

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

RELCO LOCOMOTIVES, INC.)
)
)
and) Case 18-CA-074960
)
)
INTERNATIONAL BROTHERHOOD OF ELECTRICAL)
WORKERS, LOCAL UNION #347)

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

Pursuant to the Rules and Regulations of the National Labor Relations Board, including § 102.46 thereof, Respondent, RELCO Locomotives, Inc. ("RELCO") takes Exception to the Findings of Fact, Conclusions of Law, and Remedy and Order of Administrative Law Judge Eric M. Fine issued in his September 25, 2012 Decision¹:

1. The finding that RELCO was not denied due process when its subpoena duces tecum with regard to witness affidavits was denied. ALJD 2: fn. 2.
2. The finding that Mark Bachman's ("Bachman") testimony with respect to RELCO's experience with unions "was sketchy at best," and, therefore, not credible. ALJD 7:32.
3. The inference that Cliff Benboe ("Benboe") "would adopt his position towards unions to that established by [Mark] Bachman." ALJD 7: fn. 11.
4. The failure to consider that Sindt and Douglas admitted that no one connected with RELCO's management ever so much as mentioned their involvement with the IBEW when they were discharged. Tr. 346; Tr. 222.

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

5. The failure to consider that there were apparently ten to fifteen RELCO employees who belonged to the IBEW and/or attended the IBEW's meetings, but of that group, only Sindt and Douglas were discharged. Tr. 196.
6. The failure to consider that Sindt and Douglas contradicted one another as to who led the morning meetings. Tr. 331; Tr. 368; Tr. 192.
7. The finding that Bachman's testimony with respect to whether he discussed the IBEW or unions in any of the morning meetings with employees was "questionable." ALJD 8:5.
8. The inference that RELCO's witnesses' testimony was not credible because they "testif[ied] in absolutes." ALJD 8:10-12.
9. The finding that Bachman's testimony with respect to his receiving of IBEW handbilling material under mysterious circumstances to be incredible. ALJD 8:37.
10. The failure to credit Bachman's claim that he did not learn of an IBEW campaign during the August NLRB hearing. ALJD 8: fn. 12.
11. The failure to exclude the line of questioning to Bachman regarding the August NLRB hearing because it was former testimony and the witness from the August NLRB hearing was available and present at the hearing. ALJD 8: fn. 12.
12. The finding that "Benboe incredibly claimed he did not learn of the IBEW campaign in 2011." ALJD 9:9-10.
13. The failure to credit Tom Shipp's ("Shipp") testimony that he threw IBEW handbilling materials out of his car window. ALJD 9:22-23.
14. The finding that Courtland Pfaff ("Pfaff") credibly testified that he would have observed Shipp throwing IBEW handbilling materials out of his car window. ALJD 9:23-24.
15. The finding that Pfaff credibly testified that IBEW materials were handed out in unmarked manila envelopes. ALJD 9:24-25.
16. The failure to consider that Pfaff's memory with respect to the events during the IBEW handbilling efforts was flawed, as he believed he saw a white SUV with RELCO in the license plates, when in fact, the car with RELCO license plates was brown. Tr. 185; Tr. 471.
17. The finding that because Shipp testified in Bachman's presence and because of RELCO's "anti-union posture," "Shipp refused to admit he kept the distribution [of the IBEW handbilling materials] at the time of his testimony." ALJD 9: fn. 13.

18. The finding that Shipp "incredibly claimed that he did not discuss the hand billing incident with anyone from management, that he could not recall if he discussed it with employees, and that at the time he testified at the unfair labor practice trial was the first time he discussed it with anyone." ALJD 9:30-32.
19. The conclusion that "the IBEW's October hand billing was a widely discussed topic amongst Respondent's management, and that they all knew and talked about it more than they were willing to admit." ALJD 9:41-43.
20. The finding that Mark Douglas ("Douglas") and Jerry Sindt ("Sindt") credibly testified that an "anti-IBEW picture" was posted at multiple computers rather than at just one computer. ALJD 10:22-24.
21. The finding that Douglas and Sindt credibly testified that an "anti-IBEW picture" was posted for multiple days. ALJD 10:25-26.
22. The failure to find that the discrepancy between Douglas and Sindt's testimony with respect to the number of days the "anti-IBEW picture" was posted did not undermine their assertion that it was posted for multiple days. ALJD 10:26-28.
23. The conclusion that the "anti-IBEW picture" was posted by RELCO. ALJD 10:29-31.
24. The failure to take into account that the "anti-IBEW picture" depicted nothing more than an objectively true statement. Tr. 203; Tr. 329-30.
25. The finding that Bachman's testimony with respect to Douglas Bachman's ("D. Bachman") meeting with groups of 8 to 15 employees (the "Meeting") "to be inconsistent, marked by poor recall, and somewhat evasive." ALJD 11:34-35.
26. The finding that "D. Bachman's testimony as to the nature and scope of his listed meetings [were not] very convincing." ALJD 13:17-18.
27. The finding that Sindt and Douglas credibly testified that they "attended three meetings with D. Bachman, two in which he annually discussed the next years insurance benefits with the whole staff, and the other...where D. Bachman met with groups of 10 employees in the break room." ALJD 13:25-29.
28. The finding that all of D. Bachman's previous meetings with RELCO's employees were not "of the breadth and nature as the group meetings he conducted toward the end of 2011." ALJD 13:30-31.
29. The finding that D. Bachman's Meeting was mandatory. ALJD 13:34-35; 18:22-25.

30. The finding that Douglas and Sindt credibly testified as to the contents of the Meeting, including discussions about union activities. ALJD 13:40-41; 13:50-51; 14:23.
31. The conclusion that the Meeting was "in a direct response to that hand billing as opposed to D. Bachman's claims [it was] previously planned as a result of the CSX account." ALJD 13:54-56.
32. The conclusion that RELCO officials, including Benboe, were aware of the handbilling efforts of the IBEW. ALJD 15:13-14.
33. The finding that Sindt credibly testified that Benboe approached him and asked him what he thought about the Union." ALJD 15:15-17.
34. The inclusion and consideration of separate NLRB charges brought against RELCO (*RELCO II*). ALJD 15: fn. 18.
35. The conclusion that "Benboe did not credibly testify when he denied knowledge of the hand billing or of the IBEW campaign." ALJD 15: fn. 19.
36. The finding that "Sindt credibly testified that following the Union's hand billing at [RELCO's] facility, both Benboe and Bachman made negative remarks to the employees about unions during Respondent's morning meetings." ALJD 15: fn. 20.
37. The conclusion that Benboe's alleged questioning of Sindt was a coercive interrogation. ALJD 15:23.
38. The finding that "Sindt credibly testified he did not give Benboe a truthful response as to Sindt's pro-union stance because he feared for his job." ALJD 15:33-34.
39. The finding that Benboe's alleged questioning of Sindt was violative of §8(a)(1) of the National Labor Relations Act (the "Act"). ALJD 15:35-36.
40. The finding that *NLRB v. Armour & Co.*, 213 F.2d 625 (5th Cir. 1954) and *NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535 (6th Cir. 1984) did not require ALJ Fine to find that that any alleged questioning of Sindt was not unlawful coercive interrogation in violation of §8(a)(1) if the Act. ALJD 15: fn. 21.
41. The finding that Sindt and Douglas were both interrogated by Benboe and discharged for pretextual reasons by Benboe shortly after the IBEW openly came on the scene. 16: fn. 21.

42. The finding that RELCO solicited and impliedly promised to remedy grievances during multiple meetings with its employees and that RELCO condoned or posted antiunion literature at employee clock-in computers. ALJD 16: fn. 21.
43. The failure to discredit Douglas' testimony with respect to Benboe allegedly seeing authorization cards in Douglas' back pocket because there was no mention of this incident in Douglas' initial affidavit filed ten days after his discharge. ALJD 16: fn. 22.
44. The finding that Douglas credibly testified that he kept authorization cards in his back pocket when he did not have the opportunity to deposit them in his toolbox. ALJD 16: fn. 22.
45. The finding that Douglas gave a credible account of his alleged encounter with Benboe when "considering his demeanor." ALJD 16: fn. 22.
46. The finding that Benboe's alleged questioning of Douglas concerning his union activities to be a coercive interrogation in violation of §8(a)(1) of the Act. ALJD 16: 11-13.
47. The conclusion that Douglas did not display the cards in a manner as to purposely draw attention about his union activity or to otherwise invite comment. ALJD 16:19-21.
48. The finding that Benboe's instruction to Douglas not to distribute them on "company time" to be an unlawful instruction in violation of §8(a)(1) of the Act. ALJD 16: 21-22.
49. The failure to find that RELCO has established that D. Bachman had conducted meetings in the past with groups of employees where he solicited grievances and provided his personal number. ALJD 18:36-38.
50. The crediting of Sindt and Douglas' testimony that, until late 2011, D. Bachman had only conducted annual insurance meetings with all of RELCO's staff and that the purpose of those meetings was not to solicit grievances. ALJD 18:40-44.
51. The finding that D. Bachman violated §8(a)(1) of the Act by holding small group meetings with employees and allegedly solicited complaints and grievances and implied promises of increased benefits and improved terms and conditions of employment. ALJD 18:44-47.
52. The finding that the last sentence in RELCO's solicitation and distribution policy is presumptively invalid pursuant to *TeleTech Holding, Inc.*, 333 NLRB 402 (2001), *Brunswick Corp.*, 282 NLRB 794 (1985), and *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990).

53. The finding that the last sentence of RELCO's solicitation and distribution policy "constitutes an unlawful solicitation and distribution rule because it requires management approval for engaging in protected conduct." ALJD 21:16-20.
54. The finding that, like *Guardsmark, LLC v. NLRB*, 475 F. 3d 369 (D.C. Cir. 2007), the last sentence in RELCO's solicitation and distribution policy is not connected to the preceding sentences. ALJD 21:20-23.
55. The conclusion that the last sentence of RELCO's solicitation and distribution policy violates §8(a)(1) of the Act. ALJD 21:28-29.
56. The failure to distinguish *Turtle Bay Resorts*, 353 NLRB 1242 (2009), *Pipe Corporation*, 347 NLRB 836 (2006), *Alamo Cement Co.*, 277 NLRB 1031 (1985), and *Lafayette Park Hotel*, 326 NLRB 824 (1998) from the matter at hand. ALJD 21:29-35.
57. The rejection of RELCO's argument that it was prejudiced when ALJ Fine granted at the outset of the trial Acting General Counsel's motion to amend her complaint to allege the rule as unlawful. ALJD 22: fn. 26.
58. The finding that *Adtranz Abb Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F. 3d 19 (D.C. Cir. 2001) is distinguishable from the matter at hand. ALJD 21:37-56; ALJD 22:5-10.
59. The failure to consider *Christopher v. SmithKline Beecham Corp.*, 132 U.S. 2156 (2012).
60. The finding that Bachman spoke in generalities when he recalled instances of Douglas' poor performances. ALJD 28:40.
61. The finding that Bachman inconsistently testified that the decision to terminate Douglas was made in a group only to later testify that that the decision to terminate Douglas was Bachman's alone. ALJD 29:24-27.
62. The finding that "Benboe's claim that Douglas was terminated for attendance is belied by content of Douglas' termination letter." ALJD 30:32-33.
63. The observation that, while testifying, Benboe waffled and reviewed Sindt's attendance information before conceding that Sindt was not discharged for attendance issues because Benboe did not testify regarding Sindt' attendance. ALJD 30:37-38; Tr. 522-560.
64. The inference that because Douglas' attendance was not issued in his termination letter, Douglas' poor attendance did not play a role in his discharge. ALJD 30:41-42.

65. The crediting of Douglas' version of his termination meeting with Benboe over Benboe's version. ALJD 30:54-55.
66. The finding that Douglas credibly testified that he was recently complimented by Benboe before the whole staff. ALJD 31:7-8.
67. The failure to consider that Sindt's credibility was undermined because could not commit to an explanation as to why he had to wait to retake his welding examination, first claiming it was his decision, then stating that it was Benboe's order, only to recant and admit that it was his decision to wait to take the welding certification exam. Resp. Ex. 13; Tr. 392; Tr. 353.
68. The finding that because Benboe noted in Sindt's final evaluation that in the statement, "If Jerry stays in fabrication, he will need to become certified in welding," it was implicit that Benboe was not planning on Sindt's termination and that Sindt was to be given another opportunity to pass the welding exam. ALJD 32: fn. 33.
69. The finding that Sindt testified in a credible manner about the events that transpired on his termination day, including what transpired at the termination meeting. ALJD 33:45-47.
70. The finding that Shipp's testimony was incredible because he intentionally did not want to accurately report what transpired at the meeting for Sindt's termination. ALJD 33:52-54.
71. The inference that Bachman inconsistently testified at the hearing that it was his decision to terminate Sindt, as compared to his affidavit, which stated, "I don't recall the exact reasons for Jerry Sindt's termination. I made the final decision to terminate him. I believe the majority of the reasons was based on his performance over the period of time. I don't recall the specifics of his poor performance or how many times it happened, without going through documentation." ALJD 34:12-16.
72. The finding that Sindt credibly testified, while Bachman incredibly testified, that Bachman did not speak with Sindt in December 2011 and did not tell Sindt he was expected to receive his welder's certification before the end of the year. ALJD 35:30-31.
73. The failure to credit Bachman's testimony that Sindt agreed to retake the welder's certification test. ALJD 35:41-44.
74. The failure to credit Benboe and Bachman's testimony that Benboe recommended that Sindt be terminated to Bachman. ALJD 36:5-6.
75. The failure to credit Bachman's testimony regarding instances of Sindt's poor performance. ALJD 36:21.

76. The crediting of Sindt and Douglas' testimony concerning Benboe and Bachman's remarks at morning meetings concerning unions over Benboe and Bachman's testimony. ALJD 39: fn. 37.
77. The conclusion that the Acting General Counsel made a strong prima facie case of an unlawful discharge for Douglas and Sindt. ALJD 41:5-6.
78. The inference that Benboe "was at least suspicious of [Sindt's] involvement" with the IBEW." ALJD 41:22-23.
79. The conclusion that the reasons RELCO set forth for the discharge of Sindt and Douglas were pretextual. ALJD 41:31-32.
80. The finding that Benboe praised Douglas' work performance between August 24, 2011 and January 2, 2012. ALJD 42:34-37.
81. The finding that Benboe and Bachman's testimony concerning Douglas' discharge was in any way inconsistent from one another's. ALJD 43:9-10.
82. The insinuation that Douglas was not placed on probation after his evaluation ending June 1, 2011. ALJD 43:11-12.
83. The failure to credit Bachman's testimony that Douglas was one of RELCO's more limited fabricators. ALJD 43:21-24.
84. The finding that Benboe's failure to list attendance as a reason for termination in Douglas' termination letter "supports a conclusion that it was only after the termination took place that [RELCO's] officials went back and reviewed records to justify" Douglas' discharge. ALJD 43:32-34.
85. The finding that Bachman had no recollection of Benboe recommending that Douglas be discharged. ALJD 43:34-35.
86. The finding that Bachman testified that Douglas' discharge "may have occurred at the suggestion of [RELCO's] counsel." ALJD 43:36-37.
87. The failure to credit Benboe's testimony that he recommended to Bachman that Douglas be discharged. ALJD 43:37-38.
88. The failure to credit Bachman's testimony regarding the decision to terminate Douglas. ALJD 43:39-40.
89. The finding that "the reasons put forth for Douglas['] discharge were concocted after the fact and were pretextual." ALJD 43:48-49.

90. The finding that Douglas was discharged for his union activity in violation of Section[s] 8a(a)(1) and (3) of the Act. ALJD 43:49-50.
91. The failure to consider the final evaluation of Douglas and Sindt. ALJD 43: fn. 38.
92. The finding that the retention of another employee who had a pending workers' compensation claim is evidence of disparate treatment. ALJD 44: fn. 38.
93. The finding that RELCO's witnesses' testimony as to the reasons of Sindt's termination was inconsistent from one another. ALJD 46:13-14.
94. The finding that RELCO treated Sindt disparately from other employees. ALJD 46:45-46.
95. The insinuation that because Benboe provided "only" one specific instance of Sindt's poor performance, Sindt's discharge was pretextual. ALJD 46:51-52.
96. The failure to credit Benboe and Bachman's testimony that Benboe recommended to Bachman that Sindt be terminated. ALJD 48:8-9.
97. The inference that Sindt was to receive another opportunity to complete his welding exam after his final review. ALJD 48:11-12.
98. The finding that Bachman's testimony with respect to Sindt's discharge was undercut by Benboe's testimony, because Benboe only learned that Sindt would definitively be discharged on January 2, 2012. ALJD 48:28-30.
99. The crediting of Sindt's testimony that Shipp was upset and had a strong negative reaction to Sindt's termination. ALJD 48:46-47.
100. The finding that RELCO failed to investigate the ramifications of Sindt's termination. ALJD 49:12.
101. The finding that RELCO's alleged failure to investigate the ramifications of Sindt's termination leads to the conclusion that Sindt was terminated for his union activities. ALJD 49:13-14.
102. The conclusion that Sindt was discharged because of his union activities in violation of Section[s] 8(a)(1) and (3) of the Act. ALJD 49:44-45.
103. The ALJ improperly failed to consider that the position statement drafted by RELCO's counsel was improperly admitted into evidence. GC Ex. 2.
104. The conclusion that any of the RELCO decision-makers were aware of any union activities by Sindt.

105. The conclusion that any of the RELCO decision-makers were aware of any union activities by Sindt.
106. The conclusion that RELCO discharged Sindt because of his union activities.
107. The conclusion that RELCO discharged Douglas because of his union activities.
108. The conclusion that RELCO decision-makers bore any animus against Sindt because of his union activities.
109. The conclusion that RELCO decision-makers bore any animus against Douglas because of his union activities.
110. The conclusion that RELCO failed to prove its affirmative defense that Sindt would have been discharged in any event.
111. The conclusion that RELCO failed to prove its affirmative defense that Sindt would have been discharged in any event.

Respectfully submitted,
RELCO LOCOMOTIVES, INC

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

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October, 2012 **RESPONDENT, RELCO LOCOMOTIVES, INC.'S 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	
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And on that same day, the foregoing was served via electronic mail upon:

Catherine Homolka Nichole Burgess-Peel National Labor Relations Board Region 18 330 South 2nd Avenue Suite 790 Minneapolis, Minnesota 55401 Catherine.Homolka@nlrb.gov nichole.burgess-peel@nlrb.gov	Robert J. Henry Blake & Uhlig, P.A. 753 State Avenue, Suite 475 Kansas City, KS 66101 rjh@blake-uhlig.com
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And on that same day, the foregoing was served via regular U.S. mail upon:

International Brotherhood of Electrical Workers Local 347 850 18th St. Des Moines, IA 50314
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_____/s/ Paul E. Starkman_____

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