sup> GC Exh. 21,

<sup>31</sup> GC Exh. 22.

<sup>32</sup> GC Exh. 23.

<sup>33</sup> GC Exh. 17. The record contains no evidence that Respondent played any part in its preparation or circulation.

50 <sup>34</sup> GC Exh. 25.

<sup>35</sup> GC Exh. 3.

Many of the facts surrounding the events of July 30–31 are undisputed. On July 30 at about 7:30 a.m., Delgado called Dziak and said that he would not be coming in that day. Dziak said okay and asked him whose team he was on. Delgado replied, giving his cell number if they needed reach him.

That night, Delgado experienced abdominal pain and went to the emergency room at Our Lady of the Resurrection Medical Center in Chicago. There, he received a doctor's note dated July 30, excusing him from work on July 31 and August 1.<sup>36</sup>

Delgado did not go to work on July 31. He testified that he called Dziak's extension twice that morning, but there was no answer, and that he then dialed the operator and asked to speak to either Dziak or Petrucci. She checked, said they were busy, and asked if he wanted to leave a message. He said no, he would call back. In the afternoon, Delgado tried Petrucci's extension three times and each time got Petrucci's voice mail. He never left a message.

Delgado testified that he wanted to talk to Petrucci personally rather than leave a message, but he offered no elucidation. I accept as a fact Respondent's position that Delgado had the opportunity to notify management on July 31, at least by voice mail, that he would not be coming in that day but, for whatever reason, chose not to do so.<sup>37</sup>

Because his pain had eased and he had no more sick days, Delgado returned to work on August 1, despite the doctor's note covering his absence. Shortly after his arrival, he was asked to accompany Urban and Dziak to the HR office. There, Urban asked what was going on during the past couple of days. Delgado replied that he had been sick and gone to the emergency room the previous evening but now felt fine. Urban stated that he had not called in yesterday, and Delgado replied that he had tried to call in but could not get anyone. Urban then told him, "[D]ue to your record and the fact that you did not call in on Tuesday, we're going to have to terminate you."<sup>38</sup> Delgado asked Urban to look at the doctor's note, but the latter refused and left the room.

Delgado then said to Dziak that Kopec had been a no-call, no-show for 2 straight days, and he did not understand why what he had done was a big deal. Dziak replied that he was not going to argue, that the decision was already made.

Delgado was given a termination notice signed by Urban and dated July 31, stating that Delgado had called Dziak at 7:15 a.m. and said he would not be in due to personal matters but would be in the following day; however, he never called or showed up for work on July 31. Therefore, he was discharged for attendance, failure to follow instructions, and violation of company policies/procedures.<sup>39</sup> Three previous written warnings were cited, their dates given as December 12, 2005 (Supervisor Robert Duxler); June 7, 2006 (Duxler); and February 7 (Mary Snyder).

<sup>36</sup> GC Exh. 4, the original document, filled out in blue ink. The note appears genuine on its face, and I have no reason to doubt its authenticity.

<sup>37</sup> R Exh. 3, the job description for a technician, does state, at 1, that when calling in sick, the technician must speak to a manager and not merely leave a voice mail. However, common sense dictates that leaving a voice mail is better than no notification at all.

<sup>38</sup> Tr. 132.

<sup>39</sup> GC Exh. 6 at 1.

5 These warnings were among the documents Delgado later received from HR prior to his  
 10 contested unemployment hearing on September 8. The December 2005 warning was for a  
 15 second offense of being tardy; the June 2006 warning was for excessive tardiness, for which  
 20 Delgado was placed on a 30-day probation; and the February warning (dated February 2 but  
 25 apparently erroneously stated as February 7 on the termination notice), for a pattern of poor  
 30 attendance, for which he was again placed on a 30-day probation, with the comment, "No  
 further absences or tardies in next 30 days or dismiss."<sup>40</sup> No other documents reflect that  
 Delgado had a problem with absences, as distinguished from tardies, or that he was ever a no-  
 call, no-show prior to July 31. Indeed, Petrucci admitted this.

10 Also in Delgado's record were documents in the form of e-mails. One was the Volvo  
 15 tardy report for January 4, from Duxler, who stated that Delgado had reported late for work, that  
 20 this was his first offense, and that he would receive a reprimand.<sup>41</sup> I note that even though this  
 states that it was Delgado's first offense, he had earlier received two warnings for tardiness.

15 Further, the Volvo tardy report for October 19, 2006, again from Duxler, stated that this  
 20 was Delgado's third tardy, and he would not receive any maintenance work for the day.<sup>42</sup>  
 Finally, an employee disposition from HR Director Diane Parapetti dated June 7, 2006, states  
 that Delgado arrived at work at around noon after having failed to call in and that he admitted he  
 overslept. According to the document, Petrucci reprimanded Delgado and told him he was on  
 probation for 30 days and would be terminated if he was tardy during that period.<sup>43</sup>

25 At no time has Respondent contended that tardies are tallied on any kind of annual  
 basis; indeed, that would be contrary to the reasons it averred for Delgado's termination.

30 Thus, even according to Respondent's own records, it was lax in following any kind of  
 progressive disciplinary system in Delgado's case but rather repeatedly countenanced  
 infractions. This finding is reinforced by the very similar testimony of both Delgado and  
 Petrucci, that on many occasions, Petrucci said he was lucky Petrucci was giving him a lot of  
 chances; that he was a good technician but had to start showing up on time.

35 Also in Delgado's file was a document entitled "Employee Disposition" from Parapetti,  
 dated April 26, stating that Petrucci and Dziak had smelled alcohol on Delgados' breath that  
 morning and that Delgado had admitted to having been out drinking the previous night.<sup>44</sup> She  
 further stated that this was the second time he had alcohol in his system and came to work and  
 that he had gotten into an accident on the last occasion and tested positive for alcohol. Finally,  
 it said, Petrucci sent him home for the day unpaid. In testifying, Delgado did not dispute the  
 facts set out in this document. In fact, he recalled that Petrucci told him the Company had "zero  
 tolerance" for substance abuse, despite the fact that it was his second such incident.

40 The earlier incident is documented in General Counsel's Exhibit 6 at 10-16 and  
 concerns an incident occurring on the morning of January 20, 2006, when Delgado had an  
 accident with a customer's car, was sent for a drug and alcohol screen, and was found to have

40 Ibid at 17, 8, and 4, respectively.

41 Ibid at 5.

42 Ibid at 6.

43 Ibid at 9.

44 Ibid at 3.

alcohol in his system. He received a 1-day suspension as a result—a greater penalty than he received for the second offense of being intoxicated and further evidence of Respondent's failure to practice progressive discipline.

5 I note that in their testimony concerning management discussions on July 31 about Delgado's personnel file, none of Respondent's witnesses (Urban, Dziak, or Petrucci) even mentioned the above incidents involving Delgado's alcohol use. Nor did Urban or Dziak claim that they said anything about them to Delgado at his termination interview. I therefore cannot find that these incidents played any part in the decision to terminate Delgado, even if I were to  
10 fully credit Respondent's witnesses otherwise.

At trial, Respondent also submitted an employee warning notice dated March 9 that J. Orloff issued to Delgado for failing to properly diagnose a broken window, with the penalty that he would not receive pay for the job.<sup>45</sup> Since Respondent never cited this infraction to Delgado  
15 at the time of his discharge, either orally or in writing, and failed to provide it when defending against his unemployment claim, I will not consider it now to be anything other than a transparent attempt to bolster Respondent's defense for the termination after the fact.

#### Hobday's Termination

20 Hobday was a Volvo technician since January 2005. At the beginning of his employment, Ruggieri trained him for 3 months, during which he was familiarized with everything related to Volvo service, including performing oil changes. Petrucci told technicians to check with Ruggieri or Gonzalez if they had any issues because they were considered  
25 experts. Later, Respondent twice sent Hobday to Volvo specialty training, where he received certifications for newer models.

Regarding the union campaign in June, Hobday attended two meetings, signed the petition for representation, distributed flyers, and talked with about 10 employees in favor of the Union. In addition, starting on approximately June 6, and for about a month continuously, he  
30 had a union sticker on the flip-open top of his tool box, which faced outward so that it was visible during the day to those passing by.<sup>46</sup>

I previously set out the incidents prior to the election that Hobday voiced his pronion sentiments to McConico and Dziak. On the day of the election, he wore a "vote yes" button<sup>47</sup> on  
35 the upper right part of his shirt. That morning, while wearing the button, he exchanged greetings with D. and J. Orloff and Petrucci.

During the course of his employment, Hobday performed an average of six oil changes a  
40 day, with the number varying between 1 or 2 and 10, depending on the workload. The instructions for properly changing the oil and oil filter on the Volvo model in question are provided on-line.<sup>48</sup> As depicted in General Counsel's Exhibit 11, three component parts are involved: oil filter; cup, which holds the filter and o-ring; and rubber o-ring, which wraps around  
45 the outside of the cup. Hobday testified that he always followed these instructions, including on Thursday, August 9, when he performed a free 15,000 service on the Volvo. This consisted of

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<sup>45</sup> R. Exh. 5.

<sup>46</sup> GC Exh. 9.

<sup>47</sup> GC Exh. 3.

<sup>48</sup> GC Exh. 12; see also GC Exh. 16.

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an oil change, cabin filter replacement (relating to air conditioning and heating), and multi-point inspection (looking over the entire vehicle).

5 When the vehicle was on the lift, he removed the splash pan, drained the oil, and installed a new oil filter and o-ring. After lowering the vehicle, he installed six quarts of oil and ran the engine for 5–10 minutes to make certain there were no leaks. He observed none and next raised the car back up and installed the splash pan. When he conducted the normal test drive for 5 –10 minutes around the block, neither of the dashboard lights that show a problem with oil pressure went on. Neither he nor anyone else saw any leakage while the Volvo was still  
10 on Respondent's premises prior to customer pick up.

The following Saturday, J. Orloff received a phone call from the customer, who stated that the Volvo's engine had frozen and stopped running when the vehicle was being driven on a freeway. Orloff left a voice mail for Dziak, stating that the car would be towed to the facility, to  
15 give it priority, and to have Gonzalez look at it the first thing when he came to work on Monday.

On Monday, Dziak followed Orloff's directives. Gonzalez pushed the Volvo into the shop, checked the oil level, and saw it was fine. He raised the car and tried to start the engine, but it seized or locked. When he raised it all the way, he saw a massive oil leak. Upon  
20 removing the splash pan, he observed a leak coming from the oil filter area. His further inspection revealed a cracked or "pinched" o-ring, meaning that it was missing a small (c. 3/16th-inch) piece.

Next, Gonzalez conferred with Ruggieri, whom he considered knowledgeable. He told  
25 Ruggieri that the way the o-ring was torn and because the engine had seized up, determining the cause of the problem as either installation error or manufacturing defect (failed part) was difficult. Ruggieri examined the o-ring and said he agreed.

I credit the consistent testimony of Gonzalez and Ruggieri that the problem the Volvo  
30 experienced was a rare occurrence, that its cause was and remains enigmatic, that a number of variables would have affected when the leak would first have become visible. and that Hobday might not have been able to know if there was a manufacturing defect at the time he performed service. I note that the customer apparently detected no oil leak between the time the vehicle was picked up and when it was being driven on Saturday.

35 Urban, Dziak, and Petrucci came over to Gonzalez' work area following the conversation between Gonzalez and Ruggieri, who was no longer in the immediate area. The car was still raised on the rack. Gonzalez explained his findings. Urban or Petrucci asked if the leak was Hobday's fault, and he replied that he did not know if installation error or a defective part had caused it. He had no further conversations with management prior to Hobday's discharge.  
40

At 2:30 p.m. that day, Urban and Petrucci told Hobday they needed to talk to him in the HR office. He accompanied them. Dziak and Parapetti were also present during the ensuing conversation. Urban said he had looked over Hobday's file and that Hobday's "attitude and  
45 conduct" did not "[fit] the mold that he wanted to build as a team for the dealership."<sup>49</sup> He further said that Hobday's conduct on the Volvo was unacceptable, and they had to let him go. Hobday replied that he believed he had done his job correctly.

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<sup>49</sup> Tr. 303.

Urban gave him a termination notice,<sup>50</sup> which he refused to sign. It stated that the vehicle was towed in on August 13 with no oil in the engine and that the oil filter was improperly installed and caused all the oil to leak out and the engine to seize. Three prior written warnings were mentioned: July 22, 2005 (Petrucci); August 10, 2005 (Duxler); and February 13, 2006 (Parapetti).

The July 2005 warning was for failure to tighten a splash pan; the August 2005 warning for running and testing a vehicle in the shop without an exhaust hose attached (with "possible suspension" for the next infraction); and the 2006 warning for speeding around the neighborhood, for which he received a 1-day suspension (with "termination" for a recurrent incident).<sup>51</sup>

Respondent also provided at trial an e-mail dated August 15, 2006, entitled "Kevin Hobday reprimand," in which J. Orloff related that he and Petrucci had spoken with Hobday about not following proper procedure; more specifically, that he had the car washed even though "no car wash" was clearly written on the repair order.<sup>52</sup> As I earlier explained, J. Orloff equivocated on whether this constituted a reprimand or a warning but, either way, it imposed discipline less severe than suspension or termination.

Hobday did not deny the above incidents when Respondent's counsel questioned him about them, a factor I have considered in finding him credible.

Customer Service Index (CSI) ratings, based on customer surveys that are returned, show that for the months of January through July, Hobday received the maximum of 5.0 every month but January, when his rating was 3.8.<sup>53</sup> By memorandum dated September 27, 2005, Respondent instituted a new technicians' bonus program, "In an effort to improve our CSI and to reward excellent service."<sup>54</sup> In relevant part, it set out a formula to compute bonuses for Volvo technicians who achieved an individual rating of at least one percent over the national 3-month rolling average.

#### October 2007 Raises

Technicians who received annual raises in 2005 and 2006 received them in the month of December, at the time of the annual performance reviews, with the apparent exception of new hires.<sup>55</sup> However, in 2007, management gave almost all technicians a pay increase on about October 15, and provided no pay raises with their performance reviews in December. The complaint does not allege that in the conferral of the October raises, Respondent discriminated against any particular employees because of their union activities.

Respondent's sole witness on this matter was Urban, who testified that the owners told him shortly after he was hired, in late June or early July, that they were looking to improve efficiency. He made a number of recommendations within a week of his employment, including a pay increase for the technicians at or near union scale. The owners told him that they did not disagree but that a pending NLRB proceeding prohibited the Company from doing anything with

<sup>50</sup> R. Exh. 6.

<sup>51</sup> R Exhs. 8-10.

<sup>52</sup> R. Exh. 17.

<sup>53</sup> GC Exh. 13.

<sup>54</sup> GC Exh. 14.

<sup>55</sup> See GC Exhs. 53-74, personnel change of status forms.

pay rates at that point in time; once that was resolved, they would implement his recommendation. In October, after the Union had withdrawn its petition, he suggested management immediately bring the technicians up to the accepted Chicago area standard of pay—union scale or above.<sup>56</sup>

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On cross-examination, he testified—somewhat improbably—that he did not show the owners anything in writing to demonstrate what technicians elsewhere were making. The factors he used to determine individual increases were job performance, production, and efficiency in August and September.

10

The General Counsel's only witness on the motivation behind the October pay increase was Cowan, who testified that when Urban notified him of his raise, Urban said, "[Y]ou guys did your part, now the Orloffs are doing theirs' or something like that," without specifying what he meant about "did your part."<sup>57</sup>

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The General Counsel further alleges, as a violation of Section 8(a)(1), the following statement contained at the bottom of the personnel change of status form used since on at least October 12: "Please note that Howard Orloff Imports, Inc. discourages the discussion of salary information with co-workers."<sup>58</sup>

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## Conclusions

### The 8(a)(1) Allegations

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I conclude that Respondent violated Section 8(a)(1) by the following:

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McConico, in about the first week of July, asked Montgomery why he wanted a union, thereby unlawfully interrogating him about his union sympathies. *Amcast Automotive*, 348 NLRB No. 47 at 3 (2006), cited in Respondent's Brief at 21, does stand for the proposition that an employers' questioning of employees about union activity is not per se illegal and that a violation is found only if "under all the circumstances, the questioning tended to restrain, coerce or interfere with employees in the exercise of their Section 7 rights." See also *Exceptional Professional, Inc.*, 336 NLRB 234, 236 (2001), cited in the General Counsel's Brief at 10. However, Respondent's reliance on that case is misplaced. Here, unlike *Amcast Automotive*, McConico's questioning occurred during a labor organization's active organizing effort, indeed only shortly before the election, and nothing suggests that Montgomery "felt comfortable talking with" McConico "on personal matters," a factor the Board emphasized in *Amcast Automotive* in not finding a violation. *Ibid.* On the contrary, Montgomery told McConico he did not want to talk to him.

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McConcio, on about July 12, asked Delgado what he thought of the Union and how he thought it would benefit him, thereby unlawfully interrogating him about his union sympathies. See my discussion in the preceding paragraph.

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J. Orloff, on about July 12, told Subying that if the Union came in, he could be demoted

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<sup>56</sup> E.g., GC Exh. 76.

<sup>57</sup> Tr. 703, 706. I have deemed it inappropriate to find as facts anything further Cowan said on the subject in his affidavit but to which he did not testify, in the absence of any other corroborating evidence.

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<sup>58</sup> See, e.g., GC Exh. 76.

to an apprentice or semiskilled technician, lower-paying positions. On or about the same date, Orloff told Metejka that if he voted for the Union and the Union came in, he would be demoted to lube technician, a lower-paying position. Orloff thereby unlawfully threatened employees with demotions and pay cuts if they voted for the Union, either personally or as a whole.

5

Petrucci, as service manager on July 16, told Delgado that he had treated Delgado leniently for tardiness but that if the Union came in, the Company could more easily fire him for that, thereby unlawfully threatening stricter enforcement of the tardiness policy (see *Tap Express*, 346 NLRB No. 10 (2005) (not reported in the Board volumes), possibly resulting in termination, if employees voted in the Union.

10

I conclude that D. Orloff and Coletta did not make any unlawful statements at a September meeting they held with technicians.

15

As to the cited provision in the Company's personnel change of status form, a rule that prohibits employees from discussing wages with coworkers is an unlawful restraint on their Section 7 rights to engage in concerted activities for their mutual aid and protection, unless an employer demonstrates a valid business justification that outweighs the employees' interest in the free exchange of such information. *Waco, Inc.*, 273 NLRB 746, 747-748 (1984).

20

Similarly, rules that do not go so far as to prohibit such discussions but still restrict them also violate the Act. Thus, in *Radisson Plaza Minneapolis*, 307 NLRB 94, 94 (1992), enfd. 987 F.2d 1376 (8th Cir. 1993), the Board, in reversing the ALJ, concluded that a rule that employees "shouldn't" discuss their salaries with anyone other than their supervisors was unlawful. Even a rule termed a "request" that employees not discuss their wages with each other contravenes the Act. *Heck's, Inc.*, 293 NLRB 1111, 1119 (1989); see also *LWD, Inc.*, 309 NLRB 214, 216 (1992).

25

Respondent has not averred any business justification for the provision in question, and I conclude, based on the above, that it constitutes a violation of Section 8(a)(1).

30

#### The 8(a)(3) Allegations

The framework for analyzing alleged violations of Section 8(a)(3) is *Wright Line* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of this animus.

40

Under *Wright Line*, if the General Counsel establishes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. The burden of persuasion then shifts to the employer to show that it would have taken the same adverse action even in absence of such activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399-403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Serrano Painting*, 332 NLRB 1363, 1366 (2000); *Best Plumbing Supply*, 310 NLRB 143 (1993). To meet this burden, "an employer cannot simply present a legitimate reason for its action 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." *Serrano Painting*, supra at 1366, citing *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

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50

Evidence from which animus can be inferred as far as the General Counsel's prima facie case may also go to whether Respondent has met its burden of rebutting such.

5 Delgado's Termination

At the outset, I will state that I consider Delgado's absence on July 31 to have been a no-call, no-show, and that that he offered no explanation of the logic behind his decision not to leave a voice mail that day when he could not directly reach Petrucci or Dziak.

10 Delgado engaged in union activities during the campaign, although there is no direct evidence of Respondent knowledge thereof. I find no need to delve into the issue of whether such knowledge should be inferred, because Delgado overtly expressed his prounion sympathies to McConico on July 12.

15 Animus can be inferred from Petrucci's conversation with Delgado only a few days later, in which Petrucci referred to his leniency toward Delgado's tardies and threatened a stricter policy and possible termination if the Union came in. Other various 8(a)(1) violations committed by Respondent's agents, including coowner J. Orloff, also constitute inferential evidence of  
20 animus.

Animus can further be inferred from the following:

25 1. Disparate treatment. No other employees besides Delgado have been discharged for 1 day of no-call, no-show, or for tardiness, and other technicians with repeated tardiness were not disciplined. See *Windsor Convalescent Center of North Long Beach*, 351 NLRB No. 44, slip op. at 10 (2007); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

30 2. Change in strictness of application of disciplinary policy. Management was previously lenient with Delgado on tardiness but then suddenly claimed that his tardiness record was not acceptable. See *San Luis Trucking, Inc.*, 352 NLRB No. 34, slip op. at 37 (2008); *Jennie-O Foods, Inc.*, 301 NLRB 305, 311 (1991).

35 3. Failure to consider Delgado's explanation for his absence. Urban utterly refused to even look at Delgado's proffered medical excuse covering not only July 31 but August 1, reflecting that management had no genuine interest in finding out all of the facts for his no-call, no-show on July 31. See *Windsor Convalescence Center*, *ibid* (employer rejected out of hand a doctor's note excusing the employee's absence on medical grounds); *Embassy Vacation Resorts*, *supra* at 849.  
40

Based on the above, and the record as a whole, I conclude that the General Counsel has established all the requirements for a prima facie case regarding Delgado's termination.

45 Turning to the second prong of *Wright Line*, Respondent's disparate treatment of Delgado vis-à-vis other technicians, the change in the way it treated his tardies from past practice, and Respondent's disinterest in listening to his reasons for being out on July 31 all militate against the conclusion that Respondent would have discharged him other than for the fact that he expressed prounion sentiment. In addition, Respondent's witnesses gave vacillating and conflicting, and otherwise unsatisfactory, testimony regarding the reasons for the decision  
50 to terminate him and management's deliberative processes, leading to the conclusion that its real motivation was his union activity. See *Black Entertainment Television, Inc.*, 324 NLRB 1161, 1161 (1997); *Steve Aloi Ford, Inc.*, 179 NLRB 229, 230 (1969).



and confer benefits without running afoul of the law. I therefore conclude that Cowan's testimony, standing alone, was too ambiguous to establish an improper motive for the pay increase.

5 Respondent did not violate the Act with respect to promises or conferral of benefits during the pendency of the Union's petition. That Respondent committed other ULP's during this period, including two unlawful terminations in August, does not, in my view, suffice to satisfy the necessary element of animus behind the October raises.

10 Of critical importance, the Union had already withdrawn its petition to represent the technicians, so this was not a situation where giving the pay increase potentially prejudiced a labor organization engaged in an active organizing effort. On the contrary, a large majority of technicians had already expressed their desire to remain nonunion, by signing a petition to that effect and transmitting it to the Union. Significantly, the General Counsel has not contended,  
15 nor is there any evidence, that Respondent had any involvement in its preparation or distribution. This situation is therefore akin to that where an employer grants a wage increase after lawfully withdrawing recognition from a union, conduct that the Board has held legal. See *American Mirror Co.*, 277 NLRB 1626, 1627 at fn. 7 (1986).

20 Accordingly, I recommend dismissal of this allegation.

#### Conclusions of Law

25 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. By terminating Juan Delgado and Kevin Hobday, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act.

30 4. By the following conduct, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act.

(a) Interrogated employees about their union sympathies.

35 (b) Threatened employees with demotions and pay cuts if they voted for the Union or if the Union was voted in.

(c) Threatened employees with stricter application of work rules, possibly resulting in their termination, if the Union was voted in.

(d) Maintained a provision in the personnel change of status form that restricts employees from discussing wages with coworkers.

40

#### Remedy

45 Because I have found that 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.

50 Since Respondent terminated Juan Delgado and Kevin Hobday in violation of Section 8(a)(3), it must offer them reinstatement and make them whole for any loss of earnings and other benefits in accordance with *Ogle Protective Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I deny the General Counsel's request for compound interest, based on the Board's decision in *National Fabco Manufacturing*, 352 NLRB No. 37 slip op. at 3 fn. 4 (2008).

The General Counsel has requested (General Counsel's Brief at 30) that Respondent be directed to post the notice to employees in Spanish, as well as in English. In the interest of ensuring that all employees can understand its contents, I will do so.

5

## ORDER

The Respondent, Howard Orloff Imports, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall

10

## 1. Cease and desist from

(a) Terminating or otherwise disciplining employees because they support or have engaged in activities on behalf of Automobile Mechanics Local 701, International Association of Aerospace and Machine Workers, AFL-CIO (the Union), or any other labor organization.

15

(b) Interrogating employees about their union sympathies.

(c) Threatening employees with demotions and pay cuts if they vote for the Union or the Union is voted in.

20

(d) Threatening employees with stricter application of work rules, possibly resulting in their termination, if the Union is voted in.

(e) Maintaining a provision in its personnel change of status form that restricts employees from discussing wages with coworkers.

25

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

30

## 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 Juan Delgado and Kevin Hobday 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.

35

(b) Make employees Juan Delgado and Kevin Hobday whole for any loss of earnings and other benefits they suffered as a result of their unlawful terminations, in the manner set forth in the remedy section of the decision.

40

(c) Within 14 days of the Board's Order, remove from its files any references to the August 1, 2007 termination of Juan Delgado and the August 13, 2007 termination of Kevin Hobday, and within 3 days thereafter, notify them in writing that this has been done and that the terminations will not be used in any way against them.

45

(d) Within 14 days of the Board's Order, remove from its personnel change of status form the language that restricts employees from discussing wages with coworkers.

50

(e) Within 14 days after service by the Region, post at its facility at Chicago, Illinois, copies of the attached notice marked "Appendix A"<sup>59</sup> in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 13 after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 July 1, 2007.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 13 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. July 14, 2008.

\_\_\_\_\_  
Ira Sandron  
Administrative Law Judge

<sup>59</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."

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 terminate or otherwise take disciplinary action against you because you express your support for Automobile Mechanics Local 701, International Association of Aerospace and Machine Workers, AFL-CIO (the Union), or any other labor organization.

WE WILL NOT question you about your union sympathies.

WE WILL NOT threaten you with demotions and pay cuts if you vote for the Union or the Union is voted in.

WE WILL NOT threaten you with stricter application of our work rules, possibly resulting in your termination, if the Union is voted in.

WE WILL NOT maintain a provision in our personnel change of status form that restricts you from discussing your wages with coworkers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the National Labor Relations Act, as set forth at the top of this notice.

WE WILL make Juan Delgado and Kevin Hobday whole for any loss of pay or other benefits suffered as a result of our discrimination against them.

WE WILL within 14 days from the date of this Order, offer full reinstatement to Juan Delgado and Kevin Hobday to their former positions of employment, or if such positions are no longer available, to substantially equivalent positions, without prejudice to any seniority or other rights and privileges they previously enjoyed.

WE WILL remove from our files any reference to the unlawful terminations of Juan Delgado and Kevin Hobday, and within 3 days thereafter notify them in writing that this has been done and that the terminations will not be used against them in any way.

WE WILL remove from our employee change of status form the restriction on employees' discussing their wages with coworkers.

HOWARD ORLOFF IMPORTS, INC.

\_\_\_\_\_  
(Employer)

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

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.nlrb.gov](http://www.nlrb.gov).

200 West Adams Street, Suite 800

Chicago, Illinois 60606-5208

Hours: 8:30 a.m. to 5 p.m.

312-353-7570.

**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, 312-353-7170.