UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

A/C SPECIALISTS, INC.,

and **Case No. 12-CA-076395**

UNITED ASSOCIATION OF PLUMBERS, PIPEFITTERS & HVAC REFRIGERATION MECHANICS, LOCAL UNION 123, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO.
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RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The Respondent, A/C SPECIALISTS, INC. (herein "A/C Specialists" or "the Respondent"), pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, hereby submits its Exceptions to the Decision of the Administrative Law Judge (herein "Decision"). Specifically, A/C Specialists contends that the Decision of the Administrative Law Judge erroneously concluded that (1) the Respondent violated Sections 8(a)(1) and (3) of the National Labor Relations Act ("the Act") and (2) the imposition of a bargaining order is warranted.

STATEMENT OF THE CASE

A/C Specialists is a very small, family-owned and operated business that provides heating, ventilation and air conditioning (HVAC) maintenance and repair services to residential and a few commercial accounts. Tim Winston owns the company, having acquired it from its former owner, Dave Winston, who is Tim's father. Tim Winston is responsible for all facets of the company's operations, including facilities, finances, sales and marketing. At the times relevant to this case, A/C Specialists had seven (7) employees, two of whom were Tim Winston

and Fran Winston, Tim's mother, who performed clerical duties. Dave Winston served as an unpaid consultant. There were five employees of the company who were not related to each other: Jack Orbin, telemarketer; Joe Lovell, HVAC, certified lead installer; and three (3) HVAC "technicians," James Stahl ("Stahl"), Michael Noel ("Noel"), and Jerome Gordon ("Gordon").

On March 9, 2012, two men entered the offices of A/C Specialists and asked to speak to Tim Winston. Neither identified himself or displayed any indicia of union affiliation but the men were, respectively, United Association Local Union 123 business agent Todd Vega ("Vega") and Florida plumbing union organizer Russell Leggette ("Leggette"). There is a great deal of dispute over what was said by whom in the few minutes following Leggette's and Vega's entrance. According to Leggette, he told Tim Winston that they were "out talking to contractors." (Tr. p. 100, at 4-8).[1] Leggette also maintains that he told the Winstons he wanted to talk to the company about "becoming a union contractor." (Tr. p. 117, at 5-6; p. 119, at 1-9). The Winstons declined the invitation and, in response, Leggette claims that he showed Tim Winston union authorization cards signed by Noel, Gordon, and Stahl. The Winstons contend Leggette did not display any cards, but that he instead claimed to have them and held them out from his chest in such a way that neither Tim nor Dave could identify them. Vega and Leggette then left the office.

Following this exchange, Tim Winston called Noel and Gordon and asked "what's this about a union?" and "what's this union stuff?" Noel and Gordon informed Tim Winston that they were "going to work for the union," which Tim interpreted to mean that they were quitting their employment with A/C Specialists and had found new employment with the Union. Shortly

[1] References to the page and line numbers of the transcript of the hearing held before Administrative Law Judge George Carson on August 13-14, 2012, will be made as follows: (Tr. p. ___, at ____).

after these conversations, Stahl called and expressed sentiments similar to those of Noel and Gordon.

Noel, Gordon and Stahl were terminated. On April 5, 2012, A/C Specialists extended an unconditional offer of reinstatement to both Noel and Gordon. On April 11, 2012, both men returned to work in the positions they held prior to their discharge. Noel and Gordon received full back pay, and were thereafter paid on the same performance-based compensation basis as they were prior to the discharge.

Thereafter, on March 12, 2012, the United Association of Plumbers, Pipefitters & HVAC Refrigeration Mechanics, Local Union 123, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO ("the Union"), filed a charge of unfair labor practices ("the Charge") with the National Labor Relations Board ("the Board"). The Charge accused A/C Specialists of violating Sections 8(a)(1), (3), and (5) of the National Labor Relations Act, by threatening, firing, and committing other unlawful acts against employees on account of their involvement in Act-protected activities, including signing authorization cards, and by refusing to recognize the Union as the bargaining representative of a three-man unit consisting of all of the Respondent's service technicians based on Leggette's alleged demand for recognition supported by his supposed display to the employer of the authorization cards signed by the unit members. The Union amended the charge on two occasions, April 2, 2012, and April 25, 2012, respectively.

On May 30, 2012, the Board issued a complaint and notice of hearing ("the Complaint"), alleging violations of Sections 8(a)(1), (3), and (5) of the Act based on the allegations made in the Union's charge. In the Complaint, the Board sought a wide panoply of relief against A/C Specialists, including (1) the issuance of an Order requiring A/C Specialists to bargain in good

faith with the Union as the recognized bargaining representative of the Unit; (2) the reinstatement of Stahl with backpay and making Noel and Gordon whole for any loss suffered during the time between their discharge and their reinstatement; and (3) the posting of the Notice to Employees and having said Notice read aloud to its employees on work time at a meeting convened at A/C Specialists' facilities.

On June 12, 2012, A/C Specialists filed its Answer and Defenses to Unfair Labor Practice Charge, in which it denied that any of the purported violations of the Act had taken place and asserted several defenses. Specifically, A/C Specialists contended that there was no demand for union recognition, nor were any authorization cards or any other indicia of support for the Union displayed to any agent or representative of A/C Specialists, and that, contrary to its current position, the Union's purpose in visiting the company on March 9 ,2012, was to induce A/C Specialists to execute a Section 8(f) industry agreement, not to bargain. A/C Specialists also asserted that Stahl was a supervisor within the meaning of Section 2(11) of the Act, and therefore any bargaining unit which included him was not, and could not, be an appropriate bargaining unit. Additionally, A/C Specialists noted that while Gordon and Noel were initially discharged based on the belief that they had abandoned their employment with A/C Specialists both men were subsequently reinstated to their previous positions with full backpay. Finally, A/C Specialists asserted that Stahl was not eligible for reinstatement due to multiple disqualifying acts on his behalf, including his refusal to take a service call to which he was assigned, his misappropriation of company funds and his subsequent failure to repay such monies, and his placing of numerous unauthorized long-distance telephone calls.

On August 13, 2012, and August 14, 2012, a hearing was held before the Administrative Law Judge, during which the testimony of multiple witnesses was taken regarding the events of

March 9, 2012. Testifying on behalf of A/C Specialists were Tim Winston, Dave Winston, and Mary Winston, while Leggette, Vega, Stahl, Gordon, and Noel gave testimony on behalf of the Union.

On October 12, 2012, the Administrative Law Judge issued his Decision (herein "Decision"), wherein he makes a number of recommendations with respect to the charges leveled against A/C Specialists. Specifically, the Decision finds that "by informing employees that selection of the Union as their collective-bargaining representative would be futile, threatening employees with discharge because of their union activities, and threatening employees with arrest because of their union activities," and by "discharging employees because of their union activity," A/C Specialists violated Sections 8(a)(1) and 8(a)(3) of the Act.[2] Decision, pp. 10-11, at 52-4. The Decision further recommends the dismissal of the Section 8(a)(5) allegation, concluding that no violations thereof have taken place. See id., p. 9, at 33-48. Finally, the Decision recommends the imposition of a bargaining order. Id., p. 10, at 45-46. As the remedy for these purported violations, the Decision directs A/C Specialists to offer reinstatement to Stahl, and to make Stahl, Noel and Gordon whole "for any loss of earnings and other benefits." Id., p. 11, at 12-15. Additionally, the Decision states that A/C Specialists "must recognize and bargain with the Union," and "will also be ordered to post and email an appropriate notice." Id. p. 11, at 22-24. Notably, however, A/C Specialists has already satisfied the vast majority of these requirements, as it has: (1) offered reinstatement to Stahl; (2) provided backpay to both Noel and Gordon; (3) agreed to recognize and bargain with the Union; and (4) posted and mailed an analogous notice in connection with the ancillary Section 10(j) proceeding before the district court.

[2] References to the page and line numbers of the Decision of the Administrative Law Judge will be made as follows: (Decision, p. ___, at ____).

QUESTIONS INVOLVED

I. Did the Decision of the Administrative Law Judge Erroneously Conclude that the Respondent Violated Sections 8(a)(1) and (3) of the Act?

II. Did the Decision of the Administrative Law Judge Erroneously Conclude that the Imposition of a Bargaining Order is Warranted?

ARGUMENTS IN SUPPORT OF EXCEPTIONS

I. The Decision of the Administrative Law Judge Erroneously Concludes that the Respondent Violated Sections 8(a)(1) and (3) of the Act

In the Decision, the Administrative Law Judge ("ALJ") asserts that A/C Specialists violated Sections 8(a)(1) and (3) of the Act "by discharging James Stahl, Jerome Gordon, and Michael Noel because of their activities on behalf of the Union." Decision, p. 9, at 27-29. As support for this proposition, the Decision cites two statements made by Tim and Dave Winston at the hearing held on August 13-14, 2012, as well as the doctrine of condonation, a theory that was neither advanced nor even mentioned in the briefs or arguments of any of the parties to this matter. See id., p. 9, at 18-23. However, upon closer examination, it is evident that the ALJ has both misconstrued the statements made by the Winstons and incorrectly applied the condonation doctrine, thereby necessitating the inescapable conclusion that no violations of Sections 8(a)(1) or (3) have occurred with respect to the discharges of Stahl, Gordon, or Noel.

A. The Statements of Tim and Dave Winston Clearly Demonstrate that Stahl, Gordon, and Noel Were Not Fired for Their Union Activities

As one of the bases for the conclusion that A/C Specialists discharged Stahl, Gordon and Noel because of their Union activities and thereby violated Sections 8(a)(1) and (3) of the Act, the Decision notes that "David Winston admitted that 'being a member of the Union' and being an employee of his Company were 'things that couldn't co-exist.'" Id., p. 9, at 18-19. The

Decision also states that, when asked "whether Stahl was fired 'because he had joined the Union,' [Tim Winston] admitted, 'He was fired mainly for that.'" Id., p. 9, at 21-23. Certainly, when viewed in isolation, these statements appear damning. However, when placed in the proper context, it is clear that, rather than constituting evidence conclusive of discharge predicated on union activities, these statements instead demonstrate that the Winstons were wholly unfamiliar with the mechanics of union membership and its resultant effect on the employees' employment with A/C Specialists. Given this unfamiliarity, any suggestion that Gordon, Stahl and Noel were terminated solely on account of their union activities is unsupportable.

The ALJ's Decision states that Dave Winston "admitted" that "being a member of the Union" and being an employee of A/C Specialists were "things that couldn't co-exist."[3] Id., p. 6, at 25-27. This "admission" is hardly proof that Stahl, Gordon and Noel were discharged as a consequence of their union association. Rather, Dave Winston's response simply discloses his unfamiliarity with the mechanics of union membership. Indeed, his responses to the series of questions asked by Mr. Gonzalez (counsel for A/C Specialists) in the cross-examination that immediately followed this discourse plainly illustrate his lack of knowledge and understanding regarding union membership. Specifically, Dave Winston was asked:

> Q. Mr. Winston, have you ever been a member of a union?
> A. No, sir.
> Q. Have you ever worked in a company with employees who were represented by a union?
> A. No, sir.

[3] As reproduced earlier in the Decision, "David Winston was asked whether he "felt that him [Stahl] being a member of the Union and being an employee of your company were things that couldn't co-exist, correct?" to which he replied "Correct." Id. at 6, 25-27.

Tr. p. 29, at 5-10. Consequently, when placed in context, Dave Winston's response is not evidence of discharge based on union activity, but rather a result of his belief that union membership meant union *employment*. Therefore, believing that by electing to join the union, Stahl, Gordon and Noel had also accepted union employment, it is easy to understand how Dave Winston would conclude that the two "couldn't co-exist," in the sense that the two were mutually exclusive in his mind. It is hardly possible to hold two full-time jobs concurrently. Thus, their discharges were not motivated by their union membership, but were rather a consequence of Dave Winston's misperception that the two were mutually exclusive.

The statement of Tim Winston, upon which the Decision also relies, further reinforces the notion that the Winstons fundamentally misperceived the effect of the employees' union membership on their employment with A/C Specialists. When the question "He was fired because he had joined the Union, correct?" was posed to him, Tim Winston replied, "He was fired because - - there were several things. He was fired mainly for that, yes sir." Tr. p. 340, at 23-25. As was the case with Dave Winston's response, such a short statement, without the proper context, does not provide an adequate backdrop from which to evaluate it. As noted in the Decision, Tim Winston also testified that, when speaking to Gordon regarding Leggette's and Vega's visit to the facility, Gordon stated that he was "going to work for the Union," and that he then asked Gordon how he could "work for the union and me both at the same time." Tr. p. 67, at 14-18. Tim Winston also testified that a nearly identical exchange occurred between himself and Noel, in which he told Noel "I don't know how you're going to work for the Union and for me, too." Tr. p. 66, at 20-21. In deciding not to credit this testimony, the Decision contends that any statements by Noel and Gordon that they were "going to work for the Union. . . . would have been untrue." Decision, p. 6, at 14-15. However, the fact that Noel and Gordon's

statements "would have been untrue" does not mean that they were not made. Indeed, the truth or falsity of such statements has no bearing on whether Tim Winston understood them to mean that Gordon and Noel were "going to work for the Union," and could therefore not work for A/C Specialists. Moreover, the ALJ's finding that "neither Gordon nor Noel said they were quitting or resigning" (Decision, p. 6, at 17-18) is not dispositive as to Tim Winston's understanding of the effect of Gordon and Noel's Union membership on their employment with A/C Specialists.

As was the case with Dave Winston, Tim Winston's testimony reveals his unfamiliarity with unions and the effect of union membership on current employment. When asked by the Board attorney, Mr. Zerby, whether he "told Mr. Stahl that you don't know anything about unions, right?," Tim Winston equivocally replied "I do not." Tr. p. 68, at 10-12. Continuing, Mr. Zerby asked "[a]nd you told him that if you wanted to work for unions, there's nothing you could do for him, correct?" to which Tim Winston responded "Yes, sir." Tr. p. 68, at 15-17. Furthermore, when Mr. Powers (the Union attorney) asked Tim Winston if he "felt that they [Noel, Gordon and Stahl] couldn't be a part of the Union and part of your company," Tim Winston responded "That's right." Tr. p. 72, at 1-3. Elaborating on this, Tim Winston testified that he said "how can you work for them and work for me because I didn't understand the whole thing. I don't even know what they do. When somebody tells me they're going to work for somebody, that means they're voluntarily quitting and they're moving on." Tr. p. 72, at 8-12. And, as was the case with Dave Winston, Tim Winston was asked a series of questions by Mr. Gonzalez regarding his understanding of unions:

Q. Mr. Winston, you've never been a member of a union?
A. No, sir.
Q. Have you ever seen an authorization card?
A. No, sir.
Q. Ever signed one?
A. No, sir.

Q. Ever worked for a company that was organized and had union representing any of the employees?
A. No, sir.

Tr. pp. 76-77, at 18-25, 1-2. Thus, it is clear that Tim Winston's statement that "[Stahl] was fired mainly for [joining the Union]" was intended to indicate his belief that union membership necessarily meant that union members were union employees, and thus were unable to also work for A/C Specialists. Consequently, the ALJ's conclusion that "[u]nion membership was incompatible with employment by the Respondent" (Decision, p. 9, at 6-7) is correct, only in the sense that the Winstons did not fully grasp the impact of union membership on the employees' employment with A/C Specialists.

B. The ALJ Incorrectly Applied the Doctrine of Condonation

As an additional basis for finding a violation of Sections 8(a)(1) and (3), the ALJ's Decision perfunctorily states, "[t]he alleged misconduct of Stahl that resulted in his February discharge was condoned. The Respondent rescinded the discharge and continued Stahl's employment." Decision, p. 9, at 19-21. The Decision cites United Parcel Service, Inc., 301 NLRB 1142 (1991), which states that "[t]he doctrine of condonation applies where there is clear and convincing evidence that the employer has agreed to forgive the misconduct, to 'wipe the slate clean,' and to resume or continue the employment relationship as though no misconduct occurred." United Parcel Service, 301 NLRB at 1143. Further, "'[t]he doctrine prohibits an employer from misleadingly agreeing to return its employees to work and then taking disciplinary action for something apparently forgiven.'" Id. (quoting Packers Hide Assn. v. NLRB, 360 F.2d 59, 62 (8th Cir. 1966)). While the Board "does not look for any 'magic words' suggesting that the employer has forgiven the employee," White Oak Coal Co., 295 NLRB 567, 570 (1989), "condonation may be found based on an employer's affirmative statements clearly

implying that employee misconduct had been forgiven, even if the employer did not specifically state that it would forgo disciplinary actions," Fineberg Packing Company, Inc., 349 NLRB 294, 299 (2007) (Liebman, dissenting in part). Indeed, "condonation may not be lightly presumed from mere silence or equivocal statements, but must clearly appear from some positive act by an employer indicating forgiveness and an intention of treating the guilty employees as if their misconduct had not occurred." NLRB v. Marshall Car Wheel and Foundry of Marshall, Texas, Inc., 218 F.2d 409, 414 (5th Cir. 1955).

In the present case, it is clear that A/C Specialists did not condone Stahl's malfeasance. When questioned about the circumstances surrounding A/C Specialists' attempt to fire him for improperly using the company vehicle and purchasing tools without authorization, Stahl's testimony clearly established that A/C Specialists did not, in fact, condone his misconduct. While Stahl was not fired for his misconduct, he was reprimanded and disciplined. Specifically, as a consequence of his misconduct, the terms of Stahl's repayment plan to A/C Specialists were accelerated, and his "overage"[4] was taken away. See Tr. p. 250, at 7-23 ("I was given overage at that time. They took that away from me.") These are not the actions of an employer that has "agreed to forgive the misconduct, to 'wipe the slate clean,' and to resume or continue the employment relationship as though no misconduct occurred." United Parcel Service, 301 NLRB at 1142. A/C Specialists did not in any way condone Stahl's misconduct, and therefore the ALJ's determination with respect to condonation was erroneous.

[4] "Overage" is the difference between the price quoted by A/C Specialists and the price the item is ultimately sold for. Prior to this incident, Stahl was permitted to keep the "overage."

II. The Decision of the Administrative Law Judge Erroneously Concludes that a Bargaining Order is Warranted

The level of severity required for a bargaining order is a high one, and is provided by the dissent in Scott v. Stephen Dunn & Associates, which states:

> The bargaining order is the most severe sanction available to remedy employer unfair labor practices. "A bargaining order is not a snake-oil cure for what ails the workplace; it is an extreme remedy that must be applied with commensurate care." The preferred remedy for employer unfair labor practices that affect the outcome of an election is a new election. . . . Only where there is a substantial danger that the employees will be inhibited by the employer's conduct from adhering to the union should a bargaining order issue.

241 F.3d 652, 670 (9th Cir. 2001); see also United Oil Mfg. Co., Inc. v. NLRB, 672 F.2d 1208 (3rd Cir. 1982), cert. denied, 459 U.S. 1036 (finding that a bargaining order is an extraordinary remedy and is appropriate only when harmful effects of disenfranchisement of workers are outweighed by positive advancement of policies underlying federal labor law); Grandee Beer Distributors, Inc. v. NLRB, 630 F.2d 928 (2d Cir. 1980) (noting that a bargaining order is an extraordinary remedy which should only be applied in unusual cases).

In recommending the imposition of a bargaining order, the Decision of the ALJ disregards the case cited by A/C Specialists, and instead relies upon Allied General Services, 329 NLRB 568 (1999). Quoting Allied General Services, the Decision states "the Respondent's highest officials swiftly reacted with draconian actions that affected the livelihood of every one of the unit employees. Clearly, there is a strong likelihood that the Respondent's unfair labor practices will have a pervasive and lasting deleterious effect on the Respondent's employees' exercise of their Section 7 rights." Decision, p. 10, at 23-26 (quoting Allied General Services, 329 NLRB at 570). Based on this, the ALJ recommends the imposition of a bargaining order, finding that "traditional remedies cannot erase the coercive effects of the conduct, making the holding of a fair election impossible." Id., p. 10, at 44-45.

However, the Board's conclusion in Allied General Services that the imposition of a bargaining order was appropriate was predicated, at least in part, upon a finding that the president and vice-president of the company "shut down the part of its operation in which [the bargaining unit] worked because the employees had selected the Union as their bargaining representative." Allied General Services, 329 NLRB at 4. Consequently, the "draconian actions" referenced in the Decision's quotation from Allied General Services encompass not only the discharge of employees, but also the shutdown of "the part of [the company's] operations in which [the bargaining unit] worked." Id. Notably, there has been no such finding in the instant case. As a result, the concern expressed in Allied General Services that there "is a strong likelihood that the Respondent's unfair labor practices will have a pervasive and lasting deleterious effect on the Respondent's employees' exercise of their Section 7 rights" (id.) is not present here, and, as such, the imposition of a bargaining order is inappropriate.

As noted in A/C Specialists' post-hearing brief, the fact remains that there has not been any showing whatsoever of adverse impact on the election process. No election has been requested, nor has A/C Specialists ever denied the Union its rights to petition for, and campaign as a part of, a Board election. There has been no showing of an effect on majority status, or lowered zeal on the part of the Union or any of the putative bargaining unit members. Therefore, as stated by the Eleventh Circuit, "[i]f the unfair labor practices have only a 'minimal impact on the election machinery,' a bargaining order is completely inappropriate." Ona Corp. v. N.L.R.B., 729 F.2d 713, 720 (11th Cir. 1984) (quoting Gissel, 395 U.S. at 615). Indeed, the courts have repeatedly recognized that a free election is preferable to a bargaining order, given that a bargaining order inevitability curtails and circumscribes employees' freedom to determine whether they desire union representation. See NLRB v. Gissel Packing Co., 395 U.S. 575, 612

(1969) ("[A] bargaining order is designed as much to remedy past election damage as it is to deter future misconduct."); N.L.R.B. v. K&K Gourmet Meats, Inc., 640 F.2d 460 (3d Cir. 1981) ("Only in exceptional circumstances, where it is obvious that the extensive machinery and power of the NLRB is inadequate to ensure a free election, should employees be denied their right to cast a secret ballot for or against an exclusive bargaining agent."); see also N.L.R.B. v. Pacific Southwest Airlines, 550 F.2d 1148 (9th Cir. 1977) (bargaining order based on union authorization cards is considered less desirable than such an order based on free expression of employees in a fair election); J.L.M., Inc. v. N.L.R.B., 31 F.3d 79 (2d Cir. 1994) (election, not a bargaining order, remains the preferred remedy). Therefore, in a case such as this, where there has been no showing that the electoral machinery has been impaired or restricted, and there have been little or no unfair labor practices, a bargaining order is inappropriate. See Chromalloy Min. and Minerals Alaska Div., Chromalloy American Corp. v. N.L.R.B., 620 F.2d 1120, 1129 (5th Cir. 1980) ("A bargaining order is never appropriate in cases marked by 'minor or less extensive unfair labor practices' that have a 'minimal impact on the election machinery.'") Consequently, the Decision of the ALJ is erroneous in concluding that a bargaining order is warranted in this case.

CONCLUSION

Based on the foregoing, it is clear that the Decision of the Administrative Law Judge erroneously concludes that the Respondent has violated Sections 8(a)(1) and (3), in that the testimony of the Winstons, when placed in the proper context, establishes that they were fundamentally mistaken as to the effect of the employees' union membership on their employment with A/C Specialists. Furthermore, the Administrative Law Judge has incorrectly applied the doctrine of condonation, as the Respondent did not, in any way, condone Stahl's

malfeasance. Finally, the case relied upon by the Administrative Law Judge as support for his conclusion that a bargaining order is appropriate is inapposite.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been electronically filed via the NLRB website and has been sent by U.S. Mail on this 9th day of November, 2012 to the following:

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