

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

AC SPECIALISTS, INC.

and

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

Case 12-CA-076395

**CHARGING PARTY'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 Charging Party submits this brief to the National Labor Relations Board in support of the Charging Party's cross exceptions to the Decision of Administrative Law Judge George Carson, II in the above referenced case.¹

A hearing was held before Administrative Law Judge Carson, II on August 13 and 14, 2012 at Tampa, Florida. The ALJ issued his Decision on October 12, 2012. The Administrative Law Judge found that the respondent violated 8(a)(3) and (1) of the Act by the mass discharge of the entire bargaining unit of three technicians shortly after two union representatives met with the owner of Respondent and his father to present signed authorization cards and to demand recognition. The ALJ also found that the employer violated the Act by telling the employees that this was a non-union operation and that they were not going to be union. These statements were found to have indicated the futility of joining the union in violation of section 8(a)(1) of the Act. The Respondent was also found to have violated 8(a)(1) of the Act by seeking the arrest of Stahl, identified as the principal union instigator for "having the union". The ALJ also recommended the issuance of a Gissel bargaining order to remedy the egregious violations that he found to have occurred.

The ALJ, however, erred by failing to make a specific finding that Tim Winston and David Winston were Section 2(11) supervisors and by concluding that certain conduct did not violate Section 8(a)(1) of the Act. The ALJ found that there were not interrogations violative of

¹ Respondent filed exceptions to the ALJ's Findings and Conclusions. Those exceptions are addressed in the Charging Party's Opposition to Respondent's Exceptions to the Administrative Law Judge's Decision which is filed simultaneously to the Charging Party's Cross Exceptions, this Brief in Support of Cross Exceptions, and Charging Party's Motion to Strike and Brief in Support of Motion to Strike.

Section 8(a)(1) when the Winstons contacted the three employees to ask about the union after the union representatives were ordered off the premises. The ALJ reasoned that the union had already divulged their union support. The ALJ also found no threats in violation of the Act in the phone calls after the union visit and when the trucks were returned when Stahl was called a “treasonous motherfucker,” by Tim Winston Stahl and that should come and see him and see what happens when he turned in his truck. The ALJ also found no violation of the Act when employees Noel and Gordon were told that they could thank Stahl “for getting you fired,” and when David Winston told all three employees, “good luck finding a union job in this town. If you want a union job, you’re not going to find it here.” Tr. 154-155.

The ALJ ordered a Gissel bargaining order but failed to issue a broad cease and desist order. The ALJ also failed to include in the notice a requirement that a responsible management representative read the notice to employees in English and, upon request, in Spanish to employees assembled for this purpose in the presence of a Brad agent or alternatively have the notice read in English and Spanish, upon request, by an NLRB agent in the presence of the employees who are assembled for that purpose in the presence of a responsible management representative.

The cross exceptions raise the following issues:

1. Did the ALJ err by not specifically finding that David Winston was a supervisor under Section 2(11) of the Act? (Cross Exception 1).
2. Did the ALJ err by failing to find Tim Winston and David Winston engaged in interrogations of the employees concerning their support for the union in violation of Section 8(a)(1) in telephone conversations? (Cross Exceptions 2-3).

3. Did the ALJ err by not finding that Respondent threatened employees in phone conversations on March 9 and when the employees turned in their trucks. (Cross Exceptions 5-7).
4. Did the ALJ err by failing to recommend a broad cease and desist order? (Cross Exceptions 9 and 10).
5. Did the ALJ err when it failed to include a requirement that the Order be read to the assembled employees in the presence of an NLRB agent. (Cross Exception 11).

II. Argument

1. The Status of David Winston.

Tim Winston was the owner of AC Specialist, Inc., the Respondent. David Winston, Tim Winston's father, was the former owner and continued to be involved in the operations of the company. (ALJD 2:15-17). The complaint alleged that Tim Winston was a section 2(11) supervisor. This was admitted in the answer. Respondent denied in the answer that David Winston was a supervisor within the meaning of Section 2(11) of the Act.

David Winston admitted that he had the authority to hire and fire employees. (David Winston 18, 24). Indeed, he exercised this authority by firing James Stahl on March 9 when he called Stahl shortly after the union representative had departed the shop. (ALJD 6:22-27). Tim Winston admitted that he and his father fired all three technicians on March 9. (Tim Winston 76).

It is clear that when David Winston stepped down as owner of the company in favor of his son, he did not relinquish his supervisory authority or his close involvement in the management of the company. Accordingly, both Tim Winston and David Winston were supervisors within the meaning of Section 2(11) of the Act.

2. Interrogations of Employees and Threats in Violation of Section 8(a)(1) of the Act.

Shortly after the two union representatives departed the Respondent's facility on the morning of March 9, the Winstons called each of the three service technicians.

David Winston called Jerome Gordon and asked him who was the union guy he had talked to and what made him want to talk to the union. (Gordon 195). He added that there was not going to be a union at AC Specialists. "This isn't a union shop and if [I] wanted to be in a union then I needed to get a union job." (Id). He also said "unions destroy lives." (Id). Gordon replied that he thought a union was a good idea. (Id). David Winston repeated that there would be no union at AC Specialists and when Gordon did not respond, he was told that he needed to decide.

Gordon called back and spoke to Tim Winston. Following up on the ultimatum presented by David Winston in the earlier conversation, Gordon told Tim Winston that he made up his mind and "I wanted to be union." (Gordon 196). Tim Winston asked if he was going to finish up his initial service call. Gordon responded that if he was being fired, he should turn his truck in now. (Id, ALJD 5:37-41). Michael Noel testified that Tim Winston called him shortly before he arrived at his first service call on March 9. Tim Winston asked what the union stuff was all about. (Noel 153). Noel admitted that he had joined the union. (Id). Winston replied by asking why Noel would contact the Union since he could come to him with any problems. (Id). Noel tried to assure Tim Winston that it wasn't against him." (Noel 153). Tim Winston replied that it had everything to do with him, then accused him of contacting the union behind his back. (Id).

Jim Stahl was contacted by David Winston as well. Stahl testified that Winston started out the conversation by asking him "what the fuck I was trying to do to him." (Stahl 234). He added that he knew that Stahl was behind all of this and that the other two employees weren't

smart enough to do it on their own. (Id). Stahl admitted that he and the other two service technicians had signed union cards. David Winston stated that the union was not going to happen and fired Stahl. (Id at 235; ALJD 6:29-33).

The ALJ credited Stahl's testimony that several minutes later Tim Winston called Stahl and asked him to finish his initial service call before he turned his truck back in. (Id at 236). Stahl thought about this request and called back to tell Tim Winston that since he had just been fired it wasn't appropriate to finish the call. (Id). Tim Winston angrily called Stahl a "treasonous fucker" and told him to "turn the vehicle in" and "come and see him face to face and see what happens." (Stahl 236; ALJD 6:35-40).

While the Judge found that the calls to the employees were made and that each employee was asked what was happening with the union, that this did not constitute unlawful interrogations. The employees understood that the union would be disclosing to the employer that they had signed authorization cards. According to the ALJ, the Winstons were merely confirming what had been told to them by the union and accordingly the interrogations concerning the union was not coercive.

The Board generally has held that questioning or interrogating about their union activities violates the Act. *Nat'l Tel. Directory Cor.* 319 NLRB 420, 421 (1995). However, the Board does not adopt a per se test and will consider the surrounding circumstances including the time, place, personnel involved, and know position of the employer. *Blue Flash Express*, 109 NLRB 591 (594); *Rossmore House*, 269 NLRB 1176 (1984); *Sunnyvale Medical Clinic* 277 NLRB 1211 (1945). Thus, when a supervisor poses innocuous or spontaneous questions that were mere "conversation starters" there will be no violation of the Act.

The surrounding circumstances of this case show that an employer reacted angrily when the union presented authorization cards. David Winston made it perfectly clear that they had no use for unions and when he told the union representatives to leave he said, “fuck the union” and added that “unions have ruined this country.” (Leggette 101). More than idle or casual conversation, the Winstons, the owner and co-owner, immediately contacted the employees to find out about “the union stuff.” As the Fifth Circuit stated, the mere fact that an employee was a widely-known union adherent does not validate an otherwise coercive interrogation. “Although an employee has openly declared his support for the union, the employer is not free to probe directly into his reason for supporting the union.” *NLRB v. Brookwood Furniture*, 701 F.2d. 452, 463 fn 35 (5th Cir. 1983); *Beverly California Corp.* 326 NLRB 153, 157 (1998); *Francies House Inc.*, 322 NLRB 516, 522 (1996).

The employer in this case was probing to see how firm the union support was. Gordon was told that there was not work for union members and he had to decide what he was going to do. Noel was asked why he didn't come to management with his problems and that he had gone behind his back by speaking to the union. Stahl was called a “treasonous motherfucker” when he confirmed his support for the union. Finally, in all three cases when the employees did not waver in their support for the union, they were summarily discharged.

Under these circumstances, the interrogations were clearly coercive and were part of a sequence of events that quickly resulted in unlawful terminations. Accordingly, the ALJ's finding that there was no coercive impact of the interrogations must be reversed and 8(a)(1) violations should be found in connection with the interrogation of each of the three employees on March 9 by David Winston and Tim Winston concerning their union activity.

3. Threats Made to Employees on March 9 Also Constitute Independent Violations of Section 8(a)(1) of the Act.

The ALJ also erred when he failed to find independent 8(a)(1) violations of the Act. There are three instances when threats violative of the Act occurred:

1. Tim Winston called Jim Stahl to ask him to complete his called before turning his truck in. Stahl called back to decline on the grounds that it was inappropriate to do so because he had already been fired by David Winston. Tim Winston responded angrily and called Jim Stahl a “treasonous motherfucker” and to see him face to face and see what happens. (ALJD 6:37-40).

The Judge reasoned that Tim Winston’s comments did not amount to coercive threats because he had already been terminated. The ALJ’s finding that the threat made by Tim Winston was, in effect, subsumed by the discharge is contrary to established Board policy. *TLC, a Joint Venture*, 340 NLRB 923, 924 (2003); *Benesight Inc.*, 337 NLRB 282, 284 (2001). There is good reason for this. The angry outburst by Tim Winston and the threat that he should come to him face to face and see what happens was the primary reason that Stahl contacted the Hillsborough County Sherriff’s office to ask for a deputy to be present in order to forestall the possibility of violence. To allow this serious threat to be unaddressed by an independent finding of a Section 8(a)(1) violation ignores the reality that Tim Winston’s intemperate outburst had created a volatile situation quite apart from the actual discharge.

2. The ALJ also failed to find an independent violation of Section 8(a)(1) relating to Tim Winston’s comment to the three employees that they could thank Stahl for “getting you guys fired.” (ALJD 7-7-6; 9:4-14). Similarly, the ALJ failed to find an independent violation when the employees were told by David Winston, “Good luck finding a union job in this town. If you want a union job, you are not going to find it here.” (Tr. 154-155).

These coercive comments are not subsumed by the discharges. They are independent violations of Section 8(a)(1). As to singling out the union ringleader and blaming him for the discharge of the two other employees, this certainly sent the message that taking a leading role in union organizing would lead to repercussions and heightened animosity. This strikes a particular chord in this case when the two less active employees, Noel and Gordon, were reinstated but not Stahl. Without having this threat the subject of an independent finding of a violation, the entire scope of unlawful activities will not be fully addressed. Finally, the comment that the employees would be dependent on union employers and that there would be no union job at ACS is a vivid reminder of the futility of union organizing. This too should be found to be a violation of Section 8(a)(1) of the Act.

4. A Broad Cease and Desist Order Should Be Issued.

The ALJ issued a narrow cease and desist order requiring that the respondent “cease and desist” from engaging in “like or related” conduct. This narrow order is inappropriate in cases like this one where widespread and egregious misconduct has occurred. A broad order is called for in the instant case requiring the employer to cease and desist from violating the Act “in any other manner.” Such broad orders are appropriate even where there has been no prior history of violations if it has been demonstrated that the violations were egregious. As stated by the Board in *Five Star Manufacturing*, 348 NLRB 1301, 1302 (2006):

Given the serious and wide-ranging nature of Respondent’s violations, we find that the Respondent’s misconduct demonstrates a general disregard for its employees’ Section 7 rights, justifying imposition of a broad cease-and-desist order.... Although the Respondent does not have a prior history of violation of the Act, we find that a broad order is nevertheless appropriate. Our remedial focus here is not to the Respondent’s proclivity to violate the Act, but rather the egregious and widespread nature of its misconduct. The mere fact that the Respondent has no prior history of violations does not, in and of itself, undermine the necessity for a broad order.

Further support for a broad order is found in *Cassis Management Corp.*, 323 NLRB 456 (1997), a case relied upon by the ALJ in recommending the issuance of a Gissel bargaining order. In *Cassis*, the employer unlawfully fired the entire bargaining unit just as occurred in this case, and the Board issued a broad cease and desist order. Likewise, in *Leavitt J. Cofer d/b/a Marysville Travelodge*, 233 NLRB 527 (1977), where the entire bargaining unit was terminated in response to a union organizing drive, the Board reversed the ALJ and issued a broad cease and desist order.

We respectfully request that a broad cease and desist order be issued to remedy the “outrageous and pervasive” unfair labor practices found in this case. (ALJD 10:21-22).

5. The Board’s Notice Should be Read to the Employees by a Top Official of Respondent.

This case involves egregious and pervasive unfair labor practices that warrant special remedies. The Union respectfully requests that the Notice in this case be read aloud to employees in the presence of an NLRB agent by a top management official or in the alternative that the Notice be read to assembled employees by a Board agent in the presence of a top management official. *Homer D. Brouson Co.*, 394 NLRB 512, 514 (2007); *Federated Logistics & Operations*, 340 NLRB 255 (2005); *McAllister Towing & Transportation*, 341 NLRB 394, 400 (2004). This is required in order to dissipate fully the serious violations of the Act and to ensure that employees who work in the field and do not report to the shop will fully perceive the important information set forth in the notice that may not transpire for employees who did not consult Respondent’s bulletin board.

Finally, the notice upon request should be read in English and, upon request, in Spanish. At the present, all employees are believed to be English speaking but this might not be true when

the case is remedied. Given the large number of Spanish speakers in the Tampa, Florida area it is vital that both English and Spanish notices be posted and read upon request of the union.

6. Conclusion.

For all the reasons set forth above, the Charging Party requests that the Charging Party's Cross Exceptions be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 26th day of November 2012, the following document:

Charging Party's Brief in Support of Cross Exceptions to the Administrative Law
Judge's Decision

was filed using the Court's ECF filing system and that a notice of such filing was sent electronically to the following:

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