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 REPLY TO ACTING GENERAL COUNSEL'S ANSWERING BRIEF

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

Attorneys for Respondent

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I. INTRODUCTION

In response to RELCO Locomotives Inc.'s ("RELCO") Exceptions and Supporting Brief ("RELCO's Brief"), the Acting General Counsel (the "AGC") filed its Answering Brief on Dec. 5, 2011, that failed to address many of RELCO's exceptions, and made numerous misstatements of facts and law. For these reasons, RELCO, respectfully requests that its Exceptions be granted.

II. ARGUMENT

A. The AGC's Answering Brief failed to support the ALJ's improper credibility determination.

RELCO's Brief clearly laid out how the ALJ had misstated the record in its credibility findings. The AGC did not address the substance of this RELCO exception, instead it claimed that RELCO could not address the correctness of the ALJ's findings in an improper attempt to shift focus away from the ALJ's record misstatements. *See* Exc. Br. 18-22; Ans. Br. 2.[1] The AGC parroted the ALJ's erroneous conclusion that RELCO's reasons for disciplining and suspending Mark Baugher ("Baugher") on Nov. 1 were somehow "tainted" because it did not track exactly the Sept. 13 email that Mark Bachman ("Bachman") sent to David Crall ("Crall"). The AGC ignored that Crall's response to Bachman's Sept. 13 email asked for further details about Baugher's activities on Sept. 13. Crall's subsequent investigation into the additional observations of Baugher's supervisors that they saw Baugher smoking and loitering on the job during the Sept. 13 incident explain why the Nov. 1 write-up differed slightly from Bachman's Sept. 13 email and

[1] The Acting General Counsel's Answering Brief will be designated as "Ans. Br. __." RELCO's Brief in Support of its Exceptions will be designated as "Exc. Br. __." References to the hearing transcript will be abbreviated as "Tr.___."

rebuts the ALJ's finding that RELCO somehow "padded" the Nov. 1 write-up. Yet, the AGC simply ignored these points. Exc. Br. 23.

The AGC also ignored how the ALJ erroneously refused to consider Cliff Benboe's ("Benboe") testimony based on a non-existent inconsistency in the record. Benboe never admitted during cross-examination or in his affidavit that he did not see the Sept. 13 incident. Exc. Br. 22. Rather, on cross-examination, Benboe explained his affidavit, in which he had said that he "was not involved in the incidents for which [Baugher] was being suspended," by stating that he believed that the incident for which Baugher was suspended was *only* Baugher's blue flag violation (which Benboe admitted he was not involved in), a discrepancy cleared up by the fact that Benboe was not involved in the decision to suspend Baugher. Tr. 336; Tr. 346. Accordingly, the AGC improperly ignored Benboe's subsequent testimony that explained away the non-existent inconsistency between his testimony and his affidavit.

Likewise, the ALJ's conclusion that Charles Newton's ("Newton") discharge was somehow tainted because Newton claimed that he was never put on probation during his performance evaluation should be rejected. The AGC admitted in its Answering Brief that Newton *was* placed on probation during his performance evaluation on Dec. 22, 2010.[2] *See* Ans. Br. 17. The AGC's admission must be coupled with Newton's own admission by silence at his termination meeting when he concededly did not object or protest when Crall told Newton that he had been placed on probation on Dec. 22. Unable to rebut that the legal requirement of an admission by silence were met, the AGC was reduced to conjecture that Newton may not have

[2] Unless stated otherwise, all the events discussed in this Reply occurred in 2010.

been able to "gather his wits" to disagree with Crall. Ans. Br. 5. However, (i) Newton never testified that he was unable to "gather his wits" to disagree with Crall at Newton's termination meeting on Mar. 11, 2011, and (ii) the AGC's speculation is belied by Newton's admissions that he was able to "gather his wits" to disagree with Crall at the termination meeting about other assertions that Crall made about Newton's performance record. Exc. Br. 20.

The AGC continues to rely upon the ALJ's incorrect assertion that RELCO's witnesses supposedly testified that there was insufficient work for fabricators (like Baugher and Newton) who could not pass the welding certification test. Ans. Br. 5. However, Benboe never said that. Rather, Benboe testified that "[o]ver the long haul," a fabricator cannot be an effective fabricator for an extended period of time without being able to become a certified welder. Tr. 322.

As pointedly ignored by the AGC, the difference between the ALJ's misstatement of the record about what Benboe actually testified at the hearing is crucial because RELCO did not terminate Baugher and Newton because there was insufficient work for them, but because "over the long haul," they were not effective fabricators for an extended period of time due to their inability to pass the welding test for four and three years, respectively. Thus, RELCO clearly had a legitimate reason to terminate Baugher and Newton based on Baugher and Newton's failures to become certified welders. Exc. Br. 42. It is contumacious for the AGC to continue to assert that Baugher and Newton were comparable or legally similarly situated to those other less-experienced fabricators, while ignoring that the cases cited by RELCO that unequivocably hold that Baugher and Newton were not similarly situated to such co-workers who had far less experience with the Company, and the other less experienced fabricators had nowhere near the

number of safety violations, disciplinary write-ups, and documented performance problems that Baugher and Newton had. Clearly, the AGC's invalid attempt to compare Baugher and Newton to newly hired, better performing co-workers and the record misstatements underlying the ALJ's credibility findings demonstrated that the ALJ's credibility findings and legal conclusions that Baugher and Newton's discipline and discharge were somehow "tainted" are patently erroneous and cannot stand. *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).

B. The AGC ignores the fatal flaws that require the reversal of the ALJ's findings.

As the AGC attempts to downplay, the ALJ's findings in favor of Baugher are all rooted in the unremarkable fact that Bachman's three-line Sept. 13 email to Crall did not mention Baugher was smoking and loitering during the incident when. However, (i) the ALJ found Bachman's Sept. 13 email was credible; (ii) Bachman's email requested a write-up of the Sept. 13 incident and used Baugher's failure to wear protective fear to describe the incident; (iii) Bachman nowhere indicated that there were not other aspects of Baugher's actions on Sept. 13 that warranted discipline; (iv) Crall's response to Bachman's Sept. 13 email stated that Crall needed additional details and would gather them; (v) Baugher subsequently violated RELCO's blue flag policy on Oct. 26; and (vi) RELCO's legal counsel advised RELCO to hold off punishing Baugher until Nov. 1 in order to avoid interfering with the union election. The ALJ and the AGC improperly ignored all of these undisputed intervening events between Bachman's Sept. 13 email and the Nov. 1 write up that Baugher received, and instead myopically focused on the mere fact

that the Nov. 1 write-up mentioned Baugher's smoking and loitering in addition to his failing to wear proper protective gear and Bachman's three-line Sept. 13 email did not.

In an invalid attempt to make a mountain out a molehill, the AGC merely restated well-worn but inapplicable maxims about "shifting" and "embellished" reason or "suspicious timing" but ignored that the undisputed evidence that Bachman requested a write-up, his supervisors gathered additional details and prepared a more complete write-up, but waited to deliver the write-up based on the advice of the Company's legal counsel. As pointed out in RELCO's Brief, there was simply no legal or factual basis for the ALJ to draw a negative inference that the Nov. 1 write-up was tainted, much less that all of Baugher's subsequent discipline and write-ups (even though he did not dispute most of them) and his discharge were also somehow tainted.

The AGC could not dispute that RELCO treated Baugher the same way it treated Sines, who had engaged in no union activities. The AGC tried to distinguish Sines by pointing the unremarkable fact that one of the Sines supervisors mentioned he would be disciplined, but ignored RELCO's Brief that explains why Sines was spoken to on Sept. 24, and Baugher was not. *See* Exc. Br. 9, fn. 4. The operative fact is that the discipline for Baugher and for Sines – who had no union affiliation – was both delayed until Nov. 1. This flatly belied the ALJ's finding (and the AGC's attempt to support it) that any delay in giving Baugher his Nov. 1 write-up was "suspicious" or supported an inference of anti-union animus.

C. RELCO's discharge and discipline of Newton was proper.

The AGC asserted that Newton's Nov. 29 warning was "tainted" because "Respondent was obviously looking for something to get Newton on" is a conclusory statement that is not

supported by the record. Likewise, the AGC egregiously claimed that page 109 of the transcript did not contain an admission from Newton that Jim Cronin ("Cronin") made a friendly statement to Newton when he told him that that he should not walk around because he was being watched. Newton testified that Cronin "gave me a heads-up," which the AGC and the ALJ have improperly tried to twist into a threat. Tr. 109. Their unsubstantiated conclusions about a "threat" are laced with sheer speculation that Cronin's statement somehow interfered with Newton's right to participate in the union. Newton never testified that Cronin's statement was a threat or that it interfered with his ability to do his job. Thus, this case is similar to *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (NLRB 2006), wherein the additional testimony was not necessary because the events had already been sufficiently corroborated. Here, Newton, Benboe, and Crall had testified to the events surrounding Cronin's statement, with no mention of a threat by Cronin. Because it was unnecessary for RELCO to call Cronin to testify to merely reiterate the testimony of Newton, Benboe and Crall, (assuming Cronin was available to testify and not sick), the AGC's argument that RELCO's failure to call Cronin as a witness somehow warrants an adverse inference is without any factual basis or legal support.

The AGC's reiteration of the ALJ's inference that animus existed because there was an "inadequate" investigation before disciplining Newton also ignores the legal reality that the ALJ was not entitled to act as a super-personnel official. Exc. Br. 30. As the AGC's continued conclusory assertion that RELCO conducted a "poor" or "bare bones" investigation ignores, the dispositive case law is that such arguments of "shoddy" investigation are unavailing and the

AGC's argument fails to address that RELCO never performed a more "complete" investigation of any other employee before deciding to discipline or discharge them. Exc. Br. 30.

Likewise, the AGC tried to suggest that a sinister motive could somehow be gleaned from the fact that RELCO had not disciplined other employees besides Newton (and Baugher) for similar performance reasons or for failing to pass the welding test, but the AGC ignores that no other employee similarly situated to Newton (and Baugher). *See* Exc. Br. 12, 15. The AGC's attempt to rely on the mere fact that Newton was not disciplined *before* 2010 is not "dispositive proof" that Newton (or Baugher) were adequately performing in 2010 or 2011, given the controlling case law cited by RELCO that past performance does not show adequate performance at the time of discharge, where economic conditions have changed and there is no evidence that poor performance that might have been tolerated in newly hired employees was tolerated from employees who had worked for the company for as long as Newton and Baugher. Here, the AGC's attempt to find any legal or factual support for the ALJ's decision fails.

D. The span of time between Baugher and Newton's testimony and discharge was too great to support an inference of antiunion animus.

Despite the appellate court cases cited by RELCO that the six month gap between Baugher and Newton's testimony at the Sept. hearing and their discharge in Mar. 2011 was too great to establish a causal connection, the AGC cited for the first time in its Answering Brief an NLRB decision, *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), but that decision is clearly distinguishable. There, the NLRB found that an especially vigorous anti-union campaign and the systematic discharging of four other employees involved with the union in the interim did not break the causal connection. Here, in stark contrast, the other RELCO employees

who had testified at the hearing with Baugher and Newton had *not* been discharged, and no other employees involved with the union at RELCO were discharged between Sept. 2010 and Mar. 2011. The AGC's reliance on *Globe Security Systems*, 301 NLRB 1219, 1224-1225 (1991) is also misplaced because there was evidence that the respondent did not consider the disputed union activities to be over. Here, there was no evidence that RELCO knew or suspected anything about Baugher and Newton's continued union involvement. In rejecting a similar claim, the appellate court in *NLRB v. Stor-Rite Metal Products, Inc.*, 856 F.2d 957, 965 (7th Cir. 1988) asked a question that applies here with equal if not greater force: if RELCO possessed a retaliatory intent, why did it wait six months to carry it out?

E. No facts or law support the ALJ's determination that Baugher and Newton were treated disparately.

The AGC asserted without factual or legal support that RELCO was somehow not entitled to discharge Baugher and Newton because RELCO did not set a specific deadline as to when they had to obtain their welder's certificate. The AGC is attempting to support the ALJ's invalid efforts to as a "super personnel office" in order to second-guess RELCO's management style. However, no other RELCO employees were given a specific deadline to obtain their welder certificate and no one else had worked for the Company for as long as Baugher and Newton without passing the welding test. Instead, the AGC repeatedly pointed to Steve Cox, Jonathan Richards, Jesse Neal, and Mark Douglas, but ignored the legal reality that they were not similarly situated to Baugher and Newton because they had not worked for RELCO for as long as Baugher and Newton, they did not have their long record of safety violations and poor performance. In the AGC's zeal to support the ALJ's determination, the AGC myopically and

improperly focused on one factor on their performance evaluations (the growth potential). Quite simply, the absence of any legitimate comparables to Newton and Baugher, as explained in full detail in RELCO's Brief (and conveniently ignored by the AGC) requires the rejection of the ALJ's determination. *See* Exc. Br. 40-42.

F. Pace and Renfrew's discharge should have been analyzed as a dual motive case.

The ALJ improperly failed to analyze Pace's ("Pace") and Renfrew's ("Renfrew") claims under the dual motivation analysis set forth in *Wright Line*, though RELCO offered a legitimate business reason for their discharge, namely that they spread malicious rumors in the violation of RELCO's employee policy. Even the AGC's Post-Hearing Brief included a *Wright Line* of their claims. Thus, the AGC conceded that the ALJ erred in failing to apply the *Wright Line* analysis.

G. Pace and Renfrew were not engaged in a protected concerted activity.

The AGC's argument that Pace and Renfrew engaged in a protected concerted activity must be rejected because the AGC (like the ALJ) again ignored Pace and Renfrew's dispositive admissions that they did not act for the mutual aid or protection of others. As made clear by the cases cited in RELCO's Brief, but ignored by AGC, where employees admittedly neither sought to induce others to act, nor laid the groundwork for such action, even if inquiries about events at the workplace involved other employees, no protected concerted activities occurred.

H. Pace and Renfrew's spread malicious rumors.

Unable to prove any protected concerted activities, the AGC was reduced to claiming that Pace and Renfrew's rumor-mongering was not malicious because they supposedly did not know whether Christopher Kendall ("Kendall") had been discharged. However, the AGC ignored that

the legal standard is whether the employee knew the statement was false or recklessly disregarded its truth of the statement. *San Juan Hotel Corp.*, 289 NLRB 1453, 1455 (1988). Here, Pace and Renfrew admitted that they repeatedly spread the false rumor about Kendall's purported discharge without ever asking a supervisor about it, knew Kendall was a stellar employee, knew of no reason for RELCO to discharge him, and continued to spread the false rumor knowing or recklessly disregarding that it was upsetting Kendall and spreading panic and fear to other RELCO. The AGC ignored the undisputed fact that on Dec. 22, RELCO believed Pace and Renfrew's actions were malicious. Pace and Renfrew knew or recklessly disregarded that the rumor they spread was false and that RELCO honestly believed that their rumor-mongering was malicious. Their claims were not protected by the Act and should be rejected.

III. CONCLUSION

For each and all of the foregoing reasons, RELCO's Exceptions should be granted, the ALJ's decision should be reversed, and the National Labor Relations 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@pedersenhoupt.com
szavin@pedersenhoupt.com

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 2011 **RESPONDENT, RELCO LOCOMOTIVES, INC.'S REPLY TO ACTING GENERAL COUNSEL'S ANSWERING BRIEF** 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@pedersenhoupt.com
szavin@pedersenhoupt.com