

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

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

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

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## **I. INTRODUCTION**

This case involves RELCO Locomotives, Inc.'s ("RELCO") discharge of Jerry Sindt ("Sindt") and Mark Douglas ("Douglas") on January 2, 2012 for their poor work performance. As set forth in RELCO's's Exceptions and more fully explained below, the ALJ incorrectly determined that RELCO violated §8(a)(1) National Labor Relations Act (the "Act") for allegedly: (1) coercively interrogating Sindt about his union activities; (2) coercively interrogating Douglas about his union activities; (3) instructing employees not to distribute union authorization cards on company time; (4) soliciting employee complaints and grievances and impliedly promising to remedy said complaints and grievances; and (5) maintaining an illicit solicitation and distribution policy. The ALJ also erroneously held that RELCO violated §§8(a)(1) and (3) of the Act when it discharged Sindt and Douglas.

Most egregiously, to reach his desired and improper conclusions, the ALJ's decision: (1) was riddled with "facts" that were entirely unsupported by the record; (2) consistently made credibility findings against RELCO and in favor of Sindt and Douglas that were based on misstatements or misreadings of the record, or no evidence at all; (3) ignored the absence of *any* evidence that RELCO had knowledge of either Sindt's or Douglas' involvement with the International Brotherhood of Electrical Workers (the "IBEW" or "Union"); (4) failed to show that RELCO bore any animus against either Sindt or Douglas because of their alleged union activities; and (5) disregarded RELCO's repeated and documented warnings to Sindt and Douglas about their poor work performances; and (6) violated §8(c) of the Act by using RELCO's lawful statements about the Union as substantive evidence in this unfair labor practice

proceeding that RELCO had an antiunion animus and that it also had animus against Sindt and Douglas for union activities of which RELCO had no knowledge.<sup>1</sup>

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. At-Will Employment and Termination**

There was no dispute that all of RELCO's employees were at-will employees who could have been terminated at any time at the discretion of RELCO. JT Ex. 1, p. 13; Tr. 412.<sup>2</sup> RELCO's Employee Handbook reiterated that, "RELCO reserves the right to terminate employment at any time, with or without reason." JT Ex. 1, p. 23.

### **B. RELCO's Performance Evaluation Process**

RELCO had a formal performance evaluation process that involved reviewing production employees two times per year. Tr. 50. An employee's direct supervisor would typically complete most portions of the formal performance evaluation form, but if RELCO's Chief Operating Officer, Mark Bachman, had direct knowledge of an employee, he would insert his comments, as well. Tr. 56. To ensure that the performance evaluations were fair, RELCO involved multiple supervisors in a particular employee's evaluation. Tr. 428. However, the formal written performance evaluation form was only one facet of RELCO's evaluation process for an

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<sup>1</sup> A federal judge in a separate proceeding filed by the NLRB in the United States District Court for the Southern District of Iowa Central Division (case number 12-cv-205) reviewed the ALJ's decision and found that it was unpersuasive and the federal judge explicitly held that the NLRB had failed to show a substantial likelihood of prevailing on the merits in this case based on the exact same record that is now before this Board.

<sup>2</sup> 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 Ex. \_\_\_", and as "R. Ex. \_\_\_", respectively.

employee. The comprehensive review of an employee was also based on management's observance of the employee and discussion with other foremen that have worked on projects with that employee. Tr. 435.

**C. Factors Used to Assess an Employee's Performance**

To assess an employee's performance, RELCO considered, among other things: (1) the quality of the work performed by the employee; (2) the quantity of the work performed by the employee; (3) the employee's responsibility; (4) the reliability of the employee; (5) the employee's knowledge; and (6) the employee's potential. Tr. 433. If an employee showed no desire to learn or displayed an unwillingness to be utilized in an area for which RELCO may have a need, that employee was terminated. Tr. 434.

**D. RELCO's Management's Morning Meetings with its Staff**

Approximately once a week, RELCO held morning meetings with its staff. The topic of these meetings was generally safety. Tr. 68. These meetings were conducted by various supervisors and members of management. However, at no point did Mark Bachman or Benboe ever discuss unions at these meetings, though Sindt and Douglas claimed otherwise, because both Mark Bachman and Benboe were very cautious because of the prior cases brought by the NLRB. Tr. 473; 547.

**E. The IBEW's Handbilling in October 2011**

In October 2011, the IBEW engaged in handbilling on only one occasion. Mark Bachman testified that he saw a white vehicle parked outside RELCO's facility, but at that time, did not know that the vehicle belonged to the IBEW and was handbilling. Tr. 84. It was only after Mark Bachman received that handbill on his desk the next day that he surmised that it was the IBEW that was handbilling the previous day. Tr. 84. Some time later, Mark Bachman saw a single

picture posted above a single computer, which the Acting General Counsel offered as proof of antiunion sentiment by RELCO and the ALJ concluded it as such, but in truth, merely included an accurate picture of the IBEW's headquarters with the equally accurate statement that Union dues paid for the headquarters. However, Mark Bachman did not post this picture, and there was no evidence that any other RELCO supervisor posted the picture or consented to its posting. Tr. 85. The Acting General Counsel did not – and could not – offer (much less have any proof) who was responsible for posting this picture.

**F. RELCO's Lack of Knowledge of Sindt and Douglas' Union Activities**

The record confirmed that RELCO did not know anything about Sindt's involvement with the IBEW. Sindt did not testify that anyone at RELCO even knew of his involvement with the IBEW, the Acting General Counsel offered no evidence that anyone from RELCO's management had knowledge of it, and the ALJ could only put forth circular logic that RELCO clearly had knowledge of Sindt's involvement with the Union because Benboe once asked Sindt about how he felt about unions in general ALJD 41: 21-23; Tr. 325. Sindt asserted that Benboe approached him and asked "what [Sindt's] thought was on the union," but Sindt admitted that he lied and told Benboe that "it really don't matter to me that much one way or the other." Tr. 334. Benboe testified consistently with Sindt that he did not know about Sindt's involvement with the IBEW while Sindt was employed at RELCO. Tr. 528. Sindt admitted that Mark Bachman never had any conversations with him regarding unions or Sindt's union involvement. Tr. 359. Mark Bachman confirmed that he never had any conversations with Sindt or Benboe about Sindt's involvement with the IBEW or any union activities and that Mark Bachman was not aware that Sindt was even involved in a union. Tr. 451.

The only evidence that anyone in RELCO's management had *any* knowledge of Douglas' involvement with the IBEW was his testimony that Benboe supposedly spotted some authorization cards in his back pocket in a work area during work time. Tr. 206. Allegedly, the cards fell to the floor in front of Benboe, which prompted a conversation about whether Douglas was distributing the authorization cards on company time. Tr. 206. However, Douglas' testimony on this alleged incident lacked credibility because he failed to mention this key event in his original affidavit, even though he gave this affidavit on January 12, 2012, a mere ten days after his termination and only a month after the alleged incident occurred, and even though Douglas' first affidavit had a section on RELCO's knowledge of union activities. ALJD 5: fn. 7; Resp. Ex. 8. Consistent with Douglas' first affidavit, Benboe, the more credible witness, denied this event ever took place, and that he did not have knowledge of Douglas' involvement with the union at the time Douglas was employed. Tr. 528. Even giving Douglas' testimony about this alleged event any credence (and there is no reason to do so), Douglas admitted that Benboe did not discourage Douglas from passing out authorization cards; Benboe simply asked whether he was doing it on company time. ALJD 5:36-37; Tr. 254. When Douglas replied no, Benboe merely said, "you better not be." ALJD 5:37-38; Tr. 254. Douglas also admitted that he does not know whether Benboe communicated this incident to anyone else at RELCO. Tr. 224. Mark Bachman testified without contradiction that he had no knowledge of any union activity by Douglas. Tr. 469.

**G. RELCO's Management did not have an Antiunion Animus**

There was ample evidence in the record that rebutted the ALJ's conclusion that RELCO's management held some amorphous animus or hostility towards unions in general or the IBEW in particular, even putting aside the fact that evidence of general antiunion animus is insufficient to

show that RELCO held an animus toward Sindt and/or Douglas because of their alleged union activities. Previously, RELCO had a facility in Provo, Utah that was a union shop, which Mark Bachman oversaw for twelve years without any quarrels with the union, until the plant was closed because of the poor economy. Tr. 429; Tr. 431. RELCO also negotiated a collective bargaining agreement with the IBEW to open a new plant in Kansas City in 2009 for a client, and the only reason that RELCO did not enter into a contract with the IBEW was because the sole customer that RELCO was to service with that plant decided to cancel its contract with RELCO after the downturn in the economy. Tr. 429-30. The decision to not open a plant was not made by RELCO and had nothing to do with the IBEW. Tr. 429-30.

The ALJ erroneously concluded that RELCO supervisor who interrogated and then discharged Sindt and Douglas in violation of the Act was Benboe and then inferred that Benboe somehow had an animus against unions and that he cared about any of Sindt and Douglas' alleged union activity. However, contradicting the ALJ's conclusion that Benboe harbored and acted on some inexplicable antiunion animus is the undisputed fact that Benboe was also a member of a union beginning in 1968 and was a union member for approximately 18 years. Tr. 522-23. Benboe was even a member of the IBEW, among other unions. Tr. 522. As a union member, Benboe was a shop steward, a chief shop steward for six years, and a business agent for unions. Tr. 523. As Benboe testified, having a union would make his job as supervisor "easier." Tr. 527. To Benboe, it made no difference whether an employee was a union member or not, and no one at RELCO ever told him to mistreat or interrogate anyone about their union activities, and the record shows that he did not. Tr. 528. The ALJ vaguely stated that "Benboe impressed [him] as someone who was very loyal to [RELCO], his current employer, and that he would adopt his position towards unions to that established by Bachman." ALJD 7: fn. 11. However, the ALJ did

not, and could not, point to any facts that supported such a conclusion, because there is nothing in the record that lends credence to this conclusion.

Rather, the record confirmed that RELCO did not have any antiunion animus, but the ALJ improperly ignored all such evidence. Indeed, Douglas testified that he wore a "Vote Yes" sticker during the Railroad Signalmen's Union organizing campaign in 2010, but he was not terminated until 2012 – a two year gap between that union activity and his termination that was not mentioned by the ALJ. Tr. 298. Also (even though Benboe denied this incident ever happened) according to Douglas and Sindt, though Benboe never complimented anyone else's work, he apparently singled out Douglas a week or two before the Christmas holiday shutdown and complimented Douglas before the entire plant. ALJD 23:49-53; Tr. 380-81. If Benboe bore any animus toward Douglas (and had any knowledge of Douglas' union activities, as the Acting General Counsel claims), he would not have complimented Douglas, ut the ALJ failed to consider this.

#### **H. The Decision to Terminate Sindt**

There was no dispute in the record that RELCO expected all of its employees, including Sindt, to become certified welders, but Sindt never became a certified welder, even though he had two years to do so. Tr. 387; Tr. 443. Even Sindt admitted that RELCO "wanted everybody to be certified to do any welding there." ALJD 25:35-36; Tr. 387. Sindt also knew that RELCO wanted all of its employees to cross-train in mechanical, welding, painting, and electrical work. Tr. 443; Tr. 498. RELCO's business plan, which had existed for more than fifty years, was based on assigning its production employees to perform tasks in a position in which they were needed. Tr. 443. In the middle of 2011, Sindt was among a group of workers to whom Benboe warned that anyone who does not have his welder's certificate must "make a concerted effort to do this."

Tr. 530. Although Sindt claimed that he should have been allowed to do only mechanical work in the truck shop, he admitted that even mechanical work requires welding. Tr. 388. That is because when Sindt was assigned to truck rebuilding, it required structural welds that necessitated a welding certificate. Tr. 444. Without his welding certificate, Sindt could not be assigned to perform certain tasks, which minimized his usefulness. ALJD 25:37-38; Tr. 388; Tr. 443. Specifically, each time Sindt's work called for a critical or structural weld, a certified welder would have to be moved to complete Sindt's task, which meant that RELCO had to use two people to complete a one-person job – though the ALJ ignored Sindt's harmful effect on RELCO's productivity. Tr. 442.

Sindt admitted that he attempted to obtain his welding certificate two times and failed each time. ALJD 25:44. After he failed the second time, in September 2011, Sindt initially testified that Benboe told him that he could not retake the welding certification test until after the first of the year (Tr. 392), but he later recanted and admitted that he decided on his own that he would not try again to become certified until after the first of the year (Tr. 396), but the ALJ ignored Sindt's shifting testimony, even though Sindt was admittedly told on his 2011 mid-year review that he needed to get his welding certificate. Tr. 448; GC Ex. 6(b).

What is undisputed is that, on December 9, 2010, *before* Sindt ever became involved with the IBEW, he received a performance review that warned him that he needed to work faster and to clean up his area.<sup>3</sup> Tr. 349; GC Ex. 6(c). Consistent with his 2010 year-end evaluation, Sindt's 2011 mid-year evaluation that Sindt admittedly received also put him on notice that he: (1) lacked drive and initiative; (2) did not have a willingness to accept directions; and (3) needed to

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<sup>3</sup> The ALJ ignored the timeline of events in this matter that confirm that Sindt and Douglas had previously received poor performance reviews that support RELCO's decision to terminate them. That is, most of Sindt and Douglas' recorded instances of poor performance occurred *before* even they admit they were involved with the IBEW.

certify as a welder. GC Ex. 6(b); Tr. 348; Tr. 351. Sindt's third performance review revealed the same deficiencies in his performance that had been pointed out to him in his earlier reviews ("wanders away from job assignments, lacks initiative, lacks fabrication skills, appears that he does not want to learn"). GC Ex. 6(a). Sindt's written reviews (which all came *before* he engaged in any union activities) were entirely consistent with RELCO's reasons for terminating his employment.

Because of Sindt's failure to obtain a welding certificate, it became a problem for RELCO to provide work for Sindt. Although Sindt claimed that he enjoyed working as a truck mechanic, working on truck assemblies and rebuilding trucks, in the summer of 2011, neither he nor anyone else disputed that RELCO ran out of truck work for Sindt and transferred him to the welding area where he could assist fabricators and where there was available work. Tr. 442. However, Sindt repeatedly complained to Mark Bachman and other employees that he did not like welding work. Tr. 447; Tr. 449; Tr. 454. Sindt was consequently relegated to performing clean-up duties. Tr. 444. At the end of his employment at RELCO, there was no dispute that Sindt was considered by RELCO managers to be among the worst of the welders and at "the bottom of the skill level that [RELCO] could have at that period of time." Tr. 457.

After being employed by RELCO for almost two years, Sindt was described by his supervisors as being only an "entry level" employee. Tr. 445. There is no dispute that, in the eyes of RELCO's management, if Sindt did not like a particular task, he would refuse to work on it and would find reasons to wander away from his work station. Tr. 441; Tr. 538. There was no question that Sindt was limited in the tasks he could perform. Tr. 445.

The "final straw" for Benboe concerning Sindt came in December 2011 when Benboe gave Sindt a list of tasks to complete before the end of the day, and not only did Sindt fail to

complete them, Sindt did so improperly, with the levers not mounted straight and the bolts not being tightened. Tr. 539. Accordingly, Benboe made the recommendation to Mark Bachman to terminate Sindt.<sup>4</sup> Tr. 451. Notwithstanding this recommendation, Mark Bachman reviewed all of Sindt's performance reviews and relied on his own knowledge regarding Sindt's performance deficiencies. Tr. 107; Tr. 452. Mark Bachman concluded that Sindt's performance was poor and he continued to refuse to improve. Mark Bachman decided to terminate Sindt after the holidays so Sindt could receive his holiday pay. Tr. 131; Tr. 453; Tr. 487; Tr. 545. Accordingly, on January 2, 2012, Benboe told Sindt that he was terminated for poor workmanship. Tr. 118; Tr. 134. Sindt admittedly replied "you got to be fucking kidding me?," further demonstrating his poor attitude and his refusal to take his performance evaluations seriously. Tr. 341. Sindt also admitted that he was never told that he was discharged for his involvement with the IBEW and never saw any document that his termination stemmed from his involvement with a union. Tr. 346. These facts were all ignored by the ALJ.

### **I. The Decision to Terminate Douglas**

Douglas testified that he did not begin his involvement with the IBEW until September 1, 2011, but he admitted that he had been repeatedly cited for his poor work performance by RELCO well before then. Tr. 168. Douglas admitted that he had been placed on probation as early as 2010 because he took too long to complete a project. Tr. 286. According to RELCO, Douglas had failed to meet the customer's specifications and became "very vocal and boisterous

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<sup>4</sup> The ALJ improperly concluded that because Benboe noted in Sindt's final evaluation that, "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. However, there was no dispute that Mark Bachman made the final decision to terminate employees. ALJD 32: fn. 33; ALJD 48:11-12. Supervisors, like Benboe, could offer their opinion and recommendation, but it was ultimately up to Mark Bachman to pull the proverbial trigger. Therefore, implicit from the actual evidence was that when Benboe wrote that statement, he offered his recommendation, but there was no guarantee that Mark Bachman would follow it, and, therefore, Benboe needed to be prepared if Sindt remained employed at RELCO.

to the tune of yelling..." when he was confronted about this by Benboe and Mark Bachman. Tr. 458. Douglas' initial performance review dated December 9, 2010 (before any alleged union involvement) told Douglas that he "needs to stay on assigned work task, needs to work on fabrication skills, needs to become a certified welder, [and]...[RELCO] needs to see further improvement in quantity & quality of work." GC Ex. 5(c). Douglas' next performance review, for the period between January 1, 2011 and June 1, 2011 (also before any union involvement), informed him that his performance had worsened, and that he needed to improve his attendance, his attitude<sup>5</sup>, and focus on his assigned tasks. GC Ex. 5(b); Tr. 461. This second poor review culminated in Douglas being placed on probation for a second time. GC Ex. 5(b).

In addition, Douglas also violated the blue flag policy two times; the first was a documented verbal warning in August 2010, and the second was a written warning in July 2011. Tr. 226; R. Ex. 5; R. Ex. 7. Importantly, both warnings undisputedly came before Douglas had become involved with the IBEW. Tr. 229.

By late 2011, RELCO's supervisors concluded that Douglas had failed to remedy any of his performance issues for which he was placed on probation a second time. Tr. 466. Douglas claimed that he refused to read the performance evaluation that placed him on probation, though he admittedly was told enough about the evaluation to know that he disagreed with it, but the ALJ ignored how Douglas' behavior during his 2011 performance evaluation demonstrated his poor attitude that led to his discharge and his refusal to improve as an employee.<sup>6</sup> Though

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<sup>5</sup> Douglas admitted that when Benboe went over Douglas' performance review with him, he "argued the point with [Benboe]." Tr. 244.

<sup>6</sup> Even the ALJ admitted that Douglas' attitude was poor and his demeanor towards Benboe was argumentative, though the ALJ improperly tried to minimize the gravity and damaging nature of Douglas' attitude by merely characterizing it as a relationship wherein "Douglas would dispute work related decisions with Benboe." ALJD 30:56 – 31:5. However, the ALJ ignoring the fact that his characterization of Douglas' behavior toward his supervisor actually supported RELCO's legitimate reasons in terminating Douglas.

Douglas had passed his welding certification test, as compared to other fabricators, Douglas was ranked at "the bottom end." Tr. 458. After Douglas' poor evaluation, his performance only deteriorated and his attendance continued to get worse. Tr. 297. In December 2011 alone, Douglas accumulated four points for attendance issues. GC Ex. 52; Tr. 511. In fact, there were three days in a row, December 6-8, 2011, when Douglas "had taken off and left." Tr. 540; GC Ex. 52. Douglas could not dispute that his early departures caused the work to fall behind so that those days' tasks could not be completed. Tr. 541. The ALJ made much of the fact that Douglas had "only" accumulated 10 points for poor attendance and had not yet reached the 12 point limit that required automatic termination under RELCO's attendance policy. However, the ALJ overlooked the fact that Douglas' attendance problems occurred while he was on probation for the second time, and after he had been told to improve his initiative and performance. GC Ex. 5(b).

The record clearly showed that Douglas' admitted worsening attendance problems were subsumed and included in the termination letter's reference to "poor job performance." GC Ex. 8. It was undisputed that Douglas' attendance problems were real, getting worse (Tr. 458), adversely affected RELCO, and were properly considered by RELCO in determining that Douglas' overall poor work performance warranted discharge. Tr. 399; Tr. 431; Tr. 458.

Upon Benboe's recommendation to terminate Douglas, Mark Bachman was initially skeptical, but he reviewed Douglas' file, spoke further with Benboe, and made the ultimate decision to terminate Douglas for his poor work performance and lack of initiative and improvement.<sup>7</sup> Tr. 107; Tr. 466-67. Like Sindt, Mark Bachman decided to terminate Douglas after the holidays so Douglas could receive his holiday pay. Tr. 131; Tr. 487; Tr. 545.

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<sup>7</sup> The record did not support the ALJ's insinuation that Mark Bachman inconsistently testified regarding whose decision it was to terminate Douglas. ALJD 29: 24-27. The record clearly shows that the ultimate decision to  
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On January 2, 2012, Benboe, Douglas' supervisor at the time of his termination, communicated to Douglas that he was terminated for poor workmanship and a bad attitude. Tr. 118; Tr. 132. Douglas admittedly responded with overt hostility, shouting, "Are you fucking kidding me?" Tr. 210. Douglas never said at the termination meeting that he thought he was being terminated for his union activities. Tr. 222; Tr. 543. Douglas admitted that no one at RELCO ever told him that he had been terminated for his union activities. Tr. 222. Mark Bachman confirmed that at the time of his termination, he did not know that Douglas was involved in or a supported a union. However, the ALJ failed to consider any of the pertinent facts. Tr. 469.

#### **J. Judge Gritzner's Decision**

In a failed attempt to circumvent the NLRB process<sup>8</sup>, the Acting General Counsel simultaneously filed a §10(j) injunction that sought to reinstate Sindt and Douglas in their positions at RELCO while this current matter was pending before the ALJ. The §10(j) injunction was heard by Judge James E. Gritzner in the United States District Court for the Southern District of Iowa Central Division on July 24, 2012. To obtain a §10(j) injunction, the burden was placed upon the NLRB to prove, among other elements, its likelihood of success on its merits before the ALJ. *See Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F. 2d 109, 114 (8th Cir. 1981). In other words, Judge Gritzner undertook the same analysis as the ALJ to reach his conclusion and considered whether the Acting General Counsel could meet its burden and show that RELCO violated the Act when it discharged Sindt and Douglas. A true and correct copy of Judge

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terminate Douglas was made by Mark Bachman, but he based this decision on reports he received from Douglas' supervisor and his preceding reviews. Tr. 466.

<sup>8</sup> Indeed, Judge Gritzner chided the NLRB for "essentially asking this Court to decide the case on its merits and give it the final remedy it seeks in the underlying case without giving RELCO its full appellate rights." Exhibit A, p. 11.

Gritzner's Order is attached hereto as Exhibit A. Taking all of the same facts under consideration and using the transcript of the NLRB hearing, Judge Gritzner refused to follow the ALJ's decision and instead ruled that:

- The NLRB failed to meet its burden that RELCO had any knowledge of Sindt's union activities because the only proof submitted that RELCO had knowledge of Sindt's activities was his alleged conversation with Benboe, but "Sindt never admitted that he was involved in union-related activities but rather answered neutrally and said he had no preference with regard to unionized and non-unionized workplaces." Exhibit A, p. 6.
- "The NLRB failed to provide sufficient evidence at [the preliminary] stage of the proceeding to prove Douglas and Sindt were terminated due to antiunion animus fostered by RELCO" because the NLRB attempted to shift its burden onto RELCO, requiring RELCO to prove that it had legitimate reasons for discharging Sindt and Douglas. Exhibit A, p. 6.

Consequently, Judge Gritzner found that the Acting General Counsel had not met its burden and denied the §10(j) injunction. Exhibit A, pp. 9-10. Because Judge Gritzner explicitly considered the ALJ decision and analyzed the same record that is now before the Board, Judge Gritzner's ruling is persuasive authority and should be followed.

**K. Douglas Bachman's October 19, 2011 Meeting at the RELCO Plant**

Douglas Bachman, who is RELCO's CEO and works in RELCO's Lisle, Illinois location, documented each of his meetings with the staff at RELCO's Albia facility. Meanwhile, the remaining witnesses, including Mark Bachman, Benboe, Sindt, and Douglas, merely testified as to the content and dates of these meetings from memory. The undisputed fact was that Douglas Bachman was not at the Albia facility in either December or January (contrary to the allegations in the Acting General Counsel's Complaint), nor was the topic of unions discussed at the only meeting that Douglas Bachman attended in Albia in late 2011 (specifically, on October 19, 2011), as confirmed by Douglas Bachman's more accurate comprehensive contemporaneously compiled records. Tr. 561; Resp. Ex. 10(a).

First, Douglas Bachman was out of the country during most of December 2011. Tr. 474. Second, Douglas Bachman's records accurately captured the topics of the respective meetings. The records were the best source of the topics covered by Douglas Bachman in his small group meetings with RELCO employees and were more credible than various witnesses' memories, all of whom could not even state with certainty as to the month Douglas Bachman's meetings with the employees were held. Resp. Ex. 10(a); Tr. 367; Tr. 215. Importantly, nowhere did these accurate records mention that unions were discussed.

The ALJ claims that Mark Bachman's testimony regarding these meetings were "inconsistent, marked by poor recall, and somewhat evasive." ALJD 11:34-35. However, the ALJ entirely ignored the fact that Mark Bachman did not even attend these meetings and could only testify as to what he was told about these meetings after the fact. Tr. 475. Also, what the ALJ dubbed as evasive testimony is actually attributed to Mark Bachman seeing his brother, Douglas Bachman, so often that the visits "blend[ed] together" for Mark Bachman, and without the assistance of written records, Mark Bachman was attempting to sort through the various times Douglas Bachman had visited the Albia plant to the best of his recollection. Tr. 474.

### **III. ARGUMENT**

#### **A. The ALJ made improper credibility findings.**

The ALJ improperly credited Sindt and Douglas' testimony at every juncture, while simultaneously and systematically discrediting RELCO's witnesses' testimony. 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).

#### **1. The ALJ improperly held Sindt's testimony was credible.**

The ALJ ignored that Sindt's credibility was undermined because he kept changing his story as to why he never retook his welding examination. At first, in his affidavit, Sindt admitted that he told Benboe he would retake the welding certification examination "after the first of the year," but at the hearing, Sindt suddenly changed his story and stated that it was Benboe who told him he could not retake the examination until after the first of the year. Resp. Ex. 13; Tr. 392. Later, Sindt recanted again and admitted that he made the choice, not Benboe, to wait to retake the welding examination until after January 1, 2012. Tr. 396.

Sindt's attempt to dispute the claim that he knew that he was required to certify as a welder as early as 2010 is also incredible, since he testified that he had reviewed his performance review from December 2010 at the time, which clearly listed that he was required to certify as a welder, only to later lie and assert that he was not told that he needed to certify as a welder until 2011, an inconsistency the ALJ improperly ignored. Tr. 348; Tr. 353.

The ALJ blatantly overlooked the obvious inconsistencies that cast doubt over the entirety of Sindt's testimony in order to draw the unsupported conclusion that Sindt's testimony to be credible. ALJD 33:45-47. Among the many egregious improbable statements Sindt offered in his testimony that were improperly credited by the ALJ was that the only time Sindt could attest to anyone receiving positive comments during a meeting was when Douglas was supposedly complimented. ALJD 31:7-8; Tr. 340. It is noteworthy – and blatantly self-serving – that out of all of the employees that worked at RELCO for the same time periods as Sindt, Sindt could only ever recall Douglas receiving praise.

Sindt also testified that Mark Bachman exclusively conducted morning safety meetings with the employees, though he had already testified earlier that "all the supervisors" conduct

these meetings and that Mark Bachman seldom appeared at them, another inconsistency that the ALJ ignored. Tr. 368; Tr. 331.

Sindt incredibly testified that the meeting with Douglas Bachman, which he was not certain if it occurred in November or December 2011, was mandatory, and that Douglas Bachman had only previously traveled to Albia to hold small group meetings for insurance purposes, when that clearly is belied by Sindt's admission that Douglas Bachman had also previously met with employees to discuss improving the plant's efficiency, which the ALJ also ignored. Tr. 336.

Sindt's testimony was also not credible when he asserted that Tom Shipp ("Shipp") would have remarked that when Sindt was fired, the only person that knew about bilevel cars was being fired. Tr. 341. Shipp testified that bilevel trucks are in fact "some of the easiest trucks you can build. They don't even have traction motors in them...They're just basically a truck frame and axels, and bearings," but the ALJ refused to consider these facts. Tr. 521. The ALJ overlooked every inconsistent and improbable statement made by Sindt in order to improperly credit Sindt's testimony. ALJD 33:45-46. To say the least, Sindt's testimony was discredited by his own admissions and his own shifting testimony. The ALJ patently erred in crediting Sindt's testimony.

## **2. The ALJ improperly held Douglas' testimony was credible.**

Like Sindt's clearly incredibly testimony, Douglas' testimony at the NLRB hearing was riddled with inconsistencies and impeached statements, which discredited his testimony, though the ALJ erroneously refused to find any of Douglas' testimony incredible. Most significant is Douglas' first affidavit failed to include *anything* regarding a key incident in which Benboe supposedly spotted authorization cards in Douglas' back pocket – in spite of the fact that

Douglas' first affidavit was written on January 12, 2012, only ten days after Douglas was discharged and mere weeks after the supposed incident. Resp. Ex. 8. Despite the egregiousness of the omission, the ALJ merely commented that it was "troubling," but still failed to discredit Douglas' testimony. ALJD 16: fn. 22. Unlike *Gold Circle Department Stores*, which the ALJ used as support for refusing to discredit Douglas' testimony, Douglas' affidavit was the *only* piece of evidence that the Acting General Counsel proffered to establish that RELCO had *any* knowledge of Douglas' involvement with the IBEW. 207 NLRB 1005 (1973). In *Gold Circle*, however, the omission from the affidavit merely amounted to cumulative testimony. *Id.* at 1010. Therefore, Douglas' failure to include this key event in his first affidavit renders incredible his attempt to assert that he suddenly recalled this incident when he prepared his second affidavit two months later and testified at the hearing, and the ALJ improperly failed to rule accordingly. Resp. Ex. 9; Tr. 206.

Also incredibly, Douglas initially testified that he had never seen his termination letter, only later to back-peddle and admit that he did receive exactly that letter. Tr. 262. Douglas also could not recall when the meeting with Douglas Bachman took place, frequently changing his answer as to whether it was in October, November, or December 2011. Tr. 276. Douglas also claimed that there were only six to eight people present at the meeting, but he could not identify a single co-worker that was also present at the meeting, despite the fact that he had worked there for two years and apparently remembered so clearly the topics Douglas Bachman discussed at the meeting. Tr. 216. Although Douglas claimed he had never attended small group meetings conducted by Douglas Bachman in Albia before, this only shows is that Douglas did not attend them, not that they did not occur. Tr. 219; Resp. Ex. 10.

Despite these contradictions and weaknesses in his testimony, the ALJ astonishingly credited Douglas' version of his termination meeting over Benboe's, basing his conclusion only on "the demeanor of the witnesses" and apparently "the record as whole," though the ALJ failed to cite to which portion of the record he was referring. ALJD 30:55.

**3. The ALJ improperly held RELCO's witnesses' testimony to be incredible.**

At every juncture, the ALJ ruled that RELCO's witnesses were not credible. To support his credibility findings, the ALJ apparently used nothing more than his intuition and imposed his own speculation in the place of actual evidence, while simultaneously trying to paint a false picture of Mark Bachman as a heavy-handed tyrant who intimidated his managers and supervisors into lying under oath for RELCO, and Benboe and Shipp as being nothing more than Mark Bachman's acquiescing minions, when the ALJ's characterizations of RELCO's witnesses are not supported by their testimony or the record as a whole. In particular, the ALJ relied on his conclusory belief and circular logic that because RELCO adopted a lawful position to oppose union organizing efforts, the ALJ erroneously found that RELCO's witnesses' testimony was shrouded with deceit, which the ALJ, in turn, tried to use to support his finding that RELCO bore an antiunion animus. ALJD 9: fn. 13. For example, the ALJ determined without any citation to the record that Benboe's testimony is clouded by his alleged "blind loyalty" and from that, the ALJ drew the equally erroneous and unsupported conclusion that Benboe "would adopt his position towards unions to that established by [Mark] Bachman." ALJD 7: fn. 11. This finding flies in the face of the actual evidence on the record – namely that Benboe was a union member for approximately 18 years – and there is nothing to support the conclusion that he was merely Mark Bachman's lackey, as the ALJ paints him to be. Indeed, the ALJ merely stated that Benboe "impressed" him as being loyal (ALJD 7: fn. 11) without, again, offering any supporting

evidence. In any case, being loyal to an employer does not preclude Benboe's union support or indifference to unions, nor does it show any animus towards unions.

Also, the ALJ improperly found Mark Bachman's testimony with respect to whether he discussed unions at morning meetings "questionable," because he testified he did not mention unions at those meetings. ALJD 8:5. As Judge Gritzner stated in his decision regarding the NLRB's §10(j) injunction, "the other pending actions [against RELCO] create an increased level of caution at RELCO to avoid conduct that could be interpreted as anti-union." Exhibit A, p. 9. Unlike the ALJ's irrational conclusion, Judge Gritzner's ruling is supported by the record and by common sense that Mark Bachman would be careful about mentioning unions at morning meetings. Instead of considering this rational alternative, the ALJ (without evidentiary support) stated that Mark Bachman's credibility was undermined because of the ALJ's speculation that the training Mark Bachman had been given which "would have" alerted him to the fact that there were lawful ways to reference unions to his employers. ALJD 8:6-9. The ALJ also cited Mark Bachman for "testify[ing] in absolutes" (ALJD 8:10-12), but it makes perfect sense that a company that has faced as much scrutiny from the NLRB as RELCO would avoid mentioning unions. For the ALJ to find otherwise, he had to erroneously assume that Mark Bachman disregarded the legal advice of RELCO's attorneys and his own training (which the ALJ conceded he received) in order to continue to bash unions at morning meetings.

Not surprisingly, Sindt and Douglas' testimony was clearly flawed, as they did not consistently testify as to the content of the alleged antiunion rhetoric. According to Sindt's testimony, Mark Bachman stated at these meetings he would rather keep everything in house and that he did not like unions. ALJD 5:20-21; Tr. 332. Meanwhile, Douglas testified Benboe said sometimes a union is good and sometimes they are bad. ALJD 5:23-24; Tr. 205. The

contradictions in Sindt and Douglas' testimony undermines the veracity of both their testimony and illustrates the error of the ALJ's refusal to credit Mark Bachman's testimony about what was said at the morning meetings, which the ALJ failed to consider.

The ALJ also doubted Mark Bachman's testimony that he did not learn of the IBEW's attempts to organize at the August NLRB hearing. In support of this conclusion, the ALJ merely stated that because Mark Bachman's own attorney questioned the witness, he "would likely have discussed this aspect of the witness' testimony." ALJD 8: fn. 12. This conclusion is characteristic of the ALJ's credibility findings, as his use of the term "would likely have discussed" shows he engaged in nothing more than a guessing exercise to come to this conclusion and ignored the absence of any testimony or other evidence to support it. Similarly, the ALJ held that Mark Bachman's testimony with respect to RELCO's intention to open a plant in Kansas City to service one client was to be a union plant was "sketchy at best" because "it is not of a choice of an employer whether a facility becomes organized." ALJD 7:30-35. However, even putting aside that the ALJ's conclusion is erroneous as a matter of law, the ALJ had no support in the evidence to justify rejecting Mark Bachman's uncontradicted testimony that RELCO intended to open a union plant in Kansas City, but instead, conclusorily disregarded the testimony without any basis.

Likewise, the ALJ used conjecture to determine that "Benboe incredibly claimed he did not learn of the IBEW campaign in 2011." ALJD 9:9-10. That is, without any evidence or even testimony that anyone spoke to Benboe about the IBEW, the ALJ merely surmised that someone must have spoken to Benboe about the IBEW, and, therefore, he had knowledge of it.

The ALJ also improperly credited Courtland Pfaff's ("Pfaff") version of events as to what transpired during the IBEW's handbilling efforts in October over Shipp's testimony. ALJD 9:18-

32. In particular, the ALJ did not credit Shipp's testimony that he threw the IBEW's handbilling materials out the window because "Pfaff credibly testified he would have observed any one throwing the distribution out of the window." ALJD 9:23-24. Even assuming that Pfaff testified truthfully, Pfaff was merely speculating about what he thought he "would have observed," and he was not the only IBEW agent present on that date (ALJD 4:30-32), and it could have been Bob Thomas who handed Shipp the handbilling materials or Pfaff may have missed that exchange for other reasons. Moreover, Pfaff's memory was clearly flawed, as the ALJ improperly failed to consider, since Pfaff believed he saw a white SUV with RELCO in the name of the license plate, when in fact, the only car with RELCO license plates was brown. Tr. 185; Tr. 471. To arrive at his conclusion, the ALJ improperly surmised that Shipp lied under oath merely because Shipp testified in front of Mark Bachman, but without any supporting evidence. ALJD 9: fn. 13.

The ALJ further claimed that "[Mark] Bachman's testimony [with respect to whether or not he had a meeting with Benboe after Benboe provided Mark Bachman with Sindt's year-end performance review] was undercut by that of his foreman," but this was another improper finding by the ALJ that Bachman and Benboe contradicted one another, when they did not. ALJD 48:28-29. However, Mark Bachman testified he met with Benboe prior to the Christmas break to let him know Sindt would be terminated. ALJD 48:18-21. Likewise, Benboe testified that he had a brief conversation with Mark Bachman, at which time, Mark Bachman said:

he was going to hold on to them until after the first of the year after he came back off of the Christmas shut down, that he didn't want to have any adverse terminations until after then he wanted them to be able to go ahead and get their holiday pay, and they didn't want to disrupt their Christmas holidays. Tr. 545.

There is nothing contradictory between Mark Bachman's testimony and Benboe's testimony because Benboe testified he knew that after the Christmas break, which ended on January 2,

Mark Bachman intended to terminate Sindt. Thus, the ALJ's finding to the contrary was improper.

**B. The ALJ wrongly concluded that RELCO violated §8(a)(1) of the Act by interrogating Sindt and Douglas.**

§8(a)(1) of the Act imposes liability for discussions between supervisors and employees only if an employer interferes with, restrains, or coerces an employee from participating in the protected concerted activity. 29 U.S.C. §158(a)(1). To determine whether an employer's conduct violated §8(a)(1), the alleged statements must be attributable to the employer and the statements or conduct alleged to have been illegal interrogation must be found to have a reasonable tendency to interfere with, restrain, or coerce union activities. *NLRB v. J. Schroeder Homes*, 726 F.2d 967 (3d Cir. 1984) (rejecting presumption that statements by a supervisor are necessarily those of the employer); *KenMor Electric Co.*, 355 NLRB No. 173, slip op. at 4 (2010). Here, the ALJ improperly ignored the first prong of the analysis and erroneously concluded that RELCO violated §8(a)(1) merely because: (1) Benboe allegedly asked Sindt about his opinions of unions; (2) Benboe allegedly interrogated Douglas about passing out authorization cards during company time; (3) Benboe somehow prohibited Douglas from passing out authorization cards during nonworking time when he only allegedly asked whether Douglas was passing out the cards during company time; and (4) Douglas Bachman held small group meetings regarding the CSX project. However, as set forth below, the evidence does not support a finding that RELCO violated §8(a)(1).

**1. RELCO did not interrogate Sindt or Douglas.**

An employer violates §8(a)(1) only by "coercively interrogating employees about their union activities or sentiments, or about the activities or sentiments of others, and by either directly or indirectly threatening employees." *3-E Co. v. NLRB*, 26 F.3d 1, 3 (1st Cir. 1994).

"[A]n interrogation becomes illegal when the 'words themselves or the context in which they are used . . . suggest an element of coercion or interference." *ITT Auto. v. NLRB*, 188 F.3d 375, 389-390 (6th Cir. 1999).

**(i) RELCO did not interrogate Sindt in October 2011.**

The ALJ improperly concluded that RELCO interrogated Sindt when Benboe allegedly simply asked his opinion of unions. ALJD 15:23. As an initial matter, Benboe testified that this incident did not occur. Tr. 528. As set forth in detail above, despite the ALJ's improper conclusions, Sindt was not a credible witness. Even all of the many credibility questions undercutting Sindt's testimony and ignoring Benboe's denial that this incident occurred, all that Sindt said was that Benboe asked what Sindt's opinion of unions. Tr. 344.

However, this did not constitute alleged interrogation as a matter of law. "[I]nfrequent, isolated and innocuous statements and inquiries, standing alone [do not] constitute interference, restraint or coercion within the meaning of Section 8(a)(1) of the Act." *NLRB v. Armour & Co.*, 213 F.2d 625, 628 (5th Cir. 1954). Supervisors are permitted to ask questions about how an employee feels about a union, especially where, as here, there is no evidence that the question was coercive or anything other than an isolated and innocuous question of to employee. *Central Hardware Co. v. NLRB*, 439 F.2d 1321, 1329 (8th Cir. 1971). But the ALJ improperly distinguished *Armour*. ALJD 15: fn. 21. The mere fact that in *Armour*, the employees were not discharged does not change the fact that it stands for a well-established principle of law that the ALJ was not entitled to ignore.

Even assuming Benboe did ask Sindt how he felt about unions, it was simply an innocent, isolated question. As set forth in detail below, there is no evidence that Benboe or any manager at RELCO had any knowledge of Sindt's union involvement. Nothing in Sindt's testimony about

this one-question conversation with Benboe suggested that Benboe displayed any hostility or made any threats or warning about the consequences of supporting the IBEW or any other union, despite the ALJ's improper conclusion. ALJD 16: fn.21. In fact, Sindt did not testify that Benboe's question made him feel threatened, coerced or that he had to modify his union involvement for fear of repercussions. Nor did Sindt testify that Benboe's question made Sindt change his distribution of authorization cards – Sindt admittedly continued to distribute them after this conversation with Benboe. Tr. 335. In *NLRB v. Homemaker Shops, Inc.*, where, as here, a supervisor's questions as to whether the employee had met with a union representative and what kinds of demands the union was going to make were isolated, innocuous, showing no apparent antiunion animus, since they did not contain any warning about the consequences of supporting a union, and the interrogated employee did not display any fear or coercion, the Acting General Counsel's claim of illegal interrogation necessary fails. 724 F.2d 535, 549 (6th Cir. 1984). Here, Benboe's solitary question was far more isolated and innocuous than the inquiries in *Homemaker Shops*. Notwithstanding this, the ALJ again improperly refused to follow *Homemaker Shops*, because Sindt was discharged while the parties in *Homemaker Shops* were not. This irrelevancy, however, does not justify the ALJ's disregard for the legal principle for which *Homemaker Shops* stands, as set forth above. Moreover, *Homemaker Shops* is applicable because Sindt did not testify that he felt any fear of or coercion from Benboe. Thus, the ALJ's conclusion is wrong as a matter of law and based on the facts of this case, since Sindt was not interrogated by Benboe's simple and innocuous question, which was probably not even asked in the first place.

- (ii) **RELCO did not interrogate Douglas or prohibit Douglas from engaging in union activities in December 2011.**

The ALJ also improperly concluded that Benboe interrogated Douglas when Benboe merely asked whether Douglas passed out authorization cards during company time and no one testified that Benboe prohibited Douglas from passing out authorization cards during non-work times. ALJD 16: 11-13. It is unlikely that this incident even occurred in the first place, since Douglas failed to mention this significant incident in his first affidavit, and Benboe flatly denied that this incident occurred. Tr. 528; Resp. Ex. 8. Remarkably, the ALJ refused to acknowledge the significance of this considerable omission, instead, merely commenting that, while "the omission from the affidavit is troublesome, I do not find it sufficient to discredit this aspect of Douglas' testimony," even though it was the only evidence offered to show RELCO had knowledge of Douglas' union involvement and even though the first affidavit was drafted ten days after Douglas' discharge, had a section marked "knowledge," and was closer in time to the occurrence of the alleged incident. ALJD 16: fn. 22. Though the ALJ simply refused to acknowledge it, Douglas' omission of this key fact from his first affidavit, in fact, confirmed there was no evidence that RELCO knew about Douglas' IBEW involvement since the Acting General Counsel's claim is based solely on Douglas' impeached testimony.

However, even assuming that this incident did take place, it did not constitute illegal interrogation under §8(a)(1). Douglas admitted that the *only* inquiry Benboe made was whether Douglas was passing out the authorization cards during company time. Specifically, according to Douglas, Benboe simply asked him "if I was doing that on company time." Tr. 254. When Douglas said no, Benboe simply replied, "No. And he said, "You better not be.' And that was the end of it...that was the whole conversation." Tr. 254.

Employers have a right to ask whether a union activity interferes with the employees' work. *See Consolidated Edison Co. of New York, Inc. v. McGarry*, 280 NLRB 338, 339 (1986)

(employer did not violate §8(a)(1) by telling employee not to solicit on company time since employer has right to investigate apparent interference with employees carrying out their duties); *see also NLRB v. Lyman Printing Co.*, 356 F.2d 844 (4th Cir. 1966) (supervisors who questioned employee about whether coworker employee had offered him union card to sign did not commit unfair labor practice because supervisors were lawfully entitled to ascertain if co-worker was recruiting for union on company time). Therefore, even accepting Douglas' testimony at face value, all Douglas said was that Benboe lawfully asked if he was handing out authorization cards on company time. Tr. 254. Douglas never testified that he felt he was being coerced or he felt he had to modify his union involvement for fear of repercussions.

In an effort to find any support for his conclusion that Benboe's alleged comments to Douglas were coercive, the ALJ stated that he considered the "back drop of Benboe and Bachman's negative comments towards unions during the morning meetings," which the Acting General Counsel failed to prove ever occurred, and "the anti-union posting at Respondent's facility where employees signed in at work," even though the Acting General Counsel failed to proffer any evidence that RELCO had anything to do with it. ALJD 16:12-16. However, there was no evidence connecting those other incidents to the brief conversation between Benboe and Douglas. To the contrary, Douglas merely testified that Benboe made a lawful statement about distributing cards on company time, but Douglas did not testify that he felt threatened or coerced by anything Benboe allegedly said. In other words, the ALJ's conclusion is based upon speculation, and a blatant disregard for the law or this issue that Benboe "interrogated" Douglas.

2. **Douglas Bachman did not solicit employee complaints and grievances, nor did he promise employees increased benefits and improved terms and conditions of employment if they abandoned union organization.**

The ALJ erroneously concluded that RELCO violated §8(a)(1) 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. However, the record confirms that there was no evidence that Douglas Bachman solicited employees' grievances with the promise of correcting them for the purpose of discouraging unionization, much less that he promised to resolve them if employees rejected the IBEW. *NLRB v. Broyhill Co.*, 514 F.2d 655, 657 (8th Cir. 1975). "It is well established that mere solicitation [of grievances] does not violate the act." *See NLRB v. Arrow Molded Plastics*, 653 F.2d 280, 283 (6th Cir. 1981); *Idaho Falls Consolidated Hospitals v. NLRB*, 731 F.2d 1384, 1386 (9th Cir. 1984) ("An expressed willingness to listen to grievances is not sufficient to constitute a violation"). Solicitation of employee grievances is only unlawful "where the solicitation is accompanied by the employer's express or implied suggestion that the grievance will be resolved or acted upon only if the employees reject union representation." *Health Mgmt., Inc. v. NLRB*, 2000 U.S. App. LEXIS 6765 (6th Cir. 2000).

The ALJ wrongly concluded without any evidentiary support that the meetings were "in a direct response to that hand billing." ALJD 13:54-56. However, the undisputed fact that Douglas Bachman had a history of routinely holding such meetings undermined the ALJ's conclusion that the meetings were in response to the IBEW's handbilling. There was no dispute that Douglas Bachman had held a series of meetings with Albia employees in 2009, 2010, and 2011, with the last one being on October 19, 2011 to discuss how to provide better service to RELCO's new client, CSX Railroad, a fact that is bolstered by Douglas Bachman's written records. Tr. 562. Yet, despite this, the ALJ inexplicably and erroneously credited Sindt's testimony over Douglas Bachman's, merely stating that he found "Sindt's recollection to be the best among all the

witnesses," but inexplicably refused to find that RELCO had established that Douglas Bachman had conducted meetings in the past with groups of employees where he solicited grievances and provided his personal number without again considering the written records. ALJD 18:34-37.

In any case, Sindt and Douglas did not contradict Douglas Bachman about what he supposedly said at those meetings. Sindt said the meetings were to improve the plant's efficiency and to improve employees' morale. Tr. 336. Douglas essentially agreed that the topic of the meeting was improvements to better the production and the relationship with the clients – it was not to solicit the grievances of the employees to somehow improve their individual working conditions. Tr. 217. Neither Sindt nor Douglas testified that Douglas Bachman solicited grievances or promised to correct them if the employees rejected unionization. There is no evidence that Douglas Bachman even mentioned a union, union handbilling, or union activities. Tr. 367. Further, it was undisputed that the October 19, 2011 meeting was scheduled well before the IBEW's handbilling and was intended to discuss how to improve productivity in order to service RELCO's new client, CSX Railroad (Tr. 562), but because the ALJ could not point to any evidence to the contrary, he instead chose to disregard this key point. ALJD 13:17-32.

The meetings were also voluntary (Tr. 562; Tr. 576), contrary to the ALJ's ruling that the meeting was mandatory. ALJD 13:34-35; 18:22-25. Even Douglas admitted that the posting did not state that the meeting was mandatory, and he only *assumed* the meeting was mandatory. Tr. 217. To arrive at the conclusion that the meetings were mandatory, the ALJ infused his own opinion, which was contrary to the evidence and was unsupported by Douglas and Sindt's testimony. The ALJ stated that there was nothing informing employees that they could not attend. ALJD 13:38-39. By the same token, however, by Douglas' own admission, there was nothing in the notice that stated that employees were required to attend the meetings. Since the

burden is upon the Acting General Counsel to prove that RELCO violated the Act by holding such meetings, it was the Acting General Counsel's burden to prove that the meetings were mandatory, not RELCO's burden to show that the meetings were voluntary. Because the ALJ refuse to recognize that the Acting General Counsel failed to meet its burden of proof on this issue, the ALJ's conclusion that the meetings were mandatory cannot stand.

In any event, even Sindt and Douglas confirmed that there was no solicitation of grievances by Douglas Bachman; the meeting on October 19, 2011 was merely to discuss improving plant efficiency, which the ALJ ignored. Tr. 217; Tr. 336. Douglas Bachman's employee meetings undeniably predated any union organizing. Accordingly, the ALJ erroneously concluded that Douglas Bachman unlawfully solicited employee grievances and the ALJ's finding of a violation of §8(a)(1) fails for lack of any evidence to support it.

**C. The ALJ improperly concluded that RELCO violated §§ 8(a)(1) and (3) of the Act when it discharged Sindt and Douglas.**

Under §8(a)(3) of the Act, it is an unfair labor practice for an employer to discriminate or discourage against an employee for either joining or belonging to a union.<sup>9</sup> 29 U.S.C. §158(a)(3). In general, "the burden is on the General Counsel to prove charges of unfair labor practices by sufficient evidence and is not upon the employer to disprove them." *Wellington Mill Div., West Point Mfg. Co. v. NLRB*, 330 F.2d 579, 585 (4th Cir. 1964). The Acting General Counsel had the burden to prove that: "(1) the employee engaged in a protected activity; (2) the decision-maker knew [about the employee's engagement in the protected activity]; and (3) the employer acted because of antiunion animus." *Sears, Roebuck & Co. v. NLRB*, 349 F.3d 493, 503 (7th Cir. 2003). An employer is permitted to discharge an employee associated with a union for his misconduct or poor work performance, as long as the discharge is not motivated by a desire to

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<sup>9</sup> §8(a)(1)'s standard is summarized above in Section III. C of this Brief.

penalize employees for their union activity. *Wellington Mill Div., West Point Mfg. Co.*, 330 F.2d at 586. Unless the Acting General Counsel proves the existence of such an unlawful purpose, the employer is not in violation of the Act, regardless of the nature of the employer's conduct. *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486, 491 (8th Cir. 1946). In deciding whether §8(a)(3) has been violated, the controlling factor is the employer's motivation. *Syncro Corp. v. NLRB*, 597 F.2d 922, 924 (5th Cir. 1979). Thus, it is necessary for the Acting General Counsel to prove not just that the employer held a general antiunion animus, but that the employer possessed an unlawful animus against the lawful union activity of its employee, and in turn, that animus caused the discharge of the employee. *NLRB v. Eastern Smelting and Refining Corp.*, 598 F.2d 666, 670 (1st Cir. 1979) (mere firing of union supporter and employer gratification of harming union by doing so is insufficient to show animus).

Here, despite the ALJ's conclusion, as discussed more fully below, the Acting General Counsel failed to prove that the decision-makers had any knowledge of Sindt or Douglas' involvement with the IBEW, much less cared about their activities. Rather than solely focus on the pertinent analysis that RELCO knew of Sindt and Douglas' involvement with the Union, the ALJ instead wrongly relied upon an analysis as to whether or not RELCO knew about the IBEW campaign. ALJD 8:17-37; ALJD 9:6-43. When the ALJ did consider whether the Acting General Counsel met its burden to show that RELCO had knowledge of Sindt and Douglas' union activities, he came to the unsupported conclusion that RELCO did in fact have such requisite knowledge, despite the fact that Sindt never offered testimony that anyone at RELCO had such knowledge and Douglas's testimony that Benboe may have known about his union support based on one alleged incident involving authorization cards was undermined by his failure to include the incident in his initial affidavit given to the NLRB, though it was drafted close in time to his

discharge and there was no evidence that Benboe mentioned the incident to the decision-maker, Mark Bachman.

Further, the ALJ wrongly concluded that the decision-makers at RELCO harbored an antiunion animus, let alone an animus toward any union activities by Sindt or Douglas that resulted in either of their discharges, despite the fact that there was *no* supporting evidence. For these reasons and others set forth below, RELCO cannot be found liable for violating §§ 8(a)(1) and (3) of the Act.

**1. The absence of any evidence that RELCO knew about Sindt's union activities defeats the ALJ's conclusion that the Acting General Counsel made a strong prima facie case of an unlawful discharge for Douglas and Sindt.**

As discussed above, Sindt never proffered any testimony that anyone at RELCO, including Mark Bachman or Benboe, ever had knowledge of his union activities. According to Sindt, he simply passed out authorization cards in April or May 2011, though he offered no evidence that anyone from RELCO's management had knowledge of or had seen Sindt passing out these authorization cards. Tr. 326. As stated by Judge Gritzner, "Sindt never admitted that he was involved in union-related activities but rather answered neutrally and said he had no preference with regard to unionized and non-unionized workplaces. [Tr. 334.] Benboe cannot be charged with knowledge of Sindt's involvement with the Union based on this conversation alone. The NLRB has therefore failed to prove at this preliminary stage that RELCO had any knowledge of Sindt engaging in protected activity." Exhibit A, p. 6. In *Gruma Corp.*, the Acting General Counsel failed to establish the employer had knowledge of employee's union activities when there was lack of evidence that supervisor shared information with anyone else. 350 NLRB 336, 338 (2007). The evidence is even stronger in this case that RELCO had no knowledge of Sindt's union activities, but the ALJ determined that RELCO had knowledge of Sindt's protected

activities by improperly putting forth a nonsensical conclusion that, even though Sindt denied he was involved with the IBEW to Benboe, knowledge of his union activities could somehow be imputed to Benboe by the mere fact that he even asked the question in the first place. ALJD 41:22-23. There was no supporting evidence of knowledge, merely the ALJ's speculation.

**2. The absence of any evidence that RELCO knew about Douglas' union activities defeats the ALJ's conclusion that the Acting General Counsel made a strong prima facie case of an unlawful discharge for Douglas and Sindt.**

Like Sindt, Douglas never proffered any credible testimony to show that RELCO had any knowledge of Douglas' union activities. Douglas said he became aware of the IBEW's campaign in the spring of 2011. Tr. 194. Except for attending a few IBEW meetings, Douglas admittedly only began to hand out authorization cards after September 26, 2011. Tr. 198. Like Sindt, Douglas did not offer testimony to show that any member of RELCO's management had observed Douglas passing out authorization cards, except that Douglas asserted that in December 2011 Benboe supposedly saw that Douglas had authorization cards in his back pocket and asked whether Douglas was handing them out during company time. Tr. 206. However, Benboe denied that this incident occurred and maintained that this incident occurred and that he had no knowledge of Douglas' involvement with the IBEW during Douglas' employment. Tr. 528. Mark Bachman testified that he had no knowledge of it. Tr. 469. Moreover, Douglas conspicuously omitted this crucial piece of information in his first affidavit, which was prepared on January 12, 2012 – a mere ten days after Douglas had been discharged and much closer in time to the date of the alleged incident and than his second affidavit. Resp. Ex. 8. Even if this incident did occur, the Acting General Counsel failed to present evidence that Benboe shared this information with anyone else at RELCO, which also defeats the ALJ's conclusion that RELCO knew of or

discriminated against Douglas because of his alleged union activities. *See Gruma Corp., supra*. Thus, the ALJ's conclusions about Douglas also cannot stand.

**3. The absence of substantial evidence of antiunion animus defeats the ALJ's conclusion that the Acting General Counsel made a strong prima facie case of an unlawful discharge for Douglas and Sindt.**

As stated in Judge Gritzner's decision related to the §10(j) injunction, the Acting General Counsel failed to present *any* evidence that Sindt or Douglas were discharged because of their involvement with the IBEW, or that RELCO harbored animus against them because of their union activities. *Sears, Roebuck & Co. v. NLRB*, 349 F.3d at 507-08; *Yeshiva Ohr Torah Cmty. Sch.*, 346 NLRB 992 (2006) (noting that a nexus must be proven by the Acting General Counsel between the employee's protected activity and the employer's allegedly retaliatory action motivated by an antiunion animus). Indeed, as stated by Judge Gritzner, rather than presenting any evidence that RELCO bore an antiunion animus, the Acting General Counsel instead attempted to prematurely shift the burden onto RELCO to show that it had legitimate reasons for discharging Sindt and Douglas. The only "evidence" the Acting General Counsel proffered at the hearing to suggest that RELCO bore an antiunion animus were the prior charges that the NLRB had filed against RELCO, which are currently on appeal. However, even the ALJ conceded that he had "not relied on [the previous rulings] in making credibility determinations, or to make any of [his] findings here." ALJD 2: fn. 3.

Despite this statement, the ALJ glossed over the gaping hole in the Acting General Counsel's prima facie case, as he did not even mention, much less analyze, whether the Acting General Counsel properly presented evidence that RELCO bore an antiunion animus.

Notwithstanding the ALJ's massive oversight and the Acting General Counsel's lack of evidence of animus, the record does not support a finding that RELCO had a generalized, let

alone, an unlawful animus against any lawful union activities by either Sindt or Douglas. Though Benboe is accused of interrogating and then recommending the discharges of Sindt and Douglas in violation of the Act, Benboe had been an IBEW member and a member of other unions for approximately eighteen years and held positions as a shop steward, chief shop steward, and business agent for twelve of those eighteen years. Benboe testified that he believed that having a union present at RELCO would in fact have made his job as supervisor easier. The ALJ's conclusion that Benboe is loyal to a fault to RELCO that he would lie under oath, act contrary to his testimony at RELCO, and disregard his decades of union support is unsupported by the record and cannot stand.

The ALJ also erroneously failed to consider that even 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. Indeed, apparently there were ten to fifteen other RELCO employees who belonged to the IBEW, or at least attended its meetings, but of that group, yet there was no evidence that RELCO took any action against them. Tr. 196.

Sindt and Douglas both claimed that during the morning safety meetings, Benboe and Mark Bachman made antiunion statements; however, this testimony is not credible. First, Sindt and Douglas contradicted one another as to who actually led the meetings. Specifically, Sindt testified that Benboe, Crall, or Dalman would lead these meetings and that Mark Bachman would seldom come down to these meetings, only to later testify that Mark Bachman exclusively conducted safety meetings with the employees. Tr. 331; Tr. 368. Douglas, meanwhile, stated that in addition to Mark Bachman, Benboe, Crall, or Dalman would sometimes conduct these meetings. Tr. 192.

Second, Sindt and Douglas contradicted each other about what Benboe and Mark Bachman supposedly said about unions at these meetings. According to Douglas, Benboe allegedly stated that unions are "no good" and "they just help the lazy people." Tr. 205. But Douglas merely said Mark Bachman stated that "even with the recent recession – that they had never laid ...off anybody." Tr. 205. Meanwhile, Sindt testified that Benboe stated "that unions are basically not all that they're cracked up to be," and that Mark Bachman stated at these meetings that "he'd rather keep everything in house. He does not like unions." Tr. 331; Tr. 333.

Thus, even accepting Sindt and Douglas' inconsistent testimony at face value, what they assert was said at morning meetings does not even show they possessed an antiunion animus, as that term is used in the law. More importantly, the ALJ improperly ignored that RELCO was lawfully entitled to express its opinions of unions and that it was patent error under §8(c) of the Act for the ALJ to admit such lawful statements as substantial evidence in an unfair labor proceeding. 29 U.S.C. §158(c).

In any event, Mark Bachman and Benboe testified consistently with one another that, at these morning meetings, they never made antiunion statements because: (1) they knew they were not allowed to pursuant to their training in labor relations (Tr. 473); and (2) they had no knowledge that the IBEW was even attempting to organize. Tr. 547.

Moreover, the ALJ wrongly concluded that an "anti-IBEW picture" was posted by RELCO. ALJD 10:29-31. Sindt and Douglas' testimony about this picture of the IBEW headquarters that allegedly were posted above RELCO's timekeeping computers was inconsistent, unreliable, and ultimately, unavailing. However, this picture is evidence of nothing. There is no evidence that anything was illegal or inaccurate about the pictures. According to Sindt and Douglas, it was merely a picture of the actual IBEW headquarters that stated

something along the lines that the union dues go towards funding the headquarters, which is an objectively true statement, but the ALJ failed to take into account this key point in his zeal to find evidence of an antiunion animus where none existed. Tr. 203; Tr. 329-30.

Moreover, Douglas testified that the pictures were posted for "more than a week" (Tr. 204), but Sindt claimed that the pictures were only posted for "three to four days" (Tr. 330), a discrepancy that undermines their testimony, but that the ALJ inexplicably chose to overlook merely because "at the time, neither [Sindt nor Douglas] had a reason to make a record or a note of each day they saw the posting." ALJD 10:26-28. Of course, by the same reasoning, the ALJ should not have discredited Mark Bachman's testimony that the picture was only posted, to the best of his recollection for one day, but the ALJ ignored Mark Bachman's testimony, as he did all of RELCO's witnesses. ALJD 10:24-26.

However, the ALJ also ignored that the Acting General Counsel also failed to put forth evidence to demonstrate that RELCO's management was responsible for posting the pictures. To reach his erroneous conclusion, the ALJ determined RELCO "must have" posted the picture simply because the picture was posted in plain view on RELCO's property. ALJD 10:29-31. However, this conclusion is based on speculation, at best, and the Acting General Counsel, whose burden it was to show that RELCO posted the picture, failed to present any evidence to that effect.

**4. The ALJ improperly concluded that Sindt and Douglas were treated disparately.**

The fact that Sindt and Douglas' respective discharges were not a result of any antiunion motivation is further confirmed by the uncontradicted evidence that neither Sindt nor Douglas were treated disparately. ALJD 44: fn. 38. First and foremost, Sindt and Douglas could not have

been treated disparately based on their union activities, because, as set forth above, there was no evidence RELCO had knowledge that either Sindt or Douglas were involved with the IBEW.

Second, contrary to the ALJ's conclusion, Frank Cox was not an appropriate comparable to Sindt and Douglas, and Mark Bachman did not admit that he was. ALJD 44: fn. 38. The complete absence of any similarly situated "comparables" precludes the Acting General Counsel from ever being able to show that RELCO's reasons for terminating Sindt and Douglas were a pretext for interference with protected rights. *Denisi v. Dominick's Finer Foods, Inc.* 99 F.3d. 860, 866 (7th Cir. 1996); *LB&B Assocs. v. NLRB*, 232 Fed. Appx. 270, 276 (4th Cir. 2007). Rather, like Sindt and Douglas, Frank Cox's last performance review indicated that Mark Bachman recommended also terminating him for poor performance (even though there is no evidence that Frank Cox was involved in a union). GC Ex. 24. However, unlike Sindt and Douglas, Frank Cox was part of an ongoing investigation by RELCO's workman's compensation carrier, which Mark Bachman clearly described in his testimony, precluding any conclusion that Mark Bachman admitted Frank Cox was a comparable. Because the reasons for Frank Cox's continued employment at RELCO are easily distinguished from the matter at hand, it cannot be concluded that Frank Cox was similarly situated to Sindt and Douglas. Tr. 482. If anything, the undisputed fact that Mark Bachman also recommended that Frank Cox be discharged rebutted any possible conclusion that Sindt or Douglas were discharged because of their union activities.

Additionally, the ALJ improperly concluded that Sindt was treated disparately because he was "[t]he only one who received any discipline..., who had just begun training as a fabricator, had received no prior disciplinary action, and more than coincidentally was soliciting employees to sign union cards." ALJD 46:41-43. Here, however, the ALJ was improperly acting as a "super-personnel office" in second-guessing RELCO's disciplinary procedures by implying that

Sindt "just began" training as a fabricator and that Sindt had only been told since the summer of 2011 to obtain the welding certificate, when, in fact, Sindt was told that as a condition upon his hiring in 2010, he would become certified as a welder. Even Sindt's first performance evaluation dated June 7, 2010 stated that Sindt's "welding really needs to be tested." GC Ex. 6(c). Also, to reach his improper conclusion that Sindt was somehow mistreated, the ALJ improperly speculated about whether the "8 or 9 individuals" who also failed to receive their welding certificates were not disciplined at the end of 2011, whether they had just begun training, or any other information about those 8 or 9 individuals, but the Acting General Counsel did not present any evidence about them. In the absence of any evidence about whether these "8 or 9" individuals had received prior warnings about getting their welding certificates or anything else about their performance, the ALJ had no basis to determine that they were in any way similarly situated to Sindt.

**5. Assuming *arguendo* that the Acting General Counsel met its burden of proving a prima facie case, the record clearly established that Sindt and Douglas were discharged for legitimate reasons.**

Ignoring the fact that the Acting General Counsel failed to meet its burden of proving that RELCO had knowledge of Sindt and Douglas' union activities, that RELCO bore an antiunion animus, or that animus was the motivating factor for discharging Sindt and Douglas, 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 misapplied this test, as well.

**(i) Sindt was discharged for legitimate reasons.**

The ALJ erroneously concluded that Sindt was not discharged for legitimate reasons, even though his performance deficiencies were well-documented and essentially undisputed, including evidence of his poor work performance, his failure to become a certified welder, and his refusal to perform the tasks he decided he did not wish to do. Sindt preferred to be a truck mechanic, but there was no dispute that RELCO told Sindt that he was required to cross-train as a fabricator and obtain his welding certificate. Tr. 387; Tr. 442. Rather than comply with this requirement, Sindt complained to Mark Bachman and others. Tr. 447; Tr. 449. Because Sindt's skills were limited, even putting aside the fact that he was often observed wandering away from his work station (Tr. 538), RELCO undeniably was limited in the types of work that it could assign him, and in 2011, began to run out of things for him to do or would have to use a second employee who was a certified welder to complete Sindt's jobs. Tr. 442. Thus, it was undisputed, and hardly surprising, that after two years of employment, RELCO's management considered Sindt to have the skills of only an "entry level" employee. Tr. 445.

Sindt's failure to improve is also well-documented and undisputed as shown by the performance reviews he admittedly received before he ever became involved with the IBEW. The performance evaluation that he received on December 9, 2010, *before* he became involved with the IBEW, warned him that he needed to work faster and to clean up his area. GC Ex. 6(c). Sindt's September 15, 2011 review stated that he: (1) lacked drive and initiative; (2) did not have a willingness to accept directions; and (3) needed to certify as a welder. GC Ex. 6(b); Tr. 348. For his third review, which he acknowledges he received orally<sup>10</sup>, Sindt admitted that he was repeatedly warned that he needed to become a certified welder, needed to learn more, and that he

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<sup>10</sup> The ALJ improperly stated that Sindt's final evaluation written in December 2011 was not presented to him, since Sindt plainly admitted he received the evaluation orally. ALJD 43: fn. 38.

needed to clean his area, but there is simply no evidence that he was meeting the reasonable expectations by the employer. Tr. 351.

Finally, there is also no dispute that in December 2011, Benboe gave Sindt a list of tasks to complete before the end of the day and not only did Sindt fail to complete the tasks, he did them improperly.<sup>11</sup> Tr. 539. Accordingly, Benboe made the recommendation to Mark Bachman to terminate him. Tr. 451. However, no one questions that Mark Bachman made the decision to terminate Sindt's employment after reviewing all of Sindt's performance reviews and observing no change in Sindt's performance, and how he was limited in the tasks he could perform. All of the documentation of Sindt's performance deficiencies, especially when combined with the fact that they came before Sindt's union activities and the absence of evidence that anyone in RELCO's management knew of Sindt's union activities, demonstrates that Sindt was discharged for legitimate reasons and not in violation of §§ 8(a)(1) or (3) of the Act.

**(ii) Douglas was discharged for legitimate reasons.**

Like Sindt, RELCO's legitimate business reasons for discharging Douglas were well-documented and even the ALJ was forced to concede that RELCO's reasons were real. Douglas was placed on probation, not once, but twice during the course of his two year employment at RELCO.<sup>12</sup> Tr. 458. Both times, Douglas was put on probation before any union activity.

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<sup>11</sup> Incredibly, the ALJ cited Benboe for "only" providing one example of Sindt's poor performance. Here, the ALJ is again mischaracterizing the record. Benboe was asked to provide a specific example of Sindt's performance issues in addition to all of the preceding performance issues. Tr. 539. Benboe was not asked to exhaust his memory about Sindt's performance. The ALJ's decision to reject Benboe's testimony simply because Benboe did not exhaust his memory or list every example of Sindt' poor performance is thus improper.

<sup>12</sup> The ALJ improperly insinuated that Douglas was not placed on probation for a second time after June 1, 2011, stating that the only evidence of Douglas' probation is Douglas' own signature. ALJD 43:12-13. There are two flaws in the ALJ's argument. First, the ALJ was not entitled to reject the undisputed evidence of Douglas' signature appearing on his performance evaluation. Second, the ALJ had no basis to simply ignore the testimony from Mark Bachman that confirmed Douglas was on probation. The ALJ did not find Mark Bachman's testimony with respect to whether Douglas was placed on probation incredible.

Moreover, while Douglas was on probation for the second time, his already poor attendance severely deteriorated in the later part of 2011. Tr. 457. Douglas' performance problems were also well-documented in his performance evaluations. In his initial performance review dated December 9, 2010, well before any union activity, Douglas was told that he "needs to stay on assigned work task, needs to work on fabrication skills, needs to become a certified welder, [and]...[RELCO] needs to see further improvement in quantity & quality of work." GC Ex. 5(c). In Douglas' second performance review, through the period of June 1, 2011, also before his union activities, it noted Douglas' issues with attendance, his attitude, and his problems with focusing on his assigned tasks. GC Ex. 5(b); Tr. 461. As a result of his second blue flag policy violation and his second poor review, Douglas was placed on probation for a second time. GC Ex. 5(b).

Douglas also admitted that he received two warnings (one verbal warning that was documented and one written warning) for violating RELCO's blue flag policy, both before Douglas was involved with a union. Tr. 226; Tr. 229; R. Ex. 5; R. Ex. 7. All of RELCO's well-documented complaints about Douglas' poor performance, which came before he engaged in any union activity, rebuts the ALJ's conclusion that Douglas' poor performance was a pretext. *Johnson v. Sullivan*, 945 F.2d 976, 981 (7th Cir. Ill. 1991). ALJD 41:31-32.

Despite all of these written warnings, poor performance evaluations, and being placed on probation for the second time, Douglas' attendance grew worse until in December 2011 alone, Douglas accumulated four points for poor attendance. GC Ex. 52; Tr. 511. The ALJ erroneously concluded that "Benboe's claim that Douglas was terminated for attendance is belied by [the] content of Douglas' termination letter." ALJD 30:32-33. However, the ALJ missed the real distinction between being discharged solely for violating RELCO's strict attendance policy (i.e.

if an employee accumulates 12 points, he is automatically discharged) and poor attendance being a factor in overall poor performance. Tr. 431. Accordingly, the termination letter Benboe drafted for Douglas accurately stated that Douglas was terminated for poor performance, which subsumed his poor overall attendance. The fact that Douglas' termination letter did not explicitly mention his attendance violation did not mean that it was not a reason for his termination or suggest that RELCO engaged in shifting reasons for the termination. *Grottkau v. Sky Climbers, Inc.*, 79 F.3d 70, 73 (7th Cir. 1996) (rejecting finding of "shifting reasons" where termination letter did not mention unauthorized vacation issues since it was subsumed in language in termination letter referring to "misuse of company property").

Here, RELCO never claimed it discharged Douglas for violating its attendance policy, only that his deteriorating attendance was a factor in determining Douglas should be discharged for overall poor performance. Under the ALJ's analysis, RELCO was somehow obligated to ignore Douglas' poor attendance because he had not yet reached the limit of the attendance policy – which was another mistake of the ALJ improperly acting as a super-personnel office. Accordingly, RELCO did not put forth shifting reasons for Douglas' discharge, nor did it fail to follow its own attendance policy.

Mark Bachman made the ultimate decision to terminate Douglas for his poor work performance without having any knowledge of Douglas' union activities. Tr. 469. Despite Mark Bachman's clear testimony, the ALJ egregiously misstated the record and without reference to the record, claimed that Mark Bachman stated the decision to terminate Douglas was made "at the recommendation of Respondent's counsel." ALJD 43:36-38. This complete misstatement of the record was used to discredit Mark Bachman's testimony with respect to the legitimate business reasons proffered by Mark Bachman to illustrate why Douglas had been discharged and

is just another example of the ALJ "stretching" the record so that he could reach his clearly desired, but entirely unsupported conclusion. Accordingly, for all of the foregoing reasons, like Sindt, Douglas was terminated for legitimate business reasons and not in violation of §§8(a)(1) or (3) of the Act.

**D. RELCO's Employee Handbook does not violate §8(a)(1).**

Despite having brought two previous matters against RELCO, the Acting General Counsel for the first time in this third action against RELCO alleged that a portion of RELCO's Employee Handbook violated §8(a)(1) on its face, despite the fact that that exact same policy had been in place during the entire duration of the previous two matters. Essentially, by bringing this charge for the first time at the eve of the hearing in this matter, the Acting General Counsel has unduly surprised RELCO with its new assertion that the policy, which the NLRB had for years failed to challenge, is facially invalid. Because the policy had not previously been challenged, RELCO had little reason to suspect that it was potentially in violation of §8(a)(1), and the Acting General Counsel had effectively acquiesced to the policy and should be estopped from attacking it at this late date. Moreover, the United States Supreme Court disfavors such unfair surprises, and RELCO should not be held to be in violation of §8(a)(1) for its policy. *See Christopher v. SmithKline Beecham Corp.*, 132 U.S. 2156 (2012) (employer had no reason to suspect that its policy was illicit where governmental agency failed to take action against the policy after years of opportunity to bring charges). However, the ALJ improperly failed to even consider this argument.

The ALJ's decision entirely missed the point of RELCO's argument about the unfair surprise of bringing a charge against a policy that had been in effect when the NLRB had brought two previous charges against RELCO, some of which had attacked other RELCO

policies. The NLRB had already taken two bites out of the proverbial apple, and, like in *Christopher*, failed to target the policy. Like in *Christopher*, there is no other explanation other than the NLRB apparently thought that the policy did not violate the Act for years. RELCO is *not* claiming that the Acting General Counsel's charge is time barred under the statute of limitations, and, thus, *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) do not apply. ALJD 21:29-35. Furthermore, these cases are easily distinguished from the matter at hand because in none of those cases did the NLRB file previous charges. Rather, the question was merely the NLRB should be estopped or otherwise from attacking this longstanding policy at the last minute in this case when it had two prior opportunities to do so.

In any event, contrary to the ALJ's erroneous decision, RELCO's policy does not violate §8(a)(1) of the Act. The ALJ improperly isolated the "last sentence" of the policy without considering the entire paragraph. ALJD 21:16-20.; JT. Ex. 1, p. 68. The entire paragraph is clearly limited to what employees may or may not do during *working* time. The policy is not so broad as to prohibit solicitation or distribution of material during *nonworking* time. Employers are permitted under §8(a)(1) to prohibit solicitation during nonworking times. For example, like RELCO's policy, in *Gooch Packing, Inc.*, the employer's employee handbook stated, "There shall be no solicitation or buying or selling of kind during working time unless prior permission has been obtained from the Personnel Manager." 187 NLRB 351, 351 (1970). The NLRB held that the policy did not violate §8(a)(1) because the same requirement was made for all forms of worktime solicitation, not just related to unions. *Id.* There is also no discernible difference between *Adtranz Abb Daimler-Benz Transp., N.A., Inc. v. NLRB* and the matter at hand. 253 F.3d 19 (D.C. Cir. 2001). A reasonable employee would not read the paragraph of RELCO's policy

and determine that the last sentence applies even during nonworking times, while the three preceding sentences applied only to working times, especially when the immediate sentence preceding the last sentence actually defines "working times," and the theme of the paragraph is clearly what can and cannot be done during working times.

The ALJ, however, incorrectly held that like in *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. However, RELCO's policy as it was written is easily distinguished from the "chain of command policy" in *Guardsmark*. In that case, the NLRB stated the licit qualifier, "while on duty," did not apply to the final sentence in the paragraph, "Do not register complaints with any representative of the client," because the focus of the paragraph changed from supervisors to clients and there were many intervening sentences between the licit qualifier and the final sentence. *Id.* at 375. Unlike the policy at issue in *Guardsmark*, RELCO's policy never changed focus. The focus of RELCO's policy was and remained employees. Also unlike in *Guardsmark*, there were not many sentences preceding the qualifier "working time" and the final sentence. Rather, each sentence included "working time" but the final sentence (even including a definition of "working time"), clearly indicating that the paragraph deals only with what employees can and cannot do with respect to distribution and solicitation during working time.

Because the last sentence does not dictate what RELCO employees can or cannot do during nonworking time, that sentence is not presumptively invalid, and the reliance on *TeleTech Holding, Inc.*, 333 NLRB 402 (2001), *Brunswick Corp.*, 282 NLRB 794 (1985), and *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990) is simply erroneous. Therefore, RELCO's policy did not violate §8(a)(1) of the Act.

**E. The ALJ improperly admitted the former testimony of Mark Baugher was wrongly admitted into evidence.**

The ALJ improperly upheld his decision to admit an excerpt of Mark Baugher's testimony from a previous NLRB hearing, which was improperly admitted into evidence as General Counsel's Exhibit 4. ALJD 8: fn. 12. §10(b) of the Act holds that hearings "...shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the ruled of civil procedure for the district courts..." 29 U.S.C. 160(b). Federal Rule of Evidence 804(b)(1) states that only if a declarant is unavailable as a witness will former testimony not be excluded under the hearsay rule, Fed. R. Evid. 804(b)(1)). However, in this case, the General Counsel made no attempt to demonstrate that Mark Baugher was unavailable as a witness when it offered his former testimony as evidence in this case. Federal Rule of Evidence 804(a) sets a heavy burden to show unavailability for the former testimony of a witness at a prior proceeding to be admitted, because otherwise, the transcript of the former testimony is patent hearsay. The ALJ is incorrect when he stated the testimony was not admitted for the truth of the matter asserted, as it was admitted to show that the IBEW was organizing in and around August 2011, not merely to show that Mark Bachman had knowledge of the IBEW's campaign efforts. ALJD 8: fn. 12. Therefore, General Counsel's Exhibit 4 should have been excluded from the evidence.

**F. General Counsel's Exhibit 2 was improperly admitted into evidence.**

The ALJ improperly admitted General Counsel's Exhibit 2 into evidence, which he improperly even failed to address in his decision. Specifically, General Counsel's Exhibit 2 was a position statement RELCO's counsel drafted in response to the Acting General Counsel's threats of filing a §10(j) injunction. Pursuant to Federal Rule of Evidence 801(d), it should not have been admitted because it was hearsay and was not a party admission, since it was not

inconsistent with the testimony or position of RELCO at the hearing. GC Ex. 2. According to Federal Rule of Evidence 801(d)(2), a statement is not hearsay if it "is offered against an opposing party and: (A) was made by the party in an individual or representative capacity; (B) is one the party manifested that it adopted or believed to be true; (C) was made by a person whom the party authorized to make a statement on the subject; (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or (E) was made by the party's coconspirator during and in furtherance of the conspiracy." Fed. R. Evid.

801(d)(2). However, RELCO's position statement merely states:

Assuming *arguendo* that the NLRB could make the threshold showing under *Wright Line* (and it cannot), Relco undoubtedly had a legitimate business reason for discharging both Sindt and Douglas, namely their well-documented and long-standing poor work performance. Such documentation of poor work performances extends well before August 21, 2011, contrary to what is set forth in the charges, which further rebuts the Union's claims that any unstated protected activity by Sindt and/or Douglas may have played any part in Relco's decision to terminate them. Clearly, the NLRB would not be able to meet its heavy burden of establishing a substantial likelihood of succeeding on its claims.

GC. Ex. 4. The very definition of *arguendo* is "for the sake of argument." Therefore, far from making an admission of fact, the position statement prepared by RELCO's counsel was making a legal argument that the NLRB was not likely to succeed because of RELCO's affirmative defense – that it discharged Sindt and Douglas for legitimate reasons. There is no admission of a party opponent that would warrant the admission of the position statement. Moreover, RELCO also consistently maintained that one of the factors contributing to Douglas' poor performance was his poor attendance, though Douglas was not discharged for violating the official attendance policy. The Acting General Counsel also claimed that "In particular, Relco would be forced to reemploy and pay back pay to employees who have been consistently poor work performers for years. Reinstatement of these poor performers would cause irreparable and substantial harm to

the morale of the other employees who (unlike Sindt and Douglas) consistently work hard to perform the job duties with diligence and pride (GC Ex. 4) is another admission of the party opponent. However, this is also not an admission by a party opponent, but is consistent with the testimony and evidence presented at the hearing. The Acting General Counsel also improperly attempted to draw an implication that "all other employees consistently work hard and, you know, impliedly have good job performance." Tr. 400. However, that is not what the position statement said. It merely stated the other employees who work hard would be adversely affected if Sindt or Douglas were reinstated. It did not state that all other employees have good job performances, and for the Acting General Counsel to make that assertion misstated the position statement, and it should not have been admitted.

**G. The ALJ's finding that RELCO was not denied due process when its subpoena duces tecum with regard to witness affidavits was denied was improper.**

The ALJ improperly held that RELCO was not denied due process when he sustained his decision to deny enforcement of RELCO's subpoena duces tecum. ALJD 2: fn. 2. The subpoena RELCO issued to the NLRB sought "all witness statements obtained by the NLRB during the course of the investigation." Resp. Ex. 12. Pursuant to §102.118(b) of the NLRB's Rules and Regulation, to be producible, the material sought must be either: "1) a written statement made by said witness and signed or otherwise adopted or approved by him; or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the party obligated to produce the statement." 29 CFR §102.118; *Cintas Corp. v. NLRB*, 589 F.3d 905, 914 (8th Cir. 2009). Because the witness statements RELCO sought were simply the written statements made by the witnesses, the NLRB should have been compelled to produce those witness statements

before the hearing. RELCO was prejudiced by the ruling because it only received copies of the statements minutes before having to cross-examine the General Counsel's witnesses, which constituted an improper trial-by-ambush. Accordingly, RELCO's subpoena was improperly squashed by the ALJ.

#### **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

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 23rd day of October, 2012 **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	
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And on that same day, the foregoing was served via electronic mail upon:

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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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