

**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 ANSWERING BRIEF  
TO RESPONDENT'S EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION**

Christopher C. Zerby  
Counsel for the Acting General Counsel  
National Labor Relations Board  
Region 12  
201 East Kennedy Blvd., Suite 530  
Tampa, Florida 33602-5824  
Telephone No. (813) 228-2693

## **I. INTRODUCTION AND STATEMENT OF THE CASE**

AC Specialists, Inc. (Respondent) is a residential heating and air conditioning contractor.<sup>1</sup> (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, 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 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), to represent them for the purposes of collective bargaining. (ALJD 4:15-23; Tr. 94-97; 151:17-21; 193:3-19; 232:5-21; GC Exs. 2-5).

On the morning of March 9, 2012, Union organizer Russell Leggette and business manager Todd Vega went to Respondent's facility and informed Timothy and David Winston that the employees had signed authorization cards. (ALJD 4:30-35; Tr. 19-20, 25; 65, 69-70; 99-101; 127-129). Leggette told Timothy and David Winston that the employees wanted the Union to represent them and that the employees wanted either an election, or for Respondent to recognize the Union based on the cards. (ALJD 4:37-51; Tr. 100-101). David Winston replied by saying "fuck the Union" and stating that unions had ruined this country. (ALJD 4:37-51; Tr. 56; 101). 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

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<sup>1</sup> 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.

three because they supported and joined the Union. (ALJD 9:18-29; Tr. 59-60; 71-72, 74-76, 340).

Following an investigation of the unfair labor practice charges filed by the Union, the Regional Director of Region 12 of the National Labor Relations Board issued a Complaint and Notice of Hearing, and Respondent filed an Answer and an Amended Answer. (GC Ex. 1(a)-1(m)). A hearing was held before Administrative Law Judge George Carson II (the ALJ) on August 13 and 14, 2012, at Tampa, Florida. The ALJ issued his Decision on October 12, 2012. The ALJ concluded that Respondent violated Section 8(a)(1) of the Act by telling employees that selecting the Union as their exclusive collective-bargaining agent would be futile, threatening employees with discharge because of their union activities, and threatening employees with arrest because of their union activity; and that Respondent violated Section 8(a)(1) and (3) of the Act by discharging employees Gordon, Noel and Stahl because they engaged in union activity. The ALJ also recommended that a remedial bargaining order be issued based on Respondent's violations of Section 8(a)(1) and (3) of the Act because of Respondent's outrageous and pervasive unfair labor practices.

On November 9, 2012, Respondent filed exceptions to the ALJ's conclusion that Respondent discharged technicians Stahl, Gordon, and Noel in violation of Section 8(a)(3) of the Act and to his conclusion that a bargaining order is appropriate in this case. Respondent did not file exceptions to the ALJ's conclusions that Respondent violated Section 8(a)(1) of the Act by telling employees that selecting the Union as their exclusive collective-bargaining agent would be futile, threatening employees with discharge because of their union activities, and threatening employees with arrest because of their union activity. Thus, Respondent's exceptions are limited to the following issues:

- 1) Did Respondent discharge technicians Gordon, Noel and Stahl on March 9, 2012, because of their membership in and activities on behalf of the Union, in violation of Section 8(a)(1) and (3) of the Act?
- 2) Is a bargaining order remedy appropriate, and did Respondent violate Section 8(a)(1) and (3) of the Act by refusing to recognize and bargain with the Union?<sup>2</sup>

Counsel for the Acting General Counsel submits that the questions should be answered affirmatively.<sup>3</sup>

Section II of this brief sets forth the facts surrounding the signing of the authorization cards, the Union's demand for recognition, and Respondent's reaction to the Union's demand for recognition, including its discharges of the three technicians. Section III addresses Respondent's contention that the ALJ erred by concluding that the three technicians were unlawfully discharged and that a bargaining order is appropriate. Section IV concludes the brief.

## **II. STATEMENT OF FACTS.**

### **A. Employees Gordon, Noel and Stahl signed Union authorization cards on February 23, 2012, and confirmed to Union organizer Leggette that they wanted the Union to demand recognition in early March 2012.**

On February 23, 2012, technicians Gordon, Noel and Stahl signed cards authorizing the Union to represent them for the purposes of collective-bargaining. (ALJD 4:15-23; Tr. 95-97; 151-152; 193; 232; GC Exs. 2-4). The cards state that they grant the Union the authority to "serve as [the employee's] exclusive collective bargaining representative with your employer."

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<sup>2</sup> Counsel for the Acting General Counsel is filing cross-exceptions and a brief in support of cross-exceptions with respect to the ALJ's failure to find that Respondent engaged in certain independent violations of Section 8(a)(1) of the Act; Respondent violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union; and failure to recommend certain remedial relief.

<sup>3</sup> 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.

The cards also authorize the Union to “represent [the signer] in collective bargaining negotiations on all matters pertaining to rates of pay, hours or any other condition of employment.” (GC Exs. 2-4). In early March 2012, employees Stahl, Gordon and Noel collectively decided that they wanted the Union to move forward and seek to become their collective bargaining representative. (Tr. 152, 168; 193-194, 210; 233). At that time, Stahl called Leggette and told him to take the signed cards and do whatever was necessary to seek representation for the employees. (ALJD 4:15-23; Tr. 233).

**B. The Union demanded recognition by Respondent on March 9, 2012.**

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

that they wanted Respondent to recognize Local 123 as having majority status based on the authorization cards. (ALJD 4:37-5:22; Tr. 101:5-7).

Leggette 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 showed the cards to David and Timothy Winston, and David Winston said, “fuck the Union” and that unions had ruined this country. The Winstons bent over towards the cards, leaned in, 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).

**C. Respondent immediately and unlawfully reacted to the Union’s demand for recognition, and discharged technicians Stahl, Gordon and Noel because of their union activities and sympathies.**

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 then 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 said 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).

Timothy Winston admitted that he called technicians Noel and Gordon on the morning of March 9, 2012, after Leggette and Vega left the facility. Timothy Winston claimed that Noel told him that he was going to work for the Union. Timothy Winston testified that he replied by telling Noel that he could not work for Respondent and the Union, and he instructed Noel to bring his truck back to the facility. Timothy Winston then testified that he called and asked Gordon what was going on and told him that there had been some people at the facility and that Gordon told him that he was going to work for the union. Timothy Winston further testified that he then asked Gordon how he could work for Respondent and the Union, and told Gordon to bring his truck to the facility. Timothy Winston latter admitted that neither Gordon nor Noel ever said that they were quitting or resigning. (ALJD 6:6-20; Tr. 66-67, 75). The ALJ discredited Timothy Winston's testimony that Gordon and Noel told him that they were going to work for the Union. (ALJD 6:13-20).

Timothy Winston testified that when he spoke to Stahl by telephone, he asked Stahl what was going on, and that Stahl replied that this was the best route for him to go, and that joining the Union was in the best interests of everybody. Timothy Winston further testified that he replied that Respondent was not a Union shop, that Stahl said that it should be, and that he (Timothy Winston) told Stahl that if he wanted to work for unions there was nothing he (Timothy Winston) could do for him. (ALJD 6:35-52; Tr. 67-68). According to Timothy Winston he asked Stahl, "how can you work for them and work for me . . .?," and told Stahl, "when somebody tells me they're going to work for somebody, that means that they're voluntarily quitting and they're moving on." (Tr. 72:7-12). Timothy Winston later asserted that he spoke to Noel and Gordon

and that both told him that they were going to work for the Union, but that Stahl never said he was going to work for the Union. (Tr. 89:18-90:22). The ALJ specifically credited Stahl's testimony regarding his conversations with Timothy Winston, thereby discrediting Timothy Winston's version of the conversation to the extent it conflicts with Stahl's version. (ALJD 6:52).

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.<sup>4</sup> The technicians proceeded to the Radiant gas station where they met a Sheriff's deputy who escorted them back to Respondent's facility. 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 told Gordon and Noel that Stahl was the reason that they did not have jobs. David Winston 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 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; 153-155; 196-199; 236-239).

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<sup>4</sup> 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).

David Winston admitted that being a member of the union and being an employee of Respondent were things that could not co-exist. (ALJD 9:18-23; Tr. 28:22-25). David Winston also admitted that technicians Gordon, Noel, and Stahl were discharged because they joined the Union. (Tr. 59:20-60:1). Timothy Winston admitted that the employees did not resign their employment, and that they were fired by Respondent because they had joined the Union, and he felt that they could not be part of the Union and work for him at the same time. (Tr. 71:15-72:3, 75:5-76:14). Timothy Winston also reluctantly admitted that Stahl was not fired because he had purchased tools on the company account without permission or because he misused the company vehicle, and that the main reason Respondent discharged Stahl was because he joined the Union. (ALJD 7:18-23; Tr. 340:14-25).

**D. The evidence pertaining to Respondent's assertion that James Stahl is not entitled to a reinstatement remedy because he engaged in misconduct.**

Sometime around February 2012, Stahl purchased approximately \$1,000 worth of tools using one of Respondent's accounts. Around the same time, Stahl received permission from Timothy Winston to use one of Respondent's vehicles for his personal purposes and he took the vehicle to St. Petersburg, Florida. (Tr. 247-249, 268-269).

In mid-February 2012, Stahl met with David and Timothy Winston. David Winston told Stahl that he was being discharged for filing for (personal) bankruptcy. Stahl replied that Respondent could not discharge him simply for filing for bankruptcy. David Winston responded that he would discharge Stahl for purchasing tools on Respondent's account and Stahl told David Winston that he had purchased tools in the past and the cost was simply deducted from his paycheck. David Winston then told Stahl that he was going to discharge him for misusing the company vehicle, and Stahl replied that Timothy Winston had given him permission to use the

vehicle.<sup>5</sup> David and Timothy Winston told Stahl to go home so that they could think about what to do with him, but they then decided not to discharge Stahl, although they did eliminate Stahl's overage pay at that time.<sup>6</sup> (ALJD 7:18-23; Tr. 247-250). Stahl continued working for Respondent until his discharge on March 9, 2012.

### **III. ARGUMENT**

#### **A. The Administrative Law Judge Correctly Concluded that Respondent discharged Gordon, Noel and Stahl because of their support for and activities on behalf of the Union, in violation of Section 8(a)(3) and (1) of the Act.**

The ALJ determined that there was no need to apply the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), because he determined that there was no mixed motive issue presented here. Rather, the ALJ found that technicians Noel, Gordon and Stahl were discharged solely because of their membership in, and activity on behalf of, the Union. The ALJ further found that Respondent condoned Stahl's alleged misconduct. Accordingly, the ALJ concluded that Respondent violated Section 8(a)(1) and (3) of the Act by discharging the three technicians. ALJD 9:18-28, 11:2-4).

In essence, Respondent contends that the three technicians were discharged because Timothy and David Winston mistakenly believed that membership in the Union equated to employment by the Union, and thought that the three technicians were quitting so that they could go work for the Union. Respondent further argues that Stahl engaged in misconduct rendering him unfit for reinstatement.

Respondent cites certain portions of the testimony of Timothy Winston in an effort to establish that technicians Gordon and Noel told Timothy Winston that they were quitting their

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<sup>5</sup> Stahl concedes that he did not get specific permission to drive the vehicle to St. Petersburg. (Tr. 268-269).

<sup>6</sup> Until mid-February 2012, Stahl had authority to sell units to customers at prices above Respondent's normal selling price and he got to keep the difference. For example, Stahl could sell a \$6,300 unit to a customer for \$6,500 and he was allowed to keep the \$200 difference, which was known as overage pay.

jobs with Respondent in order to work for the Union, including testimony set forth at pages 66 and 67 of the transcript. However, as noted above, the ALJ specifically discredited this testimony, both because there is no credible evidence that Gordon or Noel were, in fact, planning to work “for the Union,” and his admission that neither said that they were quitting or resigning, but also based on the ALJ’s determination Timothy Winston’s “rote recitation that both said they were ‘going to work for the Union’ . . .” was not credible. (ALJD 6:13-20). The ALJ also discredited Timothy Winston to the extent that he testified that he believed that the technicians intended to quit stating, “Gordon’s wanting ‘to be Union’ and Noel’s having ‘joined the Union’ related to Union representation not employment. Tim Winston could not have honestly concluded otherwise.” (ALJD 6:13-20). Thus, the ALJ credited Noel’s testimony that he told Timothy Winston that he joined the Union and Gordon’s testimony that he told Timothy Winston that he wanted to be Union. (ALJD 5:38-41, 5:51-6:4).

In finding that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Stahl, Gordon and Noel, the ALJ properly relied, in part, on the fact 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.’” (ALJD 9:18-23). David Winston’s admission establishes, when considered in context with the animus he exhibited toward the Union, that he simply would not tolerate Respondent’s employees being members of the Union. Thus, the ALJ rejected Respondent’s claim that the Winstons discharged the technicians because they believed that the technicians intended to quit in order to go to work for the Union.

The Board will only overrule an ALJ’s credibility determinations if the clear preponderance of all the evidence establishes that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). Respondent has not

established a basis to overrule any of the ALJ's decisions to credit the alleged discriminatees and to discredit portions of the testimony of Timothy Winston and David Winston. Therefore, to the extent that Respondent excepts to the ALJ's credibility findings, its exceptions should be denied.

The credited evidence establishes that Respondent discharged the three technicians solely because they joined the Union and engaged in activity on behalf of the Union, and there is no need to engage in a *Wright Line* analysis. Accordingly, the ALJ's conclusion that Respondent violated Section 8(a)(1) and (3) of the Act is correct and Respondent's exceptions in that regard should be denied.

Even if a *Wright Line* analysis is applied, the credited evidence establishes that Respondent violated the Act by discharging its employees because they joined the Union and engaged in union activity. Pursuant to the analysis set forth in *Wright Line* the General Counsel must show that Respondent's actions were motivated, at least in part, by anti-union considerations. See *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1<sup>st</sup> Cir. 1981), *cert denied*, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Mgt. Corp.*, 462 U.S. 393 (1983). Once a discriminatory motive is established, an employer must show that it would have taken the same action absent union activity or other protected conduct. The employer cannot meet this burden by merely showing that a legitimate reason factored into its decision, but must show that it would have acted even in the absence of the union and protected activities. See *Monroe Mfg.*, 323 NLRB 24, 27 (1997).

Respondent immediately demonstrated its animus against the employee for joining the Union upon learning that they had signed union authorization cards. On March 9, 2012, Union agents Leggette and Vega went to Respondent's facility, and Leggette displayed the union authorization cards signed by employees Stahl, Gordon and Noel, and informed Respondent that

the technicians wanted to be represented by the Union. David Winston replied by saying, fuck the Union, and that unions had ruined this country, thereby revealing his animus toward the Union and unions in general. Respondent also demonstrated its animus toward the employees' union membership and activities by committing the independent violations of Section 8(a)(1) of the Act found by the ALJ, to which Respondent has not filed any exceptions, immediately after ordering Union agents Leggette and Vega to leave its premises on March 9. The Winstons called technicians Stahl, Gordon and Noel, and told them that it would be futile to select the Union as their bargaining representative and threatened them with discharge because of their union membership, activities and sympathies. When the technicians returned their trucks to Respondent's facility, Timothy Winston further violated Section 8(a)(1) of the Act by threatening Stahl with arrest because of his union membership, activities and sympathies, as found by the ALJ. Again, Respondent did not file an exception to this conclusion by the ALJ.

The timing of the discharges, right after the Winstons learned the technicians has signed union authorization cards and during the same telephone conversations in which the Winstons unlawfully told the technicians that it would be futile to choose union representation and threatened to discharge employees for joining the Union, further reveals Respondent's animus toward the Union, and unmistakably establishes a nexus between the employees' union activities and Respondent's decision to fire them. Timothy Winston even admitted that Stahl's union activities was the main motivating factor in Respondent's decision to discharge them. In summary, General Counsel has established a very strong and essentially admitted prima facie case that Respondent discharged Stahl, Noel and Gordon because of their union activities and sympathies, in violation of Section 8(a)(1) and (3) of the Act.

Respondent's defense, that it lawfully discharged the three technicians because it believed that they were planning to quit and work for the Union, was fully discredited by the ALJ. Moreover, Respondent cannot show that it would have discharged the technicians even if they had not joined the Union. Thus, Respondent has failed to establish that the technicians intended to quit, that the Winstons really believed that the technicians intended to quit, or that it would have discharged the technicians if they had not supported the Union and signed Union authorization cards. In summary, Respondent has failed to establish a *Wright Line* defense. Respondent's exceptions to the ALJ's finding that it violated Section 8(a)(1) and (3) of the Act by discharging technicians Stahl, Gordon and Noel should be denied.

Respondent also argues that James Stahl is not entitled to reinstatement because he engaged in certain misconduct, and it contends that the ALJ erred by misapplying the doctrine of "condonation." As explained above, in mid-February 2012, Respondent considered discharging Stahl but decided not to do so, and instead merely prohibited him from earning overages. Respondent failed to establish that it would have discharged Stahl on March 9, 2012, or on any other date after mid-February 2012, for having allegedly engaged in misconduct. Respondent discharged Stahl because he signed a Union authorization card and engaged in activity on behalf of the Union. Respondent particularly held animus against Stahl because it (correctly) believed that he was the employee leader, or instigator of the Union's organizing campaign, as admitted by David Winston. Respondent blamed the union campaign on Stahl, and expressly attributed the discharges of Gordon and Noel to the fact that they followed Stahl's lead in supporting the Union. Accordingly, any claim that Stahl's purported misconduct was the reason for his discharge is pretextual. Furthermore, any argument that Stahl's alleged misconduct forms a

basis for refusing to reinstate him is meritless because the alleged misconduct did not result in his discharge.

In short, the evidence establishes that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Gordon, Noel, and Stahl because they supported and engaged in activities on behalf of the Union and Respondent should be ordered to fully remedy these violations of the Act, including offering reinstatement to Stahl.

**B. The ALJ Correctly Concluded that Traditional Remedies Cannot Erase the Coercive Effects of Respondent's Conduct and Therefore A Bargaining Order Remedy is Appropriate, as Recommended by the ALJ.**

Respondent essentially argues that its unfair labor practices are not sufficiently egregious to warrant the issuance of a bargaining order because there has been no showing that the electoral process has been adversely impacted. Despite Respondent's arguments to the contrary, the ALJ correctly concluded that a bargaining order is necessary and appropriate in this case because traditional remedies will be unable to erase the coercive effects of Respondent's outrageous and pervasive unfair labor practices. (ALJD 9:52-10:46).

When an employer engages in outrageous and pervasive unfair labor practices that undermine a union's majority status and destroy the likelihood that a fair election can be conducted, the employer forfeits any right to an election and must bargain with the union. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Such outrageous and pervasive unfair labor practices are frequently referred to as "hallmark" violations. Hallmark violations include threats of discharge and the discharge of union supporters. See *NLRB v. Jamaica Towing*, 632 F.2d 208 (2<sup>nd</sup> Cir. 1980). The presence of hallmark violations in these exceptional cases justifies the imposition of a bargaining order without an extensive analysis of whether the violations are

likely to have a long lasting inhibitive effect on a substantial percentage of the work force and remain in the employees' collective memory for a long period of time.<sup>7</sup> *Id.*

As found by the ALJ, on March 9, 2012, Union organizer Leggette told Timothy and David Winston that Respondent's employees wanted either an election or for the Union to be recognized as having majority status based on the authorization cards.<sup>8</sup> (ALJD 4:37-5:2). Furthermore, the ALJ specifically rejected Respondent's contention that the Union asked it to sign an 8(f) agreement. (ALJD 9:33-41). Thus, the evidence demonstrates that the Union made a demand for recognition, which was rejected by Respondent.

Following the Union's demand for recognition, Respondent committed a number of hallmark violations, making this an exceptional category I *Gissel* case. Every member of the bargaining unit was threatened with discharge as soon as Respondent learned that they had signed Union authorization cards. The threats of discharge were made by the current owner and President of Respondent, Timothy Winston, and by his father David Winston, the former owner and consultant, who continues to be heavily involved in Respondent's daily operations as demonstrated by his actions on March 9, 2012, and who has authority to discharge employees. Respondent then discharged all three bargaining unit employees en masse because of their union activities. Although Respondent later reinstated technicians Gordon and Noel in April 2012, James Stahl, the leading union adherent, who constituted one-third of the bargaining unit as of March 9, 2012, has not been reinstated.<sup>9</sup>

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<sup>7</sup> *Gissel* bargaining orders are also appropriate in cases without hallmark violations where the employer has engaged in pervasive unfair labor practices that undermine the union's majority and impede the election process. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613-614 (1969).

<sup>8</sup> As noted above, Counsel for the Acting General Counsel is filing cross-exceptions to the ALJ's Decision, including with respect to the ALJ's failure to conclude that Respondent violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union based on the demand for recognition made by the Union.

<sup>9</sup> Respondent's made an offer of interim reinstatement to Stahl pending the final disposition of the case before the Board by letter dated October 17, 2012, 19 days after it was ordered to do so by the United States District Court, for the Middle District of Florida in the related Section 10(j) case. By letter dated October 25, 2012, Stahl accepted

The ALJ concluded that Respondent discharged the entire bargaining unit in violation of Section 8(a)(1) and (3) of the Act, threatened employees with discharge for engaging in union activity, and made other unlawful statements. The ALJ reasoned that the facts in this case are analogous to those in *Allied General Services*, 329 NLRB 568, 570 (1999) here, because Respondent's highest officials, Timothy and David Winston, acted swiftly and in a draconian manner by discharging the entire bargaining unit. The ALJ properly concluded that Respondent's outrageous conduct places this in the first category of *Gissel* cases, and that the Board's traditional remedies cannot erase the coercive effects of Respondent's unlawful conduct, so a remedial bargaining order is necessary. (ALJD 9:52-10:46).

Respondent argues that the ALJ erred by relying on *Allied General Services*, because in that case the employer closed the portion of the plant where the discharged employees worked. Although there was no immediate closure of any portion of Respondent's business, its unfair labor practices, including threatens to discharge employees because of their union activities and discharge of the entire bargaining unit immediately after learning that the employees had signed cards authorizing the Union to represent them is certainly swift and draconian action constituting outrageous and pervasive conduct. Thus, contrary to Respondent's assertion, the ALJ properly concluded that a remedial bargaining order is warranted.

#### **IV. CONCLUSION**

The credited record evidence supports the ALJ's conclusion that Respondent violated Section 8(a)(1) and (3) of the Act by discharging technicians Gordon, Noel and Stahl. There is

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Respondent's offer of interim reinstatement and proposed a return date of November 12, 2012. By letter dated October 29, 2012, Respondent informed Stahl that he should not report to work on November 12, 2012 or on any other date, claiming that Respondent "ceased operations and terminated all of its employees on October 26, 2012." Even if it is subsequently determined that Respondent actually ceased operating on October 26, 2012, as set forth in Acting General Counsel's cross-exceptions the bargaining order remedy recommended by the ALJ should be made retroactive to March 9, 2012, the date the Union demanded recognition and Respondent embarked on its course of unfair labor practices upon learning that a majority of its unit of service technicians had authorized the Union as their bargaining representative.

no record evidence to support a conclusion that Stahl was discharged because he engaged in misconduct in February 2012 or that he did anything that disqualifies him from receiving an offer of reinstatement as part of the remedy for his unlawful discharge.. Furthermore, the record evidence amply supports that ALJ's conclusion that Respondent engaged in outrageous and pervasive unfair labor practices and that a remedial bargaining order is needed because the Board's traditional remedies cannot erase the coercive effects of Respondent's unfair labor practices. Therefore, Respondent's exceptions should be denied in their entirety.

DATED at Tampa, Florida, this 21<sup>st</sup> day of November 2012.

/s/ Christopher C. Zerby  
Christopher C. Zerby  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 12  
201 E. Kennedy Blvd., Suite 530  
Tampa, FL 33602-5824

**CERTIFICATE OF SERVICE**

I hereby certify that Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions 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:

By Electronic Filing

Hon. Lester A. Heltzer  
Executive Secretary  
National Labor Relations Board – Room 11602  
1099 Fourteenth Street, N.W.  
Washington, D.C. 20570-0001

By Electronic Mail:

Thomas M. Gonzalez, Esq.  
Counsel for Respondent  
Thompson, Sizemore, Gonzalez and Hearing  
One Tampa City Center  
201 North Franklin Street  
Tampa, FL 33601  
Email: [TGonzalez@tsghlaw.com](mailto:TGonzalez@tsghlaw.com)

Brian A. Powers, Esq.  
Counsel for the Charging Party  
O'Donoghue and O'Donoghue, LLP  
4748 Wisconsin Avenue, N.W.  
Washington, D.C. 20016  
Email: [bpowers@odonoghuelaw.com](mailto:bpowers@odonoghuelaw.com)

/s/ Christopher C. Zerby  
Christopher C. Zerby, Esq.  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 12  
201 East Kennedy Blvd., Suite 530  
Tampa, FL 33602-5824  
Email: [czerby@nlrb.gov](mailto:czerby@nlrb.gov)