UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AC SPECIALISTS, INC.

and Case 12-CA-076395

UNITED ASSOCIATION OF PLUMBERS, PIPEFITTERS & HVAC REFRIGERATION MECHANICS, LOCAL UNION 123, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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I. STATEMENT OF THE CASE

Counsel for the Acting General Counsel respectfully submits this brief to the Board in support of Acting General Counsel's cross-exceptions to the Decision of Administrative Law Judge George Carson II (the ALJ) in this matter.[1]

A hearing was held before Administrative Law Judge George Carson II on August 13 and 14, 2012, at Tampa, Florida. The ALJ issued his Decision on October 12, 2012. The ALJ concluded that AC Specialists, Inc. (Respondent) violated Section 8(a)(1) of the Act by telling employees that selecting United Association of Plumbers, Pipefitters & HVAC Refrigeration Mechanics, Local Union 123, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (the Union) as their exclusive collective-bargaining agent would be futile, and threatening employees with discharge and arrest because of their union activity; and that Respondent violated Section 8(a)(1) and (3) of the Act by discharging all three of its service technicians, Jerome Gordon, Michael Noel and James Stahl, because they engaged in union activity. The ALJ also recommended the issuance of a remedial *Gissel* bargaining order based on the violations of the Act he found.

However, the ALJ concluded that Respondent did not coercively interrogate employees when Timothy Winston and David Winston asked the technicians about their union activity. The ALJ further concluded that Timothy Winston and David Winston did not threaten technicians Noel and Stahl with discharge during their telephone conversations on March 9, 2012, or later that day at Respondent's facility.[2] (ALJD 8:13-24, 8:46-9:14). The ALJ concluded that

[1] Respondent filed exceptions to the ALJ's findings and conclusions that it committed certain unfair labor practices. Those exceptions are addressed in detail in Acting General Counsel's Answering Brief, which is being filed simultaneously with Acting General Counsel's Cross-Exceptions and this Brief in Support of Cross-Exceptions.

[2] As used herein, the numbers following "ALJD" refer to the page and line number of the Administrative Law Judge's Decision, and the numbers following "Tr." refer to the page and line numbers of the transcript. For example, "Tr. 68:19-22" refers to transcript page 68, lines 19 to 22. In addition "GC" refers to General Counsel's exhibits and "R" refers to Respondent's exhibits. "R. Br." refers to Respondent's brief in support of exceptions.

Respondent did not violate Section 8(a)(5) of the Act because Respondent did not agree to recognize the Union on the basis of a card majority. (ALJD 9:33-48).

As part of the remedy, the ALJ ordered that Respondent be required to reinstate Stahl and make Gordon, Noel, and Stahl whole for any losses suffered as a result of their discharge. However, the ALJ failed to include in his recommended order provisions directing Respondent to reimburse Gordon, Noel, and Stahl for any excess federal and state income taxes they may owe from receiving a lump-sum backpay award, and to submit the appropriate documentation to the Social Security Administration so that backpay paid to the technicians will be allocated to the appropriate calendar quarters. (ALJD 11-14).

The Acting General Counsel has filed cross-exceptions to ALJ's findings and conclusions that Respondent did not violate the Act in several respects. The cross-exceptions raise the following questions:

1. Did the ALJ err by finding and concluding that Respondent, by Timothy Winston and David Winston, did not coercively interrogate technicians Gordon, Noel, and Stahl about their Union activity in violation of Section 8(a)(1) of the Act and by failing to provide an appropriate remedy for such violation? (Cross-Exceptions 1 through 4).

2. Did the ALJ err by finding and concluding that Respondent, by Timothy Winston, did not threaten technicians Gordon and Noel with discharge during telephone conversations with those employees on March 9, 2012, and by finding and concluding that Respondent, by David Winston, did not threaten technicians Gordon, Noel, and Stahl with discharge at its facility on March 9, 2012. (Cross-Exceptions 5-10).

3. Did the ALJ err by failing to find that the Union demanded recognition on March 9, 2012, and by failing to find that Respondent violated Section 8(a)(1) and (5) of the Act by failing

and refusing to recognize and bargain with the Union retroactively to March 9, 2012, based on the unlawful threats of discharge and interrogations alleged in cross-exceptions 1 to 10, in addition to the unfair labor practices found by the ALJ? (Cross-Exceptions 11-13).

4. Did the ALJ err by failing to include in his recommended order provisions requiring that Respondent reimburse Gordon, Noel, and Stahl for any excess federal and state income taxes they may owe from receiving a lump-sum backpay award, and to submit the appropriate documentation to the Social Security Administration so that backpay paid to the technicians will be allocated to the appropriate calendar quarters. (Cross-Exceptions 14 and 15).[3]

Counsel for the Acting General Counsel submits that the questions should be answered affirmatively.[4]

Section II of this brief sets forth the relevant facts. Section III contains the argument supporting Counsel for the Acting General Counsel's Cross-Exceptions. Section IV concludes the brief.

II. STATEMENT OF FACTS

Respondent is a residential heating and air conditioning contractor. (ALJD 1-2; Tr. 18:3-5). Respondent is owned and operated by Timothy Winston, its President. (Tr. 17, 63). Timothy's father, David Winston, is a consultant with authority to hire and discharge employees,

[3] As alleged in cross-exception 16, it appears that the ALJ erroneously recommended the dismissal of paragraph 8(b) of the complaint, which alleges that David Winston, at Respondent's facility, told employees that it was futile for them to choose the Union as their collective-bargaining representative. Thus, it appears that the ALJ intended to recommend the dismissal of paragraph 8(c) of the complaint, rather than 8(b) , since he concluded that Respondent told employees that selection of the Union was futile as alleged in paragraph 8(b). Therefore, the recommended dismissal of paragraph 8(b) of the complaint was in error and cross-exception 16 should be granted.

[4] The Board filed a petition for injunctive relief pursuant to Section 10(j) of the Act in a related proceeding in the United States District Court for the Middle District of Florida, in *Diaz v. AC Specialists, Inc.*, Case 8:12-cv-01410-JDW-TBM. seeking interim remedial relief in order to preserve the viability of a final Board Order in the instant administrative case. On September 28, 2012, the Court granted the Board's petition for an injunction in part, by, inter alia, ordering Respondent to cease and desist from the unfair labor practices alleged in this matter, and offer James Stahl reinstatement, pending the issuance of a final Board Order. The Court denied the petition in part, by declining to issue an interim bargaining order. On November 5, 2012, the Court denied without prejudice Respondent's Motion for Stay Pending Appeal. In view of the ongoing Section 10(j) case, the instant case should be given priority in its processing pursuant to Section 102.94(a) of the Board's Rules and Regulations.

and he is frequently at Respondent's facility. (ALJD 2; Tr. 18, 24). Respondent employed three service technicians at all material times: Jerome Gordon, Michael Noel, and James Stahl. (ALJD 2; Tr. 18:13-23; GC Ex. 1(m)).

On February 23, 2012, Gordon, Noel, and Stahl signed cards authorizing the Union to represent them for the purposes of collective bargaining. They gave the signed cards to Union organizer Russell Leggette and Stahl told Leggette that the employees did not want him to do anything immediately, and wanted some time to consider how to approach the matter (of unionization). (ALJD 4:15-23; Tr. 94-98; 150-152; 191-194; 231-233; GC Exs. 2-5).

On March 5, 2012, Stahl told Union organizer Russell Leggette to take the signed authorization cards and do whatever was necessary to seek representation for the employees of Respondent. (ALJD 4:20-24; Tr. 152; 194; 233).

On the morning of March 9, 2012, Union organizer Leggette and Union business manager Todd Vega went to Respondent's facility. Leggette and Vega knocked on the door and were invited into the facility by one of the women sitting near the door. Leggette asked to speak with Timothy Winston. Timothy Winston came out of an office and Leggette introduced himself and Vega, and informed Timothy Winston that he and Vega were out talking to union contractors. Timothy Winston interrupted Leggette and told him that Respondent was doing fine and did not need any help from the Union. (ALJD 4:37-51; Tr. 99-102; 128-129).

At that point, David Winston came out of the office and told Leggette and Vega that Respondent was not hiring union people, and that he had no use for the Union. Leggette responded to David Winston by stating that Respondent's employees wanted to be Union. (ALJD 4:37-51; Tr. 99-102; 128-129). David Winston replied that Leggette had not spoken with his employees. Leggette said he had, and David Winston demanded to know where and when.

Leggette replied that the employees wanted Local 123 to be the collective bargaining agent for terms and wages and conditions of employment. (ALJD 4:37-5:22; Tr. 100:24-101:1-5). Leggette also told David and Timothy Winston that the employees wanted to have an election or for Respondent to recognize Local 123 as having majority status based on the authorization cards. (ALJD 4:37-5:22; Tr. 101:5-7).

Leggette then asked David and Timothy Winston if they wanted to see the authorization cards, which he had on a yellow legal pad. David and Timothy Winston both said yes. Leggette, holding the cards under his thumb, fanned the cards out on the legal pad and showed them to David and Timothy Winston. David Winston said, "fuck the Union" and that unions had ruined this country. The Winstons bent over towards the cards, leaning in, and looked at the cards and said that the signers were their employees. (ALJD 4:37-5:22; Tr. 101, 128:23-129:16, 147-148). Leggette and Vega were asked to leave and they did. (ALJD 4:37-51; Tr. 101).

David and Timothy Winston immediately called technicians Gordon, Noel, and Stahl and discharged all three because they supported and joined the Union. (ALJD 9:18-29; Tr. 59-60; 71-72, 74-76, 340). As alleged in cross-exceptions 1 to 9, and as discussed in the argument section of this brief, during these phone calls and in their subsequent meeting with the employees at Respondent's facility, all on March 9, 2012, the Winstons committed a number of independent violations of Section 8(a)(1) of the Act in addition to those found by the ALJ.

The credited testimony of technician Michael Noel establishes that on the morning of March 9, 2012, he was called by Timothy Winston. Winston began the conversation by asking what this union stuff was about, and Noel replied that he had joined the Union. Timothy Winston asked why he would do that and said that Noel could have come to Timothy Winston if he had any problems. Noel responded that it wasn't anything against Timothy Winston.

Timothy Winston said it had everything to do with him and instructed Noel to finish his call and turn in his stuff. (ALJD 5:24-6:20; Tr. 153, 156-158, 181-182).

About 20 minutes after he left the facility on March 9, Gordon was called by David Winston, but missed the call. Gordon returned the call and David Winston asked Gordon who was the Union guy he was talking to. Gordon replied, who, Mr. Leggette? David Winston said no, some fat guy, and Gordon again said Mr. Leggette. David Winston then informed Gordon that there wasn't going to be a union, and that Respondent was not a union shop, and that if Gordon wanted to be in a union, he needed to go and get a union job. David Winston asked Gordon what made him want to be union and want to talk to a union guy. Gordon responded that he thought it was a good idea. David Winston told Gordon that Respondent was not going to be union, and said that Gordon needed to decide what he was going to do. When Gordon did not immediately respond, David Winston told Gordon to call back when he made a decision. (ALJD 5:24-6:20; Tr. 194-196).

Instead of calling David Winston back, Gordon called Timothy Winston and told Timothy Winston that he wanted to be union. Timothy asked if Gordon wanted to run the service call Gordon was on and then turn in his truck, or to turn in his truck (immediately). Gordon replied that because he was being fired, he would turn in his truck immediately. (ALJD 5:24-6:20; Tr. 196, 214).

David Winston also called technician James Stahl on the morning of March 9, 2012. David Winston asked what the fuck Stahl was trying to do to him, and then told Stahl that he knew that Stahl was behind "it" (the union organizing effort) and that the others (referring to Gordon and Noel) were not smart enough to do this. Stahl replied that he had signed a Union card and that they had all signed Union cards together. David Winston told Stahl that (the

Union) wasn't going to happen and that Stahl did not have a job. David Winston asked Stahl who was the "fat fucker" with the Union and Stahl told him it was Russell Leggette. (ALJD 6:19-52; Tr. 234-235).

After he finished speaking with David Winston, Stahl was called by Timothy Winston. Timothy Winston told Stahl to run his current call, and then return to the office and turn in his truck. Stahl said okay and ended the call. After thinking for a minute, Stahl called Timothy Winston back and told him that he did not feel that it was appropriate for him to run the call. Timothy Winston said that was fine, called Stahl a treasonous fucker, and told Stahl to come and see him face-to-face and see what happens. (ALJD 6:19-52; Tr. 235-236).

After being told to return their vehicles to Respondent's facility, the three technicians met at a hotel, where they removed their remaining personal tools from their company vehicles.[5] The technicians proceeded to a Radiant gas station where they met a Sheriff's deputy who escorted them back to Respondent's facility at Stahl's request. After arriving at the facility, the technicians got out of their vehicles and were confronted by David and Timothy Winston. (ALJD 7:1-23; 153-155; 196-199; 236-239).

Timothy Winston told Gordon and Noel that they had let this motherfucker, referring to Stahl, cost them their jobs. Timothy Winston said that he wanted to have Stahl arrested for having the Union. Timothy Winston said that he wanted the tools, and he told the deputy who had escorted the technicians back to the facility that Stahl had his tools and that he wanted Stahl to be arrested. David Winston then said to the employees, "Good luck finding a union job in this town. If you want to find a fucking union job, you're not going to find it here. So long, goodbye." After Respondent took the keys and phones from the technicians, Gordon pinned a

[5] Because they had anticipated that the Union's demand for recognition might lead to some sort of adverse consequences, the technicians had removed some of their tools from their vehicles on the evening of March 8, 2012. (ALJD 4:25-28; Tr. 169-171;217-220; 276-277).

union button to his shirt. David Winston said that he didn't care about Gordon putting a union pin on his uniform, and stated that Respondent was not going to be union. (ALJD 7:1-23; Tr. 153-155; 196-199; 236-239). The technicians then left the facility.

II. ARGUMENT.

A. Respondent coercively interrogated technicians Gordon, Noel and Stahl in violation of Section 8(a)(1) of the Act.

The ALJ credited the technicians and found that Timothy and David Winston questioned the technicians about their Union activity. (ALJD 5:24-6:52). However, the ALJ concluded that Respondent did not violate the Act because "the employees understood that their support of the Union would be revealed." (ALJD 7:36-49; 8:26-29).

An interrogation about union activities violates Section 8(a)(1) of the Act if "under all the circumstances, it reasonably tends to restrain or interfere with employees' exercise of the rights guaranteed by the Act." See *Rossmore House*, 269 NLRB 1176 (1984). The Board looks at the totality of the circumstances to determine whether a supervisor's questioning of an employee about union activity is coercive, including the background of the parties' relationship, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and the truthfulness of the reply. *Id.*

As set forth in greater detail above, during his telephone conversation with Noel, Timothy Winston asked Noel about his union activity and then discharged him. When David Winston spoke to Gordon by telephone, he demanded to know who Gordon was speaking to from the Union, and then told him that selecting the Union would be futile and threatened to discharge him. During his conversation with Stahl, David Winston demanded to know "what the fuck [Stahl] was trying to do to him," and then discharged Stahl. (ALJD 6:29-33). These interrogations were conducted by Respondent's highest managers, owner and President Timothy

Winston, and his father, former owner and consultant David Winston, and were clearly coercive because the Winstons interrogated each employee during the same conversations when they committed other violations of Sections 8(a)(1) of the Act, including some violations as found by the ALJ, and others as discussed herein. In addition, despite the fact that the technicians authorized the Union to take the authorization cards and do what was needed to obtain recognition, and although they may have thereby authorized the Union to reveal their union sympathies to Respondent, they had not revealed their union sympathies directly to Respondent and did not necessarily know that the Union would do so. Given the totality of the circumstances, these interrogations violated Section 8(a)(1) of the Act.

Accordingly, the ALJ's findings and conclusions to the contrary should be reversed and cross-exceptions 1 to 3 should be granted. Counsel for the Acting General Counsel also urges the Board to find that these unlawful interrogations about employees' union activities provide further support for the conclusion that a bargaining order remedy is necessary in this case, as recommended by the ALJ.

B. Respondent threatened technicians Gordon, Noel and Stahl with discharge on March 9, 2012, in violation of Section 8(a)(1) of the Act.

The ALJ concluded that Respondent discharged employees Noel and Gordon for engaging in Union activity, and that Timothy Winston informed Noel and Gordon of their discharges by telephone on March 9, 2012, but improperly concluded that his statements informing the technicians that they must turn in their company trucks (and had been discharged) did not constitute threats of discharge. (ALJD 8:13-24). As noted above Timothy Winston told Noel that he could not work for Respondent and the Union, and directed Noel to return his truck. Similarly, Timothy Winston asked Gordon if he wanted to run his call and then turn in his van, or wanted to turn in his truck now. As noted above, Timothy Winston told Noel to finish his call

and turn in his stuff immediately after he interrogated Noel about his activities for the Union. Timothy Winston told Gordon to turn in his truck immediately after David Winston had interrogated Gordon about his union activities, threatened him that it would be futile to seek union representation, and threatened him with discharge because of his union activities. David Winston's threat to discharge Gordon by phone was the lone threat of discharge found by the ALJ to have violated Section 8(a)(1) of the Act. (ALJD 8:2-5).

The ALJ also erred by failing to find that David Winston and Timothy Winston threatened to discharge Stahl because of his union activities during their phone conversations with Stahl on the morning of March 9, 2012. As noted above, after interrogating Stahl about his union activities, telling Stahl that he knew Stahl was behind the Union, and telling Stahl that the Union wasn't going to happen, thereby unlawfully threatening Stahl that selection of the Union as the employees' bargaining agent would be futile, David Winston told Stahl he was fired and then Tim Winston called Stahl and told him to turn in his truck and said that he was a "treasonous fucker" and he should come and see Tim Winston face-to-face and see what happens. (ALJD 6:22-52; Tr. 234-236).

The ALJ also improperly concluded that the statements made by Timothy and David Winston at Respondent's facility on the morning of March 9, 2012, did not constitute threats of discharge because the employees had already been discharged. (ALJD 8:46-51, 9:8-9). Thus, when the technicians arrived at Respondent's facility on the morning of March 9, 2012, Timothy Winston told technicians Gordon and Noel that they could thank Stahl (who Respondent had admittedly determined was the employee leading the union activity) for getting them fired. In addition, Noel credibly testified that shortly before the employees left the facility after being discharged, David Winston told them, "good luck finding a union job in this town. If you want

to find a fucking union job, you're not going to find it here." (Tr. 155). David Winston did not deny making this statement. Accordingly, the ALJ erred by failing to find that David Winston made the statement attributed to him by technician Noel. David Winston's statement that, "if you want to find a fucking union job, you're not going to find it here" conveyed the message that Respondent will not tolerate union activity and that any employee who engages in union activity will be discharged.

When considered in context, all of the aforementioned discharge statements, as alleged in cross-exceptions 4 through 9, clearly conveyed to the technicians that if you engage in union activity, you will be discharged. Thus, these statements made by Timothy and David Winston amount to unlawful threats to discharge employees for engaging in union activity in violation of the Act.

The fact that some of these threats by Timothy and David Winston were simple statements to the effect that the employees were fired (i.e. turn in your truck), or were made shortly after the technicians were informed of their discharges, does not alter the fact that the statements were also independent threats of discharge, when viewed in the context of the Winstons' barrage of anti-union statements directed to the three discharged technicians. *See Sands Hotel & Casino, San Juan*, 306 NLRB 172, 184 (1992) *enfd. sub. nom. S.J.P.R., Inc. v. NLRB*, 993 F.2d 913 (D.C. Cir. 1993) (unpublished decision) (Human Resources director independently violated Section 8(a)(1) by telling three unlawfully discharged employees their terminations were due to their participation in meetings where they concertedly protested the employer's requirement that they sign a temporary employment contract); *see also UPS Supply Chain Solutions*, 357 NLRB No. 106 at 18 (2010); *Benesight, Inc.*, 337 NLRB 282, 283-84 (2001).

Based on the above, cross-exceptions 4 to 9 should be granted. Counsel for the Acting General Counsel also urges the Board to find that these additional threats of discharge for engaging in union activities further support the conclusion that a bargaining order remedy is necessary in this case, as recommended by the ALJ.

C. The ALJ erred by failing to find that since March 9, 2012, Respondent has violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union as the exclusive representative of its service technicians, in view of the Union's recognition demand and the fact that on the same date Respondent embarked on a clear course of outrageous and pervasive unfair labor practices. The ALJ erred by failing to order that Respondent recognize and bargain with the Union retroactively to March 9, 2012.

The ALJ found that on March 9, 2012, Union organizer Leggette told Timothy and David Winston that the technicians either wanted to have an election or for Respondent to recognize the Union as having majority status based on the authorization cards. (ALJD 4:37-5:22). The ALJ further found that Leggette asked David and Timothy Winston if they wanted to see the authorization cards and, when they said yes, Leggette showed the cards to David and Timothy Winston. (ALJD 4:37-5:22). Although the Union made a demand for recognition by telling Respondent that the technicians wanted an election or for Respondent to recognize the Union as enjoying the support of a majority of the unit employees, and then showing the signed authorization cards to Timothy and David Winston, the ALJ failed to make that conclusion. The ALJ's failure to conclude that the Union made a demand for recognition, notwithstanding his findings of fact to that effect, is clearly in error and the Board should conclude that the Union demanded that Respondent recognize it as the bargaining agent for the unit of Respondent's service technicians.

In recommending the dismissal of the complaint allegation that Respondent violated Section 8(a)(5) of the Act, the ALJ misunderstood Acting General Counsel's theory of the case as set forth in the complaint and brief to the ALJ. The ALJ relied the Board's decision in

Terracon, Inc., 339 NLRB 221 (2003). *Terracon, Inc.*, addressed the issue of whether or not the employer was obligated to recognize and bargain with the union because it voluntarily agreed to do so based on a demonstration that a majority of the unit employees had signed authorization cards. *See also, Snow & Sons*, 134 NLRB 709 (1961), enfd. 308 F.2d 687 (9th Cir. 1962). However, the Acting General Counsel has never based the contention that Respondent violated Section 8(a)(5) of the Act on a *Snow & Sons* theory. Instead, the Acting General Counsel has consistently alleged that Respondent violated Section 8(a)(5) of the Act based on a *Gissel* theory, i.e. by refusing to recognize and bargain with the Union based on the Union's recognition demand and card majority, because Respondent, as correctly found by the ALJ, committed such outrageous and pervasive unfair labor practices that it is highly unlikely that traditional remedies could effectively restore the pre-unfair labor practice status quo, and the holding of a free and fair election is virtually impossible.[6] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613-614 (1969).

In summary, the ALJ properly found that a majority of the employees in an appropriate unit of service technicians had signed Union authorization cards and that the Union told Respondent that its employees wanted an election or for Respondent to recognize the Union as the employees' exclusive collective-bargaining agent based on the cards. He further properly found that a bargaining order is warranted based on a *Gissel* theory because Respondent made threats of futility, David Winston threatened Gordon with discharge because of his union activities, Tim Winston threatened Stahl with arrest because of his union activities, in conversations "laced with profanity," and Respondent discharged the entire unit because of the employees' union activities. However, the ALJ erred by failing to find and conclude that the

[6] Moreover, even if the Union had never demanded recognition, a bargaining order remedy would be warranted in this case based on Respondent's violations of Section 8(a)(1) and (3) of the Act. *Steel Fab, Inc.*, 212 NLRB 363 (1974); see also, *Allied Mechanical Services*, 351 NLRB 79, 83, fn.19 (2007).

Union demanded recognition, that Respondent violated Section 8(a)(5) of the Act in these circumstances, and by failing to recommend that the Board order Respondent to recognize and bargain with the Union retroactively to March 9, 2012. (ALJD 9:50 to 10:46).

In addition to the reasons cited by the ALJ, as noted above, a bargaining order remedy is further justified by the additional unlawful threats of discharge to all three unit employees, Stahl, Gordon and Noel, and the interrogations of all three of those employees.

The ALJ further erred by failing to order Respondent to recognize and bargain with the Union retroactively to March 9, 2012, the date the Union demanded recognition based on its card majority, the date Respondent refused to recognize and bargain with the Union, and the date Respondent embarked on a clear course of outrageous and pervasive unfair labor practices in order to undermine the Union's majority status. *Trading Port, Inc.*, 219 NLRB 298, 301 (1975).

Because Respondent violated Section 8(a)(5) of the Act, the ALJ's recommended Order and Notice to Employees must be modified. The Order should include a provision requiring Respondent to rescind any unilateral changes it implemented on or after March 9, 2012, to make the employees whole for any losses suffered due to those unilateral changes, and appropriate language should be added to the Notice to Employees.

D. The ALJ erred by failing to require Respondent to reimburse the unlawfully discharged technicians for any excess federal and state income taxes they may owe from receiving a lump-sum backpay award and to submit the appropriate documentation to the Social Security Administration so that when backpay is paid it will be allocated to the appropriate calendar quarters.

The ALJ recommended that Respondent be ordered to make the technicians whole for any loss of earning or other benefits suffered as a result of their unlawful discharges by paying them backpay and interest. However, the ALJ's recommended remedy and order fails to take into account the potential adverse tax consequences that may result due to the receipt of a lump-

sum payment of backpay. Furthermore, the ALJ's recommended remedy and order fails to address the possible adverse consequences that might result if backpay is not allocated to the appropriate calendar quarters when reported to the Social Security Administration.

The Board has broad powers under Section 10(c) of the Act, 29 U.S.C. Sec. 160(c), to fashion remedies, including affirmative orders, that will effectuate the policies of the Act. *NLRB v. Strong Roofing & Insulating*, 393 U.S. 357, 359 (1969); *Teamsters Local 115 v NLRB*, 640 F.2d 392, 399 (D.C. Cir. 1981). Making workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. *Phelps Dodge Corp. v. NLRB*, 313 US 177, 197 (1941). In applying its authority over backpay orders, the Board has not used rigid formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations. *Id.* at 198. Moreover, the Board has periodically updated and reformed these remedies to more perfectly respond to new "devices and stratagems for circumventing the policies of the Act." *See id*. at 194. Indeed, the Supreme Court has commanded the Board to "draw on enlightenment gained from experience" in crafting new remedies designed to undo the effects of unfair labor practices. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964).

Both a tax component in backpay and employer notification of social security are appropriate Board remedies. Section 10(c) of the National Labor Relations Act authorizes the Board to devise remedies to reinstate the status quo ante in order to effectuate the policies of the Act. That is, under the Act, the respondent should as nearly as possible restore discriminatees to the situation that would have obtained but for the unlawful discrimination. However, the current Internal Revenue Code hinders the NLRA's make-whole objective by taxing a discrimination award more heavily than it would have had the plaintiff earned the wages and benefits in due

course. *See United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 219-20 (2001) (finding that for tax purposes backpay is income the year it is actually paid, even if for Social Security benefits purposes backpay is allocated to the years it should have been paid). *See also* Rev. Rul. 75-64, 1975-1 C.B. 16; Rev. Rul. 57-55, 1957-1 C.B. 304.

To redress this unfairness, several courts, as well as the EEOC, now allow a discriminatee to request a "gross up" of their backpay award in order to offset the increased tax liability incurred by virtue of receiving the backpay in one lump sum. *Sears v. Atchison, Topeka & Santa Fe Ry., Co.*, 749 F.2d 1451, 1456 (10th Cir. 1984) (holding that courts have equitable power to grant a gross up); *Eshelman v. Agere Sys., Inc.*, 554 F.3d 426, 441-42 (3d Cir. 2009) (same); *O'Neill v. Sears, Roebuck & Co.*, 108 F. Supp. 2d 443, 446-447 (E.D. Pa. 2000) (finding that compensation for adverse tax consequences was necessary to comply with make-whole doctrine of the ADEA); s*ee Powell v. N. Ark. Coll.*, No. 08-CV-3042, 2009 WL 1904156, at *2–3 (W.D. Ark. July 1, 2009); *Van Hoose*, EEOC Decision No. 01990455, 2001 WL 991925, at *3 (Aug. 22, 2001). A district court in the Eleventh Circuit also relied on *Sears* in finding that it could include a tax component in a lump-sum backpay award. *EEOC v. Joe's Stone* C*rab, Inc.*, 15 F. Supp. 2d 1364, 1380 (S.D. Fla. 1998). However, the court did not do so because the plaintiff had not provided enough evidence to calculate what the tax component should be. *Id.*

In order to fully vindicate the purposes and policies of the Act, the Board should follow suit, and routinely require a respondent to reimburse a discriminatee for any negative tax consequences from receiving a backpay award in one lump sum.

Backpay awards also may result in a decrease in a discriminatee's social security benefits. Currently, the burden to notify the Social Security Administration of backpay awards and proper allocation rests on the discriminatee. However, the discriminatee often does not

have the information necessary (i.e. corporate address, employer identification number, the period of time the backpay covers, etc.) to make such a request. It therefore is more appropriate that the respondent be given the responsibility to ensure that, for the purposes of social security, the discriminatee's backpay is allocated to the calendar quarters the discriminatee would have received the backpay absent the respondent's unlawful conduct. Accordingly, whenever the Board awards backpay, it should routinely include an order for the respondent to report the backpay to the Social Security Administration.

Here, unless the ALJ's recommended remedy and order is modified to include provisions requiring that Respondent reimburse the technicians for any excess tax liability and submit the necessary paperwork to the Social Security Administration to ensure that backpay is allocated to the appropriate quarters, the technicians may not be made whole. Thus, the Board should modify the recommended remedy and order accordingly, and grant cross-exceptions 14 and 15.

V. CONCLUSION

The credited record evidence establishes that the Respondent, by Timothy and David Winston, violated Section 8(a)(1) of the Act by interrogating and threatening to discharge technicians Noel, Gordon, and Stahl, as alleged in cross-exceptions 1 to 10. As alleged in cross-exceptions 11 to 13, the evidence further establishes that the Union made a demand for recognition on March 9, 2012, and that Respondent violated Section 8(a)(5) of the Act when it refused to recognize and bargain with the Union beginning on March 9, 2012, the same day it committed outrageous and pervasive unfair labor practices, both as found by the ALJ, and as established by cross-exceptions 1 to 10, as to render the holding of a fair and free election virtually impossible. The ALJ erred failing to provide remedies for these violations, including a bargaining order retroactive to March 9, 2012. As alleged in cross-exceptions 14 and 15, the

ALJ improperly failed to include in his recommended Order provisions requiring that Respondent make the unlawfully discharged technicians whole for excess taxes they may owe due to receiving a lump-sum backpay award, and submit appropriate documentation to the Social Security Administration so that when backpay is paid it will be allocated to the appropriate calendar quarters. Finally, the ALJ inadvertently erred by dismissing paragraph 8(b) of the complaint, as alleged in cross-exception 16 and explained above in footnote 3.

For these reasons, Counsel for the Acting General Counsel respectfully requests that the Board grant the Acting General Counsel's cross-exceptions in their entirety.

DATED at Tampa, Florida, this 21st day of November 2012.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that Counsel for the Acting General Counsel's Brief in Support of Cross-Exceptions to Administrative Law Judge's Decision in the matter of AC Specialists, Inc., Case 12-CA-076395, was electronically filed and served by electronic mail on November 21, 2012, as set forth below:

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