

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25**

COMMERCIAL AIR, INC.
Charged Party

Case No.: 25-CA-092821
25-CA-099616
25-CA-099620
25-CA-099624
25-CA-104026

and

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

**INDIANA STATE PIPE TRADES ASSOCIATION AND U.A. LOCAL 440, AFL-CIO'S
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION AND
MEMORANDUM OF LAW IN SUPPORT**

TABLE OF CONTENTS

I.	Statement of Exceptions	3
II.	Brief in Support of Exceptions	4
III.	Exceptions 1 and 2.	13
IV.	Exceptions 3 and 4.	20
V.	Exception 5.	22

STATEMENT OF EXCEPTIONS

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, the Indiana State Pipe Trades Association and U.A. Local 440, AFL-CIO ("Union") hereby excepts to portions of the Decision of Administrative Law Judge ("ALJ") Mr. Paul Bogas, issued in the above-captioned case on August 1, 2014.

Specifically, the Union files the following exceptions to the Administrative Law Judge's Decision (ALJD):

1. The Union excepts to the Administrative Law Judge's finding that the termination of Chris Lehr on March 1, 2013 did not violate Section 8(a)(1), 8(a)(3), or 8(a)(4) of the National Labor Relations Act ("Act"). (ALJD 15-17).
2. The Union excepts to the Administrative Law Judge's finding that Respondent met its burden of establishing that it would have discharged Chris Lehr absent his protected activities. (ALJD 17).
3. The Union excepts to the Administrative Law Judge's finding that the termination of Charles Howard on February 26, 2013 did not violate Section 8(a)(1), 8(a)(3), or 8(a)(4) of the Act. (ALJD 17-19).
4. The Union excepts to the Administrative Law Judge's finding that Respondent met its burden of establishing that it would have discharged Charles Howard absent his protected activities. (ALJD 18).
5. The Union excepts to the Administrative Law Judge's finding that the record did not support the Charge that Gatewood threatened or coerced Lehr in violation of Section 8(a)(1) by telling him that if he ever left the Respondent for the Union, he would never be re-hired. (ALJD 12-13).

BRIEF IN SUPPORT OF LIMITED EXCEPTIONS

On August 1, 2014, following a hearing on the Complaint filed by the General Counsel in the above-referenced matter, Administrative Law Judge Paul Bogas (hereinafter “ALJ ”) issued his decision. ALJD 1. The matter involves actions taken by the Respondent, Commercial Air, Inc. and its President, Tim Gatewood (“Gatewood”) against employees who were currently or previously affiliated with the Union and were assisting in an organizing campaign involving the Respondent. ALJD 1-2. The General Counsel and the Indiana State Pipe Trades and U.A. Local 440, AFL-CIO (“Union” or “Petitioner”) alleged four violations of the National Labor Relations Act (the “Act”): (1) comments by Gatewood to Lehr on August 17, 2012 were in violation of Section 8(a)(1) of the Act; (2) the suspension of Chris Lehr (“Lehr”) for engaging in protected union activities was a violation of Section 8(a)(1), 8(a)(3), and 8(a)(4) of the Act; and (3) the terminations of both Lehr and Charles Howard (“Howard”) constituted violations of Section 8(a)(1), 8(a)(3), and 8(a)(4) of the Act. ALJD 1-2.

The ALJ correctly concluded in its Decision that the Respondent’s suspension of Lehr for engaging in protected union activities, including the filing of an unfair labor practice charge, was a violation of Section 8(a)(1), 8(a)(3), and 8(a)(4) of the Act. ALJD 13-14. In doing so, the ALJ found that “the evidence show[ed] that the Respondent bore animus towards the Union” and found that statements by Respondent’s owner and president “demonstrated hostility towards, and mistrust of, the Union and union activity.” ALJD 14,16 (“I find that the General Counsel has demonstrated that the Respondent was hostile towards the Union and union activity”).

The ALJ erred, however, when he concluded that Respondent’s terminations of Lehr and Howard in the midst of the Union’s organizing campaign were not violations of Section 8(a)(1), 8(a)(3), and 8(a)(4) of the Act. ALJD 15-17. In its Decision, the ALJ concludes that Lehr and

Howard were likely terminated as the result of Respondent's downturn in plumbing. ALJD 15-17. However, the ALJ's decision is contrary to the manifest weight of the evidence that was introduced at the hearing, as the ALJ admits that the only evidence introduced at the hearing to substantiate the downturn in plumbing was the testimony of Gatewood. ALJ 16. As set forth below, the unrefuted evidence introduced at the hearing conclusively showed that the terminations of Lehr and Howard were unlawful in violation of Section 8(a)(1), 8(a)(3), and 8(a)(4) of the Act. The record also reflects that Respondent failed to meet its burden of showing that it would have taken the same action absent the protected activities.

Additionally, the ALJ erred when he decided that the record did not support the Charge that on August 17, 2012, Gatewood threatened or coerced Lehr in violation of Section 8(a)(1) by telling him that if he ever left the Respondent for the Union, he would never be re-hired. ALJD 13. In making this decision, the ALJ relied too heavily on the incredible testimony of Gatewood and ignored the manifest weight of evidence that was introduced supporting the Petitioner's claim.

For the foregoing reasons, the Union respectfully excepts to the ALJ's finding that the Respondent established a legal basis for the terminations of both Howard and Lehr. The Union also excepts to the ALJ's conclusion that the record did not support the Charge that on August 17, 2012, Gatewood threatened or coerced Lehr in violation of Section 8(a)(1) by telling him that if he ever left the Respondent for the Union he would never be re-hired. By these Exceptions, and for the reasons set forth below, the Union asserts that the decision of the ALJ should be overturned to hold the Respondent responsible for the threat made by Gatewood to Lehr in violation of Section 8(a)(1) of the Act, and for the unlawful terminations of Lehr and Howard in violation of Sections 8(a)(1), 8(a)(3), and 8(a)(4) of the Act.

STATEMENT OF FACTS

The Respondent is a mechanical services contractor involved in the construction industry. TR 13. The Respondent has stipulated that it is an “employer engaged in commerce” within the meaning of Sections 2.2, 2.6, and 7 of the Act. TR 10; JT Ex. 1. The Respondent primarily performs HVAC, plumbing, and pipefitting work. TR 13; TR 20. Tim Gatewood (hereinafter referred to as “Gatewood”) has been the owner and manager of the Respondent since 1981. TR 18-19. At all material times, Tim Gatewood has been a supervisor of Respondent within the meaning of Section 2(11) of the NLRA. JT Ex. 1. The Petitioner, is a labor organization within the meaning of Section 2(5) of the Act. JT Ex. 1.

Organizing Effort and Suspension and Termination of Chris Lehr

In February 2011, Chris Lehr (hereinafter referred to as “Lehr”) began working for the Respondent. TR 107. At the time Lehr interviewed and received the position with the Respondent, he was, and still is a member of the Union. TR 107-109. During Lehr’s interview, Gatewood brought up his union membership because it appeared on Lehr’s resume. TR 81; TR 108-109. Specifically, Gatewood told Lehr that he had other union employees before and “they never stuck around.” TR 109. Gatewood stated to Lehr “If you ever leave me to go to a union company I will never hire you back.” TR 124. Gatewood stated that guys had “come back on their hands and knees begging for their job back and he just – he couldn’t do it” if they had left for a union job. TR 109. After being offered the job by the Respondent, Lehr accepted and began working as a plumber for the Respondent. TR 110.

In May of 2012, John Kurek (hereinafter referred to as “Kurek”), an organizer for the Petitioner, began a top-down organizing campaign of the Respondent. TR 200. At this time, Kurek and the lead organizer for the Union, Jim Nuttall (hereinafter referred to as “Nuttall”)

visited the Respondent to speak with Gatewood. TR 200. Kurek and Nuttall were informed that they were required to schedule a meeting with Gatewood in order to speak with him. TR 200. Kurek and Nuttall scheduled a meeting for the following Tuesday. TR 201. Kurek and Nuttall met with Gatewood and his son Chris Gatewood and discussed the benefits of unionizing. TR 202. At the meeting, Gatewood expressed an interest in the Union and stated that he had employees who were former Union members and were “well-trained.” TR 203. Despite the appearance of interest at the meeting, Gatewood ceased all communications with Kurek after the meeting. TR 204-205. Kurek made several attempts to communicate with Gatewood after the meeting, none of them successful. TR 204-205.

Around that same time, May of 2012, Kurek contacted Lehr to introduce himself as a new organizer for the Union. TR 205. A few weeks later, in mid-May 2012, Kurek and Lehr met for the first time. TR 111. At the meeting, Kurek informed Lehr that he was working on a top down organizing effort of the Respondent. TR 111. Kurek instructed Lehr to “keep him informed” as to activities in the company. TR 111. At this point, Lehr and Kurek met about every two weeks with the goal still being a successful top-down organizing effort. TR 112.

Around August of 2012, two other employees of the Respondent joined Lehr and Kurek at some of these meetings—Charles Howard (hereinafter referred to as “Howard”) and Josh Rayburn (hereinafter referred to as “Rayburn”). TR 112. Both Howard and Rayburn were former Union members, but were no longer actively affiliated with the Union. TR 207. However, both were interested in taking part in an effort to organize the Respondent. TR 207-209; TR 162; TR 164.

In August of 2012, Kurek asked Lehr to talk to Gatewood and discuss with him the benefits of unionizing. TR 210. Lehr talked to Gatewood at Indianapolis Public Schools 107

(hereinafter referred to as “IPS 107”) in August of 2012. TR 210; TR 304. On August 17, 2012, Lehr told Gatewood that he “had been [with the Respondent] for quite a while and that [he] might need to make a choice as to where [he] was going to be at – end up at, with the Union or with him.” TR 113. Gatewood responded to Lehr that he had “to do what is right for [his] family.” TR 113. Gatewood also reiterated his comments from Lehr’s interview that “if you ever leave me and go to a union shop, I will never hire you back.” TR 113. Furthermore, Gatewood told Lehr that he has “had guys on their hands and knees begging for their job back” and he “just can’t do it after they’ve gone to a union job.” TR 113. Following this discussion, Lehr immediately reported to Kurek what Gatewood had said to him. TR 113.

Throughout the next two months, Lehr and Kurek met once every two to three weeks. TR 210. In October of 2012, Lehr was transferred from IPS 107 to a new worksite called the Grissom Air Force Base (hereinafter referred to as “Grissom”). TR 113; TR 211. Prior to starting at Grissom, Lehr discussed his hours with Gatewood, and the two mutually agreed that “because of the drive” to the worksite, Lehr could work four ten (10) hour days instead of five eight (8) hour days. TR 114. Moreover, they agreed that Lehr would work from 6:00 a.m. to 4:30 p.m. each day. TR 114. The first day Lehr arrived at the job site around 5:30 or 5:45 a.m. TR 115. He waited at the gate until about 6:10 or 6:15 when Dana Wildrick (hereinafter referred to as “Wildrick”), the foreman and lead plumber on the Grissom worksite arrived and told Lehr that he did not have to worry about getting to the job site so early because he did not have a key to get in. TR 115. Wildrick told Lehr that only the electricians had the key. TR 115. Wildrick told Lehr that he should work 6:00 a.m. to 4:30 p.m., and further told him that Gatewood and Jamie Price had approved of the hours. TR 115. As a result, Lehr followed Wildrick’s instructions and wrote down a start time of 6:00 a.m. each day. TR 115.

On November 7, 2012, approximately one month after Lehr began to work at the Grissom site, Kurek met with Lehr to “discuss the possibility of doing a bottom-up organizing campaign” because efforts to accomplish a top-down organizing campaign were not successful. TR 212; TR 124-125. During the meeting, Kurek also discussed with Lehr his recognition as a Volunteer Union Organizer. TR 213. Kurek and Lehr further discussed the possibility of filing an NLRB Charge based on Gatewood’s comments back in August 2012 that he would never hire Lehr back if he left for a union shop. TR 213.

The following day, on November 8, 2012, Kurek sent a letter to Gatewood informing him that Lehr was a Volunteer Union Organizer for the Petitioner. TR 26; GC Ex. 2. The letter was also faxed to the Respondent on November 8, 2012. TR 214. On or around that same day, the Petitioner filed a Charge with the NLRB based on the statements made by Gatewood during the August 17, 2012 discussion with Lehr. TR 125; 27-29.

Gatewood testified during the hearing that he received the NLRB Charge at the same time as he received the November 8, 2012 letter. TR 27-28. A day or two after receiving the NLRB Charge and letter, on November 11, 2012, Gatewood called Lehr and told him not to report to work the following day. TR 116-117. On Monday, November 12, 2012, Gatewood met with Lehr and Sean Young (hereinafter referred to as “Young”), the plumbing supervisor, at the Steak and Shake near Lehr’s house. TR 117. During this meeting, Gatewood discussed Lehr’s: (i) alleged excessive phone use while he was working; (ii) some piping that was done at the IPS 107 job; (iii) the way his time was kept at the Grissom job; and (iv) a comment Lehr allegedly made stating that he hoped he would get laid off. TR 35; TR 117. With regard to the time keeping issues, Gatewood told Lehr that he did not approve of the way he had been keeping time. TR 117. Lehr informed Gatewood that he was simply arriving at the time that the lead

plumber, Dana Wildrick, had instructed him to. TR 118. Gatewood docked Lehr's paycheck for the missed day of work due to the meeting at the Steak and Shake. TR 118. Gatewood never informed Lehr of this suspension, and instead just deducted the pay from his paycheck. TR 118. After Lehr's suspension, his work schedule was changed from four 10 hour shifts to five 8 hour shifts. TR 118.

Lehr returned to work the following day, November 12, 2012, and continued his efforts on the bottom-up organizing effort for the Petitioner. TR 115-116; TR 118-119. At this point, the frequency of the meetings between Lehr and Kurek increased to weekly. TR 212-213. Lehr also began to wear Union shirts and set out Union pamphlets in the company break areas. TR 119.

On November 21, 2012, Gatewood sent a memorandum to all employees of the Respondent stating the "company's position on unions." TR 36; TR 119; GC Ex. 4. The memorandum was sent to all employees to let them know that a union had expressed interest in the Respondent. TR 36; GC Ex. 4. The memo was addressed specifically from "Tim Gatewood." GC Ex. 4. In the memo, Gatewood stated "I am not in favor of a union at Commercial Air nor I do not think it would benefit you or the company." GC Ex. 4. Gatewood went on to state "you can't rely on any promises made by a union . . . [t]hey can say anything they want, but they can't guarantee anything." GC Ex. 4. Gatewood also stated in the memo that "there is plenty of work at [the company]." GC Ex. 4. Lastly, the memo also stated that the company "take[s] care of [its] employees without layoffs." GC Ex. 4. Lehr sent this memo to Kurek after he received it. TR 119.

Throughout the remainder of 2012 and into 2013, Kurek continued to meet with Lehr, Howard, and sometimes Rayburn to discuss the organizing campaign. TR 120-121. When

Howard began to work at the Grissom site, he and Lehr drove to work together every day. TR 163.

Around February of 2013, during a meeting with Kurek, Lehr expressed concern about safety issues at the Grissom worksite. TR 218. Specifically, Lehr was concerned about a truck onsite that did not have breaks, some ground openings that were not properly barricaded, standing water, and high areas that were not properly barricaded. TR 218. As a result of the safety issues, on February 28, 2013, Kurek filed a complaint with the Occupational Safety and Health Administration (OSHA). TR 221. That same week, on March 1, 2013, around 2:00 p.m., Young informed Lehr that he was laid off due to lack of work. TR 40; TR 122. At the time Lehr was laid off, he was one of two plumbers at the Grissom worksite, the other plumber being Wildrick. TR 122. Wildrick was not laid off. TR 122. In addition, there were two plumbing apprentices, Dave Richardson and Brian Moore. TR 61. Neither of the plumbing apprentices were laid off. TR 61. When Lehr was laid off, Grissom had yet to be completed and twenty to thirty percent of the plumbing work remained. TR 127-128. Approximately one week after Lehr was terminated the Respondent rehired another Plumber, Tim Evans (“Evans”), who had been laid off one week prior to Lehr. GC Ex. 10; GC EX. 25. Evans remained employed by Respondent until August 2012 when he was terminated for cause, not for lack of plumbing work. TR 56; Stipulation.

Termination of Charles Howard

Charles Howard began working for Respondent in April of 2011. TR 157. Howard was hired by Gatewood as a welder/fitter, but was also a licensed plumber. TR 156. Howard was a former Union member who had left the Union in February of 2009. TR 158. As he did in Lehr’s

interview, Gatewood informed Howard during his interview that if he ever quit and went back to the Union, “he wouldn’t be able to be re-employed by [the Respondent].” TR 158.

In the Fall of 2012, Howard began meeting with Lehr and Kurek to discuss organizing the Respondent. TR 159-160. By 2013, Howard was meeting with Lehr and Kurek weekly to discuss the organizing campaign. TR 164. In January of 2013, Howard began to work at Grissom and rode to work each day with Lehr. TR 163. During January and February 2013, Howard attended weekly meetings with Lehr and Kurek to discuss the organizing activities. TR 164.

On or about February 26, 2013, Howard was terminated due to poor work performance. TR 328;TR 170. However, according to Howard’s discharge/layoff sheet, Howard was let go due to lack of plumbing work. TR 43; GC Ex. 6.

Just a few months prior to his termination, in October of 2012, Gatewood invited Howard on a company sponsored trip to Talladega, Alabama. TR 172. There were only about fifteen employees invited on the trip and the Respondent covered all expenses, including the price of tickets for a NASCAR Race. TR 172-173. The purpose of this trip was to thank these employees for the hard work they had done for the Respondent. TR 173. In December of 2012 Howard was given a \$500.00 bonus at the Christmas party. TR 172. Howard received a larger bonus than several other employees. TR 172. When Gatewood gave Howard his bonus he told him “thank you for the work you have done . . . I’m glad I hired you . . . I’m glad you work for us.” TR 172. Despite these comments, Howard was fired for allegedly having poor work performance just a few months later. TR 328.

EXCEPTIONS 1 and 2:

The ALJ erred in ruling that the termination of Chris Lehr on March 1, 2013 did not violate Section 8(a)(1), 8(a)(3), or 8(a)(4) of the National Labor Relations Act.

The record demonstrates that the ALJ erred in ruling that the termination of Chris Lehr on March 1, 2013 did not violate Section 8(a)(1), 8(a)(3), or 8(a)(4) of the National Labor Relations Act.

Under the Board's *Wright Line* decision, in cases alleging discrimination in violation of Sections 8(a)(1), 8(a)(3) and 8(a)(4) where motivation is at issue, the General Counsel bears the initial burden of showing that the Respondent's decision to take adverse action against an employee was motivated, at least in part, by antiunion considerations. 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981); *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983). If the General Counsel establishes the antiunion considerations, the burden then shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 3-4 (2011); *ADB Utility Contractors*, 353 NLRB 166, 166-167 (2008), enf. denied on other grounds, 383 Fed. Appx. 594 (8th Cir. 2010); However, in order for an employer to establish a defense to discriminatory discharge under the *Wright Line* test, an Employer must do more than show it has reasons that could warrant discharging the employee in question." *TNT Logistics of North America, Inc. and James Morgan*, 340 NLRB 141 (Nov. 28, 2003) (citing *Lampi, LLC*, 327 NLRB 51 (November 30, 1998). Instead, the employer "*must persuade by a preponderance of the evidence* that the same action would have taken place even in the absence of the protected activity." *W.F. Bolin Co.*, 371 NLRB 1118, 1119 (1993). In the present matter, there is little question that the ALJ erred in finding that the Respondent met this high burden.

In its Decision, the ALJ found that the General Counsel met its initial burden of showing that the Respondent's decision to terminate Lehr was motivated, at least in part, by antiunion considerations. ALJD 15. (stating that “the General Counsel has met its initial burden”). The ALJ found that Unlawful animus was demonstrated because the Respondent had previously “discriminated against Lehr by suspending him and changing his work schedule because of protected activities.” ALJD 15. Because the General Counsel met its initial burden, the burden then shifted to the Respondent to show that it would have dismissed Lehr in the absence of the protected activity. ALJD 15. The record reflects that the Respondent failed to make this showing and the ALJ erred in its determination that the Respondent met this high burden.

In order to conclude that the Respondent met its burden, the ALJ made several conclusions that were not supported by the record. ALJD 15-16. The first conclusion made by the ALJ was that the Respondent had experienced a downturn in its plumbing business and as a result Lehr was laid off due to lack of work. ALJD 16. To reach this conclusion, the ALJ relies solely on the testimony of Tim Gatewood. ALJD 16. The ALJ acknowledges in its Decision that the Respondent “did not introduce documentation of its downturn” nor did it introduce any “documentation showing that the total number of plumbing hours its employees were working had been consistently reduced.” ALJ 16. In fact, the only evidence the ALJ relied upon was that the “Respondent reduced its total number of plumbers from six to three...” ALJD 16. However, the ALJ ignores the fact that the three plumbers that were “reduced” were the only three plumbers with ties to the Union, and two of whom were the alleged discriminates, Lehr and Howard. ALJD 8-12.

Additionally, the ALJ concluded that the General Counsel and Union failed to rebut Gatewood’s testimony regarding the down turn in its plumbing business. ALJD 16. However,

the ALJ ignores several key pieces of evidence when arriving at this conclusion. The following evidence was introduced at trial, which was ignored by the ALJ in its Decision:

1. Payroll records for work at the Grissom job site for the period leading up to and immediately following Lehr's termination, which the ALJ admitted "show[ed] some variability in total hours worked, but not a dramatic decline" following Lehr's termination. ALJD 11; GC Ex. 11.
2. Payroll records for Tim Evans, one of the three plumbers that remained on after Lehr was terminated,¹ that showed that Tim Evans' hours remained steady during the weeks and months following Chris Lehr's termination (GC Ex. 10)²; GC EX. 25.
3. Payroll records for Dana Wildrick, another one of the three plumbers that remained on after Lehr was terminated that showed that Dana Wildrick's hours remained steady and in fact overtime plumbing hours were worked in the weeks and months following Chris Lehr's termination (GC Ex. 16).³

¹ As explained *infra* Tim Gatewood testified at the hearing that Evans was laid off on February 28, 2013. However, payroll records for Respondent indicate that about a week after his alleged layoff, he was re-hired by the Respondent. GC Ex. 10; TR 71; TR 82-83. Evans continued to work for Respondent performing plumbing work until August 2013, when he was terminated by Respondent **for cause**, not for lack of plumbing work. TR 56; Stipulation.

² Week ending 3/3/13 – 39.30 hours
Week ending 3/17/13 – 25.3 hours
Week ending 3/24/13 – 40 hours
Week ending 3/31/13 – 40 hours
Week ending 4/7/13 – 40 hours
Week ending 4/14/13 – 8 hours
Week ending 5/5/13 – 23 hours
Week ending 5/12/13 – 40 hours
Week ending 5/19/13 – 40 hours
Week ending 5/25/13 – 16 hours
Week ending 6/2/13 – 39 hours
Week ending 6/9/13 – 40 hours
Week ending 6/16/13 – 40 hours
Week ending 6/30/13 – 40 hours
Week ending 7/7/13 – 32 hours (+ 8 holiday)
Week ending 7/14/13 – 30 hours (+16 vacation)
Week ending 7/21/13 – 40 hours
Week ending 7/28/13 – 40 hours
Week ending 8/4/13 – 40 hours
Week ending 8/11/13 – 40 hours
Week ending 8/18/13 – 32 hours (+8 vacation)
Week ending 8/25/13 – 40 hours
Week ending 9/1/2013 – 40 hours – (terminated on 8/27/13 for cause)

³ Week ending 3/31/13 – 41.0 hours
Week ending 4/7/13 – 40 hours
Week ending 4/14/13 – 40 hours
Week ending 4/21/13 – 40 hours
Week ending 4/28/13 – 40 hours

4. Records indicating that the Respondent was paying for two employees to go through a non-union plumbing apprenticeship at the same time that he laid off Chris Lehr for lack of plumbing work. (GC. Ex. 17) (TR. 78-79, 351). The records also reflect that in order to complete the plumbing apprenticeship program the apprentices were **required** under the agreement with the United State Department of Labor to obtain 7,600 hours of on-the-job plumbing during their apprenticeship. GC Ex. 28.
5. Testimony from Chris Lehr that there was twenty to thirty percent of the plumbing work that still needed to be completed at the Grissom job at the time that he was terminated. TR 127.

Despite the above evidence that was introduced by the General Counsel and the Union, the ALJ concluded that the “General Counsel and the Union did not rebut the evidence that the Respondent was experiencing a downturn in its plumbing work.” ALJD 16. This is a curious conclusion reached by the ALJ, seeing that the ALJ admits that the only evidence introduced by the Respondent regarding its downturn in business was the testimony of the Respondent. ALJD 16. The ALJ even admits that there is only “some support” for the claim of the Respondent that it would have terminated Lehr despite his Union activities. ALJD 16. The ALJ also states that the Respondent only produced evidence that was “marginally sufficient” to prove that the Respondent would have terminated Lehr regardless of his organizing activities.⁴ ALJD 16.

Additionally, the only testimony to support the downturn in business was provided by Tim Gatewood, who was anything but a credible witness. ALJD 12. The ALJ admitted in its Decision that Gatewood admitted on the stand that he had previously “signed documents certifying that [the plumbing apprentices] were doing plumbing work at times when he did not actually believe they were doing so.” ALJD 12. The testimony of a documented liar, without more, is certainly not sufficient to meet the very high burden under *Wright Line*.

Additionally, the ALJ completely mischaracterizes the evidence regarding Respondent’s recall of plumber Tim Evans, after Lehr was terminated. Tim Gatewood testified that Evans, the

⁴ The Respondent failed to introduce any evidence to support the allegation that there was a downturn in plumbing work other than his own testimony.

only laid off plumber without current or previous union affiliation, was laid off on February 28, 2013, only a few days before Lehr was laid off on March 1, 2013. TR 82; TR 53. However, the evidence introduced at trial showed that approximately one week after Lehr's termination, Evans was re-hired by the Respondent. GC Ex. 10; TR 71; TR 82-83. The General Counsel produced payroll records which support this fact. GC Ex. 10.

Gatewood testified at the hearing that Evans was recalled to "do [the] punch list items at Short Ridge." TR 313. The ALJ acknowledges this testimony in its Decision. ALJD 16. However, the ALJ ignores the evidence that was introduced by the General Counsel and the Union which showed that Evans continued working for six months after being recalled, even though Gatewood testified that the punch list at Short Ridge "was a pretty small one." TR 313; GC Ex. 10. Evans continued working at approximately 40 hours per week until August 27, 2013 when he was terminated by the Respondent *for cause*, not for lack of plumbing work. TR 56; Stipulation. The payroll records for Evans that were introduced at the hearing showed that Evans worked 40 hours per week during **all** of the 12 weeks prior to his termination, excluding vacation time. GC Ex. 10; GC EX. 25. At no time did the Respondent offer to bring Lehr back on.

The ALJ also ignored the evidence introduced by the General Counsel that Respondent employed two plumbing apprentices, Brian Moore and Dave Richardson, during the alleged "down turn in plumbing". TR 350-351. In its Decision the ALJ tenuously concludes that these apprentices were not likely performing a lot of plumbing work for the Respondent, despite the evidence introduced by the General Counsel in which both the apprentices and the Respondent certify (by signature) that the apprentices were in fact performing plumbing work during the time

period immediately before and immediately following Lehr's termination. ALJD 12 GC Ex. 17⁵. To rebut this conclusive evidence, Gatewood testified that he had personally signed their apprenticeship documents stating that they "were doing plumbing work" when he didn't believe "they was (sic) doing plumbing work." TR 360-61. Gatewood also testified the falsified documents were then presented to the apprenticeship school that the apprentices attended. TR 362.

Despite this incredible admission of dishonesty by Gatewood, the ALJ elected to believe Gatewood's testimony and concluded that the apprentices were not likely performing plumbing work.⁶ The ALJ's conclusion is again totally inconsistent with the irrefutable documented evidence introduced at trial by the General Counsel. Additionally, as acknowledged by the ALJ, when an employer offers inconsistent evidence, "a reasonable inference may be drawn that the reasons being offered are pretexts to mask an unlawful motive." *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 506 2007; *GATX Logistics, Inc.* 323 NLRB 328, 335 (1997) enfd. 160 F.3d 353 (7th Cir. 1998). It is clear the ALJ did not follow this clear precedent when it failed to draw the reasonable inference of unlawful motives from Gatewood's inconsistent testimony.

The ALJ acknowledged in its Decision the Respondent did produce a single piece evidence to support Gatewood's testimony regarding the downturn in plumbing. ALJD 16. The only evidence offered to support the downturn in plumbing was the testimony of Gatewood, who admitted to acts of dishonesty during his testimony. ALJD 16; TR 360-61. In contrast, the

⁵ The General Counsel also introduced records which stated that in order to complete the plumbing apprenticeship, each apprentice must perform 7,600 hours of plumbing work. TR 359-361. Additionally, Gatewood admitted that these two individuals performed some plumbing work. TR 61. The Respondent introduced Brian Moore's time card from March 24th showing 30.5 plumbing hours at the Grissom job (where Lehr was working when he was terminated) and Brian Moore's timecard from April 5, 2013 which states that he performed plumbing work on the Shortridge punch list and IPS 107 punch list, the two areas that plumber Tim Evans was purportedly brought back to finish. R. Ex. 30.

⁶ The ALJ stated in its Decision that Lehr could have testified as to the nature of the apprentice's work "since Lehr was the licensed plumber who signed a number of the documents reporting" on the apprentice's work. ALJD 12. However, there was no testimony introduced during the hearing to support such a conclusion. There was no testimony showing that Lehr ever signed a single document related to either apprentice. The ALJ made an assumption that such signatures were Lehr's and were authentic.

irrefutable evidence produced by the General Counsel clearly shows that there was no downturn in Respondent's plumbing business. GC Ex. 10; GC EX. 25; GC 11. Therefore, the Respondent clearly failed to rebut the presumption established by the General Counsel and the Union under the *Wright Line* standard that there was a lawful reason, i.e. the downturn in plumbing work, that lead to Lehr's termination. As a result, the Union respectfully requests that this Board overturn the ALJ's decision and find that the Respondent did violate Section 8(a)(1), Section 8(a)(3), and Section 8(a)(4) when it fired Chris Lehr on March 1, 2013.

EXCEPTION 3 and 4:

The ALJ erred in ruling that the termination of Charles Howard on February 26, 2013 did not violate Section 8(a)(1), 8(a)(3), or 8(a)(4) of the Act. (ALJD #).

The ALJ also erred in holding that the termination of Howard did not violate Section 8(a)(1), Section 8(a)(3), and Section 8(a)(4) of the Act. As referenced above in Exception 1, the ALJ held that the General Counsel met its initial burden under Wright Line due to the Respondent's blatant Union hostility. ALJD 17. Accordingly, the burden was on the Respondent to demonstrate that it would have taken the same action absent Howard's protected activities. *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 3-4 (2011); *ADB Utility Contractors*, 353 NLRB 166, 166-167 (2008), enf. denied on other grounds, 383 Fed. Appx. 594 (8th Cir. 2010); The record in the present matter indicates that the Respondent failed to meet its burden.

Again, the only evidence introduced by the Respondent to show a lawful basis for the termination of Howard was the testimony of Gatewood. ALJD 17-18. As set forth *Supra*, Gatewood was anything but credible based on his admission of falsifying paperwork related to the two apprentices. Additionally, the General Counsel and the Union rebutted Gatewood's testimony through the testimony of Howard who testified that he "tried to perform things the fastest, safest and most professional way" that he could. TR 177. Additionally, Howard testified that his work habits had not changed since December 2012 when he received a \$500 Christmas bonus and when Gatewood told him that he was glad that he had hired him and glad that he worked for Respondent. TR 173.

Gatewood's testimony that Howard was terminated for poor performance was also contrary to Respondent's Employee Discharge / Layoff Checklist which stated that Howard was terminated due to a "Work slow down / plumbing department labor reduction." GC Ex. 6; TR 43. As acknowledged by the ALJ, the Board has repeatedly held that when an employer offers

inconsistent or shifting reasons for its actions, a reasonable inference may be drawn that the reasons being offered are pretexts to mask an unlawful motive. *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 506 2007; *GATX Logistics, Inc.* 323 NLRB 328, 335 (1997) enfd. 160 F.3d 353 (7th Cir. 1998). Despite the fact that Gatewood's testimony was inconsistent with the Respondent's own records, and was inconsistent with Howard's testimony, the ALJ determined that Gatewood's testimony was sufficient to establish that Respondent had a lawful basis for terminating Howard and would have done so despite his protected activities. ALJD 17-18. This finding by the ALJ is inconsistent with the conclusive evidence introduced at the hearing.

Therefore, the Respondent clearly failed to rebut the presumption established by the General Counsel under the *Wright Line* standard that it was Howard's poor performance that lead to his termination. As a result, the Union respectfully requests that this Board overturn the ALJ's decision and find that the Respondent did violate Section 8(a)(1), Section 8(a)(3), and Section 8(a)(4) when it terminated Charles Howard.

EXCEPTION 5:

The ALJ erred when it decided that the record did not support the Charge that on August 17, 2012, Gatewood threatened or coerced Lehr in violation of Section 8(a)(1) by telling him that if he ever left the Respondent for the Union, he would never be re-hired.

The Board has held that repeated anti-union statements from an employer strongly supports the conclusion that the comments were “a calculated attempt to discourage employee organization” in violation of Section 8(a)(1) of the Act. *NLRB v. Dorothy Shamrock Coal Co.*, 833 F.2d 1263, 1266 (7th Cir. 1987). In this case the ALJ erred when he decided that the record did not support the Charge that Gatewood threatened or coerced Lehr in violation of Section 8(a)(1) by telling him that if he ever left the Respondent for the Union, he would never be re-hired.

In analyzing the Charge that Gatewood had threatened to Lehr in August 2012, the ALJ acknowledged that there was conflicting evidence on what had occurred. The ALJ acknowledged that Lehr testified that Gatewood specifically stated “if you ever leave me and go to a union shop, I will never hire you back.” ALJD 4; TR 113. Lehr also testified that Gatewood stated “I have had guys on their hands and knees begging for their job back, and I just can’t do it after they’ve gone to a union job.” Tr. 113. The ALJ states that Lehr’s testimony was contradicted by Gatewood’s who denied making such statements and instead testified that he requested notice if Lehr elected to leave him. ALJD 4. The ALJ states in his Decision that he did not find a basis for crediting one account over the other.⁷ Notwithstanding, the ALJ determines that the record did not establish that Gatewood made the unlawful statement to Lehr

⁷ The ALJ states in his Decision that Lehr’s testimony is undermined by the absence of any contemporaneous documentation of such statement. As a result, the ALJ determines that the General Counsel failed to meet its burden in establishing that the statement was made. However, later in its Decision the ALJ points out that the Respondent failed to provide any contemporaneous documentation to corroborate Gatewood’s testimony regarding the downturn in the plumbing business, yet inexplicably finds that the Respondent meets its burden, despite the absence of such documentation. ALJD 11, 16.

in August 2012. ALJD 4, 12. The ALJ ignored several key pieces of evidence in reaching this conclusion.

For starters, Lehr testified that Gatewood had made a very similar statement to him at the time of his interview. TR 109. At the hearing, Lehr testified that during his interview in February 2011, Gatewood told him “If you ever leave me and go to a union company, I will never hire you back.” TR 124. Additionally, Howard testified that during his interview in April 2011, Gatewood had made a very similar comment to him. TR 158. Howard testified at the hearing that Gatewood had 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. Additionally, John Kurek testified at the hearing that Lehr informed him of Gatewood’s unlawful statement shortly after it occurred in August 2012, and that he know it was an unfair labor practice. TR 249. Kurek testified that he actually drafted and filed the NLRB Charge. TR 249.

In addition to the multiple witnesses that testified regarding similar statements made by Gatewood, the evidence also showed that Gatewood was clearly hostile toward union. In its Decision, the ALJ determines that Gatewood was hostile toward the Union and Union activity. ALJD 17. The ALJ stated that “the evidence show[ed] that the Respondent bore animus towards the Union.” ALJD 14,16. The ALJ also stated that statements by Respondent’s owner and president “demonstrated hostility towards, and mistrust of, the Union and union activity.” ALJD 14,16. Additionally, the ALJ found that Gatewood’s statements that he “oppose[d] unionization”, that “it would not be good for you”, and that “you can’t rely on any promises made by a union”, shed light on the Respondent’s motivations regarding the alleged unlawful actions taken by Gatewood. ALJD 14.

Based on his documented anti-union sentiment, combined with the multiple accounts of similar statements made by Gatewood, there is no question that record establishes that Gatewood threatened and coerced Lehr in violation of Section 8(a)(1) by telling him that if he ever left the Respondent for the Union, he would never be re-hired. As a result, the Union respectfully requests that this Board overturn the ALJ's opinion and find that the threat made to Lehr on August 17, 2012 by Gatewood violated Section 8(a)(1) of the Act.

Based on the foregoing evidence and legal authority, the Union 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.

Respectfully submitted,

/s/ William P. Callinan
Attorney for the Union
JOHNSON & KROL, LLC
300 South Wacker Drive, Suite 1313
Chicago, Illinois 60606
Direct: (312) 757-5464
Main: (312) 372-8587 x222
Fax: (312) 255-0449
william@johnsonkrol.com

CERTIFICATE OF SERVICE

The undersigned certified that on today's date, August 29, 2014 he served a copy of the Indiana State Pipe Trades Association and U.A. Local 440 AFL CIO's Exceptions to the Administrative Law Judge's Decision and Memorandum of Law in Support **via electronic mail** to each of the below referenced the Recipients.

Gary Shinnors
Executive Secretary
National Labor Relations Board
1099 14th Street N.W.
Washington DC 20570-0001

Michael T. Beck
Attorney for General Counsel
NLRB, Region 25
575 N. Pennsylvania Street, Room 238
Indianapolis, IN 46204-1577

A. Jack Finklea
Attorney for Respondent
Scopelitis, Garvin, Light, Hanson & Feary, P.C.
10 West Market Street, Suite 1500
Indianapolis, IN 46204

/s/ William P. Callinan
Attorney for the Union
JOHNSON & KROL, LLC
300 South Wacker Drive, Suite 1313
Chicago, Illinois 60606
Direct: (312) 757-5464
Main: (312) 372-8587 x222
Fax: (312) 255-0449
william@johnsonkrol.com