

**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.)	

**RESPONDENT, RELCO LOCOMOTIVES, INC.'S BRIEF IN SUPPORT OF ITS
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER**

Paul E. Starkman
Svetlana Zavin
Pedersen & Houpt, P.C.
161 North Clark Street, Suite 3100
Chicago, Illinois 60601

Attorneys for Respondent

Dated: November 16, 2011

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. STATEMENT OF FACTS.....3

A. RELCO'S Business and Physical Plant.....3

B. The Albia Plant's Management.....3

C. RELCO's Employee Manual.....3

D. Welding Certification and RELCO Fabricators.....4

E. Blue Flag Policy.....5

F. Performance Reviews.....5

G. September 2010 NLRB Hearing.....6

H. Union Election.....7

I. Baugher and Newton's Termination.....8

1. Baugher's September 13, 2010 Safety Violations.....8

2. Baugher's Blue Flag Policy Violation.....8

3. Baugher's Discipline on November 1, 2010.....9

4. Baugher's Poor Performance Evaluation.....10

5. Newton's Discipline on November 29, 2010.....10

6. Newton's Poor Performance Evaluation.....10

7. Baugher and Newton's Failure to Become a Certified Welders.....11

8. Baugher's and Newton's Discharges on March 11, 2011.....11

J. Pace and Renfrew's Termination.....12

1.	The Spreading False Rumors on December 22, 2010.....	12
2.	Pace and Renfrew's Discharge on December 23, 2010.....	13
III.	ARGUMENT.....	14
A.	The Acting General Counsel failed to establish its <i>prima facie</i> case that RELCO violated Sections 8(a)(1), 8(a)(3), or 8(a)(4) of the Act when it disciplined and/or discharged Baugher and Newton.....	14
1.	There is no evidence of animus by RELCO toward Baugher and Newton's union activity.....	15
a.	The ALJ improperly admitted the September 14-16 hearing transcript and decision.....	16
b.	The circumstantial evidence relied upon by the ALJ does not show that RELCO's actions were motivated by animus.....	18
c.	The ALJ improperly credited the Acting General Counsel's witnesses.....	18
d.	The ALJ improperly refused to credit RELCO's testimony.....	20
e.	The ALJ improperly found RELCO offered shifting reasons for issuing Baugher the written warning for the September 13 incident.....	22
f.	The ALJ erroneously found that the timing of the written warning for the September 13 incident was "suspicious.".....	23
g.	The discipline of other employees shows a lack of unlawful motivation by RELCO in disciplining Baugher.....	26
h.	Baugher's negative performance review was proper.....	26
i.	Baugher's termination on March 11, 2011 was proper...	27
2.	There is no evidence of an animus by RELCO toward Newton's concerted activity.....	28

a.	Cronin's remark to Newton was not a threat.....	28
b.	The timing between Newton's union and protected activity and his November 29 discipline was not suspicious.....	29
c.	The ALJ had no basis to determine that Newton's performance review violated the Act.....	30
d.	The ALJ's findings regarding Newton's termination on March 11, 2011 should be rejected.....	31
3.	RELCO Would Have Discharged Baugher and Newton Even Absent Any Protected Activity.....	32
a.	The ALJ failed to consider the fact that Baugher failed to obtain his welder's certificate.....	33
b.	The ALJ failed to consider Baugher's September 13, 2010 safety violations in his analysis of RELCO's affirmative defenses.....	34
c.	The ALJ failed to properly consider Baugher's violation of the blue flag policy.....	35
d.	The ALJ failed to consider Baugher's poor work performance.....	35
e.	The ALJ improperly found that there is no evidence that Baugher's performance was substandard during Baugher's probation.....	37
f.	The ALJ failed to consider the fact that Newton failed to obtain his welder's certificate.....	37
g.	The ALJ failed to consider that Newton's poor work performance warranted discharge.....	38
h.	The ALJ improperly inferred a negative finding for Cronin's testimony.....	39
i.	The absence of evidence of disparate treatment proves RELCO's lawful motivation.....	40
B.	The Acting General Counsel failed to establish its <i>prima facie</i> case that RELCO violated Sections 8(a)(1) of the Act when it discharged Pace and Renfrew for spreading false rumors.....	42

1.	The ALJ improperly concluded that this is a single motive case.....	43
2.	The ALJ erroneously concluded that Pace and Renfrew were engaged in protected concerted activity.....	44
	a. The ALJ did not acknowledge RELCO's argument that Pace and Renfrew admitted that they did not act for the mutual aid or protection of others.....	45
	b. The ALJ did not acknowledge RELCO's argument that Pace and Renfrew's conduct indefensibly injured RELCO.....	47
3.	The ALJ improperly ignored the absence of any animus by RELCO.....	47
4.	The ALJ should have found that RELCO Would Have Discharged Pace and Renfrew Even in the Absence of Their Concerted Activity.....	48
IV.	CONCLUSION.....	50

TABLE OF AUTHORITIES

CASES

ARO, Inc. v. NLRB, 596 F2d 713 (6th Cir. 1979).....46

Beacon 76th Street Garage Corp. 1994 NLRB LEXIS 864 (1994).....23

Bio v. Federal Express Corp. 424 F.3d 593 (7th Cir. Ind. 2005).....40

Carleton College v. NLRB, 230 F.3d 1075, 1081 (8th Cir. 2000).....47

Central Security Services 315 NLRB 239 (1994).....43

Crawford v. Indiana Harbor Belt RR Co., 461 F.3d 844 (7th Cir. 2006).....41

Davey Roofing, Inc., 341 NLRB 222 (2004).....30

Earle Indust., Inc. v. NLRB, 75 F.3d 400, 406-08 (8th Cir. 1996).....47

Elko Gen. Hosp., 347 NLRB 1425 (2006).....19

Eggo Frozen Foods Div. 209 NLRB 647, 647 (1974).....44

Enterprise Aggregates Corp., 216 NLRB 71 (1985).....17

Florida Steel Corp. v. NLRB, 587 F.2d 735 (5th Cir. 1979).....26

Fresenius USA Mfg., 2010 NLRB LEXIS 325 (2010).....44

Golden State Foods Corp., 340 NLRB 382 (2003).....29

Goldtex, Inc., 309 NLRB 158 (1991).....32

Joran v. Sumner, 205 F. 3d 337 (7th Cir. 2000).....32

Jordan Marsh Stores Corp., 317 NLRB 460 (1995).....32

Kariotis v. Navistar International Transportation Corp.,
131 F.3d 672 (7th Cir. 1997).....31

Lee Enterprises, Inc. d/b/a Arizona Daily Star,
Case No. 28-CA-23267 (April 21, 2011).....45

Medic One, Inc., 331 NLRB 464 (2000).....24

<i>Millbrook v. IBP, Inc.</i> , 280 F.3d 1169 (7th Cir. 2002).....	18
<i>Nelson v. NLRB</i> , 421 Fed. Appx. 342, 346 (5th Cir. 2011).....	33
<i>North Carolina License Plate Agency #18</i> , 346 NLRB 293, 294 (2006).....	30
<i>NLRB v. Esco Elevators, Inc.</i> , 736 F2d 295, 300 (5th Cir. 1984).....	46
<i>NLRB v. Interstate Builders, Inc.</i> , 351 F.3d 1020 (10th Cir. 2003).....	36
<i>NLRB v. Joy Recovery Tech. Corp.</i> , 134 F.3d 1307 (7th Cir. 1998).....	32
<i>NLRB v. Stor-Rite Metal Products, Inc.</i> , 856 F.2d 957 (7th Cir. 1988).....	24
<i>NLRB v. Washington Aluminum Co.</i> , 370 U.S. 9, 17 (1962).....	47
<i>Paraxel Int'l LLC</i> , 356 NLRB No. 82 (2011).....	45
<i>Patt v. Family Health Systems, Inc.</i> , 280 F.3d 749 (7th Cir. 2002).....	41
<i>Pergament United Sales, Inc. v. NLRB</i> , 920 F.2d 130 (2d Cir. NY 1990).....	42
<i>Queen of the Valley Hospital</i> , 316 NLRB 721 (1995).....	39
<i>Roosevelt Memorial Medical Center</i> 348 NLRB 1016 (2006).....	40
<i>Roper Corp. v. NLRB</i> , 712 F.2d 306 (7th Cir. 1983).....	23
<i>Shepherd v. Slater Steels Corp.</i> , 168 F.3d 998 (7th Cir. 1999).....	36
<i>St. George Warehouse, Inc.</i> , 349 NLRB 870 (2007).....	41
<i>Standard Dry Wall Products</i> , 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).....	19
<i>Unacon, Inc. v. NLRB</i> , 736 F3 2d 1188 (7th Cir. 1984).....	17
<i>Valley Steel Prod. Co.</i> , 111 NLRB 1338 (1955).....	20
<i>Vulcan Basement Waterproofing of Illinois, Inc. v. NLRB</i> , 219 F.3d 677 (7th Cir. 2000).....	20
<i>Wright Line</i> , 251 NLRB 1083 (1980).....	16, 32, 44, 48

STATUTE

National Labor Relations Act, 29 U.S.C. §157.....45

I. INTRODUCTION

This matter involves four discharged RELCO employees, namely (1) Mark Baugher ("Baugher"), (2) Charles Newton ("Newton"), (3) Richard Pace ("Pace"), and (4) Nicholas Renfrew ("Renfrew"). As set forth in Respondent's Exceptions and more fully explained below, the ALJ erroneously determined that RELCO violated Sections 8(a)(3), (4), and (1) of the National Labor Relations Act (the "Act") when it: (1) gave Baugher a written warning, a suspension, and placed him on probation for his violation of company policies; (2) gave Baugher a negative performance review; (3) discharged Baugher; (4) a supervisor commented to Newton that he should be careful because RELCO was observing Newton's performance; (5) placed Newton on probation for his poor work performance; (6) gave Newton a negative performance review; and (7) discharged Newton for pro-union activities that occurred six months before their ultimate discharge.

Among the many factual and legal errors, the ALJ: (1) made invalid comparisons to other employees who were not similarly situated to Baugher and Newton; (2) improperly deemed RELCO's and in favor of the Charging Parties discipline of Baugher and Newton to be tainted; (3) made credibility findings against RELCO that were based on misstatements or misreadings of the record; (4) ignored the absence of direct evidence that that any anti-union animus existed either before or after the union election on October 26, 2010; (5) disregarded RELCO's repeatedly warning Baugher's and Newton's about their safety violations and unacceptable work behavior was unacceptable, and the need for them to improve their work performance, and to become certified welders.

Further, the ALJ disregarded the complete absence of any direct evidence connecting Baugher and Newton's prior union activities to their subsequent discipline and discharge for their

repeated and undisputed violations of RELCO's company safety policies (which were undeniably legitimate), performed below RELCO's expectations, and failed to become certified welders – a condition precedent for the continued employment for all of RELCO's fabricators. Despite these warnings, it was uncontradicted that in the opinion of all of their supervisors, Baugher and Newton were chronic poor performers, who failed to improve and never displayed a desire to improve. Essentially, the ALJ's conclusion that RELCO violated Sections 8(a)(3), (4), and (1) violations is a "house of cards" that falls because there is no basis for the ALJ to determine that any of the discipline and discharge were done for unlawful reasons.

The ALJ also improperly found that RELCO discharged Pace and Renfrew in violation of Section 8(a)(1) of the Act. It was undeniable that Pace and Renfrew were terminated for spreading malicious false rumors that another RELCO employee, Christopher Kendall ("Kendall"), had been discharged. Neither the ALJ nor the NLRB disputed that RELCO has a clear, longstanding, and legitimate written policy prohibiting employees from spreading malicious rumors. Pace and Renfrew admitted that: (1) they spread such false rumors; (2) they knew about RELCO's policy; and (3) such policy was legitimate. Most importantly, the ALJ erroneously chose to disregard, the "unequivocal" admissions by both Pace's and Renfrew that their spreading the malicious false rumor was never intended to prepare for, incite, or instigate any group action. Pace and Renfrew's admissions were dispositive of the General Counsel's concerted activity claim and render the ALJ's finding of Section 8(a)(1) violation erroneous as a matter of law.

For these reasons, the ALJ's Findings of Fact and Conclusions of Law cannot be sustained, the ALJ's Decision and Order should be reversed, the Complaint should be dismissed in its entirety, and judgment should be entered in RELCO's favor.

II. STATEMENT OF FACTS

A. RELCO's Business and Physical Plant

As stated in the ALJ's decision, RELCO is a corporation that rebuilds, repairs, and manufactures locomotives in its Albia, Iowa facility. ALJD 2:32-36.¹ RELCO's corporate headquarters are in Lisle, Illinois. Its Albia, Iowa facility, which is at the center of this dispute, employs approximately 100 people over the course of four different shifts. ALJD 3:6-7.

B. The Albia Plant's Management

The Albia plant is overseen by Mark Bachman ("Bachman"), its Chief Operating Officer. Also at this facility are Cliff Benboe ("Benboe"), a project manager, and David Crall ("Crall"), the Operations Manager. Each had previously had good working relationships with unions in the past without incidents or hostility.

Specifically, RELCO had a facility in Provo, Utah that was a union shop, which Bachman oversaw for twelve years and had no quarrels with the union. Tr. 418-19. Meanwhile, Benboe was a member of the Local 370, Operating Engineers, for twelve years and even held the position of business agent for the union. Tr. 322-23. Crall previously worked at Cargill Foods while a union was present the entire time. Tr. 373. There was no dispute at the hearing that RELCO employed union members, and had no issues with them, because they are good, productive workers. Tr. 419; Tr. 420. Even Newton admitted that he could not say that RELCO held any animus against unions and its employees' involvement with unions. Tr. 133.

C. RELCO's Employee Manual

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 abbreviated as "GC Exh. ___", and as "R. Exh. ___", respectively.

RELCO has implemented several policies to ensure the safety and well-being of all of its employees. These policies are set forth in its Employee Manual ("Manual") dated January 1, 2009. Ex. 76. Some of the policies relevant to this case require employees to: (1) abstain from smoking outside of the designated smoking areas; (2) wear the appropriate safety equipment at all times; (3) abstain from harassing other employees; and (4) abstain from spreading malicious gossip or rumors. R. Exh. 76.

D. Welding Certification and RELCO Fabricators

RELCO employs many fabricators, including Baugher and Newton. ALJD 13-14. These fabricators are expected to weld. ALJD 3:15; Tr. 193; Tr. 384. The company felt that it was important for a fabricator to become a certified welder both for safety reasons and so that the fabricator could be given more tasks to complete. ALJD 3:14-15; Tr. 321-22. Typically, new hires are given three months to obtain their welding certification. Tr. 414. Without their welding certification, fabricators could not perform extensive welding duties, effectively limiting the amount and type of work they could perform. Tr. 385.

In order to obtain a welding certificate, Benboe conducted welding tests at RELCO's facility. ALJD 3:20; Tr. 321. Once fabricators passed this test, the test results would be reviewed by an outside firm. Tr. 320. If a particular fabricator failed the welding certification test, he would be allowed an opportunity to retake the examination after a thirty day waiting period. Tr. 330; Tr. 407; Tr. 414. If the fabricator failed the certification test a second time, he would have to wait another ninety days to retake the examination. ALJD 22-26; Tr. 330; 407; Tr. 414. Despite the ALJ's improper statement, and although RELCO would find work for those fabricators who did not have a welding certificate, ultimately, all fabricators were expected to obtain their welding certification. ALJD 3:17. If a fabricator failed to comply, he would be

terminated. Pursuant to this policy, RELCO did not have any employees who failed to receive their welding certification over a two year period, which the ALJ improperly failed to note.

ALJD 16:5-10; Tr. 90.

E. Blue Flag Policy

RELCO had a longstanding "blue flag" policy, which is railroad industry safety measure to warn other employees that an employee is working on a particular project at the plant. ALJD 8:fn.8; Tr. 84. Under this policy, an employee is required to affix his blue flag to a locomotive or car when a project is being worked on and to remove it after completing work on that locomotive or car. Tr. 84. This measure was required by RELCO and enforced by the Iowa Department of Transportation which made it an offense punishable with fines for an employee to apply or remove another employee's blue flag. Tr. 84-89, 91. The ALJ confirmed that the blue flag policy is a legitimate safety measure, and that enforcement of it was justified. ALJD 8:fn. 8.

F. Performance Reviews

In December 2010, RELCO, in order to improve upon its evaluation process, refined its procedure for giving performance evaluations. Tr. 79. The refined evaluation process required its foreman to complete standard questionnaires covering twenty-six areas, calling for the ranking of an employee's particular skills on a scale of one to five and listing the employees' strengths and weaknesses. ALJD 3:32-33; Tr. 437. The foreman then consulted with Bachman, and based on these discussions, Bachman decided whether a particular employee merited a salary increase, a salary decrease, or whether some other measures were necessary. ALJD 4: 1-3; Tr. 51. At the end of 2010, RELCO gave performance reviews to all of its employees. Tr. 39; Tr. 422. If an employee was placed on probation for poor work performance, it was not RELCO's policy to provide any follow-up feedback during that probationary period, nor did RELCO provide

timetables for its employees as to when they were expected to improve upon their performance or skills. Tr. 74.

At RELCO, pay raises are independent of performance reviews, though pay raises may be given with reviews. ALJD 3:30-31; Tr. 435. A pay raise may depend on an individual employee's performance and on the health of the economy. Tr. 435. During 2008 and 2009, pay raises were still being given, albeit, at a smaller rate. Tr. 445-46. However, the ALJ improperly ignored the testimony that workers who performed exceedingly well still received raises. ALJD 4:fn. 6. Although raises were distributed in 2008 and 2009, neither Baugher nor Newton received a raise because their performance was considered to be substandard. Once the recession subsided, RELCO began to give more pay raises to those employees with positive evaluations. Tr. 422-23. Employees with poor performance evaluations did not receive pay raises. Tr. 290-91; Tr. 423; Tr. 444. Baugher and Newton did not receive raises.

G. September 2010 NLRB Hearing

Between September 14-16, 2010, an NLRB hearing was held involving charges brought against RELCO for violating the NLRA for discharging four employees and for allegedly maintaining an unlawful nondisclosure agreement and by coercing employees to sign that agreement. ALJD 5:38-40; GC Exh. 36 at 1. At the hearing, five RELCO employees were subpoenaed to testify as witnesses called by the General Counsel, Baugher, Newton, Jamie McKim ("McKim"), Richard Purdun ("Purdun"), and Jonathan Graber ("Graber"). See GC Exh. 32 and GC Exh. 35.² Unlike Baugher and Newton, McKim, Purdun and Graber are currently employed by RELCO because they are good, productive employees and not because of any

² As discussed more fully below, RELCO objects to the admission of the testimony in the September 14-16 hearing. ALJD 19:fn. 32; GC Exhibits 32, 33, 34, 35, and 36. Without waiving its exception, RELCO refers to these transcripts in the event its exception is overruled.

union affiliations they may have or any testimony they may have given. Tr. 420. As discussed more fully below, the ALJ erred when he concluded that Purdun and Graber's testimony was distinguishable from Baugher and Newton's testimony (and ignored McKim's testimony altogether). ALJD 18:20-22.

On March 16, 2011, an unfavorable verdict was handed down by Administrative Law Judge, William Schmidt, to which RELCO timely filed its exceptions brief. Notably, Judge Schmidt did not issue its decision until March 28, 2011 (16 days *after* Baugher and Newton were terminated) – and yet, the ALJ improperly implies that there is a causal connection between RELCO's discharge of Baugher and Newton and their testimony at this hearing. ALJD 28:29; ALJD 31:46³; see GC Exh. 36. Moreover, the charges involved in the prior case stemmed from employment actions that occurred in 2009 (over a year before the discharges involved in the instant case) and are entirely separate and unrelated from the claims in this case. ALJD 5:1-48; ALJD 6:1-9. Incidentally, RELCO did not penalize Baugher or Newton for taking time off to testify at the hearing, Baugher admitted. Tr. 196. Moreover, after the September 2010 hearing, Baugher and Newton attended other meetings. RELCO management was not told and did not know it. ALJD 11:fn. 19; ALJD 15:fn. 25; Tr. 215-17.

H. Union Election

On October 20, 2010, a union election was held at RELCO. ALJD 7:28-30; Tr.36. The employees voted against unionization, and it was declared that another union certification election could not be held for another year. ALJD 12:42. Although the ALJ concluded that RELCO was motivated by an anti-union animus to unlawfully discipline and discharge Baugher

³ The ALJ erred when he failed to note that the timeline of events failed to support that a causal nexus existed between Baugher and Newton's discharge on March 11, 2011 and their respective testimony on September 15, 2010 – six months later.

and Newton, they were not disciplined and discharged until November 1, 2010, November 29, 2010, December 22, 2010 and March 11, 2011, several months after their union activities and several months before RELCO employees were even eligible to unionize at the plant. By failing to consider these intervening factors, that broke the causal connection between their union activities and their discipline and discharges, the ALJ erred in his animus analysis. ALJD 26:20-23; ALJD 28 12-14; ALJD 28:31-32; ALJD 30:15-18; ALJD 30:17-21; ALJD 32:1-2.

I. Baugher and Newton's Termination

1. Baugher's September 13, 2010 Safety Violations

On September 13, 2010, Bachman, Crall, Benboe, and other supervisors observed Baugher smoking in a “B-cab.” Tr. 327; Tr. 376. They considered Baugher's action to not only be a safety hazard, but also a violation of the policies in the Employee Manual. Tr. 327. They also observed that Baugher was not wearing his protective gear was also loitering, another violation of company policies. Tr. 327; Tr. 429. At the time of this incident, Crall thought that Baugher should be immediately disciplined for this indiscretion. Tr. 379. The ALJ improperly discredited this testimony, as is discussed below. At the time, RELCO management did not know that Baugher was scheduled to testify at the NLRB hearing two days later, as Crall was the first RELCO manager to learn of Baugher's intention to testify and only learned about this intention on September 14, 2010. ALJD 7:10; Tr. 80. In spite of this, the ALJ improperly failed to consider that there was no causal connection between the decision to discipline Baugher on September 13 for his company violations, on the one hand, and Baugher's testimony at the September 14-16 hearing, on the other hand. ALJD 26:3-36.

2. Baugher's Blue Flag Policy Violation

Baughner routinely neglected to remove his blue flag after he finished a project. On one such occasion, on October 26, 2010, Baughner could not be located well after his shift was finished. Tr. 382. After spending time searching for him, the blue flag was removed, and Baughner was given a written warning about this incident on November 1, 2010. ALJD 8:3-6; Tr. 382. On that date, Baughner was suspended for two days and was placed on probation when he returned. Tr. 382. RELCO was not aware that another employee, Dean Fenton, allegedly neglected to remove his blue flag, and in fact, if Fenton was indeed neglectful, he would have been disciplined in the same manner as Baughner. ALJD 8:fn.9; Tr. 351.

3. Baughner's Discipline on November 1, 2010

Baughner was not disciplined for the September 13 incident and the blue flag violation until November 1, 2010, because RELCO's attorney advised RELCO not to impose any punishment or provide any benefits to employees until after the union election was held on October 20. Tr. 80; Tr. 379. Once the certification of the election was returned and RELCO's counsel confirmed that employees may be reprimanded again, on November 1, 2010, Baughner was suspended for two days and placed on probation for these incidents. Tr. 400. However, the ALJ improperly contradicted such testimony by finding that Kevin Sines was disciplined on September 24, 2010.⁴

While a verbal warning may be RELCO's policy for first time violators of the blue flag policy, RELCO has no custom in place for disciplining its employees for multiple safety violations. ALJD 10:fn. 14. For instance, Mark Douglas, who had no union affiliations, was

⁴ Kevin Sines was not disciplined on September 24, 2010. The document was not signed and was not given to Sines, in accordance with RELCO's counsel's advice. Tr. 81; see GC Exh. 3. Additionally, RELCO's counsel was present at RELCO's offices on September 13, 2010 and was able to offer the advice in-person. He was not present on September 24, 2010 and did not witness Sines' indiscretion. Once the counsel was conferred with, Sines was not disciplined until November 1, 2010 – like Baughner – after the certification of the union election.

suspended for three days – a day longer than Baugher – for violating the blue flag policy for a second time. GC Exh. 37(z). Meanwhile, Baugher was suspended not only for the blue flag policy, but also for the September 13 incident. If anything, the record supports that such instances of multiple safety violations warrant suspension.

4. Baugher's Poor Performance Evaluation

According to his performance review, which was given to Baugher on December 22, 2010, he displayed problems with staying on task, organizing his work station, problem solving, being proactive, contingency planning, his judgments and decisions, accepting responsibility, recognizing and facilitating improvement, fulfilling goals, and improving since joining the company. ALJD 16-21; GC Exh. 18; Tr. 336; Tr. 383; Tr. 439. His supervisors determined that Baugher's welding techniques were poor. ALJD 16-21; GC Exh. 18; Tr. 115; Tr. 117; Tr. 383.

5. Newton's Discipline on November 29, 2010

It was noted by Benboe that tasks that should have taken an average employee two hours to complete took Newton five hours to complete. R. Exh. 1. Newton was often observed wandering around the warehouse and was warned about this on several occasions by Benboe. Tr. 326. It was not just a one-time occurrence. On November 29, 2010, Benboe and Crall observed Newton wandering the warehouse on three separate occasions. Tr. 344. For this, Newton was given a written warning.⁵ ALJD 13:30-32; R. Exh. 1; Tr. 388.

6. Newton's Poor Performance Evaluation

⁵ The ALJ erred when he accepted Newton's version of the events that transpired on November 29 and implied that RELCO arbitrarily disciplined Newton for wandering back and forth throughout the plant, while accepting Newton's explanation that he was doing so for legitimate reasons. ALJD 12:46-48; ALJD 13:1-6; ALJD 13:13-20. The fact of the matter is that RELCO's management is aware of how long it should take employees to complete tasks and how much walking back and forth employees should be doing for a given task. Newton was constantly walking back and forth, taking the least efficient routes, and taking more than twice the normal amount of time to complete tasks. By implying that such conclusions are incorrect, the ALJ is effectively acting as a super-personnel, which is contrary to the law, as more fully described below.

In his performance review, which was also administered on December 22, 2010, it was stated that Newton had a poor attitude, his volume of acceptable work was low, and he had trouble with meeting deadlines. ALJD 14:1-2. Newton even admitted that there were aspects of his performance that needed improvement. ALJD 14:31-32; Tr. 116. In the years that he worked at RELCO, he never received a wage increase, indicating that his performance was stagnant, if not inefficient. Tr. 136; Tr. 421; GC Exh. 17. Newton was placed on probation after his poor performance review in December 2010. Tr. 85.

7. Baugher and Newton's Failure to Become Certified Welders

Baugher was hired to work as a fabricator on March 15, 2007. GC Exh. 18. At the time, he told upon being hired that he was expected to become a certified welder. Baugher attempted to obtain his certification within ninety days of beginning his employment, but failed this test. Baugher attempted to retake the examination three more times, but failed each ensuing attempt. ALJD 11:18-19; Tr. 175. These continued failures contributed to RELCO's decision to terminate Baugher, especially true since in 2011 that Baugher was assigned to repair an Amtrak 200, a task that required Baugher to weld. ALJD 11:23-25. Without his welding certificate, his value as an employee was limited.

Newton was hired as a fabricator on November 24, 2008. GC Exh. 17. Like Baugher, Newton was an established welder and was told upon being hired that he was expected to become a certified welder. Tr. 76. Newton took the welding certification test within thirty days of being hired. Like Baugher, Newton was unable to pass. However, unlike Baugher, Newton failed to ever retake the examination, despite having three years to meet this basic requirement. ALJD 14:fn. 23; Tr. 76; Tr. 136-37.

8. Baugher's and Newton's Discharges on March 11, 2011

On March 11, 2011, Bachman reviewed Baugher and Newton's progress in completing the goals for improvement set out for them on December 22, 2010. Tr. 69. Those employees that were deemed problematic, like Baugher and Newton, has been evaluated every day for signs of improvement. Tr. 73. Three months after being placed on probation, neither Baugher nor Newton had progressed in their work performance – a fact that the ALJ erroneously ignored. Tr. 389. After discussions with supervisors, Bachman determined that it was necessary to discharge both employees. Tr. 69; Tr. 77; Tr. 389. Baugher responded negatively to the termination, snapping that it “RELCO's loss, not his,” and storming out of the office. Tr. 389.

Meanwhile, Newton had been warned of his inefficiency at his evaluation, but failed to change and was accordingly discharged. Tr. 71. These discharges occurred six months after Baugher and Newton testified – a significant lapse of time that the ALJ erroneously failed to consider. ALJD 26:24-25; ALJD 30:17-21. Moreover, there were no other RELCO employees who: (1) committed multiple safety violations, (2) failed to obtain their welding certificate after four years of employment, and (3) received a poor work performance review, like Baugher. Nor were there any other employees who: (1) had been warned wandering around the plant, (2) failed to obtain his welding certificate after three years of employment, and (3) received a poor work performance review, like Newton. ALJD 17:8-10. As such, the ALJ's conclusion that Baugher and Newton were treated disparately is a mischaracterization of the evidence. ALJD 16:15-21; ALJD 17:3-5; ALJD 17:8-13; ALJD 18:1-9. There are no other similarly situated co-workers to whom they could be legitimately compared.

J. Pace and Renfrew's Termination

1. The Spreading False Rumors on December 22, 2010

On December 22, 2010, Pace and Renfrew began to spread the maliciously false rumor that Kendall had been terminated. ALJD 19:20-21; ALJD18-19; Tr. 395; Tr. 279; Tr. 248; Tr. 261; Tr. 280-281. This caused other employees to engage in further rumor-mongering and speculation. At no point did Pace and Renfrew ever approach RELCO management about the rumors. Most importantly, Pace and Renfrew admittedly did not attempt to band together with other employees, nor did they want to take any group action because of the false rumors.

At approximately 3:00 p.m. later that day, Jeffrey Dalman ("Dalman"), Kendall's supervisor, noticed that Kendall was visibly upset. ALJD 21:1; Tr. 365. Kendall snapped back at Dalman if RELCO did fire him, RELCO was "playing a hell of a cruel joke on me." ALJD 21:1-2; Tr. 226, 251. Kendall was reassured that he was not going to be fired, but it took some time for him to calm down. Tr. 392.

2. Pace and Renfrew's Discharge on December 23, 2010

On December 23, 2010, Crall and Bachman met with Kendall who stated that Pace and Renfrew were the people spreading the rumors of his discharge. Tr. 40. Bachman asked Kendall if he could look at Kendall's phone, and Kendall agreed. Tr. 41. Bachman only saw a text message from Pace. Tr. 41. Bachman noted that Kendall's phone revealed that Pace had sent his text message at 1:06 p.m., during regular work hours. ALJD 20:fn. 35; Tr. 425. As is common throughout the rail industry, an employee is not permitted to use his cell phone during regular work hours. Tr. 86; Tr. 381. Bachman concluded that Pace's use of a cell phone during regular work hours constituted a breach of RELCO's policies.

Immediately after their meeting with Kendall, Bachman and Crall met with Pace and Renfrew individually. Tr. 394. At that time, Pace admitted that he had sent the text message. ALJD 2-3; Tr. 394; Tr. 250. Renfrew admitted that he spoke with at least one person, Ed Cohn,

about the rumors. ALJD 21:4; Tr. 395; Tr. 279. After interviewing Pace and Renfrew, and within the purview of the Employee Manual, Bachman decided sending the text and spreading the false rumors were so malicious and cruel to Kendall, both Pace and Renfrew should be discharged. ALJD 6-8; ALJD 18-19; Tr. 46.

RELCO's Employee Manual dictated that RELCO employees who spread malicious false rumors would be terminated. R. Exh. 76 at 20. RELCO did not have a policy that it would address false rumors at staff meetings. The only example presented at the hearing of Bachman speaking with employees at a staff meeting about a rumor was the possibility of union organization. ALJD 22:fn. 38; Tr. 260-261; Tr. 289-290.

III. ARGUMENT

The Board should set aside the ALJ's Decision because, among various serious errors: (1) the ALJ made many key factual findings that are not supported by the record; (2) many of the ALJ's legal conclusions are contrary to his own factual findings and applicable law; (3) the ALJ erroneously found that the Acting General Counsel established a *prima facie* case of discrimination against Baugher, Newton, Pace, and Renfrew when no such finding was justified; and (4) the ALJ further compounded his legal and factual errors by failing to find that RELCO established, with overwhelming and undisputed evidence, that it would have discharged Baugher, Newton, Pace, and Renfrew, even in the absence of their pro-union or alleged concerted activities. For these reasons, the ALJ's decision should be reversed, and the Board should dismiss the Complaint in its entirety.

- A. The Acting General Counsel failed to establish its *prima facie* case that RELCO violated Sections 8(a)(1), 8(a)(3), or 8(a)(4) of the Act when it disciplined and/or discharged Baugher and Newton.**

The undisputed facts and the ALJ's findings demonstrate that RELCO had legitimate reasons to warn, discipline, and ultimately discharge Baugher and Newton for their numerous safety violations, years of poor work performance, and failure to obtain their welding certificates. No other RELCO employees had as many safety rule violations and instances of documented poor work performance, or had as long and as many opportunities to get their welding certificate, but failed to do so, as Baugher and Newton. ALJD 34:19-32.

1. There is no evidence of animus by RELCO toward Baugher and Newton's union activities.

As is more fully explained below, there was not one shred of evidence that any RELCO decisionmaker made any negative comments or exhibited any hostility toward Baugher or Newton because of their testimony at the September 14-16 hearing or their prior pro-union activities. No RELCO document mentions their testimony or their pro-union activities. The warnings, write-ups, and discipline that form the crux of this case came months *after* the union election. The ALJ ignored that RELCO had no motive to retaliate against Baugher and Newton's union activities, because after the election, there was a one year ban on any future union certification election. Nonetheless that the ALJ apparently concluded, despite the absence of any evidence, that all of Baugher's and Newton's supervisors engaged in an unspoken conspiracy to write-up and discipline Baugher and Newton over many months for violations of safety rules and poor performance (that the ALJ found they committed) and then discharged them six months later because of their testimony and prior union activity and not because of all of their performance problems and their failure to get their welding certificates. However, there is no evidence to support the ALJ's conspiracy theory or prove that a causal nexus existed between Baugher and Newton's union involvement and testimony at the September 14-16 NLRB hearing and their respective discharges six months later, given their subsequent and intervening safety

violations, continued poor performance and failure to obtain their welding certificates that the ALJ recognized were properly noted in the many write-ups, warnings and performance evaluations that they received before they were finally discharged on March 11, 2011. In the absence of any evidence of a causal connection, the ALJ should have dismissed the claims against RELCO.

Although the ALJ recognized the burden-shifting framework set forth in *Wright Line*, 251 NLRB 1083 (1980) controls, the ALJ failed to recognize that the Acting General Counsel had to prove, not only that RELCO bore an animus toward Baugher and Newton at the time of the September 14-16, 2010 hearing, but that this animus was a motivating factor in the subsequent warnings, disciplinary actions and discharges that occurred months later. However, there was no basis for the ALJ to make such findings, much less sufficient evidence to meet the Acting General Counsel's burden of proof on these key issues.

a. The ALJ improperly admitted the September 14-16 hearing transcript and decision.

The ALJ went astray when he improperly admitted the transcript and decision on a prior NLRB action that is currently on appeal. However, the transcript and unreviewed ALJ Decision from September 14-16 NLRB proceeding are not admissible or probative of animus, notice, or any other proper purpose in Baugher's and Newton's case. Although the ALJ erroneously posited without citing any legal authority that the finding of the other ALJ in the prior case (Judge Schmidt) "could serve as evidence that RELCO acted with animus in this case," he expressly stated that "I did not rely on Judge Schmidt's decision for that purpose." ALJD 19:fn. 32. Thus, the unreviewed decision in the other case cannot be used to support the ALJ's finding animus in this case. Evidence that an employer has been held to have violated the NLRB in an earlier proceeding, without more, cannot support an inference of unlawful motive in a later proceeding.

Unacon, Inc. v. NLRB, 736 F3 2d 1188 (7th Cir. 1984); *Enterprise Aggregates Corp.*, 216 NLRB 71 (1985).

Nor can the transcripts be used to show animus in this case. The ALJ admitted the transcripts for the sole (but erroneous) purpose of showing that RELCO was on notice of the nature of the testimony provided by the five witnesses, even though the ALJ actually (and improperly) used the truth of the five witnesses' testimony in his legal analysis. ALJD 19:fn. 32. Specifically, the ALJ concluded that "Graber and Perdun⁶ [sic] were openly reluctant witnesses for the Acting General Counsel in Judge Schmidt's case," a conclusion that the ALJ could only have made by erroneously considering the substance of their testimony. The truth of the matters asserted in the transcript was that Baugher's and Newton's testimony favored the union and the testimony of other witnesses did not. ALJD 18:31-32. For example, the ALJ explicitly relied on the truth of the matter asserted in the transcript stated that "Baugher provided testimony that conflicted with RELCO's assertion that Dixon was observed working on top of a locomotive with his feet dangling off the edge and Newton testified about the nondisclosure agreement and the warnings that employees received about needing to speak with Bachman if they refused to sign the agreement." ALJD 5:47-48; ALJD 6:1-3. Thus, the ALJ's unavailing explanation that the transcripts were somehow admissible to show that RELCO was on notice of the truth of what they asserted at the prior hearing was an invalid attempt to dress up the use of patent hearsay in the guise of a non-hearsay purpose.

The ALJ also improperly found that his admission of the transcript did not violate RELCO's due process rights. ALJD 19:fn 32. However, RELCO was not given an opportunity to

⁶ The ALJ also erred in his finding that "the evidentiary record shows that Newton and Baugher's actions before and during trial were materially different than the actions of the other 3 employee witnesses." ALJD 18:20-22. This is because the ALJ failed to state how McKim's testimony was materially different than Baugher and Newton's testimony, so as to render the analysis incomplete and without meaning.

cross-examine the three witnesses (McKim, Purdun, and Graber) about the subjects of their prior testimony in the context of the completely different factual and legal issues involved in the instant case – a very clear distinction that the ALJ ignored.

In any event, the facile distinctions that the ALJ attempted to draw between McKim, Purdun, and Graber, on the one hand, and Baugher and Newton, on the other hand, do not show that RELCO agreed with the ALJ's assessment of their testimony, much less prove that RELCO retaliated against Baugher and Newton for their testimony.

b. The circumstantial evidence relied upon by the ALJ does not show that RELCO's actions were motivated by animus.

Because the transcript and the decision in the prior does not constitute evidence of anti-union bias, the ALJ's finding that RELCO harbored an animus against Baugher rests solely on the following insubstantial "circumstantial" evidence that: (1) ALJ's assertion that the reason for giving Baugher a written warning for the September 13 incident "shifted," (2) giving Baugher a written warning for the September 13 incident on November 1 was somehow "suspicious," and (3) the ALJ's conclusion that Baugher's negative performance review on December 22 was "tainted" because it referred to the November 1 write-up. ALJD 26:20-23; ALJD 28 12-14; ALJD 28:31-32. However, these findings do not withstand scrutiny and show nothing about the motivation of RELCO, as courts have long recognized, "the sum of many nothings is nothing." *Millbrook v. IBP, Inc.*, 280 F.3d 1169, fn. 4 (7th Cir. 2002).

c. The ALJ improperly credited the Acting General Counsel's witnesses.

The ALJ's credibility determinations illustrate how far the ALJ strained to find in favor of the Acting General Counsel and against RELCO. Because the clear preponderance of the relevant evidence amply demonstrates that the ALJ's credibility findings are incorrect, they are

not entitled to any deference. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951); *see also Elko Gen. Hosp.*, 347 NLRB 1425 (2006).

Here, the ALJ found the Acting General Counsel's witnesses to be "poised, forthright and composed" and that any inconsistencies in their testimony "related to collateral matters or matters beyond the scope of their personal knowledge." ALJD 25:20-25. Yet, this conclusion flies directly in the face of the ALJ's own factual findings. For example, the ALJ refused to credit Baugher's denial that he was working on a B-cab and his testimony about his blue flag violation on September 13, but Baugher's testimony were not mere inconsistencies and were clearly not testimony on collateral matters or matters beyond his personal knowledge. ALJD 6:fn. 7; 8:fn. 8.

The ALJ found RELCO's witness to be not credible because he incorrectly found that they "had trouble squaring their testimony with documentation ... they prepared." ALJD 25: 26-27. Yet, when Baugher did the same thing by trying to use the work schedule that he prepared in order to try to deny that he worked on the B-Cab on September 13 – though the ALJ noted that Baugher's work schedule actually showed he worked on the B-cab that day – the ALJ nevertheless found that Baugher was otherwise credible. ALJD 6:fn 7.

RELCO's witnesses *consistently* testified that on September 13, they saw Baugher smoking, loitering, and not wearing a hard hat, while working on a B-cab located right outside the conference room where they were meeting, but the ALJ believe their the part of their testimony about this Baugher smoking and loitering simply because Bachman's September 13 email to Crall did not mention those violations (though the ALJ found it was the most reliable source of information that Baugher failed to wear proper protective gear while working on the B-cab). ALJD 7:fn. 7. However, was a key instance when the testimony of RELCO's witnesses

squared with their documentation, but the testimony of the Acting General Counsel's witness (Baugher) did not. R. Exh. 2.

Newton's testimony was as inconsistent and incredible as Baugher's. Newton asserted on multiple occasions that he did not know that he had been placed on probation. Tr. 125; Tr. 140. However, when recounting his termination on March 11, he admitted that when Crall told him he had been on probation, Newton did not object or protest. Tr. 124. Rather, he admitted that the only thing he argued about with Crall at his termination meeting was Crall's assertion that Newton's productivity was poor. Tr. 124. Crall's assertion clearly called for a response from Newton if it was not true and it was certainly possible for Newton to respond (as Newton did by responding to the claims of poor productivity). Astoundingly, the ALJ simply ignored Newton's admission by silence. This not only belies Newton's self-serving but immaterial assertions that he did not know he was on probation, it is contrary to the ALJ's conclusion that the inconsistencies of the Acting General Counsel's witnesses related only to collateral matters or matters beyond their personal knowledge. It is clear from a preponderance of the evidence that the ALJ improperly credited Baugher and Newton's testimony and the ALJ's credibility findings cannot stand.

d. The ALJ improperly refused to credit RELCO's testimony.

Similarly, the ALJ's finding that RELCO's witness gave inconsistent testimony must be rejected since a review of the record reveals that no such inconsistencies existed. *Vulcan Basement Waterproofing of Illinois, Inc. v. NLRB*, 219 F.3d 677, 688 (7th Cir. 2000) (rejecting finding that witnesses gave inconsistent testimony when a review of the record revealed that no such inconsistencies existed); *Valley Steel Prod. Co.*, 111 NLRB 1338, 1345 (1955) (establishing

that credibility findings based on inconsistencies should be rejected when the record fails to reveal such inconsistencies).

One glaring example of how the ALJ made credibility finds based on alleged inconsistencies that did not exist in the record involves the ALJ's finding that "Benboe testified that he observed Baugher's conduct on September 13, but later admitted during cross-examination that he did not see the September 13 incident." ALJD 6:fn 7. This is a clear misstatement of the record. Benboe never admitted during cross-examination that he did not see the September 13 incident. Rather, on cross-examination, Benboe was merely presented with his affidavit in which he had stated that he "was not involved in the incidents for which [Baugher] was being suspended." Tr. 336. However, what the ALJ improperly ignored was Benboe's subsequent testimony that he believed that the incident for which Baugher was suspended was *only* Baugher's the blue flag violation (which Benboe admitted he was not involved in), which is also consistent with Benboe's uncontradicted testimony that he was not involved in the decision to suspend Baugher. Tr. 346. Thus, Benboe's affidavit was not inconsistent with his testimony that he observed Baugher smoking, loitering, and not wearing his protective gear while working on the B-cab during the September 13 incident. As such, the ALJ improperly discredited his testimony as to the September 13 incident based on a purported inconsistency that does not exist in the record.⁷

The ALJ stated that Benboe testified that RELCO lacked sufficient work to assign fabricators who had not passed the welding certification test. ALJD 3:fn. 3. However, that summary is incorrect and grossly misinterprets Benboe's testimony. In fact, Benboe testified that

⁷ The ALJ's refusal to consider Benboe's testimony was especially significant since no one could rationally find that RELCO possessed any animus, given that that he had been a union employee, and even Newton admitted that he had no proof that Benboe discriminated against him in any way because of his union activities. Tr. 134

"[o]ver the long haul," a fabricator cannot be an effective fabricator for an extended period of time without being able to weld. Tr. 322. For these reasons, the ALJ erred when he failed to credit Benboe's testimony about the importance of fabricators getting their welding certificate. ALJD 3:fn. 3.

The ALJ also erred when he discredited Crall's testimony because he could not identify any specific occasions that work could not be found for Baugher. ALJD 3:fn. 3; Tr. 373. This was not because Crall's testimony was dishonest, but rather, because he was not Baugher's supervisor – a fact the ALJ wrongfully ignored. Regardless, Crall's inability to state a work assignment does not undermine the fact that over an extended period of time, a fabricator cannot be an effective fabricator if he does not know how to weld. After four years of employment, it became senseless to continue to employ two fabricators without a welding certificate at the expense of RELCO's business interests.

e. The ALJ improperly found RELCO offered shifting reasons for issuing Baugher the written warning for the September 13 incident.

The ALJ improperly concluded that RELCO offered "shifting reasons" for issuing a written warning to Baugher and that RELCO embellished its account of Baugher's misconduct on September 13. ALJD 26:21; ALJD 27:17-19. However, the ALJ's erroneous conclusions about "shifting reasons" is based on the innocerous fact that on September 13, Bachman sent an email to Crall (which was the only evidence the ALJ considered), stating that Baugher should be given letter of reprimand for "not wearing his PPE equipment today," R. Exh. 2; ALJD 7:7. When Baugher was given a letter of reprimand by Crall, along with his written warning on November 1, he was written up for smoking and loitering, as well as failing to wear proper protective gear while working on the B-Cab on September 13. GC Exh. 26; GC Exh. 25. First

and foremost, any added reasons for disciplining Baugher for the September 13 incident are not evidence of pretext where, as here, the reasons were not inconsistent and stemmed from the same fundamental problem with Baugher's performance. *See Beacon 76th Street Garage Corp.* 1994 NLRB LEXIS 864, *20 (1994) ("The theory that a discriminatory motive can be inferred when shifting reasons are advanced applies when those reasons are found to be false." However, real and often-stated reasons that are demonstrably true are not affected by additional reasons.).

There was no basis for the ALJ to draw a negative inference merely from the fact that Bachman did not list every infraction in his September 13 email, especially in light of the clear and consistent testimony by RELCO's witnesses about Baugher smoking and loitering on the B-cab, which was corroborated by the November 1 written warning on Baugher's policy infractions.

The ALJ unjustifiably ignored that on September 13, Crall responded to Bachman's earlier email by stating that he needed additional details. R. Exh. 2. Thus, any difference between Bachman's September 13 email and the November 1 letter of reprimand merely indicates that in the interim, Crall obtained the additional details he needed to prepare Baugher's letter of reprimand. As noted above, the ALJ wrongfully refused to credit the testimony of Benboe and RELCO's other witnesses. Certainly, the ALJ "was not entitled to find the opposite of that to which [he] testified was true" absent any evidence to support the opposite conclusion. *See Roper Corp. v. NLRB*, 712 F.2d 306, 310 (7th Cir. 1983). Here, the only person who disputed that Baugher was smoking and loitering in the B-cab was Baugher himself, whose testimony was rejected. ALJD 6:fn. 7; GC Exh. 2; Tr. 198-200. In any event, the ALJ was not entitled to draw an inference that RELCO was lying about the September 13 events simply because Bachman did not list every one of Baugher's September 13 violations incident in his September 13 email.

f. The ALJ erroneously found that the timing of the written warning for the September 13 incident was "suspicious."

The ALJ improperly found that the timing of Baugher's written warning, suspension and probation was "suspicious." ALJD 26:24-25. Exemplifying the errors in the ALJ's analysis, the ALJ cited *Medic One, Inc.*, 331 NLRB 464 (2000), where the Board held that even though the discipline at issue in *MedicOne* occurred just *three days* after the union election, it was *insufficient* to establish that the employer was unlawfully motivated in implementing the discipline. *Id.* at 475. Thus, the ALJ's reliance on *Medic One* underscores the error of the ALJ's conclusion that the timing of RELCO's issuance of a written warning, suspension, and probation to Baugher on November 1 was "suspicious" or in any way "tainted" RELCO's discipline of Baugher on November 1 several weeks after the October 20 election and months after Baugher's last known pro-union activity or his testimony on September 15 at the prior NLRB hearing.

Here, there was no dispute that RELCO delayed in disciplining Baugher on November 1 for the September 13 incident (in which the ALJ found he failed to wear proper protective gear in violation of RELCO's safety rules) and Baugher's violation of RELCO's blue flag policy on October 26, 2010 solely because of the legal advice of RELCO's attorneys that RELCO refrain from disciplining Baugher and other employees before, during and after the union election to avoid the appearance that it was trying to affect the union election. Tr. 416. RELCO duly followed the legal advice of its attorneys and refrained from disciplining Baugher until November 1. Tr. 80; Tr. 379. However, the ALJ improperly ignored the undisputed evidence of RELCO's legitimate reason for delaying the discipline of Baugher and certainly did not find that this testimony was discredited. ALJD 9:fn. 13. In *NLRB v. Stor-Rite Metal Products, Inc.*, 856 F.2d 957, 965 (7th Cir. 1988), the federal appellate court rejected the NLRB's claim of unfair labor practices because of a similar gap in time, asking, "if Stor-Rite acted with retaliatory intent, then why did it delay the full impact of its retaliation until months" after the protected conduct?

The court's answer to this question that the ALJ erred in the instant case by drawing a negative inference from the fact that RELCO 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 26:22-23.

Significantly, the ALJ also ignored the fact RELCO also waited until November 1 to discipline Sines. See GC Exh. 37(q); see also GC Exh. 37(o). Like Baugher, Sines committed a safety violation before the union election – on September 24, 2010. Unlike Baugher, Sines had no affiliation with a union and did not testify at the September 14-16 NLRB hearing. Following the advice of counsel, RELCO noted Sines' infraction but did not immediately give the written warning to Sines. Tr. 81; GC Exh. 3. Instead, RELCO waited until November 1 – the same day Baugher was disciplined – to formally suspend Sines and place him on probation. ALJD 9:fn. 13; GC Ex. 37(p). Therefore, the ALJ's implication that Sines was disciplined on September 24, so as to distinguish Baugher from Sines, is patently incorrect. ALJD 9:fn. 13. The fact that the RELCO waited until November 1 to give both Baugher and Sines written warnings and suspensions for earlier safety violations flatly contradicts the ALJ's erroneous finding that the Acting General Counsel presented sufficient evidence of animus with respect to the November 1 written warning, suspension and probation. ALJD 26:20-24. The ALJ's improper finding regarding Baugher's November 1 write-up causes all of the ALJ's conclusions regarding Baugher to fall like a "house of cards," because the ALJ used his erroneous finding that Baugher's November 1 write-up was "tainted" to justify his further conclusions that each of the subsequent instances of Baugher's discipline and ultimate discharge were also "tainted" because those decisions referred to the November 1 write-up. Based on this error alone, all of the ALJ's conclusions regarding Baugher's claims should be rejected.

g. The discipline of other employees shows a lack of unlawful motivation by RELCO in disciplining Baugher.

The ALJ improperly ignored the significance of the fact that RELCO also wrote up Sines for a safety violation on November 1. ALJD 9:fn. 13. Sines was disciplined on the very same day as Baugher, despite the lack of evidence that Sines was ever involved in union activities or testified at the prior NLRB hearing, rebutting any inference that Baugher was written up because of RELCO's animus.

It is also uncontroverted that RELCO has suspended employees who violate the blue flag policy. See GC Exh. 37(z); see also ALJD 10. These RELCO employees were suspended for solely violating the blue flag policy, while Baugher was suspended for not only violating the blue flag policy, but also for the September 13 incident. This evidence conclusively established that RELCO enforced its policies without regard to union affiliation – and in some cases, were even harsher on employees that did not have union affiliations. This proved the lack of any animus in Baugher's November 1 write-up and suspension, which the ALJ improperly disregarded it.

h. Baugher's negative performance review was proper.

As noted above, the ALJ improperly found that Baugher's performance review was "tainted" because the performance review contained a single reference to the November 1 write-up. ALJD 27:29; ALJD 28:1-3. Putting aside the fact that the ALJ's findings regarding the November 1 write-up are fatally flawed, the ALJ's presumption that some generalized antiunion bias continued to "taint" subsequent disciplinary actions is simply not sustainable, as a matter of law. *Florida Steel Corp. v. NLRB*, 587 F.2d 735, 744 (5th Cir. 1979) ("an employer's unlawful motivation cannot be based solely on the general bias or anti-union of the employer, whether proved or conceded."). The ALJ's decision regarding Baugher's performance review was also improper because he disregarded that it was not merely based on the September 13 incident.

Rather, as further detailed below, Baugher's performance review was also based on the undisputed fact that Baugher had failed to obtain his welder's certificate, his violation of RELCO's blue flag policy, and his supervisors' honest opinions about his other poor work performance. Tr. 69. More importantly, the ALJ made no finding that Baugher was reviewed any differently than any other fabricator.

i. Baugher's termination on March 11, 2011 was proper.

As discussed above, the ALJ incorrectly held that: (1) Baugher's November 1 written warning, suspension, and probation were "tainted," (2) Baugher's December 22 performance review was infected by a reference to the November 1 write-up, and (3) Baugher's discharge was infected by the prior write-ups that he admitted were based on real performance issues, but the ALJ nonetheless improperly found were "tainted." Moreover, the ALJ also improperly disregarded the undisputed facts that, as discussed more fully below, Baugher was discharged for failing to obtain his welder's certificate and failing to improve his work performance while on probation. Instead, the ALJ based his finding that the Acting General Counsel made its *prima facie* that Baugher's discharge was improper on unsupported adverse inferences drawn from RELCO's failure to continue to warn Baugher about his poor performance after his substandard performance review and the ALJ's patently improper comparison of long-term employees like Baugher (and Newton) to newly hired co-workers who had not obtained their welding certificates. Indeed, as the ALJ conceded, other RELCO employees received equally poor performance reviews in December 2010, though they had no records of pro-union activity, nor did they have Baugher's repeated safety rule violations or his long history of failing to obtain his welding certification. ALJD 17:2-10. Thus, because there is no basis for ALJ's invalid theory that

Baughner's performance review was "tainted" by some unproven bias that supposedly infected the November 1 write-up, the ALJ's conclusions concerning Baughner's discharge cannot stand.

2. There is no evidence of an animus by RELCO toward Newton's concerted activity.

As with Baughner, the ALJ ignores evidence that RELCO bore no animus toward Newton's union involvement or his testimony at the September 14-16 hearing. Instead, the ALJ's found such an animus based merely on: (1) Cronin's alleged "threat" that Newton admitted was not a threat, (2) the "short" time frame between RELCO learning of Newton's union activity in September and discipline he received over two and a half months later on November 29, 2010, (3) non-existent improprieties relating to Newton's December 22 performance review, and (4) the unfounded decision that Newton's discharge was somehow lawful because RELCO did not continue to warn Newton about his poor work performance after giving him a substandard performance review in December and because RELCO did not also fire newly hired co-workers who had not yet obtained their welding certificates, but discharged Newton and Baughner who had gone three and four years respectively without getting theirs. ALJD 30:15-18; ALJD 30:17-21; ALJD 32:1-2. As is more explained below, this is not evidence that Newton's discipline and discharge were motivated by RELCO's animus.

a. Cronin's remark to Newton was not a threat.

The ALJ improperly held that Cronin "threatened" Newton. ALJD 29:35-36. However, the ALJ ignored Newton's admission that Cronin did not act out of an antiunion animus. Tr. 109. Instead, the ALJ found that Cronin merely told Newton that he should not walk around because he was being watched. ALJD 13:10-11. In fact, Newton confirmed that Cronin simply made a friendly statement. Tr. 109. Thus, there was no basis for the ALJ to conclude that Cronin "threatened" Newton, let alone that he did so because of Newton's union activities and not

because Cronin (and RELCO's other supervisors) honestly that Newton walked around the plant too much when he was supposed to be working.

In an effort to support his conclusion, the ALJ cited *Golden State Foods Corp.*, 340 NLRB 382 (2003). Though, in that case, the employer's remark that, "[t]he eyes are on you and you need to watch your step because you can get fired for discussing this stuff on company grounds," was a clear threat of discharge that was directly related to the employee's union activities and the impending union election. *Id.* at 389. In stark contrast, Cronin's alleged statement contained no threat of discharge or any reference to union activities. Instead, Newton's admissions that Cronin made a friendly statement that was not based on antiunion animus precludes the ALJ's improper attempt to turn it into the exact opposite.

Additionally, to reach his far-fetched conclusion, the ALJ made the unsupported assertion that Newton inferred that he "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 29:40-42. However, Newton made no such statement during the hearing. Instead, the ALJ simply speculated about what Newton supposedly "inferred" to reach the desired conclusion that Cronin somehow violated Section 8(a)(1). The ALJ's speculation about a non-existent "threat" is contrary to the record and the law and cannot stand.

b. The timing between Newton's union and protected activity and his November 29 discipline was not suspicious.

The ALJ improperly found that the Acting General Counsel presented sufficient evidence of animus because of the alleged short time frame between RELCO learning of Newton's protected activities (in September and October 2010) and the November 29 discipline. ALJD 30:17-18. Established precedent confirms that the two and a half month gap in time involved in Newton's case is too long to constitute "suspicious timing," and the cases the ALJ cited confirm

this. In *North Carolina License Plate Agency #18*, the employees were terminated the very same day the employees threatened to file a complaint. 346 NLRB 293, 294 (2006); *see also Davey Roofing, Inc.*, 341 NLRB. 222, 223 (2004)(the employees were discharged the day after their participation in the union rally). Here, the significant lapse of time between Newton's activity in September, on the one hand, and his discipline on November 29, on the other hand, precludes the ALJ's inference that the discipline was motivated by Newton's union activities.

c. The ALJ had no basis to determine that Newton's performance review violated the Act.

Based on his unfounded conclusion that Newton's November 29 verbal warning was discriminatory, the ALJ made the equally unfounded determination that RELCO acted out of some unproven antiunion animus when it gave Newton his performance review and placed him on probation a month later in December. ALJD 31:19-21. As established, the November 29 verbal warning was not tainted. The only evidence presented at the hearing was that Newton received a verbal warning that he wandered too much, based on his supervisors' examination of Newton's work performance, including their good faith determination that Newton took five hours to complete tasks that should have taken two hours. ALJD 13:31-33; R. Exh. 1. The ALJ once again overstepped his authority when he found that RELCO merely made a "bare-bones" investigation of Newton's productivity before deciding to discipline him. ALJD 30:36. There is no legal standard regarding the extent of an investigation that an employer must perform before deciding to discipline or discharge an employee. There was no evidence that RELCO more fully investigated any other employee before deciding to discipline or discharge them. Thus, this is another instance of the ALJ improperly acting as a "super-personnel" office.

Moreover, the ALJ ignored the undisputed fact that Newton's performance review was not solely based on his conduct surrounding his November 29 verbal warning. Rather, RELCO

noted Newton's poor attitude, small volume of acceptable work, and Newton's inability to meet deadlines. ALJD 14:1-3; GC Exh. 17 at 1. Newton's speed, welding, and quality of work were also found by his supervisors to be very poor, and Newton failed to become a certified welder. ALJD 14:1-3; GC Exh. 17 at 3. RELCO's lack of animus was further proven by the fact that once Newton pointed out that his attendance record was incorrect, RELCO investigated it and corrected it. ALJD 14:26-27. The ALJ improperly ignored that there was no reason for RELCO to correct Newton's attendance record if it was intent on retaliation. ALJD 31:19-22. As all of these reasons show, there is no evidence to support the ALJ's finding of a violation with respect to Newton's performance review.

d. The ALJ's findings regarding Newton's termination on March 11, 2011 should be rejected.

The ALJ also improperly concluded that RELCO terminated Newton, based on his previously discussed baseless findings regarding Newton's November 29 verbal warning and the negative performance review that Newton received (along with many other co-workers with no record of union activities) on December 22. However, since none of the ALJ's findings regarding these prior disciplinary actions can pass muster, his findings regarding Newton's discharge also fail. Additionally, as discussed above, despite Newton's assertions to the contrary, his admission by remaining silent when Crall told him that he had been put on probation, when coupled with Bachman's honest belief that Newton had been placed on probation and that Newton was properly discharged for failing to obtain his welder's certificate and failing to improve upon his work performance, required the rejection of the Acting General Counsel's claims regarding Newton. *See Kariotis v. Navistar International Transportation Corp.*, 131 F.3d 672, 679 (7th Cir. 1997) (employer's non-discriminatory reason for termination prevails if employer had honest belief in its truth even if that belief was based on shoddy investigation).

3. RELCO Would Have Discharged Baugher and Newton Even Absent Any Protected Activity.

Under the *Wright Line* test, "[t]he employer can then avoid a finding of an unfair labor practice if it can show that it would have taken the action regardless; that is, for legitimate reasons." *NLRB v. Joy Recovery Tech. Corp.*, 134 F.3d 1307, 1314 (7th Cir. 1998). However, the ALJ only discussed those facts which, according to the ALJ, indicated that RELCO's reasons for disciplining and discharging Baugher and Newton were pretextual. In doing so, the ALJ misapplied the law stating that a showing of pretext requires proof that the employer's reasons were "a lie" to hide an unlawful motive, not just that the employer's reasons may have been mistaken, ill-conceived, arbitrary, or contrary to its policies and past practices. Even if the ALJ could have found that RELCO's action were mistaken, ill-considered, or arbitrary (though RELCO's reasons were well-founded), there was no legal basis for the ALJ to find that RELCO's reasons were a "pretext." *Joran v. Sumner*, 205 F. 3d 337, 343 (7th Cir. 2000); *see also Jordan Marsh Stores Corp.*, 317 NLRB 460, 476 (1995); *see also Goldtex, Inc.*, 309 NLRB 158 fn. 3 (1991) (recognizing that a respondent has not acted unlawfully if it shows that it discharged an employee based on a reasonable belief that the employee had engaged in conduct warranting discharge). Equally significant, the ALJ made no findings that RELCO's supervisors did not honestly believe that Baugher violations warranted that discipline and a poor performance review. Therefore, assuming there was a basis for the ALJ's findings that the determinations by RELCO's supervisors were mistaken, arbitrary, or based on shoddy investigations, those findings do not support the ALJ's conclusions that RELCO's reasons for disciplinary and discharging Baugher and Newton were pretextual or that RELCO would not have discharged any other employee who had the same histories of rule violations, poor work performance, and failure to get their welding certificates.

In an unavailing effort to support his finding in favor of the Acting General Counsel, the ALJ attacked each instance that Baugher and Newton were found to be poor employees as being insufficient to justify their terminations. However, in so doing, the ALJ ignored the fact that RELCO did not fire Baugher and Newton for any one of these many incidents. Rather, they were legitimately terminated because of their long histories of rule violations and poor work performance. *See Nelson v. NLRB*, 421 Fed. Appx. 342, 346 (5th Cir. 2011) (affirming the Board's rejection of the argument that each incident did not support the termination of the employee, because "[t]he Board did not base its finding on any one incident; it found that the Corporation terminated [the employee] after looking at her repeated pattern of abusive behavior..."). This error alone requires the reversal of the ALJ's finding that RELCO failed to prove its affirmative defense.

a. The ALJ failed to consider the fact that Baugher failed to obtain his welder's certificate.

The ALJ recognized that Baugher was put on notice of his poor work performance when he was put on probation and was told at that time he was to obtain his welding certificate. ALJD 10:19-20. Baugher was given three months to complete this task, and did in fact make an effort to obtain certification. However, just as he had done several times before, Baugher again failed the certification test in January 2011. ALJD 11:18-20. In addition to Baugher's three other failed welding certification tests taken between 2007 and September 2010, this amounted to a total of four failed welding certification examinations.

Most importantly, according to the ALJ Decision, an employer may never decide that an employee has been given sufficient chances to redeem himself, but that employee – who has had *three years* to pass his welding certification test and fails on the fourth time – not only does not run the risk of termination, but also the employer is punished for deciding to make such a

reasonable business decision. This is simply not the law. In his performance review, it explicitly stated that Baugher "needs to certify for welding requirements." GC Exh. 18 at 3. By using the word "needs," RELCO properly informed Baugher that it was required, not suggested, that he obtain his welding certificate.⁸ Ultimately, RELCO proved that Baugher was discharged because, among other deficiencies, RELCO determined that he could not be an effective fabricator for an extended period of time without his welding certificate.

b. The ALJ failed to consider Baugher's September 13, 2010 safety violations in his analysis of RELCO's affirmative defenses.

After the ALJ determined that the written warning, suspension, and probation were tainted, he failed to include in his analysis whether the September 13 incident – together with Baugher's other improprieties – merited the discipline he received. ALJD 28:26-43; ALJD 29:1-14. Specifically, assuming *arguendo* that Benboe's testimony as to the September 13 incident is found to be incredible, the only credible evidence involving the September 13 incident is Bachman's September 13 email to Crall. ALJD7:fn. 7. This confirms that Baugher did in fact violate the work rule, for which Baugher was issued a written warning before anyone at RELCO knew of Baugher's testimony or union activity. Thus, RELCO proved that it had legitimate reasons to issue a written warning, suspend, place on probation, issue a poor performance review, and discharge Baugher for the B-cab incident, taken together with his other violations.

c. The ALJ failed to properly consider Baugher's violation of the blue flag policy.

⁸ The fact that no timetables were set forth in Baugher's review did not mean that RELCO did not honestly expect Baugher to get his welding certificate within a few months. Tr. 76-77; GC Exh. 8 at 3. In footnotes 17 and 47, the ALJ is substituting his own business judgment in place of RELCO's by drawing a negative inference from RELCO's failure to set a deadline or continue to warn Baugher. ALJD 10:fn. 17; ALJD 29:fn. 47. The ALJ also erroneously failed to consider Bachman's testimony that it is not RELCO's practice to continue to remind employees about their outstanding requirements. Tr. 74. This is another instance of the ALJ improperly ignoring RELCO's business practice. With this negative inference, the ALJ improperly failed to consider that RELCO did not treat anyone else differently and did not give follow-up warnings or timetables.

The ALJ recognized that Baugher was aware of the blue flag policy, which he undeniably violated. ALJD 10:fn. 15; ALJD 26:35-36. In spite of this, the ALJ improperly found that RELCO "fell short in establishing its affirmative defenses." ALJD 27:5-8. The ALJ based this decision on the fact that some of RELCO's testimony about the September 13 incident was not credible, but as explained above, this too was an improper finding. ALJD 27:17-19. Notwithstanding this fact, the ALJ also underestimated the importance of the blue flag policy. The ALJ also improperly found that Baugher's violation of the blue flag policy supported a verbal warning; however, this is categorically untrue. ALJD 26:36. The ALJ overlooks instances where other employees were suspended for violating the blue flag policy. ALJD 16:5-6; GC Exh. 37(z). Like Baugher, Mark Douglas was suspended, but unlike Baugher, Mark Douglas did not have any union affiliations. Therefore, the record does not support a finding that Baugher "should" have merely received a verbal warning, since there is no pattern on which to base this conclusion. Assuming *arguendo* that Baugher should have only received a verbal warning if he had only violated the blue flag policy, the ALJ ignores that this was not Baugher's only violation, as previously discussed.

d. The ALJ failed to consider Baugher's poor work performance.

As stated in Baugher's performance review, he displayed problems with staying on task, organizing his work station, problem solving, being proactive, contingency planning, his judgments and decisions, accepting responsibly, recognizing and facilitating improvement, fulfilling goals, and improving since joining the company. ALJD 16-21; GC Exh. 18. It is inaccurate for the ALJ to claim that the performance review relied on the November 1 discipline of Baugher when it is clear that RELCO also relied on a number of other factors. ALJD 28:43. Notably, the fact that Baugher received "satisfactory" ratings in sixteen areas and an "exceeds

expectations" rating in one area shows that RELCO did not arbitrarily perform its evaluation of Baugher. ALJD 10:14-15. These shortcomings were significant, and the ALJ failed to consider these additional factors, focusing only on the September 13 incident. ALJD 28:1-3. The ALJ also erroneously failed to recognize that most of Baugher's poor performance noted in the performance review was undisputed. As confirmed by the performance review, Baugher was a critically deficient employee. Despite these apparent flaws on December 22, 2010, Baugher was afforded an opportunity to improve, which he failed to do over the course of four months.

The ALJ states that RELCO did not indicate that Baugher could be fired for failing to obtain his welding certificate and that RELCO managers did not speak to Baugher about his weaknesses or goals listed on his performance review, or otherwise indicate that they were unhappy with his performance. ALJD 29:2-4; ALJD 11:25-27. However, at the same time, Baugher knew that he was under a probationary period, was never told that his performance was good or acceptable, and was never told that he was taken off probation. Moreover, the ALJ draws an improper inference that RELCO was somehow required to speak to Baugher after his December 2010 performance review about his weaknesses or goals. ALJD 11:25-27. This inference is improper, however, as there is no evidence that RELCO has done this for any other employees who had been placed on probation for poor work performance, and in fact, stated that it was not its practice to do so. Tr. 74. By drawing such an inference, the ALJ is effectively presiding as a super-personnel official. *See Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1003-04 (7th Cir. 1999) (noting that "[t]his court does not sit as a super-personnel department and ...does not undercut and employer's legitimate business decisions without evidence of discriminatory intent, even if the decision is arguably wrong"); *see also NLRB v. Interstate*

Builders, Inc., 351 F.3d 1020, 1027 (10th Cir. 2003) (observing that the Act does not allow the Board to sit as a "super-employer").

e. The ALJ improperly found that there is no evidence that Baugher's performance was substandard during Baugher's probation.

The ALJ improperly held that there was no evidence to support RELCO's assertion that Baugher's performance was substandard between November 1, 2010 and March 11, 2011. ALJD 29:9-11. However, Baugher was on notice that he was placed on probation on November 1. At no time during this probationary period was Baugher notified that he was taken off probation, that his level of work had improved, and that RELCO had excused his requirement to retake the welding certification examination. The lack of any change in Baugher's status confirms that his performance was stagnant and that Baugher knew that he was required to improve his performance.

f. The ALJ failed to consider the fact that Newton failed to obtain his welder's certificate.

The ALJ conceded that Newton's review clearly laid out RELCO's concerns and he was told that he needed to obtain his welding certificate. ALJD 14:3-5; GC Exh. 17 at p. 3. Like Baugher, Newton was not a certified welder after he failed his initial certification test within ninety days of beginning his employment. Unlike Baugher, Newton never so much as attempted to retake this examination, despite having several years to do so and being told at his performance review in December 2010 that he was required to obtain a welder's certificate.

As explained above, it was necessary for fabricators to obtain their welding certificate because they could not be an effective fabricator for an extended period of time without this welding certificate. After providing years for Newton to comply and given notice that he was needed to comply at his performance review, Newton still failed to even schedule a welding

certification test. In his performance review, it explicitly stated that Newton "needed to weld certify in the 1st quarter of the year." GC Exh. 17 at 4. By using the word "needed," RELCO properly informed Newton that it was required, not suggested, that he obtain his welding certificate. However, by failing to do so, this proved to RELCO that he was not interested in improving and that RELCO's business interests were harmed by continuing to employ a fabricator who could not properly weld. Based on this, together with Newton's other deficiencies RELCO proved that Newton was properly discharged, notwithstanding his union activities.

g. The ALJ failed to consider that Newton's poor work performance warranted discharge.

The ALJ improperly failed to take into account RELCO's testimony that supervisors noted that Newton was walking around the plant too much in his analysis as to whether RELCO had a legitimate business reason to discharge Newton. ALJD 31:43-47; ALJD 1-29. Specifically, it took Newton five hours to complete tasks that should have taken two hours. ALJD 13:32-33; R. Exh. 1. The ALJ improperly credited Newton's testimony regarding his version of events that transpired on November 29, including Newton's explanations as to why he was walking from one end of the warehouse to the other on multiple occasions, failing to note the self-serving aspect of Newton's testimony as opposed to the consistent testimony of Benboe, Crall, and Bachman, as well as written evidence. ALJD 13:2-7; ALJD 13:13-20; R. Exh. 1. At the same time, the ALJ ignored Benboe's testimony that Newton was often observed wandering around the warehouse and was warned about this on several occasions by Benboe. Tr. 326. Newton admitted he was wandering around the plant. Though he may have felt it was for legitimate reasons, RELCO supervisors disagreed on legitimate grounds. On November 29, 2011, Benboe and Crall observed Newton wandering the warehouse on three separate occasions – more than any other RELCO employee had been observed doing. Tr. 344.

The ALJ also states that "Newton did not receive any negative feedback or criticism from his supervisors at any point after his December 2010 performance review." ALJD 15:13-15. However, this is irrelevant. As is the case with Baugher, nobody told Newton that his performance was acceptable during this time when he knew that he was on probation. His only conclusion could be that his performance was stagnant and not meeting RELCO's expectations. Moreover, the ALJD is once again acting as super-personnel office by requiring that RELCO give Newton negative feedback or criticism after his December 2010 performance review. ALJD 15:4-5. Once again, the ALJD is infusing his own judgment as to how the business should be run, which, as discussed above in regards to Baugher, is contrary to the law.

Moreover, Newton's assertions about his own work performance – that he did not have a bad attitude and did not weld poorly – are irrelevant, because it is the employer's perceptions that matter. ALJD 14:29-30. The employer honestly believed that Newton's attitude was bad and his welding was poor, as confirmed by Newton's failure to obtain his welding certificate. Notwithstanding this, even Newton conceded that there were aspects of his performance that needed improvement. ALJD 14:31-32; Tr. 116.

h. The ALJ improperly inferred a negative finding for Cronin's testimony.

The ALJ also improperly inferred that Cronin's testimony would not have supported RELCO's defense regarding the November 29 allegation involving Newton. ALJD 30:26-30. Such an adverse inference requires a showing that the witness was available to the employer, which Cronin was not due to an illness. *See Queen of the Valley Hospital*, 316 NLRB 721, 726 (NLRB 1995) ("An inference adverse to the party who fails to call witnesses otherwise available to it, or neglects to explain the failure to call such witnesses, has been established law since the early days of the Board.").

In any case, like in *Roosevelt Memorial Medical Center*, there is no basis to make this negative inference, because Cronin's testimony is not necessary. 348 NLRB 1016, 1022 (NLRB 2006) ("...we find no basis for inferring that the Respondent feared that Hunter's testimony would have been adverse. We infer instead that the Respondent elected not to call Hunter because the other record evidence supporting Brown's testimony made Hunter's testimony unnecessary."). Here, Cronin's testimony was unnecessary, since Newton, the other witness, did not testify that it was a threat, as no testimony was elicited to determine whether Newton felt as though Cronin's statement had a causal relationship with his protected activities, there was no reason to call Cronin as a witness to rebut the testimony. Moreover, Benboe and Crall effectively testified as to their observations of Newton's constant wandering. It was unnecessary for Cronin to testify to merely reiterate the points made by Benboe and Crall.

i. The absence of evidence of disparate treatment proves RELCO's lawful motivation.

The ALJ stated that RELCO has established a track record of issuing verbal warnings to employees who violate its blue flag policy. ALJD 16:3-4. However, the ALJ based this conclusion on the fact that two verbal warnings were issued to two employees, but calling this a "track record" is wrong. ALJD 16:3-4. There were also two incidents when two employees were suspended for violating the blue flag policy. ALJD 16:5-7; GC Exh. 37(z). If anything, these incidents serve to corroborate that RELCO disciplines its employees for blue flag violations without regard for union affiliations.

The ALJ also improperly held that Steve Cox, Jonathan Richards, Jesse Neal, and Mark Douglas are similarly situated to Baugher and Newton merely because they, along with Baugher and Newton, are fabricators who have failed to obtain their welding certificate. ALJD 17:2-4. In *Bio v. Federal Express Corp.*, the Seventh Circuit held that "a similarly situated employee is one

who is directly comparable to [the plaintiff] in all material respects." 424 F.3d 593, 597 (7th Cir. 2005); *see also St. George Warehouse, Inc.*, 349 NLRB 870, 879 (2007) (no other employees found to be similarly situated to employee because no one else was responsible for four overweight containers). However, in *Bio*, the Seventh Circuit held that the plaintiff and a co-worker were *not* similarly situated, because, even though the co-worker also had job performance problems, he did not have as much experience on the job as the plaintiff. *Id.*

Similarly, in this case, despite the ALJ's assertions to the contrary, Steve Cox, Jonathan Richards, Jesse Neal, and Mark Douglas are not similarly situated in all material respects. *Patt v. Family Health Systems, Inc.*, 280 F.3d 749, 752 (7th Cir. 2002) (employee not similarly situated to co-worker who had worked for employee one year longer). Specifically, they are not proper comparables or similarly situated to Baugher or Newton, since they had been hired at least one year, and in several cases, three years after Baugher and Newton.

In essence, the ALJ found that Baugher and Newton were similarly situated to the four employees he cherry picked because they were similarly situated in one respect (their skill development rating). Footnote 31 of the ALJ's Decision shows that the ALJ is "cherry picking" his comparables, as he ignored other employees that were discharged for poor performance and for not having skills that met RELCO's needs. *See Crawford v. Indiana Harbor Belt RR Co.*, 461 F.3d 844, 846 (7th Cir. 2006) ("cherry picking" among comparisons is improper); ALJD 17:fn.31; GC Exh. 38(u); GC Exh. 38(hh).

The mere fact that they were all given similar skill development ratings does not show that the other four employees were similar to Baugher or Newton in their experience on the job, much less that they were similarly situated to Baugher or Newton in "all material respects." Thus, the ALJ erred as a matter of law.

Further, a comparison of the individuals shows that Steve Cox is easily distinguished from Baugher and Newton because it is undisputed that Steve Cox had not been employed as long as either Baugher or Newton, and that he no longer worked solely as a welder, but had been transferred to do mechanical work. Tr. 419. Thus, Steve Cox was not comparable or similarly situated to Baugher and Newton, who were hired solely as fabricators. Tr. 419.

In regards to the remaining employees, Jonathan Richards, Jesse Neel, and Mark Douglas, they had been hired only since early June 2009, had far less time with the company than Baugher and Newton, and did not have their long history of poor performance. GC Exh. 6, GC Exh. 7, GC Exh. 8, GC Exh. 9, GC Exh. 10, GC Exh. 11; Tr. 146; Tr. 95. Clearly, these employees are also not similarly situated with Baugher and Newton. The ALJ did not cite any other similarly situated employees who had the same rule violations and who failed to pass the welding test who were not fired. Without such an analysis, Baugher and Newton have not been treated disparately, and the ALJ's findings are inherently flawed.

B. The Acting General Counsel failed to establish its *prima facie* case that RELCO violated Sections 8(a)(1) of the Act when it discharged Pace and Renfrew for spreading false rumors.

"In all cases alleging unfair labor practices, the General Counsel has the burden of showing, by a preponderance of the evidence, that an improper motive contributed to the employer's action." *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 137 (2d Cir. NY 1990). That is, regardless of whether the matter is a single motive case (as the ALJ improperly claims) or a dual motive case, the Acting General Counsel still bore a burden to show that Pace and Renfrew were discharged because of an improper motive – a burden the Acting General Counsel failed to meet. The ALJ erroneously concluded that this is a single motive case and that the Acting General Counsel made an initial showing that RELCO discharged Pace and Renfrew

in violation of Section 8(a)(1) of the Act when it discharged the Pace and Renfrew for spreading false rumors. There is no evidence that Pace and Renfrew's activities were protected under the Act, since they were not done for the mutual aid or protection of others. Because the ALJ improperly concluded that this is a single motive case, he improperly failed to: (1) recognize that RELCO's decisionmakers did not bear any animus (or an improper motive) toward Pace and Renfrew's alleged concerted activities, and (2) analyze RELCO's affirmative defenses.

1. The ALJ improperly concluded that this is a single motive case.

The ALJ improperly found that there is no dispute that RELCO discharged Pace and Renfrew because Pace and Renfrew engaged in an activity that was protected by the Act based in large part on his error law that this was a single motive case.⁹ ALJD 34:10-15.

RELCO's Employee Manual comports with *Central Security Services*, which held that an employer may properly have a policy that prohibits false statements that were made with the knowledge of the falseness of the statement or with ruthless disregard of the truth. 315 NLRB 239, 249 (1994). Indeed, Pace and Renfrew admittedly spread this malicious rumor with ruthless disregard for whether it was true or not and with ruthless disregard for the fact that the false rumor that Kendall had been discharged was going to anger and upset Kendall and his friends. The Acting General Counsel failed to charge that RELCO's rule was invalid. The ALJ made no finding that RELCO's rule was invalid. Thus, RELCO's rule is valid. Because Pace and Renfrew were discharged for a legitimate reason – i.e., violating RELCO's legitimate rule found in its Employee Manual – this is a dual motive case. As such, the ALJ erred in ignoring the

⁹ The ALJ also improperly assumed, without any analysis or support, that Pace and Renfrew's comments were not malicious. ALJD 33:21-29. However, if spreading false rumors that co-worker has been fired and also texting the co-worker to ask if he has been fired and may not be able to support his family is not malicious, what is? Not surprisingly, the ALJ cited no legal authority to support the unwarranted assumption that spreading false rumors that a co-worker like Chris Kendall has been fired is somehow not malicious. There is certainly no dispute that RELCO honestly believed that Pace's and Renfrew's actions were malicious.

lawful reason asserted by RELCO for discharging Pace and Renfrew, and the ALJ compounded this error by failing to analyze this matter under the *Wright Line* and disregarding RELCO's affirmative defense. For this reason, the ALJ's decision regarding Pace and Renfrew cannot stand.

2. The ALJ erroneously concluded that Pace and Renfrew were engaged in protected concerted activity.

Among the many other reasons why the ALJ's findings regarding Pace and Renfrew are fatally flawed, the ALJ's interpretation of concerted activities is patently overbroad, legally unsupported and erroneously encompasses virtually every conversation any employee may have with another employee. *See Fresenius USA Mfg.*, 2010 NLRB LEXIS 325, *36 (2010) ("the protection to be afforded an employee's conduct hinges upon its purpose"). For example, in *Eggo Frozen Foods Div.*, it was held that five employees did not engage in any protected concerted activity when they left their respective work stations to see what was happening regarding the firing of another employee, but did not protest the firing or in any way indicate any intent to prepare for, incite, or induce any group activity support of the discharged employee. 209 NLRB 647, 647 (1974). Here, the ALJ improperly disregarded Pace and Renfrew's admissions that their conversations with other employees was the result of their individual curiosity about whether Kendall had been fired and was not part of any intent to prepare for or induce group activity.

Here, Pace and Renfrew's admission that they did not seek to initiate or induce others to act, the fact that neither they nor anyone else brought their concerns to the attention of any RELCO manager, and the fact that no one delegated them to speak for anyone else simply precludes the ALJ's erroneous and unsupported conclusion that this case somehow involved "circumstances where individual employees seek to initiate or to induce or to prepare for group

action, as well as individual employees bringing truly group complaints to the attention of management." ALJD 33:1-4.

- a. **The ALJ did not acknowledge RELCO's argument that Pace and Renfrew admitted that they did not act for the mutual aid or protection of others.**

The ALJ found that "preliminary conversations between employees about working conditions are indispensable steps toward group action, and thus are themselves concerted activities." ALJD 33:fn. 49. This finding, however, ignores Pace and Renfrew's admission that they did not act for the mutual aid or protection of others – an indispensable requirement for findings of protected concerted activities. *See* 29 U.S.C. 157. Pace and Renfrew's admissions distinguish this case from *Paraxel Int'l LLC*, 356 NLRB No. 82 (2011). That is, in *Paraxel*, the charging party never admitted that she did not intend to act for the mutual aid or protection of others. *Paraxel Int'l LLC*, supra slip op. at 3-4. Here, on the other hand Pace and Renfrew admitted that their gossiping about whether Kendall was fired had nothing to do with the terms and conditions of their employment, nor did their discussions about this false rumor seek to involve other RELCO employees in any kind of way. Tr. 250; Tr. 279. Even the NLRB has recognized in *Lee Enterprises, Inc. d/b/a Arizona Daily Star*, Case No. 28-CA-23267 (April 21, 2011) that an employee's individualized communications (in that case, tweets), even when other employees offer "emotional support" for these communications, were not concerted activities protected by Act Section 7 and the employers' discharge of the employee for those communications did not violate Act Section 8(a)(1). There, as here, the employee's communications (tweets) were not related to the terms and conditions of his employment and did not seek to involve other employees in mutual, employment-related issues. *Id.* However, the ALJ improperly ignored this analysis.

Any after-the-fact suggestion that Pace and Renfrew somehow acted for the mutual aid and protection of others is rebutted by their own admissions and by the fact that they never have brought any concerns to management or took any affirmative actions to thwart RELCO's layoffs. *See ARO, Inc. v. NLRB*, 596 F2d 713, 718 (6th Cir. 1979) (employee's testimony that she was not acting on behalf of others was enough to preclude a finding of concerted activity). Merely passively spreading a rumor is not the sort of protected activity contemplated under the Act. *See NLRB v. Esco Elevators, Inc.*, 736 F2d 295, 300 (5th Cir. 1984) (court held that a discharged employee was not engaged in a concerted activity when he made safety complaints to his employer, because there was no showing that the employee made the complaints to enlist the support of other employees or that the complaints had any relation to group action in the interest of employees). Testimony presented at trial did not remotely begin to suggest that Pace and Renfrew were spreading the rumor to act to somehow secure their co-workers' jobs. Pace and Renfrew admitted that when they were talking to others about the rumor, there was no talk about employees banding together and taking some action to correct what they thought had happened. Tr. 563; Tr. 293. Pace also admitted there was no talk of the shop banding together or doing anything collectively about Kendall. Tr. 263. Renfrew conceded that when he spoke to others about the Kendall rumored termination, he just talked about how surprised he was. ALJD 20:fn. 34; Tr. 294. Pace sent text messages during work hours to Kendall, and Renfrew continued to spread the rumor for their own selfish concerns, not to instigate any group activity.¹⁰ Tr. 279; Tr. 294.

¹⁰ The ALJ improperly speculates, "It stands to reason that Kendall's phone would show when the text was received (not sent), since Kendall was the message recipient." ALJD 20:fn. 35. However, this is improper speculation, as there was no evidence presented to support such a conclusion. The ALJ also improperly found that RELCO failed to investigate the timing of Pace's text so as to find that it was strong evidence to support the rationale that discharging Pace was pretextual. ALJD 34:fn. 50. The ALJ ignores the fact that Bachman interviewed Pace and Kendall, inspected Kendall's phone, and wrote down his observations at the time. It is not for the ALJ to determine the lengths Bachman should have gone in his investigation.

b. The ALJ did not acknowledge RELCO's argument that Pace and Renfrew's conduct indefensibly injured RELCO.

The ALJ improperly failed to even acknowledge RELCO's argument that Pace and Renfrew's conduct was not protected because RELCO was indefensibly injured by it. ALJD 32:34-44; ALJD 33:1-38; ALJD 34:1-15. Section 7 protects only "concerted activity" for certain purposes, namely collective bargaining (which is not at issue here), or "other mutual aid or protection." 29 U.S.C. §157. Section 7 does not protect individualized activities that are not intended to protect concerted activities that are unlawful, in breach of contract, violent, or indefensibly injurious to the employer's interest. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962). "[M]isconduct that is 'flagrant or render[s] the employee unfit for employment' is also unprotected." *Carleton College v. NLRB*, 230 F.3d 1075, 1081 (8th Cir. 2000), quoting *Earle Indust., Inc. v. NLRB*, 75 F.3d 400, 406-08 (8th Cir. 1996).

In this case, Pace and Renfrew freely and repeatedly admitted that they spread a false rumor throughout RELCO that Kendall had been fired. Tr. 394; Tr. 250; Tr. 395; Tr. 279. They admitted that this rumor caused unnecessary speculation and conjecture at the plant, and caused people to become unnecessarily concerned for their jobs. Tr. 249. In fact, the ALJ recognized that "other employees continued to chatter about Kendall's status." ALJD 20:18. Thus, there can be no dispute that Pace's and Renfrew's involvement in the spreading of such false rumors disrupted the workplace, inexcusably upset a co-worker who was valued by RELCO, injured RELCO's interests, and caused unnecessary concern to Kendall and other employees. By spreading false rumors that Kendall had been discharged, Pace and Renfrew engaged in conduct that is not protected by the Act because it indefensibly injured RELCO. However, the ALJ improperly failed to acknowledge this.

3. The ALJ improperly ignored the absence of any animus by RELCO.

Because the ALJ improperly ignored the *Wright Line* analysis, the ALJ improperly failed to analyze whether RELCO had an animus against Pace and Renfrew's alleged protected activity. That is, assuming *arguendo* that Pace and Renfrew spreading malicious gossip is protected under the Act, there was no evidence of animus presented. As more fully set forth above, RELCO did not harbor any animus against unions. Moreover, Pace and Renfrew did not have any connection to a union or desire to unionize. At the time of their discharge on December 22, 2010, RELCO's employees had chosen to not unionize, and there was a one-year ban in place against union certification. Furthermore, there was no testimony elicited, nor any evidence presented, that RELCO bore an animus against employees banding together to speak with the management about employment conditions.

4. The ALJ should have found that RELCO Would Have Discharged Pace and Renfrew Even in the Absence of Their Concerted Activity.

Again, because the ALJ improperly failed to analyze this matter under the *Wright Line* test, he improperly ignored RELCO's affirmative defenses. As stated above, to establish its burden under *Wright Line*, RELCO need only to prove that it had a reasonable belief that Pace and Renfrew engaged in misconduct, and that it acted on that belief in discharging them. However, the ALJ failed to even consider RELCO's rebuttal case. In particular, the ALJ failed to consider Pace and Renfrew's violation of RELCO's Employee Manual, which states that harassment of a co-worker and spreading rumors is an unacceptable activity that is punishable by termination of employment. R. Exh. 76.

There is no question that Pace and Renfrew had knowledge of RELCO's policy against harassment and spreading rumors. They admitted that they repeatedly spread the false rumor about Kendall by texting him and talking with numerous co-workers. Other employees continuing to discuss the state of Kendall's employment reveals why RELCO, like other

companies, has a rule against spreading malicious false rumors, as the wild chatter disrupted RELCO's plant, caused a distraction among its employees, and led to unbridled speculation about RELCO. Tr. 395; Tr. 279. Also, as discussed above, RELCO's policy against spreading rumors was proper and did not violate the Act. Accordingly, Pace and Renfrew were discharged for legitimate reasons – breaching a proper employee policy.

Pace admitted that he sent a text message to Kendall. ALJD 20:24. That is, rather than speak with a company manager, Pace and Renfrew continued to feed the hysteria they created. Kendall was deeply upset by the rumors and was still fearful for his job by 3:00 p.m. on December 22, 2010. ALJD 20:1. The fact that Kendall still did not know his employment status so late in the work day means that he had to endure almost a full day of uncertainty about his and his family's livelihood as a result of the false rumors that Pace and Renfrew helped spread.¹¹ Clearly, RELCO had uncontroverted evidence that Pace and Renfrew had violated RELCO's proper policy.

The ALJ improperly implies that Bachman should have merely addressed the rumor at a staff meeting. ALJD 22:fn. 38. However, the ALJ overlooks that this rumor was markedly different than the other instance of rumor-spreading. Specifically, in the past, Bachman has spoken with the staff when the rumor involved the possibility of organizing a union. Tr. 260. That was not a malicious rumor, as the rumor about Kendall in this case was. Further, there are many legitimate reasons as to why Bachman may not have wanted to merely address this rumor about Kendall at a staff meeting, such as not wanting to embarrass Kendall any further. It is not for the ALJ to infuse his business judgment and decide that Bachman should have addressed the

¹¹ The ALJ improperly speculated that "it stands to reason that Kendall would not have been upset when he returned to work on December 23, once again, infusing his own judgment, rather than looking at the record on its face. The record reveals, and the ALJ ignores, Kendall's testimony that he was "cranked up" because of the rumors. Tr. 239.

staff when this current situation was so distinguishable from the rumor in the past. Accordingly, RELCO's legitimate business decision should be upheld, and the General Counsel's claims regarding Pace and Renfrew should be dismissed.

IV. CONCLUSION

For each and all of the foregoing reasons, the ALJ's decision should be reversed, and the Board should dismiss the Complaint in its entirety.

Respectfully submitted,
RELCO LOCOMOTIVES, INC

By: /s/ Paul E. Starkman
One of Its Attorneys

Paul E. Starkman
Svetlana Zavin
Pedersen & Houpt
161 N. Clark, Suite 3100
Chicago, IL 60601
312-261-2173
pstarkman@pedersenhaupt.com
szavin@pedersenhaupt.com

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

Paul E. Starkman
Svetlana Zavin
Pedersen & Houpt
161 N. Clark, Suite 3100
Chicago, IL 60601
312-261-2173
pstarkman@pedersenhaupt.com
szavin@pedersenhaupt.com