

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COMMERCIAL AIR, INC.

and

INDIANA STATE PIPE TRADES  
ASSOCIATION AND U.A. LOCAL 440, AFL-CIO

Cases 25-CA-092821  
25-CA-099616  
25-CA-099620  
25-CA-099624  
25-CA-104026

BRIEF IN SUPPORT OF  
GENERAL COUNSEL'S EXCEPTIONS TO  
THE ADMINISTRATIVE LAW JUDGE'S  
DECISION

Comes now Counsel for the General Counsel and respectfully submits the following brief in support of the General Counsel's exceptions to the decision of the Administrative Law Judge in this matter which was issued on August 1, 2014. The General Counsel asserts that, contrary to the Administrative Law Judge's decision, Commercial Air, Inc. (herein referred to as Respondent) violated Section 8(a)(1) of the National Labor Relations Act when it, by owner Tim Gatewood, informed employees that they would not be rehired if they engaged in union activity and violated Section 8(a)(1), (3) and (4) of the Act when it discharged employee Chris Lehr. Finally, Respondent violated Section 8(a)(1) and (3) of the Act when it discharged employee Charles Howard.

I. STATEMENT OF FACTS

Respondent is a mechanical services contractor that provides HVAC, plumbing and sheet metal fabrication services for the construction industry in central Indiana. (TR 20) It has an office and main place of business in Lebanon, Indiana. (TR 20) Tim Gatewood is Respondent's

Owner and President. (TR 18) As of March 2013, Respondent employed approximately 27 employees as pipefitters, plumbers, sheet metal workers, and laborers. (G.C. Ex. #7) Based on Respondent's records, five of these employees were classified as plumbers, including discriminatees Chris Lehr and Charles Howard. (G.C. Ex. #7)

Chris Lehr was hired as a plumber in February 2011. (TR 107, 110) Before he was hired, Lehr was interviewed by Tim Gatewood. (TR 109) During that interview Gatewood told Lehr, a member of U.A. Local 440 (herein referred to collectively with the Indiana State Pipe Trades as the Union) that Gatewood had hired union members before and that if they left Respondent, Gatewood refused to rehire them. (TR 109) Beginning in May 2012, Lehr began meeting with Union organizer John Kurek as part of the Union's efforts to organize Respondent. (TR 111) Lehr also invited Respondent employees Charles Howard and Josh Raburn to attend these meetings, and those two employees did attend several meetings with Kurek. (TR 112) In August 2012 Lehr, at the request of Kurek, spoke to owner Tim Gatewood about the Union and Lehr's future with Respondent. (TR 112-113) Gatewood told Lehr that he would understand it if Lehr decided to leave but that if Lehr left to go to a union job, Respondent would never rehire him. Gatewood said that he had employees leave in the past for union jobs who then came begging on their knees for Gatewood to rehire them, but he refused to do so. (TR 113)

In November 2012 the Union decided to actively campaign with Respondent's employees. (TR 212) On Thursday November 8, 2012, Kurek sent a fax to Gatewood informing him that Lehr was a "volunteer union organizer". (TR 214) The Union's fax was transmitted at 7:27 am. (G.C. Ex. #15) A copy of the letter was also sent via certified mail. (TR 214) Also on November 8, the Union filed an unfair labor practice charge in Case 25-CA-092821, which was served on the Respondent by regular mail on the same day, alleging that the Respondent had

unlawfully threatened and intimidated an employee on or about August 17, 2012. (G.C. Ex. #1(a)) Respondent received a copy of that charge on November 9, 2012. (R. Ex. #14)

Respondent knew that the charge was referring to the August conversation between Gatewood and Lehr. (G.C. Ex. #12)

On Sunday November 11, 2012, Gatewood called Lehr at home and told him not to report to work on Monday, November 12. (TR 116) Gatewood said that he would call Lehr later to set up a meeting with him on Monday. On Monday Gatewood called Lehr at about 1:00 pm and asked him to meet him at a Steak and Shake restaurant at 1:30 pm. (TR 117) Gatewood arrived at the meeting with Sean Young, plumber supervisor. (TR 117) Gatewood told Lehr that the company had noticed that Lehr's reported work time for the previous week was wrong. (TR 117-118) Per a previous agreement with Gatewood, Lehr was working at the Grissom Hangar jobsite from Monday through Thursday, 10-hour days. (TR 114) He had recorded his time as 6:00 am to 4:30 pm although the gates to the jobsite did not open until 6:30 am. (TR 115) Lehr explained that he reported his time according to plumbing project lead Dana Wildrick's instructions. (TR 118) Wildrick had reported the same times as Lehr. (TR 274) According to Lehr, Gatewood told him that he did not authorize, nor approve of, the way they had reported the time. (TR 117-118) Gatewood did not tell Lehr that he was being disciplined or suspended. (TR 118) Respondent considered this to be a one-day suspension for Lehr. (TR 31) Respondent did not suspend Wildrick. (TR 355)

On November 21, 2012, Respondent sent a memo to all employees informing them that a union had expressed interest in its operations and that Respondent's position was that it was not in favor of a union. (G.C. Ex. #4) The memo also said Respondent was able to conduct its

business without needing to lay off employees and that there was plenty of work for Respondent's employees. (G.C. Ex. #4)

In April 2011 Respondent hired Charles Howard, a former Union member, as a pipefitter/welder. (TR 157-158) Howard was interviewed by Tim Gatewood before Howard was hired by Respondent. (TR 157) Howard and Gatewood discussed Howard's prior membership in the Union, and Gatewood told Howard that if he left Respondent to return to the Union, Howard would never be rehired by Respondent. (TR 158) Chris Lehr brought Howard to several of his meetings with Kurek in the summer of 2012. (TR 112) When Howard was transferred to the Grissom job in January 2013, he rode to the job everyday with Lehr. (TR 163) After the Union sent the letter to Respondent identifying Lehr as a volunteer Union organizer, Lehr wore shirts with Union logos to work almost every day, placed pro-Union flyers in the break room, talked to other employees about the Union, invited them to Union meetings and attended weekly meetings with Union Organizer Kurek. (TR 119-120) Howard also wore Union shirts to the jobsite, and once he started riding to work with Lehr, attended the meetings with Kurek. (TR 163-164)

Sometime around the middle of February 2013 Howard was working at the Grissom jobsite when Gatewood came to where Howard was working and started yelling at him that he had nothing to show for the time Howard had been working there. (TR 166-167) Gatewood told Howard that he was discharged but that Gatewood would allow him to finish the day because Gatewood knew that Lehr was Howard's ride. (TR 167-168) Howard tried to explain that he was behind schedule because of missing materials. (TR 167) By the end of the day, some of the missing material had arrived, and Howard completed more of the work. (TR 168) Gatewood told Howard that he could stay but that next time Gatewood was not satisfied with Howard's

work, there would be no conversation. (TR 169) On February 26, 2013, Supervisor Jamey Price approached Howard and told him that he was being let go and that if Howard had any questions, he needed to talk to Gatewood. (TR 169) Howard spoke to Gatewood who told him to remember that he had said there would be no talk next time and refused to explain what Howard had done wrong. (TR 169) On March 1, 2013, Lehr was also laid off while still working at Grissom. Lehr was told that this was because of a lack of plumbing work. (TR 122) However, Respondent's records showed no such shortage of work. (GC Exs. #10, 11, 25)

## II. ANALYSIS

### 1. Credibility of Tim Gatewood

Tim Gatewood is Respondent's owner and President (TR 18) and was Respondent's primary witness at the hearing in this matter. In fact Respondent only called one other witness at the hearing, Tim Gatewood's son, and his brief testimony only dealt with a single incident involving Chris Lehr. (TR 263-273). The rest of Respondent's case relied almost exclusively on the testimony of Tim Gatewood. Regarding the discharge of Charles Howard, Gatewood testified that he had discharged many other employees for similar reasons, but no documents were offered to support this testimony. (ALJD p. 10, ll. 19-23). Regarding the discharge of Chris Lehr, Respondent relied largely on the testimony of Tim Gatewood regarding its defense that Gatewood was discharged due to a lack of work. (ALJD p. 11, ll. 6-7) Respondent did not offer any documents to support Gatewood's claim of a downturn in work and did not call any other witnesses to corroborate Gatewood's claims. (ALJD p. 11, 15-19) Respondent's defense in this matter is almost exclusively reliant on the testimony of Tim Gatewood, and the record clearly shows that Gatewood was not a credible witness.

First, the Administrative Law Judge specifically discredited Gatewood at least twice in his decision. Chris Lehr testified that when he was sent to the Grissom project by Tim Gatewood, he and Gatewood agreed that Lehr would work four, ten hour days at the project. (TR 114) Gatewood denied having made any such agreement regarding Lehr's schedule at the Grissom project. The Administrative Law Judge in his decision credited Lehr's version of the conversation. (ALJD p. 5, ll. 47-49) In addition, Gatewood denied that he suspended Lehr on November 12, 2012 in retaliation for Lehr's protected activities. The Judge held in his decision that Lehr was in fact suspended on November 12, 2012 in retaliation for his protected activities (ALJD p. 15, ll. 34-37). Thus, the Administrative Law Judge again discredited the testimony of Tim Gatewood.

In addition other evidence in the record also casts serious doubt on the credibility of Tim Gatewood. At the hearing the General Counsel introduced into evidence records involving two employees of Respondent, David Richardson and Brian Moore, who were enrolled in a plumbing apprenticeship school. (GC Ex #17) The records were used to certify that Moore and Richardson were performing the required plumbing work. Tim Gatewood testified that he signed several of those records even though he did not think that Evans and Moore were performing the work described in those forms. (TR 360-361) Gatewood admitted falsifying documents that were submitted to the apprenticeship school. Gatewood also entered into an agreement with the same apprenticeship school in which he agreed that Respondent would provide employees enrolled in the school with 7600 hours of plumbing work over a four year period, and agreed to maintain the records showing the substantial plumbing work performed by the two. (G.C. Ex. #28) Gatewood then testified that the two employees enrolled at the school were not performing any significant

amount of plumbing work. (TR 360-361) Gatewood admitted not following the agreement that he himself had signed with the school.

Finally, during the investigation of this matter, Respondent submitted a position statement dated March 29, 2013 which indicated that employee Tim Evans had been laid off as part of the same reduction in force that led to the layoff of discriminatee Chris Lehr. (G.C. Ex. #13) However, Respondent's records showed that Evans had already been recalled to work during the week of March 11, 2013 and continued to work for Respondent doing plumbing work on multiple projects until he was discharged for cause in August 2013. (GC. Exs. #10, 25, TR 56-57). The position statement was silent on the issue of Evans' recall. Based on the above, it is clear Tim Gatewood was not a credible witness in this matter.

2. Unlawful Threat by Tim Gatewood (Exceptions 1, 2, 6 and 7)

As set forth above, on about August 17, 2012 employee Chris Lehr approached Respondent owner Tim Gatewood and had a discussion regarding the Union. (TR 112-113) The two men discussed Lehr's future employment with Respondent, and Gatewood told Lehr that if Lehr left Respondent to work for a union employer, Gatewood would never rehire Lehr at Respondent. The General Counsel alleged that this statement by Gatewood violated Section 8(a)(1) of the Act. In his decision in this matter, the Administrative Law Judge held that the record did not establish that Gatewood made the statement, and the Administrative Law Judge dismissed the allegation. (ALJD, p. 13, ll. 7-8) This conclusion by the Administrative Law Judge is not supported by the record in this matter and should be reversed.

In making his determination that the record did not establish that Gatewood made the alleged statement, the Administrative Law Judge stated that he could not find a basis for crediting either Lehr or Gatewood's version of the conversation over the other. (ALJD p. 4, ll.

38-39). The Administrative Law Judge erred in this statement as there is ample evidence to warrant crediting Lehr over Gatewood in regard to this conversation. First, the Administrative Law Judge specifically found that Gatewood made a similar statement to Charles Howard when Gatewood interviewed Howard for employment. (ALJD p. 4, ll 41-44). Howard testified that when he was hired by Respondent, Gatewood told him that if he “quit Commercial Air and went back to the union then [he] wouldn’t be able to be re-employed by Commercial Air.” (TR 158) Gatewood did not deny making this statement to Howard. The statement to Howard by Gatewood was nearly identical to the one alleged to have been made by Gatewood to Lehr. The fact that Gatewood made the earlier comment to Howard of course makes it more likely that he made a nearly identical statement Lehr in August 2012, and thus is a basis for crediting the testimony of Lehr over that of Gatewood regarding that statement.

In addition, as set forth above, Tim Gatewood was not a credible witness. In fact the Administrative Law Judge specifically credited Lehr over Gatewood regarding a conversation over Lehr’s work schedule at the Grissom project. (ALJD p. 5, ll. 47-49) This also presents a basis for crediting the testimony of Lehr over Gatewood regarding the August 2012 conversation.

Finally, the Administrative Law Judge in making his determination that the record did not establish that Gatewood made the alleged unlawful statement relied in part upon the fact that no contemporaneous written records were offered at the hearing that reflected Lehr’s version of the conversation. (ALJD p. 4, ll. 45-48) The Administrative Law Judge stated that the absence of such a report undermined the reliability of Lehr’s claim. However, there was very little evidence at the hearing concerning what was contained in the reports prepared by Lehr, and no evidence was offered that Lehr ever created such a report concerning his August 2012 conversation with

Gatewood. Since there was no evidence that such a document existed, the failure to produce such a document cannot be used to undermine the reliability of Lehr's claim as it would be impossible to produce a non-existent document.

Based on the above, Lehr's version of his August 2012 conversation should be credited. The Board should make a finding that Gatewood told Lehr that if Lehr left to work for a union employer, he would not be rehired by Respondent and that this statement by Gatewood violated the Act. An employer cannot tell employees that they would never be considered for rehire if they engage in union activity. See *Anaheim Plastics*, 299 NLRB 79, 96-97 (1990). Thus, Gatewood's statement violated Section 8(a)(1) of the Act.

3. Discharge of Chris Lehr (Exceptions 3, 4, 5, 8, 9, 10, 11 and 12)

As set forth above, Chris Lehr was discharged by Respondent on March 1, 2013. The Administrative Law Judge in his decision found that the General Counsel had established a prima facie case that said discharge of Lehr was in retaliation for Lehr's protected activities. (ALJD p. 15, ll.44-48) Once the General Counsel makes a showing of discriminatory motivation, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). The Administrative Law Judge then found that Respondent's evidence was "marginally sufficient" to show that it, more likely than not, would have discharged Lehr even absent his protected activities. This finding by the Administrative Law Judge is not supported by the weight of evidence.

The Administrative Law Judge in reviewing Respondent's defense, first correctly notes that Respondent failed to produce any documentary evidence to support its claim of a decrease in work and failed to call any witnesses to corroborate the testimony of Tim Gatewood regarding

the downturn in work. (ALJD p. 16, ll. 22-29) As set forth above, the record clearly demonstrates that Tim Gatewood was not a credible witness. However, the Administrative Law Judge goes on to state that the General Counsel and the Charging Party did not rebut Gatewood's claim regarding a downturn in work. (ALJD p. 16, ll. 34-36) This statement is not supported by the evidence. The General Counsel produced substantial evidence of plumbing work that continued well after Lehr's discharge. First, Respondent retained two plumbing apprentices on its payroll, Brian Moore and David Richardson after the discharge of Lehr. (TR 60-61) During the investigation of the unfair labor practice charges, Respondent attempted to mislead the Region by asserting that these apprentices were classified as sheet metal workers. (G.C. Ex. #7) However, both Moore and Richardson were enrolled in a plumbing apprenticeship program at the time Lehr was laid off, and both men turned in records to that apprenticeship program showing that they were performing a substantial amount of plumbing work including plumbing work after Lehr's discharge. (G.C. Ex. #17)

Some of the forms submitted by Richardson and Moore to the apprenticeship program certifying the amount of plumbing work they performed were signed by Tim Gatewood. (TR 360) At the hearing, Tim Gatewood testified that he signed the forms certifying that the apprentices were performing plumbing work even though he did not think the two were actually performing the work. (TR 361) However, Gatewood also admitted that he only visited jobsites about once a week and thus did not know what work each employee was performing. (TR 349) Gatewood further admitted that each employee would have more knowledge than Gatewood of what work that employee was performing. (TR 350) Thus, the two apprentices, Moore and Richardson, had more knowledge of what type of work they were doing than Gatewood, and it was Moore and Richardson who indicated in the forms submitted to the apprenticeship program

that they were performing plumbing work. Respondent also did not call any witness who had firsthand knowledge of Moore and Richardson's work to deny that the two were performing plumbing work. The weight of the evidence clearly supports the conclusion that Moore and Richardson performed substantial plumbing work both before and after Lehr's discharge.

In his decision, the Administrative Law Judge discussed that Respondent recalled plumber Tim Evans following the discharge of Lehr. (ALJD p. 16, ll 41-45) The Administrative Law Judge only mentions Evans in the context Respondent claims at the hearing that Evans was returned to work in order to complete items on a so-called "punch list" at two jobsites, IPS 107 and Shortridge. (TR 348) If one only read the Administrative Law Judge's decision, it would appear that Evans employment ended after completing the punch-list at those two jobs. This, however, is not the case. Respondent's records show that Evans was done with the work at those two projects by April 14, 2013 but continued to be employed by Respondent on multiple other projects until he was discharged for cause in August 2013. (G.C. Exs. 10, 25) The Administrative Law Judge makes no mention of this subsequent employment of Evans.

The Administrative Law Judge also asserted that Respondent did not bring on any additional plumbers to replace Lehr following his discharge. This is not accurate. Respondent's records show that immediately after Lehr was discharged, Respondent's plumbing supervisor Sean Young worked for several days at the Grissom project doing plumbing work when he had not done so before. (G.C. Ex. #11) In addition, plumbing apprentice Brian Moore was also sent to the Grissom Project shortly after Lehr was discharged. (G.C. Ex. #11).

The General Counsel produced all of the above evidence at the hearing to counter Respondent's defense that it discharged Lehr due to a lack of plumbing work. The only evidence offered by Respondent in support of its position was the uncorroborated testimony of Tim

Gatewood. As has previously been discussed, Gatewood was simply not a credible witness. Therefore, Respondent failed to meet its burden to show that it would have discharged Lehr even in the absence of his protected activities. Lehr's discharge violated Section 8(a)(1), (3) and (4) of the Act.

4. Discharge of Charles Howard (Exceptions 13, 14, 15, and 16)

As set forth above, Respondent discharged Charles Howard on February 26, 2013. In his decision the Administrative Law Judge held that the General Counsel had met its initial burden under *Wright Line* of establishing that Howard's discharge was motivated by his protected activities and that the burden would shift to Respondent to demonstrate that it would have discharged Howard even absent those activities. (ALJD p. 18, ll. 1-3) The Administrative Law Judge then concluded that Respondent had met this burden. (ALJD p. 18, ll. 18-19) This finding by the Administrative Law Judge is incorrect.

Respondent asserted that it discharged Howard for poor performance. (TR 46) The evidence does not support this defense. Howard was verbally warned about slow work twice in the first six weeks after he started his employment in April 2011. (TR 170, 355) The Administrative Law Judge in his decision states that these earlier warning took place in May or June 2012. (ALJD p. 18, ll. 7-11) This is an inaccurate description of the record. Howard actually received those warnings shortly after he started work in April 2011 and was not warned about poor work performance again until nearly two years later in February 2013. (TR 166-168, 170) This of course was after Howard began his Union activity. Gatewood's accusation about Howard being too slow has no merit, since he was doing a two-man job on his own without help and he had lost time waiting for materials to arrive. (TR 165, 168) After Howard was given some additional needed materials, he was able to demonstrate to Gatewood that he had done a

substantial amount of work, and Gatewood rescinded the discharge. (TR 168) Howard was then discharged on February 26, 2013 for poor work performance but Respondent refused to give him any specifics about said poor performance. (TR 169)

Respondent's claims that Howard was a poor worker are further undercut by the fact that at Respondent's Christmas party in December 2012, Gatewood gave Howard a \$500 bonus and told Howard that he was doing a good job and that Gatewood was glad he hired him. (TR 172) In addition, in October 2012 Howard was invited by Gatewood on an all-expense paid trip to the NASCAR race in Talladega, Alabama. (TR 172) Howard attended along with a number of other employees, and Gatewood said the trip was to reward them for their good work. (TR 173) In his decision, the Administrative Law Judge refers to the above benefits being provided to Howard mere months before he was discharged for being a poor worker, but the Administrative Law Judge gives them virtually no weight because the Judge claims the record does not show any development between when Howard received the bonus and when he was discharged that would explain why Respondent suddenly became hostile towards Howard's union affiliation. (ALJD p. 19, ll. 29-33) In making this statement, the Administrative Law Judge completely ignores the fact that in January 2013 Howard began riding to work every day with Chris Lehr. (TR 163) Respondent knew that Lehr was organizing for the Union and had already demonstrated hostility towards that conduct by suspending Lehr. This was the trigger that caused Respondent's hostility towards Howard. He became openly aligned with Lehr and that is what spurred Respondent to discharge Howard.

In addition, as noted above, Respondent has repeatedly altered its position regarding the discharge of Howard. Initially, Respondent asserted that Howard was a plumber (G.C. Ex. #13), and Howard's initial discharge notice indicated that he was laid off for lack of work in the

plumbing department (G.C. Ex. #6). Respondent then claimed at the hearing that Howard was a pipefitter who was discharged for poor work performance. (TR 41). These shifting positions by Respondent are further evidence of its unlawful motive in the discharges of Howard. *Desert Toyota*, 346 NLRB 118, 120 (2005).

Furthermore, Respondent failed to produce any record of any other employee discharged for the same or similar reasons as Howard. Once again Respondent relied solely on the testimony of Tim Gatewood. None of the individuals who actually supervised Howard on the Grissom job were called to corroborate Gatewood's testimony, and Gatewood was not a credible witness. Respondent failed to meet its burden that it would have discharged Howard even absent his protected activities, and Howard's discharge violated Section 8(a)(1) and (3) of the Act.

### III. CONCLUSION

Based on the above, the General Counsel respectfully requests that its exceptions be granted and that the Board uphold all of the allegations in the consolidated complaint and provide an appropriate remedy for Respondent's unlawful conduct.

Dated at Indianapolis, Indiana this 29<sup>th</sup> day of August 2014.

Respectfully submitted,

A handwritten signature in black ink that reads "Michael Beck". The signature is written in a cursive, flowing style.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of Brief in Support of General Counsel's Exceptions to the Administrative Law Judge's Decision was served on the following individuals by electronic transmission on August 29, 2014.

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