UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matters of:

RELCO LOCOMOTIVES, INC.,	)	
	)	
Respondent,	)	
and	)	Case 18-CA-19720
	)	
MARK BAUGHER, An Individual,	)	
	)	
and	)	Case 18-CA-19721
	)	
CHARLES NEWTON, An Individual,	)	
	)	
and	)	Case 18-CA-19744
	)	
RICHARD PACE, An Individual,	)	
	)	
and	)	Case 18-CA-19745
	)	
NICHOLAS RENFREW, An Individual,	)	
	)	
Charging Parties.	)	

EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE
ON BEHALF OF RESPONDENT, RELCO LOCOMOTIVES, INC.

Pursuant to the Rules and Regulations of the National Labor Relations Board, including Section 102.46 thereof, Respondent, RELCO Locomotives, Inc. ("RELCO") takes Exception to the Findings of Fact, Conclusions of Law, and Remedy and Order of Administrative Law Judge Geoffrey Carter issued in his October 19, 2011 Decision:[1]

[1] The Administrative Law Judge's Decision will be designated as "ALJD __:___." References to the hearing transcript will be abbreviated as "Tr.___"; and references to the General Counsel's exhibits and to Respondent's exhibits will be abbreviates as "GC Ex. ___", and as "R. Ex. ___", respectively.

1. The finding that RELCO does not enforce a mandatory policy for its fabricators to become certified welders. ALJD 3:17.

2. The finding that Cliff Benboe's ("Benboe") testimony that RELCO lacks sufficient work to assign to fabricators who had not passed the welding certification test is incredible. ALJD 3:fn. 3.

3. The finding that Mark Baugher ("Baugher") and Charles Newton ("Newton") were not on notice that their performances were subpar in 2008 and 2009 when neither Baugher nor Newton received raises in such years. ALJD 4: fn. 6.

4. The exclusion of the fact that Baugher was not given a raise in 2007. ALJD 4:fn. 6.

5. The inclusion of the facts surrounding Jeffrey Smith, Ronald Dixon, and Timothy Kraber's union involvement, employment at RELCO, and eventual termination. ALJD 5:3-32.

6. The inclusion of the facts surrounding the September 14-16, 2010 National Labor Relations Board ("NLRB") hearing, including Baugher and Newton's testimony. ALJD 5:37-48; ALJD 6:1-8; ALJD 7:17-19; ALJD 12:26-34; ALJD 18:14-40.

7. The finding that David Crall's ("Crall") testimony related to the incident of September 13, 2010 was incredible. ALJD 6:fn. 7.

8. The finding that Benboe's testimony related to the incident of September 13, 2010 was incredible. ALJD 6:fn. 7.

9. The finding that "in the same pre-election time frame (on September 24), management (Benboe) spoke to another employee (employee K.S.) about driving recklessly on company property, and notified K.S. that disciplinary action would be forthcoming." ALJD 9:fn. 13.

10. The implication that Crall was required to specify steps that Baugher needed to take for Baugher's probation to be lifted. ALJD 10:8-9.

11. The failure to credit Mark Bachman's ("Bachman") testimony that Baugher had 60 to 90 days to obtain a welding certificate. ALJD 10:fn. 17.

12. The implication that RELCO assigned Baugher to work on a project that required Baugher to perform welding tasks to establish a pretextual reason for terminating Baugher. ALJD 11:23-25.

13. The implication that RELCO management was to advise Baugher to retake the welding certification test at any point between late 2008 and the 2010 performance evaluation. ALJD 11:fn. 18.

14. The finding that Baugher had not heard that he had until the 1st quarter of the year to complete his weld test. ALJD 12:7.

15. The finding that Newton walked 150 feet to observe a front headlight on a locomotive so that he may make a rear headlight. ALJD 12:47-18; ALJD 13:1-6.

16. The finding that Newton was assisting a coworker and only walked 50 feet to retrieve his work gloves. ALJD 13:13-15.

17. The implication that Newton could continue his employment as a fabricator at RELCO, because he worked for approximately two months on projects that did not require welding. ALJD 14:40; ALJD 15:1.

18. The finding that "Newton did attempt the weld certification test in 2010." ALJD 14:fn. 23.

19. The failure to note that Newton did not object to Crall's statement that Newton was on probation. ALJD 15:10-11.

20. The failure to include Newton's failure to obtain a welding certificate as a reason for terminating Newton. ALJD 15:9-10.

21. The finding that RELCO has a very limited track record of giving employees verbal warning for poor productivity or conduct. ALJD 15:32-33.

22. The finding that RELCO's verbal warning to two employees for poor productivity or inconsistent performance are irrelevant in March 2011. ALJD 15:37-38.

23. The finding that "Newton had never before been told that he was on probation." ALJD 15:fn. 26; ALJD 31:30-31.

24. The finding that there is no clear pattern of discipline for safety violations other than violations of the "blue flag policy" when in fact, footnote 28 lists a number of times RELCO employees were disciplined for safety violations. ALJD 16:8-9.

25. The implication that because the record does not include an example of formal discipline issued to an employee (other than Baugher) for smoking in an enclosed space or for failing to wear a hard hat, it necessarily means that there were other RELCO employees that were observed to be smoking in a confined space or not wearing a hard hat, but were not punished for such infractions. ALJD 16:10-12.

26. The finding that M.D.'s suspension "carries less weight in [the ALJ's] analysis since it occurred after Baugher and Newton were discharged." ALJD 16:fn. 28.

27. The failure to distinguish between Baugher and Newton and employees S.C., J.R, J.N, and M.D. ALJD 17:2-4; ALJD 8-13; ALJD 18:1-4.

28. The finding that RELCO's stated distinction between Baugher and Newton and employees S.C., J.R, J.N, and M.D. is undermined by the reviews of the respective employees. ALJD 17:8-13; ALJD 18:1-4.

29. The finding that Newton and Baugher's actions before and during trial were materially different than the actions of Jonathan Graber ("Graber"), Jamie McKim ("McKim"), and Richard Purdun ("Purdun"). ALJD 18:19-22.

30. The failure to state how McKim's actions before and during the trial were materially different than the actions of Newton or Baugher. ALJD 18:24-40.

31. The finding that RELCO "missed the mark" when it asserted that the transcripts of Baugher, Graber, McKim, Newton, and Purdun's testimony from the September 14-16, 2010 NLRB should not have been admitted. ALJD 18:fn. 32.

32. The finding that Richard Pace ("Pace") sent a text message about Chris Kendall's ("Kendall") employment status during lunch. ALJD 20:24-25.

33. The finding that Pace's explanation that he sent the text message to Kendall between 12:00 and 12:30 p.m. credible. ALJD 20:fn. 35.

34. The failure to include the fact that Kendall only mentioned Pace and Renfrew as the perpetrators behind spreading the false rumor that Kendall had been terminated. ALJD 21:30-34.

35. The failure to distinguish the "other occasions when rumors circulated around the shop" when Bachman responded by appearing at staff meeting to discuss the issue and the rumor that Kendall had been discharged. ALJD 22:fn. 38.

36. The finding that the Acting General Counsel's were poised, forthright and composed and generally credible when they testified. ALJD 25:20-25.

37. The finding that RELCO's witnesses were incredible. ALJD 25:27-33.

38. The finding that Baugher's testimony as a whole was credible. ALJD 25:fn. 39.

39. The finding that "Benboe also had to backtrack from his testimony that he observed Baugher commit safety infractions on September 13, 2010, after he was confronted with his admission (found in his affidavit) that he did not see the alleged infractions on September 13 and simply signed the disciplinary paperwork." ALJD 25:fn. 40.

40. The finding that the Acting General Counsel made an initial showing of discrimination when RELCO issued its written warning, suspension, and probation to Baugher. ALJD 26:12.

41. The finding that the "Acting General Counsel also presented sufficient evidence of animus, as the record shows that Relco provided shifting reasons for giving Baugher a written warning for the September 13 incident, and disciplined Baugher less than 2 months after learning of his union and protected activities, and less than 2 weeks after the union election was held." ALJD 26:20-23.

42. The failure of the Administrative Law Judge to consider in his decision RELCO's management's favorable involvement with unions as evidence that RELCO did not bear an anti-union animus. ALJD 26:20-23.

43. The finding that "Relco failed to show that it would have taken the same adverse action against Baugher even in the absence of Baugher's union and protected activities." ALJD 26:33-35.

44. The finding that RELCO fell short in establishing its affirmative defense because its claims of the violations committed by Baugher on September 13, 20110 were incredible. ALJD 27:5-8.

45. The finding that "Relco's description of Baugher's September 13 misconduct transformed significantly." ALJD 27:10-11.

46. The finding that "the credibility of Relco's claims about Baugher's misconduct on September 13 is undermined by the fact that no one in management bother to speak to Baugher about the alleged misconduct." ALJD 27:14-17.

47. The finding that "Relco embellished its account of Baugher's misconduct on September 13 to justify the written warning, suspension and probation that it imposed." ALJD 27:17-19.

48. The conclusion that "the Acting General Counsel demonstrated that Relco discriminated against Baugher in violation of Section 8(a)(3), (4) and (1) when it warned Baugher for misconduct that allegedly occurred on September 13, suspended Baugher and placed him on probation." ALJD 27:20-23.

49. The failure to "credit Relco's explanation that [it] decided not to speak to Baugher because its former attorneys warned against taking disciplinary action with the union election approaching." ALJD 27:fn. 45.

50. The conclusion that RELCO violated the Act by giving Baugher a negative performance review on December 22, 2010. ALJD 27:27-28.

51. The finding that Baugher's performance review is tainted by the November 1, 2010 discipline, "and thus violates the Act." ALJD 28:4-5.

52. The finding that RELCO's anti-union animus is established by the circumstantial evidence of the timing of RELCO's actions and the disciplinary action that RELCO took against Baugher on November 1, 2010. ALJD 28:12-15.

53. The finding that the "Acting General Counsel therefore made an initial showing of discrimination" when RELCO placed Baugher on probation. ALJD 28:14-15.

54. The finding that "RELCO's argument that it would have given Baugher a negative performance review irrespective of his Union and protected activities fails…because

Relco explicitly relied on the unlawful November 1 discipline as a significant predicate for giving Baugher a negative performance review." ALJD 28:17-20.

55. The finding that "Relco unlawfully discriminated against Baugher (in violation of Section 8(a)(3), (4) and (1)) by giving [Newton] a negative performance review on December 22." ALJD 28:21-22.

56. The finding that "the Acting General Counsel made an initial showing of discrimination" when RELCO terminated Baugher. ALJD 28:27-28.

57. The finding that "the Acting General Counsel presented sufficient evidence of animus insofar as (among other things) Relco unlawfully disciplined Baugher on November 1, and unlawfully gave Baugher a negative performance review on December 22. ALJD 28:29-32.

58. The finding that "Relco's proffered reasons for terminating Baugher are pretexts for discrimination." ALJD 28:40-41.

59. The finding that "Relco's decision to discharge Baugher based on ongoing deficiencies identified in his performance review is tainted because as previously noted, the performance review (and the November 1 discipline on which it relied) was unlawful." ALJD 28:40-43.

60. The finding that "Relco's assertion that Baugher was terminated because he did not obtain his welding certification does not ring true because Relco did not suggest in Baugher's performance review that the welding certification required immediate attention or could serve as a basis for some sort of adverse employment action if it was not obtained." ALJD 29:2-4.

61. The failure to distinguish between the "4 other employees who had both poor job performance/productivity and lacked welding certifications in December 2010" from Baugher. ALJD 29:5-8.

62. The finding that "there is no evidence that Baugher's performance was substandard, or that he committed any workplace infractions during the time period between the start of his probation (November 1) and the date of his discharge (March 11, 2011)." ALJD 29:8-10.

63. The finding that RELCO failed to establish an affirmative defense regarding Baugher's discharge and that the "Acting General Counsel met its burden of proving that Relco unlawfully discriminated against Baugher by discharging him in violation Section 8(a)(3), (4) and (1) of the Act." ALJD 29:11-14.

64. The conclusion that Cronin's comment to Newton on November 29, 2010 "ran afoul of Section 8(a)(1) of the Act." ALJD 29:35-36.

65. The finding that "Cronin's remark had a reasonable tendency to interfere with, restrain or coerce Newton (or any reasonable employee) in the exercise of his Section 7 rights,

because the logical inference was that Newton was being targeted because of his recent Union activities and testimony as a witness for the Acting General Counsel in Judge Schmidt's case." ALJD 29:38-42.

66. The finding that the Acting General Counsel made an initial showing that the verbal warning on November 29, 2010 was discriminatory. ALJD 30:6-7.

67. The finding that the Acting General Counsel showed sufficient evidence of RELCO's animus "in the form of Cronin's threat to Newton on November 29, as well as the short time frame between RELCO learning of Newton's union and protected activities (in September and October 2010) and the November 29 discipline. ALJD 30:17-18.

68. The finding that "Relco's proffered explanation for the discipline suffers from significant credibility problems." ALJD 30:24-25.

69. The inference that "Cronin's testimony would not have supported Relco's defense regarding the November 29 allegations involving Newton." ALJD 30:299-30.

70. The finding that "Relco made (at Best) a barebones investigation of Newton's productivity before deciding to discipline him." ALJD 30:36-37.

71. The finding that "Relco failed to establish an affirmative defense." ALJD 30:44.

72. The finding that "Relco did discriminate against Newton in violation of Section 8(a)(3), (4) and (1) of the Act when it disciplined Newton on November 29." ALJD 30:45-46.

73. The finding that Newton's performance review and probation are tainted by RELCO's "reliance on the unlawful November 29 discipline, and therefore violate the Act." ALJD 31:11-13.

74. The finding that "[a]nimus is established not only by the circumstantial evidence regarding the timing of Relco's actions, but also by the unlawful threat and disciplinary action that Newton received from Relco on November 29." ALJD 31:19-21.

75. The finding that "[t]he Acting General Counsel therefore made an initial showing of discrimination." ALJD 31:21-22.

76. The finding that "Relco's affirmative defense that it would have given Newton a negative performance review and placed him on probation because of poor productivity and his lack of a welding certification (and thus irrespective of Newton's Union and protected activities) also falls short." ALJD 31:24-26.

77. The finding that "the evidence shows that Relco explicitly relied on the unlawful November 29 discipline as a significant predicate for giving Newton a negative performance review." ALJD 31:28-29.

78. The finding that Newton's "probation was imposed without Newton's knowledge at a later date to serve as a springboard for Newton's subsequent discharge." ALJD 35-36.

79. The finding that "Relco unlawfully discriminated against Newton (in violation of Section 8(a)(3), (4) and (1)) by giving him a negative performance review on December 22 and placing him on probation." ALJD 31:37-38.

80. The finding that "the Acting General Counsel made an initial showing of discrimination" when RELCO discharged Newton. ALJD 31:44-45.

81. The finding that "the Acting General Counsel present[ed] sufficient evidence of animus insofar as (among other things) Relco unlawfully threatened and disciplined Newon on November 29, and unlawfully gave Newton a negative performance review on December 22 and placed Newton on probation." ALJD 31:46-47; ALJD 32:1-2.

82. The finding that "Relco's proffered reasons for terminating Newton are pretexts for discrimination." ALJD 32:10-11.

83. The finding that "Relco's decision to discharge Newton based on ongoing deficiencies identified in his performance review is tainted because as previously noted, the performance review and probation (and the November 29 discipline on which they relied) were unlawful." ALJD 32:11-14.

84. The finding that "Relco's assertion that Newton was terminated because he did not obtain his welding certification does not ring true because Relco did not suggest in Newton's performance review that the welding certification required immediate attention or could serve as a basis for some sort of adverse employment action if it was not obtained." ALJD 32:14-17.

85. The failure to distinguish between Newton and the 4 other employees who had both poor job performance/productivity and lacked welding certifications in December 2010." ALJD 32:19-21.

86. The finding that "there is no evidence that Newton's performance was substandard, or that he committed any workplace infractions during the time period between his receiving his performance review on December 22 [and] his discharge on March 11, 2011." ALJD 32:22-24.

87. The finding that "Relco failed to establish an affirmative defense regarding Newton's discharge." ALJD 32:26-27.

88. The finding that "the Acting General Counsel met its burden of proving that Relco unlawfully discriminated agaisnt Newton by discharging him in violation of Section 8(a)(3), (4) and (1) of the Act." ALJD 32:27-29.

89. The finding that "Pace and Renfrew were indeed engaged in concerted activities when they communicated with other employees about their concern that Kendall had been discharged." ALJD 33:22-23.

90. The finding that Pace and Renfrew's purpose in their discussion was "related to the collective employee concern about job security at Relco." ALJD 33:24-27.

91. The failure to analyze the discharge of Pace and Renfrew under the *Wright Line* test. ALJD 32:36-40.

92. The failure to distinguish *Parexel Int'l, LLC*, 356 NLRB No. 82 (2011) from Pace and Renfrew's situation. ALJD 33:fn. 49.

93. The finding that "the Acting General Counsel met its burden of proving the remaining elements of its initial showing that Relco discharged Pace and Renfrew in violation of Section 8(a)(1)." ALJD 33:31-33.

94. The finding that "[s]ince Relco's only reason for discharging Pace and Renfrew was their protected concerted activities (discussing the concern that Kendall had been fired), the Acting General Counsel's initial showing of discrimination stands and no further analysis is required." ALJD 34:10-12.

95. The finding that "Relco violated Section 8(a)(1) of the Act when it discharged Pace and Renfrew on December 23 because of their protected concerted activities." ALJD 34:13-15.

96. The failure of ALJ to consider in his decision RELCO did not bear animus to motivate Pace and Renfrew's termination. ALJD 34:10-12.

97. The failure of the ALJ to consider in his decision the fact that RELCO's did not delay in disciplining Pace and Renfrew and that Pace and Renfrew were not treated disparately. ALJD 34:10-12.

98. The failure of the ALJ to consider in his decision RELCO's affirmative defense related to the discharge of Pace and Renfrew. ALJD 34:10-12.

99. The failure of the ALJ to "credit the explanation that Relco discharged Pace because he sent his text while on duty." ALJD 34:fn. 50.

100. The finding that "Relco's failure to investigate the timing of Pace's text is strong evidence that this proffered rationale for discharging Pace is a pretext." ALJD 34: fn. 50.

101. The conclusion that "[b]y issuing a written warning to, suspending, and placing Mark Baugher on probation on or about November 1, 2010, Relco violated Section 8(a)(3), (4) and (1) of the Act." ALJD 34:19-20.

102. The conclusion that "[b]y threatening Charles Newton on or about November 29, 2010, that he was being watched, Relco violated Section 8(a)(1) of the Act." ALJD 34:22-23.

103. The conclusion that "[b]y issuing a documented verbal warning to Newton on or about November 29, 2010, for alleged lack of productivity, Relco violated Section 8(a)(3), (4) and (1) of the Act." ALJD 34:25-26.

104. The conclusion that "[b]y issuing unfavorable performance reviews to Baugher and Newton on or about December 22, 2010, Relco violated Section 8(a)(3), (4) and (1) of the Act." ALJD 34:28-29.

105. The conclusion that "[b]y placing Newton on probation on or about December 22, 2010, Relco violated Section 8(a)(3), (4) and (1) of the Act." ALJD 34:31-32.

106. The conclusion that "[b]y discharging Richard Pace and Nicholas Renfrew on or about December 23, 2010, because they engaged in protected concerted activities by discussing their concerns that a coworker (Chris Kendall) had been fired, Relco violated Section 8(a)(1) of the Act." ALJD 34:34-35; ALJD 35:1.

107. The conclusion that "[b]y discharging Mark Baugher and Charles Newton on or about March 11, 2011, Relco violated Section 8(a)(3), (4) and (1) of the Act." ALJD 35:3-4.

108. The conclusion that "[th]e unfair labor practices stated in conclusions of law 1-7 above are unfair labor practices that affect commerce within the meaning of Section 2(6) and (7) of the Act." ALJD 35:6-7.

Respectfully submitted,
RELCO LOCOMOTIVES, INC

By: _/s/ Paul E. Starkman_____
One of Its Attorneys

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2011 **RESPONDENT, RELCO LOCOMOTIVES, INC.'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** was filed with the Executive Secretary's Office of the National Labor Relations Board, electronically by using the E-Filing system on the Board's website.

Lester Heltzer Executive Secretary National Labor Relations Board 1099 14th Street, NW, Suite 6300 Washington, DC 20570-0001	

And on that same day, the foregoing was served via electronic mail upon:

David M. Biggar Catherine Homolka National Labor Relations Board Region 18 330 South 2nd Avenue Suite 790 Minneapolis, Minnesota 55401 Catherine.Homolka@nlrb.gov David.Biggar@nlrb.gov	Mark J. Bachman RELCO Locomotives, Inc. One Relco Avenue Albia, IA 52531 mbachman@rlcx.com

And on that same day, the foregoing was served via regular U.S. mail upon:

Mark Baugher 302 South 13th Street Albia, IA 52531	Charles Newton 11245 Jewel Avenue Bloomfield, IA 52537
Richard Pace 602 East Court Avenue Chariton, IA 50049	Nicholas Renfrew 126 N. James Street Ottumwa, IA 52501

__/s/__Paul E. Starkman ____

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