

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

BNC NORTHWEST PSYCHIATRIC
HOSPITAL, LLC d/b/a BROOKE GLEN
BEHAVIORAL HOSPITAL,

Respondent

and

Case Nos. 04-CA-164465
 04-CA-174166

BROOKE GLEN NURSES ASSOCIATION/
PENNSYLVANIA ASSOCIATION OF
STAFF NURSES AND ALLIED
PROFESSIONALS,

Charging Party

**CHARGING PARTY'S BRIEF IN SUPPORT OF EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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Dated: November 16, 2016

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

BNC NORTHWEST PSYCHIATRIC
HOSPITAL, LLC d/b/a BROOKE GLEN
BEHAVIORAL HOSPITAL,

Respondent

and

Case Nos. 04-CA-164456
 04-CA-174166

BROOKE GLEN NURSES ASSOCIATION/
PENNSYLVANIA ASSOCIATION OF
STAFF NURSES AND ALLIED
PROFESSIONALS,

Charging Party

**CHARGING PARTY’S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to 29 CFR § 102.46, Brooke Glen Nurses Association/Pennsylvania Association of Staff Nurses and Allied Professionals (“Union” or “Charging Party”) files this brief in support of its exceptions to the decision of the Administrative Law Judge (“ALJ”).

I. Introduction

Brooke Glen Behavioral Hospital (“Respondent”) operates a hospital specializing in treating behavioral health issues. Charging Party has represented the Respondent’s full and regular part-time registered nurses for many years. Following the execution of the most recent collective bargaining agreement in 2010, the Respondent was sold to a new corporate owner, Universal Health Services (“UHS”). The parties have been negotiating without success for a successor agreement for the registered nurses since the expiration of the most recent agreement in 2014. In early- to mid-2015, the Charging Party successfully organized the Respondent’s per diem registered nurses. Around the same time, it began organizing efforts among the registered

nurses at Friends Hospital, a nearby behavioral health hospital also owned by UHS. In mid- to late-2015, soon after the successful campaign to organize per diems, the Charging Party began an organizing drive among the Respondent's mental health technicians ("techs"), who were already represented by a different labor organization.

In this context, the Respondent informed the Union that it would not proceed with a bargaining session while techs brought by the Union were present. When the Union insisted on the techs remaining at the session, Respondent refused to proceed. The Respondent also discharged the Union's chief employee organizer on all three of the above-mentioned 2015 organizing campaigns, full-time registered nurse Elisa DiGiacomo ("DiGiacomo"). The ALJ declined to find that the Respondent violated Sections 8(a)(5) or (1) of the Act by conditioning bargaining on the absence of the techs. The ALJ also declined to find that DiGiacomo's discharge violated Sections 8(a)(3) or (1) of the Act.

With regard to each of these issues, the ALJ misapplied the relevant Board doctrines or applied incorrect versions of those doctrines. Regarding the refusal to proceed with the bargaining session so long as the techs were present, while acknowledging that a union is entitled to select whomever it likes to attend negotiations, the ALJ drew a novel distinction between "observers" and "members of the bargaining team"—concluding that a union cannot bring the former but can bring the latter—that is foreclosed by the Board's decisions. Regarding the discharge of DiGiacomo, the ALJ applied versions of the Board's *Wright Line* and *Atlantic Steel* tests that conflict with the Board's articulations of those tests.

II. Issues and Recommendations

1. Did the ALJ correctly find that the Respondent did not violate Sections 8(a)(5) or (1) by refusing to proceed with a scheduled bargaining session?

No. The Respondent acted unlawfully when it refused to bargain with the Charging Party because the Charging Party brought employees represented by another labor organization to a bargaining session.

2. Did the ALJ correctly find that the Respondent did not violate Sections 8(a)(3) or (1) when it discharged DiGiacomo?

No. DiGiacomo was fired because of her union activity under both the *Wright Line* and *Atlantic Steel* tests.

III. Analysis

A. Refusal to Proceed with Bargaining So Long as Techs Were Present

1. ALJ's Findings of Fact

The ALJ made the following findings of fact that are relevant to determining whether Respondent's refusal to proceed with a bargaining session violated the Act. The most recent collective bargaining agreement between the parties took effect on October 1, 2010 and expired on September 30, 2014 (ALJD at 2, ¶¶ 31-32). Beginning at some point in September 2014, the parties began bargaining for a successor agreement. Despite meeting roughly 50 times for negotiations, the parties have yet to agree to a new contract. (ALJD at 2, ¶¶ 38-41.)

In the late summer or early fall of 2015, some techs employed by Respondent approached the Charging Party to express their desire to be represented by the Charging Party (ALJD at 3, ¶¶ 4-6). Another union, an affiliate of the Teamsters, already represented Respondent's techs (ALJD at 3, ¶¶ 6-7). The Charging Party set out to organize the techs in response to the appeals

by several of the techs to do so (ALJD at 3, ¶¶7-9). The Respondent did not want the Charging Party to represent the techs, instead preferring that the Teamsters affiliate continue to do so (ALJD at 3, ¶¶14-15). The Respondent held meetings at which it urged the techs to reject PASNAP and remain represented by the Teamsters affiliate (ALJD at 3, ¶¶16-17).

At the same time Charging Party and Respondent were bargaining a successor agreement for the nurses and Charging Party was organizing the techs, the Respondent and the Teamsters affiliate were negotiating a new agreement for the techs (ALJD at 3, ¶¶11-13).

On November 10, 2015, the parties met for a bargaining session (ALJD at 3, ¶¶3-4). DiGiacomo was present on behalf of the Union (ALJD at 3, ¶23). DiGiacomo brought a number of techs to the session (ALJD at 3, ¶29). The lead negotiator for the Respondent, Frank Kurtz, objected to the presence of the techs (ALJD at 3, ¶32). The lead negotiator for the Union, Bill Zoda, stated that the techs were “here as witnesses to what’s happening at the table with us” and stated that the Union would agree to bargain without the techs present in exchange for the Respondent’s pledge to cease holding mandatory meetings with the techs at which the Respondent misrepresented the Union’s positions at bargaining (ALJD at 3, ¶¶31-36). The Respondent ended the session (ALJD at 3, ¶¶37-38).

The following day, November 11, 2015, the parties met again at the same location (ALJD at 3, ¶40). Although the Charging Party again brought techs, the Respondent did not object to their presence and the parties discussed terms and conditions of employment (ALJD at 4, ¶¶1-4).

2. Facts Shown by the Evidence but not Found by the ALJ

The following facts are established by the evidence, although the ALJ did not specifically address them.¹ Each side designated someone to take notes of the November 10 bargaining

¹ None of these facts implicate the ALJ’s credibility determinations.

session (GC 8, 10). The Respondent's notes indicate that Kurtz opened the meeting by asking whether he was correct in observing that there were two "Teamsters" present.² When Zoda responded "Yes," Kurtz declared that the Respondent would not "proceed with bargaining if [the techs] [we]re in the room." Zoda then explained that the negotiations were for the nurses' terms and conditions, not the techs', mentioned that the Respondent had held meetings and represented things about what happened at the bargaining table, and stated that the Charging Party's "policy [wa]s [the techs] are welcome to observe." Kurtz then threatened to file an unfair labor practice charge against the Charging Party for bringing the techs. According to the notes, Zoda then described the techs as "observers." At one point, Zoda stated that it was "[o]ur right to have observers, nothing precludes us from bringin [sic] in who we want on our side of the table." (GC 10, 8.)

The notes further reveal that, after a caucus, Zoda stated that the Charging Party would bargain without the techs if the Respondent removed its anti-Union consultant and stopped misrepresenting the Union's actions at bargaining to the techs. Kurtz then declared that "It's been the law forever...What happens in the room, [sic] is between the representative and the facility." In response, Zoda explained that the Charging Party's goal in having the techs' present was to lessen "confusion and chaos in the facility" brought on by the Respondent's parent company's "campaign against the nurses with the teamsters." Kurtz later claimed again that "What happens in here [meaning in bargaining], happens between hospital and union." (GC 10, 8.)

² The following facts are derived from the Respondent's notes of the November 10 bargaining session, which are General Counsel's Exhibit 10. They are corroborated by the less detailed notes of the Charging Party, which are General Counsel's Exhibit 8.

3. The ALJ's Decision Contradicts Board Doctrine

Resolution of this question centers on the scope of the Board's "[l]ongstanding precedent establish[ing] that employers and unions have the right to choose whomever they wish to represent them in formal labor negotiations" and that "[p]arties must deal with the chosen representatives who appear at the bargaining table except in the rare circumstance when the presence of a particular representative makes collective bargaining impossible or futile." *Wellington Industries, Inc.*, 357 NLRB 1625, 1625 fn. 1 (2011) (internal quotation marks, brackets, and ellipsis omitted). The ALJ concluded that this doctrine did not permit the Charging Party to bring "'observers' who [we]re not members of the bargaining team and ha[d] nothing to add to the bargaining" (ALJD at 8, ¶¶40-42) and who were brought "to counter Respondent's apparent argument that the Union was not a good choice for the technicians because of its conduct in its bargaining for the nurses" (ALJD at 9, ¶¶9-12).

The ALJ's conclusion is controverted by Board decisions articulating the scope of the right to choose representatives in bargaining. Those decisions make clear that a Union may bring employees who are present, to use the judge's word, simply to "observe." (ALJD at 8, ¶¶40-42.) Thus, in *Steelworkers Local 2556 (Lynchburg Foundry Co.)*, 192 NLRB 773, 779 (1971), the employer was negotiating with two separate bargaining representatives for two separate units at two of its plants. The employer accused the unions of seeking to require it to bargain with all of the employees as a single combined unit, and cited as evidence the fact that the unions "insist[ed] on including on the negotiation committee for each plant unit employee committeemen from the other plant, *who acted as observers.*" *Ibid.* (emphasis added). The Board observed that "under now well-established law, the [unions] were clearly within their

lawful rights in doing so.” *Id.* at 779-80 (citing *General Electric Co. v. NLRB*, 412 F.2d 512 (2d Cir. 1969) and *Minnesota Mining & Mfg. Co. v. NLRB*, 415 F.2d 174 (8th Cir. 1969)).

Similarly, in *Dilene Answering Service*, 257 NLRB 284, 291 (1981), the employer’s “objections to the presence of the employees were that they were not truly ‘representatives’ of the employees.” At the bargaining session, the union’s negotiator described the employees as part of the union’s committee who had a “right to attend, observe, and say what they pleased.” *Ibid.* The employees themselves, meanwhile, described themselves as being “there to see and hear what was going on” and explained that “they were not representing the Union.” *Ibid.* In response to the employer’s negotiator’s protestations, the union negotiator explained that the employees “were there to see what a liar [the employer’s negotiator] was.” *Ibid.*

In finding that the employer violated the Act by conditioning bargaining on the employees’ absence, the Board explained that the term “representative” as used in this area of Board law included those whose “presence had been requested by the Union and...[who] were there *to observe* and assist [the union’s negotiator] in negotiations in whatever way he should require.” *Ibid.* (emphasis added). The Board explained that once the union’s negotiator stated that the union “had asked the four employees to be present at negotiations as part of the committee,” the Act required the employer to accept their presence and begin bargaining. *Ibid.*; *see also Caribe Staple Co., Inc.*, 313 NLRB 877, 889 (1994) (employer violated the Act by conditioning bargaining on the union not bringing employees “who participate to no extent in negotiations” to bargaining sessions). The lesson of these cases is clear: provided a union is not attempting to force the employer to treat two units as a single combined unit, the union’s motive for requesting the presence of individuals at the bargaining session, and the contribution of those individuals to bargaining, is irrelevant.

Here, the techs were present at the Union's request to observe negotiations. The Respondent conditioned bargaining on the techs' absence. Those facts alone make out a violation of the Act. The ALJ's decision to the contrary is erroneous.

The ALJ ruled in the alternative that, because the Respondent met and bargained with the Charging Party with techs present the day after it conditioned bargaining on techs' absence, the Respondent did not commit an unfair labor practice. Put differently, the ALJ concluded that discontinuing one bargaining session for an unlawful reason does not violate the Act if the party ceases its unlawful objection soon after. This decision is similarly foreclosed by longstanding Board precedent.

In *Caribe Staple*, the employer sent a letter conditioning future negotiations on the union's accession to a variety of demands regarding "guidelines and ground rules" for the negotiations. 313 NLRB at 888. When the union's attorney protested this conditioning, the employer sent a follow-up letter a couple weeks later denying that it was insisting on the "guidelines and ground rules." *Id.* at 888-89. As the Board explained: "Obviously, the Respondent is not excused from the [initial] stratagem on the fortuitous grounds that the Union elected to resist, rather than yield, in the face of the threat to delay or curtail bargaining." *Id.* at 889.

Here, the Respondent informed the Charging Party that it would not bargain with techs present, and repeatedly demanded that the techs leave the session. As in *Caribe*, the Union "elected to resist, rather than yield, in the face of the threat to delay or curtail bargaining" by refusing to send the techs away both on November 10 and in subsequent negotiations. When its initial conditioning failed to succeed, the Respondent stopped its protestations. But the Respondent's initial "stratagem" is not excused just because the Charging Party "fortuitous[ly]"

chose to resist it. The Board does not excuse an employer’s unlawful bargaining strategy just because it happened to prove unsuccessful in deterring the union. If the Board did, it would incentivize parties to impose unlawful conditions on bargaining: if the other party acceded to the unlawful demands, the party would find itself in an unlawfully obtained advantageous bargaining position; but, if the other party resisted the condition, the party could simply drop the condition and suffer no consequences.

The ALJ’s second alternative holding—that assuming, *arguendo*, the Respondent did violate the Act, there was no need for a remedial order—is erroneous for the same reason. If a party can impose an unlawful condition on bargaining and gain an advantage if it is successful and suffer no consequences if it is not, then there is no disincentive to impose such conditions. Obviously, finding a violation but not remedying has the same practical effect as finding no violation: it tells the Respondent that it can violate the Act with impunity and makes unlawful conditions on bargaining the most rational bargaining strategy.

In addition, the ALJ speculated that “changed circumstances”—namely, the conclusion of a contract between the Teamsters affiliate and the Respondent and the consequent end of the Charging Party’s effort to organize the techs—“make such a remedy unnecessary” (ALJD at 10, ¶15.) “[I]n my opinion,” the ALJ wrote, remedying the Respondent’s unfair labor practice would “create more tension and ill will than would letting things stand as they are” (ALJD at 10, ¶¶17-18). The ALJ’s assessment of the need for and impact of a remedial order is controverted by the fact that the Charging Party and the Respondent continue to negotiate for a new collective bargaining agreement for Respondent’s nurses (ALJD at 2, ¶¶38-41). Whatever the chances that the Charging Party will bring techs to negotiations again, the Charging Party may well seek to bring individuals to bargaining whom the Respondent would prefer not attend; a remedy is

needed to ensure that the Respondent will not once again violate the Act in an effort to control the identity of the Charging Party’s representatives.

Moreover, the ALJ cited no precedent—because none appears to exist—in which the Board refused to remedy an unfair labor practice based on its purely speculative feeling that the remedy would “create more tension and ill will” than just allowing the violation of the Act to go unaddressed (ALJD at 10, ¶¶16-18). Such a practice is contrary to the plain language of the Act, which mandates that when the Board determines that “any person named in the complaint has engaged...in any such unfair labor practice, then the Board...*shall* issue...an order requiring such person to cease and desist from such unfair labor practice” and to take such affirmative action as will effectuate the policies of the Act. 29 U.S.C. § 160(c) (emphasis added). Once an unfair labor practice is found, the Act leaves the Board no discretion—it must issue an order remedying the violation.³ *UAW v. NLRB*, 427 F.2d 1330 (6th Cir. 1970) (The Board, “having

³ On exceedingly rare occasions, the Board has encountered misconduct “of such obviously limited impact and significance that [the Board] ought not to find that it rises to the level of constituting a violation of [the] Act”—this is the Board’s *de minimis* doctrine. *American Federation of Musicians, Local 76 (Jimmy Wakely Show)*, 202 NLRB 620, 621 (1973). Here, however, the ALJ’s second alternative ruling is not that the Respondent’s actions were so trivial that they could not qualify as a violation of the Act but rather that, assuming they *were* a violation of the Act, a remedial order would “create more tension and ill will than would letting things stand as they are” (ALJD at 10, ¶¶16-18). As already stated, once a violation is found, the Act mandates a remedial order. 29 U.S.C. § 160(c). Therefore the ALJ’s second alternative ruling is erroneous.

In any event, the Respondent’s violation here would not qualify as *de minimis* even if the ALJ had invoked that doctrine. In *Teletech Holdings, Inc.*, 342 NLRB 924, 927 (2004), a supervisor unlawfully asked an employee to remove her union insignia. The next day, another supervisor advised the employee that the first supervisor was wrong and the employee could wear her insignia. *Ibid.* The Board found that the second supervisor’s actions did not constitute “effective repudiation” of the initial violation because “there was no acknowledgement that the request was unlawful or assurance that the request would not be repeated,” and that, “[a]bsent effective repudiation, it [wa]s reasonable to infer that [the supervisor’s] request continued to chill employee exercise of Section 7 rights.” *Ibid.* The violation was therefore not *de minimis*. *Ibid.*; see also *All American Gourmet*, 292 NLRB 1111, 1120-21, 1121 fn. 40 (1987) (*de minimis* doctrine, as articulated in *Bellinger Shipyards*, 227 NLRB 620 (1976), did not apply where

found a violation, must issue a remedial order”); *Woodworkers, Local 3-10 v. NLRB*, 380 F.2d 628 (D.C. Cir. 1967).

B. Discharge of DiGiacomo

1. ALJ’s Findings of Facts

The ALJ found the following facts relevant to determining whether the discharge of DiGiacomo violated the Act. In March 2014, Respondent’s Director of Admissions and Referrals, Ellen Strauss, told DiGiacomo that DiGiacomo “was being watched because she was active in the Union” (ALJD at 11, ¶¶29 fn. 16). The following spring and summer, DiGiacomo led the Union’s effort to persuade the Respondent’s per diems to vote to join the nurses unit (ALJD at 2, ¶¶45-46), which the Respondent opposed (ALJD at 2, ¶¶43-45). The per diems voted to join the existing unit in a Board-conducted election in July 2015 (ALJD at 2, ¶¶ 32-34). DiGiacomo was also on the Union’s bargaining committee for a successor agreement for the nurses unit in the negotiations that began in September 2014 and have continued since (ALJD at 3, ¶ 1 and 2, ¶¶38-41)

On April 9, 2015—around the same time that she was leading the effort to organize the per diems—DiGiacomo handbilled as part of an effort by the Union to organize nurses at Friends Hospital, a hospital close to the Respondent that was also owned by UHS (ALJD at 6, ¶¶28-30).

supervisor rescinded unlawful threats after five minutes because the supervisor had not effectively remedied the initial violation).

Similarly, in the present case, although the Respondent acquiesced to the presence of techs at bargaining after a day of refusal, there is no evidence that it “acknowledge[d] that [its conduct] was unlawful or assur[ed] [the Union] that [its conduct] would not be repeated”; therefore, its violation was not remedied. *Ibid.* And absent an effective remedy, it is reasonable to infer that the Respondent’s actions continued to chill employee exercise of the right to select bargaining representatives, particularly in light of the fact that the parties continue to bargain for a successor agreement and the Charging Party may well wish to bring outsiders to future sessions. *Ibid.*

On that occasion, Friends' officials ejected DiGiacomo from the property after a very short period of time (ALJD at 6, ¶¶29-30).⁴

In later summer or early fall 2015, techs approached the Union about the Union becoming the techs' representative (ALJD at 3, ¶¶4-6), prompting the Union to seek to do so (ALJD at 3, ¶¶7-9). The Respondent was against the Union representing the techs and preferred that the techs remain represented by the Teamsters affiliate; it held mandatory meetings to dissuade the techs from voting for Union representation and to encourage them to stay with the Teamsters (ALJD at 3, ¶¶14-16). Respondent's Director of Plant Management, Bill Thomas, repeatedly stated in the presence of employees that the Respondent hated the Union but did not mind the Teamsters affiliate (ALJD at 11, ¶29 fn. 16). DiGiacomo was again the lead organizer of the techs for the Union, and her efforts included meeting with techs and speaking to them on behalf of the Union (ALJD at 3, ¶¶10-11).

It was DiGiacomo who brought techs to the November 10, 2015 bargaining session on behalf of the Union (ALJD at ¶¶21-22). In attendance at that session on behalf of the Respondent was Laura Nolet, Respondent's Human Resources Director, who would play an instrumental role in discharging DiGiacomo the following week (see *infra*) (ALJD at 3, ¶¶24-25). Also in attendance on the Respondent's behalf was Autumn DeShields, Respondent's acting or interim Director of Nursing, on whose report the Respondent would principally rely in

⁴ The ALJ credited DiGiacomo's testimony regarding handbilling at Friends (ALJD at 6, ¶¶28-30). According to that unambiguous testimony, DiGiacomo handbilled at Friends on April 9, 2015 (Tr. 53-55). Her testimony regarding the date is not disputed anywhere in the record. The ALJ mistakenly indicated that this handbilling took place a year earlier, in roughly April 2014 (ALJD at 6, ¶28), a date which finds no support in the record. The ALJ's oversight has been corrected for purposes of this brief.

discharging DiGiacomo the following week (see *infra*) (ALJD at 4, ¶¶4-6). UHS transferred DeShields to the Respondent from Friends in early October 2015 (ALJD at 4, ¶9 fn. 5).

Nolet and DeShields attended the November 11 bargaining session as well (ALJD at 4, ¶¶4-6 and ¶¶18-20). At that session, DiGiacomo “engaged in a fairly intense debate about staffing and morale at the hospital” with DeShields (ALJD at 4, ¶¶4-6). More specifically, in discussing a Union proposal to increase the number of nurses and techs relative to patients, DiGiacomo asked DeShields about DeShields’ failure help with staffing and why DeShields “was not doing anything” (ALJD at 4, ¶¶ 6-9).

Also at the November 11 bargaining meeting, DiGiacomo asked the Respondent’s representatives about an anti-union consultant named Jose who had been sent by UHS to the hospital to defeat the techs’ bid to be represented by the Union (ALJD at 4, ¶¶11-14, ¶14 fn. 6). DiGiacomo told the representatives that employees had told her that they were uncomfortable with the consultant’s presence at the hospital and felt intimidated by him (ALJD at 4, ¶¶15-18).

On November 12, DeShields brought a group of techs and supervisors from Friends to the Respondent’s facility for a tour (ALJD at 6, ¶¶8-10). When the tour came to the section of the facility dedicated to treating adolescents, at which DiGiacomo was working, DiGiacomo pointed to the visitors and asked who they were and why the group was there in a yelling voice (ALJD at 6, ¶¶18-23). At the time, a patient was in a lounge that was near enough that the patient might have heard DiGiacomo (ALJD at 6, ¶¶24-26). DiGiacomo knew the group was from Friends (ALJD at 6, ¶¶26-27). DeShields gave no response to DiGiacomo’s questions (ALJD at 6, ¶¶32-33).

Receiving no response, DiGiacomo repeated her question and asked one Friends’ tech, whom DiGiacomo had seen at the facility before, how many orientations he needed, sarcastically

pointing out various obvious features of the unit to emphasize the point (ALJD at 6, ¶¶33-36).

As the group left the adolescent section, DiGiacomo asked whether she could now tour Friends (ALJD at 6, ¶¶38-40).

Later, DiGiacomo saw the group in a hallway and said, “I didn’t get this kind of hospitality when I went to Friends, I got kicked out in like ten minutes”—a reference to the handbilling incident of a few months prior (ALJD at 7, ¶¶2-5).

At the end of DiGiacomo’s workday, as she was walking to her car, DiGiacomo saw the tour group standing in the Respondent’s parking lot and approached them. She asked a Friends supervisor who was part of the group whether he was going to work at the Respondent’s facility, to which the supervisor responded “possibly.” (ALJD at 7, ¶¶13-14.) DiGiacomo then said “good,” and, indicating to DeShields, said “this one don’t do shit, she ain’t shit.” She then left the group and headed for her car, and as she did so said “I’m going to get you the fuck out of here.” (ALJD at 7, ¶¶16-18.)

At about this same time—that is, within a day or two of November 12—Nolet interrupted a Union meeting when she found out that techs were in attendance and insisted that she would eject the Union from the hospital premises if the techs did not leave (ALJD at 12, ¶¶13-17).

On November 16, Nolet and Mullen met with DiGiacomo and asked her about the events of November 12 for the first time. They discharged her in the same meeting. (ALJD at 8, ¶¶7-11.) Final responsibility for the decision rested with Mullen (ALJD at 8, ¶¶10-11). In the meeting, Nolet and Mullen provided DiGiacomo with a written termination notice saying that Respondent was discharging her for her conduct with respect to the tour group (ALJD at 8, ¶¶11-13). But at hearing, Mullen asserted that DiGiacomo was also discharged for failing to adequately confess to Nolet and Mullen’s version of what happened (ALJD at 8, ¶¶16-18).

Profanity was commonplace at the hospital (ALJD at 12, ¶¶30-33). In addition, on numerous occasions, Respondent imposed mere verbal or written warnings on employees who engaged in unprofessional conduct (ALJD at 12, ¶¶33-35).

2. Facts Shown by the Evidence but not Found by the ALJ

The record establishes the following facts relevant to determining whether DiGiacomo's discharge violated the Act but not specifically found by the ALJ.⁵ Although the ALJ found that the Respondent had imposed mere verbal or written warnings on employees alleged to have acted unprofessionally on numerous occasions, he did not explore these incidents in any detail (ALJD at 12, ¶¶33-35). The General Counsel introduced uncontested evidence of nine such occasions between November 24, 2010 and October 7, 2015.⁶ These included instances where nurses used profanity in front of adult and adolescent patients, fellow employees, and managers (see the report for nurse Jessica Walters from September 12, 2014 for saying "This is the same shit..." in front of numerous witnesses), acted disrespectfully toward supervisors (see report for tech Trinidad Strowhower from November 24, 2010 for hanging up on a supervisor abruptly and for nurse Tom Dennery for having an "unprofessional conversation" with the Nursing Supervisor), used inappropriate language and entered incorrect information in official patient information documents (see report for tech Susan Dobzanski from July 15, 2011), or even traumatized patients through unprofessional comments and behavior (see report for nurse Susan Dobzanski from January 16, 2015), among others. Moreover, even where an employee repeatedly engaged in unprofessional conduct, the most he or she received was a written warning (see two reports for Trinidad Strowhower and three for Susan Dobzanski). Furthermore, even

⁵ None of these facts implicate the ALJ's credibility determinations.

⁶ The following facts are derived from Respondent's official discipline reports, which were entered into the record as General Counsel's Exhibit 9.

where a nurse refused to acknowledge that he had behaved unprofessionally in any way, he still received only a verbal warning (see report for Tom Dennery from August 6, 2014). Nolet personally signed off on the lesser discipline for four of the nine incidents and Mullen, who was only promoted to a managerial role in mid to late 2015, signed off on one incident. (GC 9.) There is no evidence that the Respondent has ever imposed more than a written warning for unprofessional behavior.

As already mentioned, the ALJ credited DiGiacomo's testimony regarding Strauss' statement to her in March 2014 "that she was being watched because she was active in the Union" (ALJD at 11, ¶29 fn. 16). In that same conversation, Strauss also told DiGiacomo that she was "a target now" because of her Union activism (Tr. 27).

In addition, there is no dispute that, in her roughly one month at the Respondent's facility prior to DiGiacomo's discharge, DeShields accompanied the anti-Union consultant Jose to as many as 20 meetings with techs at the hospital (DeShields herself testified to this) (Tr. 38, 40, 42, 45, 46, 59, 200, 205, 206). Also, according to Respondent's notes of the November 11 bargaining session, DiGiacomo specifically mentioned seeing DeShields with the consultant at the hospital (GC 10). Furthermore, according to Charging Party's notes of that meeting (which are corroborated by Respondents), Zoda told the Respondent's bargaining team: "[T]here are people walking around an adolescent unit. [M]aybe he [the consultant] is a convicted felon. [I]s he even able to interact with adolescents[?]" DiGiacomo also raised her concern about "someone walk[ing] around with no pic[tur]e on [their ID] badge" and dressed in casual clothing, in reference to the consultant. (GC 8; *accord* GC 10.)

3. ALJ's Erroneous Evidentiary Rulings

The ALJ made multiple erroneous decisions to exclude evidence of central importance to determining whether DiGiacomo's discharge violated the Act. As discussed more fully below, the Board's *Atlantic Steel* test applies where the employer's admitted reason for discharging an employee constitutes activity protected by the Act. The Respondent admits that it discharged DiGiacomo because of her actions on November 12 with respect to the Friends group. DiGiacomo took those actions because the techs that she was organizing on behalf of the Union had specifically complained to her about DeShields' prolific efforts to prevent the techs from joining the Union. Furthermore, prior to November 12, techs had specifically told DiGiacomo that the Respondent had announced to them that it could replace them with techs from Friends in an effort to intimidate them. It was in this context that DeShields arrived on November 12 with a large group of Friends techs for a "tour." DiGiacomo understood this "tour" to actually be a tactic by the Respondent to parade its techs' replacements in front of them. Her actions were, *inter alia*, a protest against this tactic and were therefore protected (see *infra*).

The General Counsel and Charging Party attempted to introduce testimony from a variety of witnesses demonstrating that techs had reported to DiGiacomo (1) DeShields' substantial anti-Union efforts and (2) Respondent's threats to replace them with Friends techs (Tr. 31, 43-44, 50, 129-30, 132, 207). The ALJ refused to permit this evidence on grounds of relevance, at one point even spontaneously cutting a witness off at a time when Respondent had made no objection (Tr. 43-44). Then, in his decision, the ALJ declared that "[t]here is, of course, no evidence that" the tour was meant to convey a threat of replacement to Respondents techs (ALJD at 6, ¶30 fn. 8). This is exactly what the evidence the ALJ excluded would have established. Evidence that techs had told DiGiacomo that DeShields was a leader of the anti-Union effort and that

Respondent had specifically threatened to replace techs with Friends employees is plainly relevant to determining the nature of DiGiacomo's disruption of a group of Friends employees conspicuously touring the hospital with DeShields. The ALJ's exclusion of this evidence as irrelevant was therefore erroneous.

4. Wright Line

To determine whether an employer discharged an employee because of the employee's union activity, the Board utilizes the *Wright Line* standard. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel has the initial burden of "showing union activity by the employees, employer knowledge of that activity, and union animus on the part of the employer." *Advanced Life Systems*, 364 NLRB No. 117, slip op. at 2 (2016).

"[I]t is not necessary for the General Counsel to also show as an element of the initial burden a connection, or nexus, between the employer's union animus and the adverse employment actions." *Id.*, slip op. at 2 fn. 6. As the Board has recently explained:

[P]roving that an employee's protected activity was a motivating factor in the employer's action does *not* require the General Counsel to make some additional showing of particularized motivating animus towards the employee's own protected activity or to further demonstrate some additional, undefined "nexus" between the employee's protected activity and the adverse action.

Libertyville Toyota, 360 NLRB No. 141, slip op. at 4 fn. 10 (2014) (emphasis in original). In fact, the Board has "emphasize[d] that such a showing is not required." *Dish Network*, 363 NLRB No. 141, slip op. at 1 fn. 1 (2016).

Here, the ALJ found union activity by DiGiacomo (ALJD at 11, ¶¶23-24), Respondent knowledge of that activity (*ibid.*), and union animus on the part of Respondent (ALJD at 11,

¶¶25-27), yet concluded that the General Counsel did not satisfy his initial burden because of a perceived lack of evidence “that such opposition focused on DiGiacomo or could reasonably lead to the inference that her discharge was motivated by her union or protected activity” (ALJD at 11, ¶¶27-29.) Thus, the ALJ improperly required the General Counsel to demonstrate “particularized motivating animus towards [DiGiacomo’s] own protected activity or to further demonstrate some additional, undefined ‘nexus’ between [DiGiacomo’s] protected activity and the adverse action,” despite the Board repeatedly emphasizing that the General Counsel need not make such a showing. *Libertyville, supra*, slip op. at 4 fn. 10. Once the ALJ found activity, knowledge, and animus, Board precedent mandated the conclusion that the General Counsel carried his initial burden. The ALJ’s contrary conclusion was erroneous.

“Under Wright Line, if the General Counsel sustains his initial burden, the burden shifts to the employer to persuade by a preponderance of the evidence, not merely that it could have taken the same action for legitimate reasons, but that it actually would have done so in the absence of the protected conduct.” *Dish Network, supra*, slip op. at 1 fn. 1. The ALJ concluded, in the alternative, that the Respondent had “shown persuasively that it would have discharged DiGiacomo even in the absence of her protected activity because of her serious misconduct on November 12,” basing this conclusion on his opinion that “[a]n employer need not put up with such insults that show blatant disregard for authority and proper decorum” and that it was “reasonable for Mullen” to discharge DiGiacomo (ALJD at 13, ¶¶4-7). The judge thus improperly asked whether Respondent “could have taken the same action for legitimate reasons,” *Dish Network, supra*, slip op. at 1 fn. 1—that is, whether it was “reasonable” for Respondent to have discharged DiGiacomo for her actions on November 12. This is not the correct test. *Ibid.* Rather, the correct test is whether the Respondent “persuade[d] by a preponderance of the

evidence...that it actually would have [discharged DiGiacomo] in the absence of protected conduct.” *Ibid.*

The Respondent did not carry its burden here. As an initial matter, there is direct evidence that the Respondent had been looking for an excuse to rid itself of DiGiacomo, the most prominent and effective organizer on its site, for some time. Thus, in March 2014, one of Respondent’s managers told DiGiacomo that Respondent was surveilling DiGiacomo because it knew she was active in the Union (ALJD at 11, ¶29 fn. 16) and further told DiGiacomo that she was “a target now” (Tr. 27).

There is also evidence that the Charging Party’s drive to organize the techs had increased the Respondent’s desire to discharge DiGiacomo—who “spearheaded” that drive (ALJD at 3, ¶10)—to a fever pitch. Thus, a few days before her discharge, DiGiacomo brought the techs to the Union’s bargaining session, making her central role in the organizing campaign absolutely apparent to the Respondent. Also a few days before the discharge, Nolet, who was instrumental in DiGiacomo’s discharge, interrupted a Union meeting to eject techs who were in attendance. Put simply, at the same moment when the Union’s organizing drive among the techs’ was peaking, the Respondent fired the Union’s lead tech organizer. This is powerful evidence that the Respondent used the November 12 events as an excuse to terminate DiGiacomo. *See, e.g., G4S Secure Solutions*, 364 NLRB No. 92, slip op. at 38 (2016).

With such powerful direct and circumstantial evidence of discriminatory intent, the Respondent would have had to have introduced considerable evidence to show that it actually would have discharged DiGiacomo in the absence of her union activity. *Dish Network, supra*, slip op. at 1 fn. 1. Conspicuously, the Respondent introduced no evidence that it had ever discharged an employee for a first instance of unprofessional conduct. The General Counsel, on

the other hand, introduced unchallenged evidence of nine instances in which the Respondent issued mere verbal or written warnings to employees who engaged in unprofessional conduct not unlike that of which DiGiacomo was accused (GC 9).

Respondent's cursory investigation into DiGiacomo's conduct further demonstrates that it was seizing on an excuse to fire a prominent union activist rather than imposing discipline without regard to union activity. *See, e.g., Michigan Roads Maintenance Co., LLC*, 344 NLRB 617, 625 (2005) (citing *Firestone Textile Co.*, 203 NLRB 89, 95 (1973)). Thus, Respondent discharged DiGiacomo in the same meeting in which it first interviewed her about what happened—it took no time to process or cross-check DiGiacomo's account of events for accuracy, as one would expect of an employer conducting an impartial investigation. Moreover, although the Respondent claimed to have only made the decision to discharge DiGiacomo after speaking to her in the meeting, the record reveals that the Respondent had prepared an elaborate written termination notice before the meeting began (ALJD at 8, ¶¶10-13; GC 4), suggesting an eagerness to discharge DiGiacomo that further enforces the idea that Respondent seized on the November 12 incident to discharge the leader of the drive to organize the techs.

In addition, in the written termination notice, Respondent cited DiGiacomo's unprofessional conduct as the reason for her discharge (ALJD at 8, ¶¶11-13). Yet, at hearing, Mullen claimed that she also discharged DiGiacomo for failing to adequately confess (ALJD at 8, ¶¶16-18). Shifting, improvisational explanations for why DiGiacomo was discharged further demonstrate that the true reason was her union and organizing activity. *See, e.g., Inter-Disciplinary Advantage, Inc.* 349 NLRB 480, 506 (2007).

Together, the evidence demonstrates that the Respondent, having encountered an excuse to fire DiGiacomo—the same employee who had led the successful drive to unionize the

Respondent's per diem nurses a few months earlier, who had also attempted to organize Friends nurses a few months earlier, who was an outspoken and fierce member of the Union's bargaining team for the nurses' contract, and who, most significantly, was (in the ALJ's words) "spearhead[ing]" an effort to bring techs under Union representation that the Respondent adamantly opposed—seized it. Had these circumstances not existed—had DiGiacomo been less active, or had the threat of the techs' joining the Union been less acute—the Respondent would have treated DiGiacomo the same way it treated every other employee who engaged in unprofessional conduct in the preceding years and issued her a verbal or written warning.

Because the General Counsel carried his initial burden and Respondent failed to rebut it, *Wright Line* dictates that the Respondent violated the Act by discharging DiGiacomo because of her union activity.

5. *Atlantic Steel*

“When an employee is discharged for conduct that is part of the *res gestae* of protected concerted activities the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act.” *Modern Management Services, LLC*, 361 NLRB No. 24, slip op. at 13 (2014) (explaining the test articulated in *Atlantic Steel Co.*, 245 NLRB 814 (1979)). Therefore, to find that an employer violated the Act pursuant to *Atlantic Steel*, the Board must conclude that the conduct for which the employee was discharged was (1) part of the *res gestae* of protected activity and (2) remained protected. *Ibid.*

The ALJ concluded that DiGiacomo's actions on November 12 were not part of the *res gestae* of protected activity because, although the evidence showed that DiGiacomo “perceived the tour as somehow related to her union activity,” “protected activity must be based on objective fact, not subjective perceptions of the party or witness making the claim” (ALJD at 14, ¶¶10-13).

This is an incorrect statement of the law. An employee’s protected concerted activity in response to a perceived employer action remains protected even if the employee’s belief as to the employer’s conduct was mistaken. *Crowne Plaza LaGuardia*, 357 NLRB 1097, 1099 (2011); *see also Wagner-Smith Co.*, 262 NLRB 999, 999 fn. 2 (1982). The only exception to this rule arises when the employee has acted in bad faith. *Crown Plaza*, *supra* at 1099. There is no allegation of bad faith here. DiGiacomo held a good faith belief that the Friends tour was a tactic deployed by the Respondent to intimidate the techs she was organizing by parading their threatened replacements in front of them, and her actions were meant to protest and counter that tactic (ALJD at 6, ¶¶30 fn. 8; 14, ¶¶10-12). Her actions were therefore protected even if the tour was actually (as the ALJ found) “conducted for purely management reasons having nothing to do with DiGiacomo” (ALJD at 14, ¶¶21-22). *Crowne Plaza*, *supra* at 1099; *Wagner-Smith*, *supra* at 999 fn. 2.

In the alternative, the ALJ concluded that the activity was sufficiently egregious so as to be removed from the Act’s protections (ALJD at 14, ¶¶16-35). As the Board recently explained, to answer the question “[h]ow egregious is ‘sufficiently egregious?’” the Board asks whether the communications in question are “so violent or of such serious character as to render the employee unfit for further service”—a “strict test” that is difficult to meet. *Modern Management*, *supra*, slip op. at 13 (internal quotations and citations omitted).

“In making this determination [as to egregiousness], the Board examines the following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice.” *Ibid.* (citing *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979)). The Board has recently clarified that, as to the fourth factor, employer “conduct [that] evinces an

intent to interfere with protected rights” qualifies as provocation, even if the conduct is not “explicitly alleged as a ULP.” *United States Postal Service*, 360 NLRB No. 74, slip op. at 8 (2014).

Where an employer discharges an employee for multiple discrete incidents, the Board applies the factors to each incident in turn to see whether the employee lost the protection of the Act at any point. *See Winston-Salem Journal*, 341 NLRB 124, 125-27 (2004). Therefore, the analysis in the present case must begin by applying the factors to DiGiacomo’s actions at the nurses station. There, DiGiacomo pointed to the visitors and asked who they were and why the group was there in a yelling voice (ALJD at 6, ¶¶18-23) and asked one Friends’ tech how many orientations he needed, sarcastically pointing out various obvious features of the unit to emphasize the point (ALJD at 6, ¶¶33-36). As the group left the adolescent section, DiGiacomo asked whether she could now tour Friends (ALJD at 6, ¶¶38-40).

a. Nurses Station Comments

The first factor is the place of the employee’s activity. To determine whether this factor favors protection, the Board asks whether the place was a “reasonable” one in which to engage in union activity. *See Postal Service, supra*, slip op. at 7. Although the nurses station comments were made in a working area, the Respondent introduced no evidence that any employees “were in the immediate vicinity, and the evidence does not establish that the work of other employees was disrupted in any way.” *Ibid.* (place factor favored protection although comments were made at supervisor’s desk “on the workroom floor” because there were no employees in the immediate vicinity and no disruption of employees’ work). Furthermore, although there was a patient in a nearby lounge at the time, DiGiacomo’s comments were brief and there was no evidence offered by the Respondent that the noise interfered with the patient or affected his care in anyway, or

even that the patient heard DiGiacomo's statements. *Cf. Crowne Plaza, supra* at 1100 (place factor favored protection even though a customer was "in the vicinity of the confrontation" because comments were brief and did not interfere with operations); *accord Goya Foods of Florida*, 347 NLRB 1118, 1134 (2006) (place factor favored protection where 4-minute protest inside a store "did not appreciably interfere with the activities of the store"). Because the comments were not made around other employees, did not disrupt other employees' work, and did not interfere with the care of the one patient nearby, the nurses station was a reasonable place to have the discussion and weighs in favor of protection.

The second factor is the subject matter of the comments. Here, DiGiacomo, the Union's lead organizer of the techs, was protesting what she believed in good faith to be an effort by the Respondent to intimidate the techs from exercising their rights under the Act by parading their threatened replacements through the hospital. Protests against an employer's anti-union conduct are protected by the Act. *See, e.g., Union Carbide*, 259 NLRB 974, 977 (1981). This factor therefore favors protection.

The third factor, the nature of the conduct, similarly weighs in favor of protection. That DiGiacomo raised her voice in her initial inquiries does not render her comments unprotected. "[T]he Board has repeatedly held that merely speaking loudly or raising one's voice in the course of protected activity generally does not warrant a forfeiture of the Act's protection." *Crowne Plaza, supra* at 1100. In addition, her comments by the nurses station were not profane or offensive. Although some of the comments were sarcastic, the Act protects "accusatory language that is stinging and harsh." *Winston-Salem, supra* at 126 (quoting *CKS Tool & Engineering*, 332 NLRB 1578, 1586 (2000)) (internal brackets omitted). DiGiacomo's comments at the nurses station, while antagonistic, were well within accepted parameters of

protected expression. This factor therefore favors protection. *See, e.g., UPS Supply*, 357 NLRB 1295, 1311 (2011).

The final factor is provocation. Here, the day after DiGiacomo and the Union had complained in bargaining about the Respondent's bringing outsiders into the hospital as part of its anti-Union campaign and of DeShields' involvement in that effort, DeShields led a parade of outsiders into the hospital in what DiGiacomo believed in good faith was a part of its anti-Union campaign. When DiGiacomo asked who the visitors were and why they were present, DeShields ignored her. These actions constituted provocation. *See Postal Service, supra*, slip op. at 8 (provocation factor favored protection where supervisor refused to answer steward's questions about filing grievances and the steward and supervisor had had another altercation about grievances a few days earlier); *Overnite Transportation Co.*, 343 NLRB 1431, 1438 (2004) (provocation factor favored protection where supervisor completely refused to discuss possible grievances with steward).

In sum, all four factors weigh in favor of DiGiacomo's nurses station comments remaining within the Act's protection.

b. Hallway Comments

The next incident occurred in the hallway when DiGiacomo approached the group and said, "I didn't get this kind of hospitality when I went to Friends, I got kicked out in like ten minutes"—a reference to when she was ejected from the Friends premises for handbilling a few months earlier (ALJD at 7, ¶¶2-5). The place factor favors protection. The hallway was "away from the normal work areas," supporting its reasonableness. *Modern Management, supra*, slip op. at 13. Moreover, there is no evidence that rank-and-file employees "were in the immediate vicinity" at the time of the comments. *Postal Service, supra*, slip op. at 7; *see also Tampa*

Tribune, 351 NLRB 1324, 1326 (2007), enf. denied 560 F.3d 181 (4th Cir. 2009); *Winston-Salem Journal*, *supra* at 126.

The subject matter of the comments also favors protection. DiGiacomo's comments constituted a continuance of her protest against what she understood to be an anti-Union intimidation tactic. The nature of the conduct in this instance was a simple comment devoid of profanity or offensive language made in an ordinary voice. This third factor therefore also favors protection. Finally, DeShields continued to completely ignore DiGiacomo, thereby provoking her. The provocation factor therefore favors protection as well. *See Postal Service*, *supra*, slip op. at 8; *Overnite Transportation Co.*, *supra* at 1438. Because all four factors favor protection, DiGiacomo's comments in the hallway remained protected.

c. Parking Lot Comments

The final incident occurred in the Respondent's parking lot. Here, the place, subject matter, and provocation factors favor protection. The parking lot is a non-work area in which the discussion could not have disrupted the Respondent's business operations, and the discussion occurred at a time when DiGiacomo was off-duty. There is no evidence that any patients or other employees were in the parking lot at the time. A parking lot while off-duty is a "reasonable" place to engage in union activity. *Postal Service*, *supra*, slip op. at 7. Regarding the subject matter factor, DiGiacomo's exchange was a continuation of her earlier protests against the Respondent's perceived intimidation tactic against the techs. This factor therefore favors protection for the same reasons it favored protection of the earlier comments. So, too, with the provocation factor, as DeShields continued to ignore DiGiacomo.

Turning to the nature of the conduct factor, although, unlike the earlier comments, the parking lot comments contained profanity, this did not remove them from the Act's protections.

“[T]he Board and the courts have found foul language or epithets directed to a member of management insufficient to require forfeiting employee protection under Section 7.” *CKS Tool, supra* at 1586 (quoting *Health Care & Retirement Corp.*, 306 NLRB 63, 65 (1992)). Thus, in *CKS Tool*, an employee who interrupted a supervisor at a meeting of employees to say “Don’t you think we give a f[uck] about our work? Are you saying, Tom, we don’t give a f[uck] about our jobs?” and “God damn it, don’t you think w[e] are human beings,” as well as other profanity, remained within the protection of the Act. *Id.* at 1583, 1586. Similarly, in *Winston-Salem*, an employee who called his supervisor “a bastard red-neck son-of-a-bitch” to the supervisor’s face in the presence of another employee did not lose the protection of the Act. Furthermore, where profanity is “commonly used at the facility by [employees] and supervisors alike,” an employee’s use of profanity in the context of protected activity is particularly likely to remain protected. *Corrections Corporation of America*, 347 NLRB 632, 636 (2006).

The ALJ found that profanity was commonplace at the hospital, even in the presence of supervisors (ALJD at 12, ¶¶32-33). In this employment environment, DiGiacomo’s use of profane language cannot be considered so far outside the bounds of reasonableness that the Act does not shield it. *Corrections Corporation, supra* at 636. Although DiGiacomo’s remarks about DeShields certainly amounted to “accusatory language that [wa]s stinging and harsh,” *CKS Tool & Engineering, supra* at 1586, they were not “so violent or of such serious character as to render [DiGiacomo] unfit for further service,” *Modern Management, supra*, slip op. at 13. Therefore, the “strict test” needed to remove otherwise protected conduct from the Act’s coverage is not satisfied.

In sum, the Respondent admittedly discharged DiGiacomo for her three interactions with the Friends group on November 12. DiGiacomo’s actions were a protest against what she

believed in good faith to be an effort by the Respondent to intimidate techs whom she was organizing from exercising their rights under the Act and were therefore protected. These actions never lost the Act's protection. Therefore, pursuant to *Atlantic Steel*, the Respondent violated the Act by discharging DiGiacomo for them.

IV. CONCLUSION

For the foregoing reasons, the Board should reverse the Administrative Law Judge and find that the Respondent violated Sections 8(a)(5) and (1) of the Act by conditioning bargaining on the removal of the techs and Sections 8(a)(3) and (1) by discharging Elisa DiGiacomo because of her union activity.

Respectfully submitted,

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Dated: November 16, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2016, true and correct copies of the Charging Party's Exceptions to the Decision of the Administrative Law Judge and Brief in support thereof were served by electronic mail upon:

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