

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RELCO LOCOMOTIVES, INC.

and

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL UNION #347

Case 18-CA-074960

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COUNSEL FOR THE ACTING GENERAL COUNSEL'S  
ANSWERING BRIEF

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Submitted by:

Catherine L. Homolka  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 18  
330 South Second Avenue, Suite 790  
Minneapolis, Minnesota 55401

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## I. STATEMENT OF THE CASE

Pursuant to Section 102.46(d)(1) of the Board's Rules and Regulations, Counsel for the Acting General Counsel hereby submits this Answering Brief in response to Respondent's Exceptions to the Administrative Law Judge's decision. Following an administrative hearing on June 6 and 7 of 2012, Administrative Law Judge Eric Fine issued a decision on September 25, 2012. Judge Fine found that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by engaging in the following conduct: 1) interrogating employees about their union activities; 2) prohibiting an employee from engaging in union activity on non-work time; 3) soliciting employee complaints and grievances and impliedly promising to remedy them; 4) maintaining an unlawful work rule prohibiting employees from discussing their work conditions; and 5) discharging employees Mark Douglas and Jerry Sindt for their union activities. On October 23, 2012, Respondent filed Exceptions to these findings, as well as a brief in support of its Exceptions.<sup>1</sup>

Respondent's exceptions can be reduced to three arguments: exceptions to credibility resolutions, exceptions to legal conclusions, and exceptions based on findings made by the district court denying injunctive relief to the discriminatees. However, contrary to Respondent's exceptions, Judge Fine's conclusions and decision should be affirmed for the following four reasons. First, Judge Fine's credibility resolutions are well-reasoned and fully supported by the record evidence as demonstrated by the facts set forth below. Second, the case law relied upon by Judge Fine is on point, and the cases cited by Respondent are

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<sup>1</sup> References to the Administrative Law Judge's decision shall be referred to as "ALJD". References to Respondent's brief in support of its exceptions shall be referred to as "Resp. Br." References to the record shall be referred to as "Tr." References to exhibits in the record shall be referred to as "GCX" (General Counsel exhibits) and "RX" (Respondent's exhibits).

distinguishable and/or not controlling. Third, Respondent erroneously argues that the Board should reverse the ALJ's decision because a district court judge failed to grant injunctive relief for the discriminatees. Fourth, while not addressed in great detail in the ALJD, the documentary evidence, and particularly the reviews of both discriminatees and other employees and other disparate treatment evidence, strongly supports Judge Fine's decision that Douglas and Sindt were discharged in retaliation for their Union activities. Based on the above reasons, Counsel for the Acting General Counsel urges the Board to affirm Judge Fine's decision in its entirety.

## **II. STATEMENT OF THE FACTS**

### **A. Respondent's Operations and Employees' Organizing Efforts**

Respondent repairs and rebuilds locomotives. (GCX 1(g), 1(k).) Chief Administrative Officer Doug Bachman manages corporate headquarters in Illinois, while his brother and Chief Operations Officer Mark Bachman oversees a production facility in Albia, Iowa. (Tr. 41-43.)<sup>2</sup> At the time of the alleged events, six foremen and approximately 115-120 employees, including discriminatees Mark Douglas and Jerry Sindt, staffed Respondent's Albia facility. (Tr. 45, 189, 317.) Douglas was a fabricator, while Sindt was a mechanic who worked on trucks and had received some cross-training into fabrication. (Tr. 190, 318-320.) Several different foremen supervised their work.<sup>3</sup>

Respondent's Albia facility has never been a union shop, though employees have attempted to organize since 2009. RELCO Locomotives, Inc., 358 NLRB No. 32, slip op. at

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<sup>2</sup> All of the allegations at issue concern the Albia, Iowa facility.

<sup>3</sup> Respondent's foremen supervise projects, rather than particular employees. (Tr. 120, 192-193, 321.)

4-5 (2012).<sup>4</sup> From 2009-2010, employees other than Douglas and Sindt initially sought representation from the Brotherhood of Railroad Signalmen. RELCO II, 358 NLRB No. 37, slip op. at 4. In late 2010, the Regional Office conducted an election, which the Union lost; in early 2011, employees initiated a new campaign for the IBEW. (Tr. 195, 324-326); RELCO II, 358 NLRB No. 37 at 4. Both Douglas and Sindt became actively involved in the IBEW campaign.

On September 26, 2011, IBEW representatives met with Respondent's employees, including Douglas. (Tr. 186, 196.) At the meeting, Douglas voiced concerns about their working conditions, and Business Agent Courtland Pfaff asked Douglas to join the Union's volunteer organizing committee (VOC); Douglas accepted. (Tr. 170, 197.) Afterwards, Douglas distributed authorization cards until his termination and met with Pfaff to discuss strategy. (Tr. 197-199.) Douglas also enlisted Sindt's help because Sindt had access to paint booth employees and could provide them with authorization cards. (Tr. 200-201.) In October, Sindt began distributing cards as well. (Tr. 201.)

In early-to-mid-October, Pfaff and another IBEW representative handbilled outside of RELCO. (Tr. 172-176, GCX 7.) Mark Bachman testified that he received a report, though he could not recall from whom, about a car in RELCO's driveway. (Tr. 81, 88.) The next day he discovered an envelope on his office desk containing an IBEW booklet. (Tr. 88.) Bachman denied knowing who put it there, though only certain employees can access his upstairs office. (Tr. 88, 470.)<sup>5</sup> While he "surmised" it came from the car he had heard about and that the car belonged to an IBEW official, he denied discussing the handbill with anyone. (Tr. 83, 88, 94.)

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<sup>4</sup> Hereinafter, the first RELCO case will be referred to as RELCO I. The second RELCO case—RELCO Locomotives, Inc., 358 NLRB No. 37 (2012)—will be referred to as RELCO II.

<sup>5</sup> Employees have proximity cards to access various parts of the plant. Mark Bachman testified that only leadmen, foremen, materials people, the field group, and office workers can access upstairs. (Tr. 470.)

In addition to Mark Bachman, Supervisor Tom Shipp received a handbill that day but also denied discussing it with anyone. (Tr. 160, 163.) Moreover, Shipp testified that he threw the handbill back at the Union representative, but Pfaff denied that happened. (Tr. 160, 162, 173-176.)

Despite the handbilling, some supervisors denied knowledge of an organizing campaign. Mark Bachman testified that he was “not aware definitively” of any campaign and was just “surmising now that it has taken place.” (Tr. 72, 83.) Similarly, Doug Bachman and Supervisor Cliff Benboe also denied knowledge of a campaign, and Benboe testified that he first learned of it during the Region’s investigation. (Tr. 121-122, 571-572.) However, in addition to the handbilling, a former RELCO employee testified about the IBEW campaign at the RELCO II hearing in August of 2011. (GCX 4.) Mark Bachman was present during that hearing, and Respondent’s attorney cross-examined the employee about this; however, Bachman denied hearing any such testimony. (Tr. 73-74.)

Nevertheless, at the most current hearing, Counsel for the AGC presented the following additional evidence of Respondent’s knowledge of the campaign and Douglas’s and Sindt’s involvement in it.

*1. The IBEW Posters*

In the days after the handbilling, identical documents appeared above approximately 8 to 12 log-in computers and in a glass bulletin board; they depicted a union building and contained language implying that union dues only pay for fancy union halls. (Tr. 203, 329-330.) Douglas saw these documents posted for a week, and Sindt saw them for about 3 to 4 days. (Tr. 204, 330.)

Mark Bachman testified to seeing a single document with a picture of an IBEW office but no words. (Tr. 85-86.) He denied management posted it or gave employees permission to do so. He said he immediately threw it away upon seeing it. (Tr. 96-97.)

## *2. Benboe's Interrogation of Sindt*

A day or two after the handbilling, Sindt testified that Benboe approached him to discuss the Union, though Benboe denies the conversation occurred. (Tr. 528.) According to Sindt, Benboe questioned Sindt about his thoughts on the Union. (Tr. 334-358.) Sindt replied that he had worked at union and non-union places and it did not matter to him. (Tr. 334.) Benboe pressed Sindt about how RELCO treated him, and Sindt said he was treated fairly; Sindt testified that he responded that way because he feared for his job. (Tr. 334.)

## *3. Morning Meetings*

Douglas and Sindt testified that around the time of the handbilling Mark Bachman and Benboe made comments at morning meetings about unions. According to Douglas, Benboe criticized “no good” unions for helping lazy people, and Bachman implied that employees could be laid off if they unionized. (Tr. 205, 272.) Similarly, according to Sindt, Mark Bachman said he preferred keeping matters in-house, and Benboe remarked that unions were not all they were cracked up to be. (Tr. 331-333.) Bachman and Benboe deny these comments. (Tr. 473, 547.)

## *4. Solicitation of Employee Grievances*

Aside from morning meetings, both Douglas and Sindt testified about small group meetings Doug Bachman conducted in December of 2011. Because Doug Bachman is based in Illinois, Douglas and Sindt rarely saw him in Albia—except for yearly all-staff insurance meetings. (Tr. 215, 561.) However, in December of 2011, Douglas and Sindt observed a hallway posting that contained employees' names and meeting times for small groups of employees. Douglas and Sindt attended different meetings. At Douglas's meeting, Doug Bachman asked for suggestions to improve production and RELCO's relationship with

clients. (Tr. 217.) At Sindt's meeting,<sup>6</sup> Doug Bachman explained that he called the meeting to discuss improving the work environment, employee morale, and efficiency. (Tr. 336.) At both meetings, Doug Bachman offered employees his personal cell phone number if they had questions—something neither Douglas nor Sindt recalls him ever doing in the past. (Tr. 219, 338.)

Corroborating the testimony of Douglas and Sindt, Benboe testified that Doug Bachman holds annual insurance meetings, and he believed Doug came to Albia in December of 2011 to hold small group sessions for employees to talk about shop and *employee improvements*. (Tr. 142.)

In contrast to Benboe, other Respondent witnesses disagreed about the timing of the meetings. Although Respondent's Amended Petition to Revoke the GC's Subpoena states that Doug Bachman was never at the plant in December (GCX 3, p. 4.), Mark Bachman testified that Doug *was* in Albia in either November or December of 2011 to hold meetings (Tr. 70). Later in the trial, Mark Bachman testified that he and Doug Bachman were out of the country from mid-December until Christmas and that his brother held meetings in October. (Tr. 474-476.)

Respondent's witnesses also offered conflicting testimony regarding the meetings' content. Mark Bachman admitted that, while he did not attend Doug's meetings and did not know what Doug discussed, they were a continuation of meetings that Mark Bachman held in the *two previous years*. (Tr. 71, 476.) However, Doug Bachman testified that the meetings focused on the CSX project—a *new* project at RELCO. (Tr. 579.)

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<sup>6</sup> While Sindt was certain his meeting was in December, he said on cross-examination that it could have been in November after Thanksgiving. (Tr. 366-367.)

Doug Bachman was the sole Respondent witness to testify about the small group meetings, despite the fact that Supervisor Jammie McKim was present for one as well. (Tr. 580.) Doug testified that his meetings occurred on October 19, 2011,<sup>7</sup> and at that time he was aware of the handbilling. (Tr. 572.) Doug said that the meetings were voluntary and focused on the CSX project. (Tr. 562, 565-566.) Doug also testified that he had conducted many past meetings for Albia employees to solicit employee feedback, and he introduced an exhibit listing meetings and employee suggestions. (Tr. 574.) However, the document lacks dates, and Doug himself did not know which suggestions were made at which meetings. (Tr. 569, 573; RX 10(a)-(b).) Additionally, both Douglas and Sindt testified that, aside from insurance meetings and the December meetings, Doug Bachman did not conduct any further meetings in Albia. (Tr. 280, 368.)

#### *5. Interrogation of Douglas*

Around the time of the December meetings, Benboe approached Douglas, who had authorization cards sticking out of his back pocket. (Tr. 206, 267.) Douglas testified, “[C]liff asked me if I was doing that on company time, and he was pointing at my pocket. And that’s when I realized that they were poking out of my pocket.” (Tr. 206.) Douglas replied “no” and Benboe warned him, “You better not be.” (Tr. 206.)

### **B. The Evaluation Process**

Each year employees receive mid-year and year-end reviews, which consist of a form and a meeting between a foreman and the employee. (Tr. 50-51.) A foreman will complete the majority of the form, and Mark Bachman testified that he assigns foremen to reviews “depend[ing] on the circumstances and who’s available today to do the reviews.” (Tr. 52.)

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<sup>7</sup> Doug said the log-in computers displayed notices announcing the October meetings but Respondent failed to introduce this notice at the hearing. (Tr. 582.)

After Bachman reviews the form, he returns it to the foreman to review with the employee.  
(Tr. 129.)

Management completed three reviews each for Douglas and Sindt but only gave them two. (GCX 5, 6.) During the first week of December 2011, Benboe submitted year-end reviews to Mark Bachman, including the reviews for Douglas and Sindt. (Tr. 123, 556; GCX 5(a), 6(a).) Mark Bachman returned all of them to Benboe, except Douglas's and Sindt's. (Tr. 545-546.)

At the trial, Benboe gave inconsistent testimony as to why Bachman retained those particular reviews. For example, during the AGC's 611(c) examination of Benboe, Benboe said Bachman had informed him he did not return Douglas's and Sindt's forms because he was considering disciplinary action. (Tr. 131, 540, 547.) In contrast, during Respondent's direct examination of Benboe, Benboe testified that Mark Bachman said he was keeping the evaluations until January to avoid adverse terminations during the shutdown.<sup>8</sup>

### **C. The Terminations**

Mark Bachman testified that he makes the ultimate decision in all terminations except those involving attendance. (Tr. 59.) RELCO has a point-based attendance system where employees are terminated upon accruing 12 points in a rolling calendar year. (JTX 1, p. 28; Tr. 61.) Regardless of the termination reason, employees receive termination letters. (Tr. 60.) Respondent's secretaries drafted identical termination letters for Douglas and Sindt, and Benboe dictated what they should say. The letters state, "This letter is to inform you that your employment at RELCO Locomotives, Inc. has ended today January 2, 2012, due to poor job performance. The required improvements on your last employee performance review

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<sup>8</sup> On December 23, 2011, the plant shut down for the holidays and did not re-open until January 2, 2012.

have not been met.” (GCX 8, 9.) Benboe testified that Mark Bachman first told him to terminate Douglas and Sindt on January 2, 2012—the day of their terminations. (Tr. 546.)

*1. Douglas’s Termination*

On January 2, 2012, Douglas returned from shutdown, and Benboe and Supervisor Jim Cronin gave him a termination letter. After reading the letter, Douglas asked Benboe what he meant by poor performance and testified that Benboe did not answer. (Tr. 213, 543.) Douglas questioned Benboe about various “attaboys” and “job well done” remarks Benboe had made to him, but Benboe did not answer. (Tr. 210.) In particular, in November or December of 2011, Douglas said Benboe praised him at a morning meeting for saving Respondent money by fixing certain doors. (Tr. 211-212.) Sindt testified that this was the first time *any* supervisor praised an employee at a morning meeting. (Tr. 340, 380.)

Aside from the reasons in Douglas’s termination letter, Respondent’s witnesses testified about other reasons as well. Some reasons were given during the investigation, while others were mentioned for the first time at trial. For instance, in Mark Bachman’s affidavit, Bachman made the following handwritten notation: “Douglas and Sindt do not stay on task, quality was poor, *they* wandered, *they* talked to everyone, *their* attendance was poor, and *their* attitude was poor.” (Tr. 108) (emphasis added.) In contrast, at the hearing Benboe could not recall if Douglas was terminated for attendance, and Mark Bachman could not recall the number of points Douglas had accrued. (Tr. 109.) However, Bachman asserted that it did not make a difference if [Douglas had] eight, nine, ten, or eleven [points].” (Tr. 509.)<sup>9</sup> Additionally, in response to leading questions, Bachman testified that Douglas was on probation twice, though he could not recall the particulars without consulting Douglas’s performance reviews. (Tr. 460-61.)

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<sup>9</sup> In contrast, RELCO has permitted other employees to well exceed the point limit. (Tr. 491, GCX 12(eee).)

Last, Benboe said that he recommended Douglas's termination partly due to blue-flag violations Douglas received in the past. However, Douglas only had two violations, and the last one occurred in the summer of 2011—months before his termination. (RX 5, 7.) Neither violation was mentioned in Douglas's 2011 reviews, nor is there any record evidence that past employees have been terminated for this reason.

## *2. Sindt's Termination*

On January 2, 2012, Benboe told Shipp that Sindt was going to be terminated but did not share the reason, and Shipp did not ask. (Tr. 155.) Although Shipp supervised Sindt, Shipp denied knowing about his termination prior to Benboe's announcement. (Tr. 150, 515.)<sup>10</sup> Shipp said no one asked for his opinion of Sindt's termination, and he never recommended it. (Tr. 148, 514-515.) In contrast, Bachman said Shipp agreed that Sindt lacked mechanical abilities and that RELCO lacked a place to put him. (Tr. 455.)

On January 2, Benboe and Shipp gave Sindt a termination letter, and Benboe said he was terminated for poor workmanship. (Tr. 134, GCX 9.) According to Sindt, Shipp complained that Benboe was firing the only guy who knew about bi-level cars. (Tr. 341.) At the hearing Shipp admitted telling Sindt, "[N]ow I ha[ve] to go find somebody else to do the trucks for the bi-level." (Tr. 514.) However, Shipp was unsure if Benboe was present for this, and he became confused about whether he said this before or after the termination meeting. (Tr. 518, 520, 544.)

As with Douglas, Respondent offered several different reasons for Sindt's termination letter, and some were mentioned for the first time at the hearing. For instance, in Mark Bachman's affidavit, he states that he terminated Sindt for wandering, talking to everyone, and poor attendance, quality of work, and attitude. (Tr. 108.) However, at trial, Bachman

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<sup>10</sup> Shipp testified that he does not recall when that supervision took place. (Tr. 150.)

suddenly denied that Sindt was terminated for attendance, and Benboe testified that he could not recall if attendance was a factor in Sindt's termination. (Tr. 109, 135.) Bachman maintained that he terminated Sindt for poor performance but could not recall a specific instance. In contrast, Shipp was "not a hundred percent sure" that Sindt was terminated for performance. (Tr. 104, 156.)

Although omitted from his affidavit, Mark Bachman said he also terminated Sindt for failing to obtain a welding certification, which consists of a two-part "vertical up" and "overhead" test. Bachman testified that Sindt's lack of a certification limited his usefulness to Respondent. (Tr. 443, 453.) However, after Sindt's termination, Shipp had to borrow *two* employees to finish the bi-level trucks Sindt was working on. (Tr. 521.)

Benboe initially attempted to testify that Respondent requires employees to obtain welding certifications by a certain deadline. However, he was impeached by his testimony from a prior hearing and admitted that no deadlines exist—which Mark Bachman confirmed also. (Tr. 496, 549, 552.) Sindt denied that Respondent gave him a deadline or warned him of any consequences for failing to become certified. (Tr. 353.) When he was terminated, Sindt had already passed one part of the welding test but believed he had to wait until the first of the year to take the other. (Tr. 391.) Additionally, other employees also lacked certifications but were not terminated. (Tr. 351.)

#### **D. Performance Evaluations and Disparate Treatment**

Douglas's and Sindt's termination letters state that required improvements in their last reviews were not met. (GCX 8, 9.) In Respondent's Position Statement, Respondent says it terminated both Sindt and Douglas for their "well-documented and long-standing poor work performance." Prior to their terminations, Respondent completed three evaluations for each of them but only gave them their first two. (GCX 5(a)-(c), 6(a)-(c).) Each is reviewed below.

*1. Douglas's Reviews*

a. First Evaluation—2010 End-Year Review

During Douglas's 2010 year-end review, Supervisor Dave Crall complimented Douglas's attendance and safety records. (Tr. 236.) The evaluation itself lists "needs to stay on assigned work task" as an area for improvement and lists fabrication skills and becoming a certified welder as goals. Douglas received a 50-cent raise for his evaluation. (Tr. 236, 284.)

b. Second Evaluation—2011 Mid-Year Review

Benboe completed Douglas's 2011 mid-year, reviewing it with him on August 24. (Tr. 193, 241, GCX 5(b).) Improving from his first review, Douglas received nearly all "satisfactory" ratings and only three "below expectations" ratings for attitude, problem solving, and attendance. (GCX 6(b).) By this review, Douglas had obtained his welding certification. (Tr. 246.)

The evaluation listed two other areas of "required improvement"—staying on task and improved communication with supervisors. (GCX 5(b).) On the evaluation's second page, Mark Bachman wrote "probation for above"; however, Douglas denied that Benboe mentioned probation to him at all during his meeting. (GCX 6(a); Tr. 243, 245.) Mark Bachman said that when he received Douglas's review, he began watching Douglas. (Tr. 462.) As an example, he merely said he observed Douglas looking "disgusted" and "angry" at Benboe but then testified that he may have observed this before receiving the review. (Tr. 463.) Bachman also recalled observing Douglas in 2010 being vocal about a customer's preferences but was unable to give specifics. (Tr. 464.)

c. Third Evaluation—2011 End-Year Review

Benboe prepared Douglas's last review, giving him only one "below expectations" rating for attendance. (GCX 5(a).) His required improvement (time management) is also different than his previous review (working on communication with supervision and staying

on assigned job). On the review, Bachman wrote that Douglas had not improved upon his probationary items.

## 2. *Sindt's Reviews*

### a. First Evaluation—2010 End-Year Review

Jeff Dalman gave Sindt a 2010 year-end review. (Tr. 350, GCX 6(c).) Sindt never saw the form but recalled Dalman telling him to learn more, clean his area, and get his welding tested. (Tr. 350-351.) On the form, Dalman did not list any required improvements but wrote that Sindt was a “very good welder” and was “good at trucks.” (GCX 6(c).) Sindt received mostly satisfactory ratings but did receive a few “below expectations” ratings. (GCX 6(c).)

### b. Second Evaluation—2011 Mid-Year Review

Although Tom Shipp was not a supervisor until July 2011 and was not Sindt’s supervisor until later, he gave Sindt his 2011 mid-year review. (Tr. 151; GCX 6(b).) Shipp did not fill the evaluation out and does not know who did. (Tr. 151-52.) During the meeting, Shipp encouraged Sindt to become certified and cross-train as a fabricator but did not give deadlines. (Tr. 352.)

The evaluation form lists “becoming more proactive” and “having greater initiative” as areas of required improvement.<sup>11</sup> It notes that Sindt achieved progress by learning and working in general locomotive areas and shows that Sindt received a similar number of “satisfactory” and “below expectation” ratings that he received on his first review.

### c. Third Evaluation—2011 End-Year Review

Benboe drafted a third evaluation for Sindt but never gave it to him. Unlike Sindt’s past reviews, where he received several “below expectations” ratings, Benboe gave Sindt

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<sup>11</sup> At some point afterwards, both Jeff Dalman and Tom Shipp told Sindt that he had become more proactive and showed greater initiative, saying Sindt had improved. (Tr. 356.)

“satisfactory” ratings in every category—including for categories he was required to improve upon in his previous review. (GCX 6(a).) The evaluation lists new areas for required improvement—becoming certified *if* he stayed in fabrication and staying at his assigned job. (emphasis added).

### *3. Disparate Treatment*

Out of 58 employees terminated from 2009-2012, Respondent terminated only two employees aside from Douglas and Sindt for failing to meet improvements in their evaluations. (GCX 12(a)-(ggg).) Those two employees are RELCO II discriminatees Charlie Newton and Mark Baugher—employees the Board found were terminated for their union and other protected activities. (GCX 12(c), (h).) The majority of other employees were terminated either for attendance or for failing to meet their initial 90-day probationary period. (GCX 12(a)-(ggg).)

Respondent asserts that Douglas and Sindt were its “most limited” employees. (GCX 2; Tr. 445.) However, other employees had evaluations similar to those of Douglas and Sindt but were not terminated for their performance. Instead, Respondent allowed these employees to continue working or to cross-train into other departments. (GCX 21, 24, 40.)

### **E. Solicitation Policy**

Respondent also maintained an unlawful solicitation policy prohibiting solicitation without management’s approval. (JTX 1, p. 68.)

## **III. ARGUMENT**

In its appeal, Respondent has filed 111 exceptions. However, nearly all of these exceptions can be reduced to three main conclusions: 1) Respondent disputes the ALJ’s credibility findings; 2) Respondent merely argues with the ALJ’s legal conclusions; and 3) Respondent, in support of its exceptions, attempts to rely upon a district court decision that

has since been appealed. None of these arguments requires a different result. Judge Fine's decision contains a sound analysis of the above facts, and his ultimate findings should be affirmed in their entirety.

Below, I will explain why Respondent's aforementioned arguments should be disregarded.

#### **A. Respondent Disputes the ALJ's Credibility Resolutions**

In his decision, Judge Fine largely discredited Respondent's witnesses and credited the AGC's witnesses. Respondent now excepts to these findings. However, as amply demonstrated above, Judge Fine's credibility resolutions are based on Respondent witnesses' inconsistent testimony and shifting defenses. Respondent witnesses Doug Bachman, Mark Bachman, Cliff Benboe and Tom Shipp all testified, and Judge Fine questioned the credibility of each. As explained below, the ALJ's credibility determinations should not be disturbed in this case.

Under Board law, an administrative law judge can rely on many factors, including the context of the witness's testimony, the witness's demeanor, the weight of the evidence, established or admitted facts, and probabilities and inferences that can be drawn from the record. Double D Construction, 339 NLRB 303, 305 (2003); Daikichi Sushi, 335 NLRB 622, 623 (2001). Once the ALJ makes a credibility determination, the Board's established policy is not to overrule this determination unless the clear preponderance of all the relevant evidence establishes that they are incorrect. See UPS Supply Chain Solutions, Inc., 357 NLRB No. 106, n. 2 (2011), citing Standard Dry Wall Products, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3rd Cir. 1950).

In the instant case, Judge Fine's sound credibility resolutions should not be overturned. Consistent with Board law, Judge Fine relied on permissible factors such as the context of witness testimony and reasonable inferences when making his credibility

determinations. Respondent has failed to establish that the preponderance of evidence requires these determinations be overturned. As Judge Fine's decision reflects, the testimony of Respondent's witnesses is so incredible at times that Judge Fine questioned the overall tenor of their testimony, as well as questioning the veracity of specific witnesses' testimony on certain points.

For example, Judge Fine recognized that "[t]here was a clear theme amongst the testimony of Respondent's officials to obfuscate or testify in absolutes . . ." and that "[t]he tenor of their testimony suggests that they were intentionally not giving a correct account of what actually transpired." (ALJD 9). In its Exceptions and supporting brief, Respondent failed to adequately address severe problems that pervaded the testimony of each of its witnesses. Its witnesses repeatedly offered contradictory accounts of the same events and, to the amazement of the judge and AGC, it attempted to deny any knowledge of an organizing campaign despite testimony about the campaign at a previous trial and despite Union hand-billing and postings. Respondent's witnesses also denied discussing the handbilling event with other members of management. Given Respondent's past history with unfair labor practices and organizing campaigns, Judge Fine correctly concluded that it is highly implausible that members of management would keep silent about a new campaign and decline to alert higher-level management or educate lower-level management. Additionally, Respondent's witnesses offered conflicting reasons for the discriminatees' discharges and often found themselves impeached by their prior testimony. Even with the assistance of their Counsel's repeated use of leading questions, Respondent witnesses still failed to recall key conversations or offer any concrete examples of the discriminatees' purported poor performance.

In addition to credibility problems related to the testimony of Respondent's witnesses as a whole, Judge Fine also addressed problems specific to each Respondent witness. In its

exceptions, Respondent takes issue with these findings. For instance, Respondent attempted to challenge the judge's description of Mark Bachman's testimony as "questionable," "sketchy at best," and "inconsistent, marked by poor recall, and somewhat evasive." (ALJD 8-9, 12.) Instead of addressing or explaining the problems with Mark Bachman's testimony, Respondent instead attacked the ALJ's decision-making abilities. Respondent accused the ALJ of "apparently us[ing] nothing more than his intuition" and "impos[ing] his own speculation in the place of actual evidence." (Resp. Br. 19.) Respondent also complained about the ALJ's "conclusory belief[s]," "circular logic," and failure to cite the record. (Resp. Br. 19.) Respondent also challenged the judge's credibility resolutions with respect to other Respondent witnesses, but because Respondent has failed to set forth reasons as to why those should be overturned as well, it is unnecessary for this brief to address them.

Judge Fine's resolutions are similar to those of other administrative law judges who also discredited Respondent's witnesses at two previous hearings. Prior to the instant case, the Board issued two decisions involving RELCO, finding that RELCO violated the Act for numerous reasons. In both of those decisions, Respondent filed Exceptions asking the Board to overrule the ALJ's credibility findings. The Board declined to do so in both cases and instead upheld the credibility resolutions. In RELCO I, Administrative Law Judge William Schmidt found the testimony of Respondent's witnesses to be "unworthy of belief." 358 NLRB No. 32, slip op. at 3. In RELCO II, Administrative Law Judge Geoffrey Carter observed that Respondent's witnesses "had trouble squaring their testimony with documentation" and also "had trouble recalling details without the assistance of leading questions. 358 NLRB No. 37, slip op. at 13. The same is true in this case.

Additionally, Respondent challenged the ALJ's finding that the AGC's witnesses were credible but it again failed to prove why that determination should be overturned. In support of its argument, Respondent selectively parsed the record and mischaracterized the

testimony of Douglas and Sindt. For instance, despite record evidence to the contrary and despite the impeachment of its witnesses, Respondent persists to argue that Sindt is lying about knowing he was required to certify as a welder by a certain point. (Resp. Br. 16.) The record reflects that Respondent's own witnesses admitted that no such deadline existed. Similarly, Respondent's argument that Sindt inconsistently testified about Doug Bachman's meetings with employees is patently false. At the hearing, Sindt made clear that Doug Bachman conducted insurance meetings and then also conducted a meeting in late 2011 to solicit employee grievances. Respondent also attempted to criticize Douglas's credibility by stating that Douglas's first affidavit failed to include Benboe's interrogation of Douglas. However, Respondent omitted record evidence that Douglas's first affidavit bears a different case number and ignored Douglas's testimony that the Board agent did not ask about that incident. Moreover, Respondent failed to acknowledge that Douglas did provide this information to the Board in a second affidavit during the Board's investigation—unlike Respondent witnesses who provided affidavits and then introduced new information at trial not contained in those affidavits.

In sum, the AGC's witnesses were forthright and genuine in their attempts to truthfully recount events, while Respondent's witnesses offered testimony that was evasive, self-serving, inconsistent, and incoherent. Respondent has failed to present any basis for Judge Fine's credibility determinations to be set aside.

#### **B. Respondent Merely Argues with the ALJ's Legal Conclusions**

In many of its exceptions, Respondent merely sets forth legal conclusions. For example, in some exceptions, Respondent states that Judge Fine wrongly relied on certain cases. (See, e.g., Exceptions 40, 52.) In other exceptions, Respondent asserts that its conduct did not violate Section 8(a)(1) or (3) of the Act. (See, e.g., Exception 39.) However, the Board is fully capable of resolving these issues on its own.

### **C. Respondent Wrongly Relies Upon a District Court Decision**

In support of its Exceptions, Respondent attempts to rely upon a district court decision that the Regional Office has since appealed. Prior to the hearing in the instant case, the Acting General Counsel also filed a 10(j) injunction to obtain immediate injunctive relief while the current action is pending before the Board. Specifically, the AGC sought an injunction requiring Respondent to reinstate Sindt and Douglas to their former positions. On July 24, 2012, Chief Judge James E. Gritzner of the United States District Court for the Southern District of Iowa heard oral arguments, and he issued a decision two months later denying the injunction. Osthus v. RELCO Locomotives, Inc., No. 4:12-cv-00205 (S.D. Iowa 2012). In his decision, the judge concluded that Respondent had no knowledge of the discriminatees' union activities and that the terminations were not motivated by union animus.

The Board should disregard this decision because the district court abused its discretion by exceeding the role delineated by the Eighth Circuit, which has jurisdiction over this case.<sup>12</sup> Respondent attempts to argue that the Board should overturn the ALJ because the district court judge declined to find that the AGC had proved likelihood of success on the merits. However, in Sharp v. Parents in Community Action (PICA), 172 F.3d 1034, 1039 (8th Cir. 1999), the Eighth Circuit emphasized, "The district court in a 10(j) proceeding does not decide whether Respondent has committed unfair labor practices. That is the province in the Board's on-going adjudicatory proceeding, subject to judicial review by a court of appeals." 172 F.3d at 1039. Despite this explicit warning, Judge Gritzner did not accord any

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<sup>12</sup> It should be noted at the outset that the Eighth Circuit applies a traditional equitable analysis to determine whether Section 10(j) relief is "just and proper." This analysis is comprised of the following four factors: 1) the threat of irreparable harm to the movant; 2) the balance between the harm to the movant and the harm to other parties; 3) the movant's probability of likelihood of success on the merits; and 4) the public interest. See Sharp v. Parents in Community Action (PICA), 172 F.3d 1034, 1039 (8th Cir. 1999) (citing Dataphase Systems, Inc. v. CL Systems, Inc., 640 F.2d 109 (8th Cir. 1981) (en banc)).

deference to the Regional Director or ALJ and attempted to decide the case on the merits. He also only briefly referenced the ALJ's decision and did not point to any shortcomings in the ALJ's decision that would warrant his decision to question the ALJ's findings and replace them with his own. Therefore, Respondent is wrong to rely upon the district court decision in support of its Exceptions, and Counsel for the Acting General Counsel urges the Board to disregard the district court decision as well.

#### **IV. CONCLUSION**

Counsel for the Acting General Counsel respectfully submits that the record evidence and the law establish that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act. The Board should reject Respondent's Exceptions, affirm the decision of the administrative law judge, and issue an order directing Respondent to offer reinstatement to the discharged employees and make them whole. The order should further direct Respondent to revoke its unlawful solicitation policy from its employee handbook to the extent it interferes with employees' exercise of their Section 7 rights, and notify employees that it has done so.

Dated at Minneapolis, Minnesota, this 20th day of November, 2012.

Respectfully submitted,

/s/ Catherine L. Homolka

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Catherine L. Homolka  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 18  
330 South Second Avenue, Suite 790  
Minneapolis, Minnesota 55401

## CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Answering Brief in response to Respondent's Exceptions to the Administrative Law Judge's decision was filed via e-filing and served by the methods indicated on November 20, 2012, on the parties whose names and addresses appear below.

### Served Via E-Mail

Paul E. Starkman, Attorney  
Pedersen & Houpt  
161 N. Clark St.  
Suite 3100  
Chicago, IL 60601-3242  
pstarkman@pedersenhaupt.com

Mark J. Bachman  
RELCO Locomotives, Inc.  
One Relco Avenue  
Albia, IA 52531  
mbachman@rlcx.com

Robert J. Henry, Attorney  
Blake & Uhlig, P.A.  
753 State Ave Ste. 475  
Kansas City, KS 66101-2510  
rjh@blake-uhlig.com

Lori Elrod, Attorney  
Blake & Uhlig, P.A.  
753 State Ave Ste. 475  
Kansas City, KS 66101-2510  
lde@blake-uhlig.com

### Served Via First-Class Mail

International Brotherhood of  
Electrical Workers, Local 347  
850 18th St.  
Des Moines, IA 50314

/s/ Catherine L. Homolka

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Catherine L. Homolka  
Counsel for the Acting General Counsel