

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

COMMERCIAL AIR, INC.

and

Case Nos. 25-CA-092821  
25-CA-099616  
25-CA-099620  
25-CA-099624  
25-CA-104026

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

**RESPONSE AND CROSS EXCEPTIONS OF RESPONDENT,  
COMMERCIAL AIR, INC., TO EXCEPTIONS FILED  
BY GENERAL COUNSEL AND BY INDIANA  
STATE PIPE TRADES ASSOCIATION AND U.A. LOCAL 440, AFL-CIO**

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	CROSS EXCEPTIONS .....	2
III.	STATEMENT OF FACTS .....	2
	A. Commercial Air’s Business .....	2
	B. Commercial Air Begins Taking On Plumbing Work And Hiring Plumbers .....	3
	C. Mr. Lehr Is Pressured By The Union .....	5
	D. Mr. Lehr Volunteers For The Grissom Project And Commits His Third Instance of Unilaterally Changing His Work Schedule .....	5
	E. Tim Gatewood Meets With Mr. Lehr To Discuss Mr. Lehr’s Conduct .....	7
	F. Commercial Air’s Business Continues To Dwindle, Prompting Layoffs .....	9
	G. Commercial Air Is Left With Work For Only Two Journeyman Plumbers .....	11
	H. Charles Howard’s Poor Performance Results In Discharge .....	12
	I. Commercial Air’s Workforce Has Been Cut In Half Due to Lack Of Work .....	16
IV.	ARGUMENT .....	17
	A. Substantial Evidence Supports The Conclusion That Lehr Was Not Threatened .....	17
	B. Judge Bogas’ Finding That Commercial Air Lawfully Laid Off Mr. Lehr Should Stand .....	22
	1. Commercial Air Established A Downturn In Plumbing Work Prompted Mr. Lehr’s Layoff .....	22
	2. General Counsel Failed To Meet Its <i>Prima Facie</i> Burden .....	29
	C. Judge Bogas Correctly Found Mr. Howard’s Poor Performance, Alone, Caused Discharge .....	33
	1. Mr. Howard Would Have Been Discharged Regardless Of Protected Activity .....	33

2.	No <i>Prima Facie</i> Case Was Established Relating to Mr. Howard ....	38
D.	The Credibility Issues Relating To Mr. Gatewood Pale In Comparison To Those Of Mr. Lehr And Mr. Howard .....	41
V.	CONCLUSION.....	44

**TABLE OF AUTHORITIES**

**Court Cases**

*G&H Prods. V. N.L.R.B.*, 714 F.2d 1397 (7th Cir. 1983) .....23

*Sears Roebuck & Co. v. N.L.R.B.*, 349 F.3d 493 (7th Cir. 2003) .....22

*UAW v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972) .....19

*Vulcan Basement Waterproofing of Illinois, Inc. v. N.L.R.B.*,  
219 F.3d 677 (7th Cir. 2000) .....30

**Board Cases**

*Affiliated Foods, Inc.*, 328 NLRB No. 165 (1999) .....33

*American, Inc.*, 342 NLRB 768 (2004) .....17, 32, 33

*Bridgestone/Firestone, Inc.*, 335 NLRB 941 (2001) .....43

*California Pellet Mill Co.*, 219 NLRB 435 (1975) .....43

*Camaco Lorain Mfg. Plant*, 356 NLRB No. 143 (2011) .....31, 32, 40

*C.E. Natco/C-E Invalco*, 272 NLRB 502 (1984) .....28, 37

*Cobb Mech. Contractors, Inc.*, 2009 WL 5138341  
(Div. of Judges Dec. 28, 2009) .....21

*GATX Logistics, Inc.*, 323 NLRB 328 (1997) .....26

*Gold Coast Restaurant Corp.*, 304 NLRB 750 (1991) .....38, 39

*In re E.A. Sween Co.*, 2009 WL 3422395 (Div. of Judges Oct. 23, 2009) .....35

*In re Kentucky Gen., Inc.*, 334 NLRB 154 (2001) .....43

*In re River Ranch Fresh Foods, LLC*, 351 NLRB No. 15 (2007) .....35

*Interbake Foods*, 2013 WL 4715677 (Div. of Judges Aug. 30, 2013) .....30

*Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480 (2007) .....26

*Jones Sausage Co. and Jones Abattoir Co.*, 118 NLRB 1403 (1957) .....22

<i>Nat'l Ass'n of Letter Carriers</i> , 2011 WL 1229767 (Div. of Judges Apr. 1, 2011) .....	43
<i>Neptco, Inc.</i> , 346 NLRB 18 (2005) .....	31, 40
<i>Sears Roebuck De Puerto Rico</i> , 284 NLRB 258 (1987) .....	43
<i>T. Steele Constr., Inc.</i> , 348 NLRB No. 79 (2006) .....	42
<i>TTT West Coast, Inc.</i> , 2000 WL 33665558 (Div. of Judges Oct. 24, 2000) .....	27, 37
<i>Winn-Dixie Stores, Inc.</i> , 153 NLRB 276 (1965) .....	38
<i>NLRB v. Wright Line, a Div. of Wright Line, Inc.</i> , 251 NLRB 1083 (1980) .....	22
<i>Standard Dry Wall Products</i> , 91 NLRB 544 (1950) .....	17

**Statutes**

Section 8(a)(1) .....	2, 21, 22
Section 8(a)(3) .....	22, 22
Section 8(a)(4) .....	2, 22

Respondent, Commercial Air, Inc. (“Commercial Air”), by counsel, files its Response to Exceptions to Administrative Law Judge Paul Bogas’ decision filed by the Indiana State Pipe Trades Association and U.A. Local 440, AFL-CIO (the “Union”) and Counsel for the General Counsel of the National Labor Relations Board (“NLRB”).

## I.

### **INTRODUCTION**

On November 8, 2012, March 5, 2013 and April 30, 2013, the Union filed a series of unfair labor practice charges (the “Charges”) against Commercial Air, alleging that Commercial Air (1) verbally threatened employee Chris Lehr on August 17, 2012, over his union affiliation; (2) changed the conditions of Mr. Lehr’s employment on November 12, 2012; (3) suspended Mr. Lehr on November 12, 2012 for one day; (4) discharged employee Charles Howard on February 26, 2013 due to his involvement in a union organizing campaign; and (5) discharged Mr. Lehr on March 1, 2013 due to his involvement in a union organizing campaign.

Commercial Air opposed the Charges, showing that (1) the August conversation simply involved Mr. Lehr telling Commercial Air’s Tim Gatewood that the Union was pressuring him (Lehr) to go back to the Union and Mr. Gatewood responding by requesting advanced notice if Mr. Lehr decided to leave; (2) Mr. Lehr started working at another job site in November, 2012, upon his own request; (3) Mr. Lehr was suspended for a single day in November, 2012 because he attempted to set his own work hours and reported working during times in which he did not even have access to the jobsite; (4) Mr. Howard’s discharge arose solely out of his poor work performance even after Mr. Gatewood had provided Mr. Howard with a final warning; and (5) Mr. Lehr was laid off due to a lack of work.

On August 4, 2014, after a hearing on the merits, Judge Bogas entered his decision finding that General Counsel failed to establish a violation of either Section 8(a)(1)(3) or (4) of the Act regarding an alleged August, 2012 threat, the layoff of Chris Lehr, or the discharge of Charles Howard, but that a violation of the Act did occur with respect to the one-day suspension of Mr. Lehr. *See NLRB Division of Judges Decision* (“ALJ Decision”) at 19:16-26 (Doc. No. 30-1). On August 29, 2014, General Counsel and the Union filed exceptions to the ALJ Decision. Commercial Air now files this response showing the exceptions filed by General Counsel and the Union should be rejected.

## **II.**

### **CROSS EXCEPTIONS**

Commercial Air, pursuant to Section 102.46(e), submits the following cross exceptions to the ALJ Decision:

1. Commercial Air excepts to the finding that the General Counsel met its *prima facie* burden of proof with respect to the layoff of Chris Lehr. *ALJ Decision* at 15:44-52 to 16:1-10.
2. Commercial Air excepts to the finding that the General Counsel met its *prima facie* burden of proof with respect to the layoff of Charles Howard. *ALJ Decision* at 17:36-52.

## **III.**

### **STATEMENT OF FACTS**

#### **A.**

#### **Commercial Air’s Business**

Commercial Air is a full-service mechanical contractor serving Central Indiana. Commercial Air was formed by Mr. Gatewood who started the business January 1, 1981,

performing small heating, ventilation and air conditioning jobs. *Tr.* at 19-20, 279-80. Commercial Air gradually worked its way into performing commercial work and bidding on larger projects, which it has been doing for the past 15-20 years. *Tr.* at 280-81; *see ALJ Decision* at 2:33-36. Commercial Air installs HVAC, process piping, plumbing and sheet metal. *Tr.* at 20; *ALJ Decision* at 2:16-32. Commercial Air's field workers are divided into classifications of plumbers, fitters, and sheet metal workers. *Tr.* at 21; *ALJ Decision* at 2:36-37.

Commercial Air built itself into a commercially-driven contractor that performs approximately 75% public work, in which wage rates are set by the government as either prevailing wage (federally-funded jobs) or common construction wage (state-funded jobs). *Tr.* at 284-85. Due to the large percentage of public work, Commercial Air pays its employees generally a higher wage rate than that received by those working out of the Union hiring hall. *Tr.* at 288. Specifically, Union hiring hall workers receive a cash wage rate, and their employers are obligated to contribute an additional amount to various Union fringe benefit funds. For example, Union hiring hall workers in 2012 earned approximately \$33.00 an hour in cash wages and an additional \$15.00 was contributed by the employer to fringe benefit funds. *Tr.* at 240. Commercial Air workers, however, performing work on public projects received both the hourly cash wage rate and the fringe benefit amount all as a single hourly cash payment. *Tr.* at 288. Likewise, until February, 2013, Commercial Air had never been forced to lay off employees. *Tr.* at 38, 75-76, 80.

## **B.**

### **Commercial Air Begins Taking On Plumbing Work And Hiring Plumbers**

Portions of the commercial work awarded to Commercial Air involved plumbing tasks, which, in Indiana, required licensed plumbers to perform. *Tr.* 78-79, 234. Commercial Air

historically subcontracted the plumbing portions of its awarded contracts to plumbing contractors. *Tr.* at 281. In 2010 or 2011, however, Commercial Air began performing plumbing work when the primary subcontractor it used for plumbing work was set to close its business. *Tr.* at 281. Mr. Gatewood, at the plumbing contractor's request, agreed to hire some of the plumbers, including Sean Young who has since being hired operated as a plumbing foreman, and begin performing plumbing work. *Tr.* at 281-82. Mr. Young is over all the plumbers. *Tr.* at 22; *ALJ Decision* at 2:42-45.

After Mr. Young was hired, Commercial Air hired Mr. Lehr, Dana Wildrick, Tim Evans and Josh Rayburn to perform work as plumbers. Mr. Gatewood hired Mr. Lehr as a journeyman plumber in February, 2011 based on a referral from a Commercial Air employee, Tracy Albaugh. *Tr.* at 25, 107-08, 286; *ALJ Decision* at 2:39-41, 3:1-4. Mr. Gatewood interviewed Mr. Lehr in a construction trailer on one of the jobsites. *Tr.* at 286. They discussed Mr. Lehr's past work and the fact that he had been on the bench from the Union hiring hall for the last year or so. *Tr.* at 286-87; *see ALJ Decision* at 2:39-41, 3:1-4.

During the discussion, Mr. Gatewood indicated that employees in the past sometimes received a call to return to their previous job, dropped everything they were doing for Mr. Gatewood and left immediately without notice. *Tr.* at 287, 290. Mr. Gatewood explained he thought leaving without notice was unprofessional and rude. *Tr.* at 287-88, 290. Mr. Gatewood had no problem with the fact that Mr. Lehr worked for the Union, and Mr. Gatewood knew if the Union called, Mr. Lehr would have a decision to make, which Mr. Gatewood was fine with. *Tr.* at 288. Mr. Gatewood simply told Mr. Lehr that if he left without notice, he should not bother trying to come back to Commercial Air. *Tr.* at 288, 290.<sup>1</sup>

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<sup>1</sup> Mr. Gatewood expressly denied telling Mr. Lehr that if he went to the Union, he would not be rehired. *Tr.* at 288.

**C.**

**Mr. Lehr Is Pressured By The Union**

In August, 2012, while Mr. Lehr was working on a Project at Indianapolis Public School No. 107 (the “IPS 107 Project”), he phoned Mr. Gatewood and the two met in the school gymnasium. Mr. Lehr told Mr. Gatewood that he was being pressured by the Union to go back to the hiring hall because they had a job available for him; *see ALJ Decision* at 4:20-21. Mr. Lehr also indicated that his family was split as to which way to go, as some wanted him to stay at Commercial Air and some wanted him to go to the hiring hall.<sup>2</sup> *Tr.* at 289-90.

Mr. Gatewood told Mr. Lehr that he understood and that Mr. Lehr had a decision to make. *Id.* Mr. Gatewood also indicated that although Commercial Air was having trouble obtaining plumbing jobs, it was trying to find continuous work. *Tr.* at 290. Mr. Gatewood also reminded Mr. Lehr that Mr. Albaugh, the Commercial Air employee who referred Mr. Lehr to Commercial Air, had just left without providing advance notice. *Tr.* at 290. Mr. Gatewood therefore repeated his request to Mr. Lehr, indicating that if Mr. Lehr decided to leave, it would be professional of him to provide advance notice. *ALJ Decision* at 4:46-52, 5:1-2, 12:44-47, 13:1-2. Mr. Lehr was not discharged, suspended, or written up for anything that occurred during the conversation. *Tr.* At 146.

**D.**

**Mr. Lehr Volunteers For The Grissom Project And Commits His Third Instance Of Unilaterally Changing His Work Schedule**

As work progressed on the IPS 107 Project, another project at the Grissom Air Reserve Base Hangar 200 (the “Grissom Project”) began ramping up. The change in workload prompted

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<sup>2</sup> Mr. Lehr denied saying that the Union was pressuring him, but he could not deny (or confirm) that he indicated his family was split over the decision, nor could he deny that Mr. Gatewood told Mr. Lehr it would be professional to provide notice in advance if he decided to leave. *Tr.* At 145-46.

Mr. Gatewood to approach the plumbers working the IPS 107 Project and explain he would be sending Rayburn to the Grissom Project. *Tr.* at 293-94. Lehr, however, asked if he, himself, could go to the Grissom Project instead of Rayburn. *Tr.* at 293-94. Mr. Gatewood agreed. *Tr.* at 293-94; *ALJ Decision* at 5:10-12. The Grissom Project was in fact a more interesting project, being on a military base and involving high work. *Tr.* at 294.

On November 4, 2012, Mr. Lehr turned in his time sheet for work performed the previous week (work dates 10/30 – 11/2) on the Grissom Project. *R.Ex.* 12. Chris Gatewood, Commercial Air's Project Manager and Vice President, whose job includes reviewing timecards turned in by employees, noticed that the starting and ending times on the timecards of Mr. Lehr and Mr. Wildrick involved improper start and end times. *Tr.* at 264-66. Chris Gatewood therefore contacted Jamie Price, the overall on-site project superintendant at the Grissom Project, who regularly reported to the Grissom job site at 6:30 a.m. *Tr.* at 266-67. Mr. Price confirmed that he did not authorize 6:00 a.m. start times for the plumbers and that he had not provided the plumbers with a key to access the job site. *Tr.* at 267-68.<sup>3</sup>

For the week ending November 4, 2012, Mr. Lehr and Mr. Wildrick were at the site even though the shift, like all other Commercial Air hourly employees at the site, did not start until 7:00 a.m. Indeed, Mr. Price held Commercial Air's only access key to the property. *ALJ Decision* at 5:29-33. Thus, absent special circumstances or the early presence of another contractor on site, access to the site was not even possible until at least 6:30 a.m. *Tr.* at 266-70. *ALJ Decision* at 5:29-33.

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<sup>3</sup> Because the Grissom Project involved a military base, the military controlled general hours of work and access to the job site. From time to time, the military required particular start times and kept workers off the job site on some days. *Tr.* at 302. In addition, various contractors on the job had to coordinate schedules, prompting the construction manager to adjust schedules. *Tr.* at 278.

Based on his conversation with Mr. Price, Chris Gatewood placed calls to Mr. Lehr and Mr. Wildrick the morning of November 8 some time just after 8:00-8:30 a.m. to discuss the matter, but he was forced to leave messages with each. *Tr.* at 268. Mr. Wildrick called back shortly thereafter, and he was with Mr. Lehr via speakerphone; *see ALJ Decision* at 6: FN 3. Chris Gatewood asked why the start times were so early on the timecards, why the hours were different than Mr. Price's hours and the rest of the crew, and who authorized the hours. *Tr.* at 268-69; *see ALJ Decision* at 6: FN 3. Chris Gatewood also let Mr. Wildrick and Mr. Lehr know that there was no way they could have accessed the job site at the hours they reported. *Tr.* at 268-69. Mr. Wildrick and Mr. Lehr admitted they were not authorized to work the hours they reported and that they did not have access to the job site for the reported hours. *Tr.* at 270; *ALJ Decision* at 7:10-14. Chris Gatewood told Mr. Wildrick and Mr. Lehr that he did not appreciate their actions, he did not feel the actions were right, and he thought they were trying to take advantage of the situation. *Tr.* at 270. Mr. Wildrick and Mr. Lehr apologized. *Tr.* at 270; *ALJ Decision* at 7:10-14.

## E.

### **Tim Gatewood Meets With Mr. Lehr To Discuss Mr. Lehr's Misconduct**

After speaking with Mr. Lehr and Mr. Wildrick, Chris Gatewood phoned Mr. Gatewood to let him know about the incident. *Tr.* at 270-71. The conversation, like the conversations between Chris Gatewood and Mr. Lehr and Mr. Wildrick, occurred Thursday, November 8. *Tr.* at 270, 295; *ALJ Decision* at 6:26-29. Mr. Gatewood phoned Mr. Lehr on Thursday, November 8, to discuss the matter. *Tr.* at 30, 297. Mr. Gatewood wanted to sit down and discuss matters with Mr. Lehr in person because this was Mr. Lehr's third offense of unilaterally changing his work hours, despite the fact Mr. Gatewood was stern with Mr. Lehr on the two other occasions.

*Tr.* at 297; *see ALJ Decision* at 8:9-13. The change involved Mr. Lehr starting at 6:00 a.m. rather than the normal 7:00 a.m. *Tr.* At 31. Mr. Gatewood arranged the meeting for Monday, November 12. *Tr.* at 297. Mr. Gatewood knew that holding the Monday meeting would mean that Mr. Lehr would perform no work on Monday, which was Mr. Gatewood's intent when he set up the meeting. *Tr.* at 30, 304.

After Mr. Lehr spoke to Chris Gatewood about the timecard issue and after Mr. Gatewood set up the Monday meeting with Mr. Gatewood, Mr. Gatewood received notice from the Union identifying Mr. Lehr as a Union organizer.<sup>4</sup> Mr. Gatewood therefore decided to have Mr. Young also attend the meeting as a witness. *Tr.* at 298-99; *ALJ Decision* at 6:38-39, 7:1-4. Mr. Gatewood had not planned on discharging Mr. Lehr, but he wanted to make clear to Mr. Lehr that they had already discussed Mr. Lehr improperly changing his schedule twice previously. *Tr.* at 298-99.

In the meeting, Mr. Gatewood reiterated to Mr. Lehr that changing his schedule was wrong and that they had discussed it on two previous occasions. *Tr.* at 300; *see ALJ Decision* at 8:9-13. Mr. Gatewood told Mr. Lehr that if it happened again, he would be discharged. *Tr.* at 300. Mr. Lehr agreed that he could not change his work hours, and he did not disagree with the fact that he improperly changed his hours or allege in any way that he had an agreement to change his hours. *Tr.* at 117, 133, 148, 301-02; *see ALJ Decision* at 7:10-14.<sup>5</sup> Mr. Gatewood did not suspend Mr. Wildrick because it was Mr. Wildrick's first offense. *Tr.* At 34.

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<sup>4</sup> Commercial Air's records indicate it received the Union notice on November 9, 2012, while the Union argued that the notice was faxed November 8, 2012. *R.Ex. 13-14*; GC Ex. 15. Mr. Gatewood, however, testified without contradiction that he did not see the notice the exact day it came in, and he had no knowledge of the Union notice when he set up the Monday meeting with Mr. Lehr to discuss Mr. Lehr's third occasion of improperly setting his own hours. *Tr.* at 27, 298-99. Mr. Lehr in fact admitted that neither he nor Mr. Gatewood mentioned the unfair labor practice charge or the designation of Mr. Lehr as a union organizer at the meeting. *Tr.* At 147-48.

<sup>5</sup> Mr. Lehr's direct testimony included an allegation that he had an agreement with Mr. Gatewood to work four ten hour days a week at the Grissom Project. *Tr.* at 114. Mr. Lehr, however, admitted that he did not bring up any such purported agreement in the meeting with Mr. Gatewood. *Tr.* at 148. Indeed, Mr. Gatewood could not have made

Mr. Gatewood also addressed excessive phone use by Mr. Lehr in supporting Mr. Lehr's insurance sales side business. *Tr.* at 300. Mr. Gatewood told Mr. Lehr he must decide which is more important because he could not be performing insurance sales while he should be working at Commercial Air. *Tr.* at 300. Mr. Gatewood then addressed a rumor he had heard that Mr. Lehr desired to be laid off and draw unemployment benefits. *Tr.* at 300. Mr. Lehr indicated he may have said it but that he did not mean it. *Tr.* at 300-01.

Finally, Mr. Gatewood and Mr. Young spoke to Mr. Lehr about some plumbing problems on the IPS 107 Project that occurred while Mr. Lehr was the lead plumber on that project but which had been recently discovered. *Tr.* at 303-04. Specifically, some of the plumbing vents on the IPS 107 Project were not installed in accordance with Indiana Code. *Tr.* at 303-04. The meeting ended well and everyone understood Mr. Lehr would report back to the Grissom Project the following day. *Tr.* at 303-04.

## F.

### **Commercial Air's Business Continues To Dwindle, Prompting Layoffs**

By February, 2013, work on both the IPS 107 Project and the Grissom Project began winding down. *ALJ Decision* at 9:13-15; 16:8-39. With no other substantial jobs available, Commercial Air decided to lay off Mr. Rayburn on February 8, 2013 from the IPS 107 Project. *Tr.* at 132; *GC Ex.* 9. Mr. Rayburn was chosen because the work at the IPS 107 Project reached a point in which only one plumber was needed to complete the work, and Mr. Evans, the other plumber on the IPS 107 Project, was the lead plumber (the plumber who knew the most about the project). *Tr.* at 294, 312-14; *ALJ Decision* at 11:33-38, 12:1-4. Mr. Rayburn was instead more of a helper plumber. *Tr.* At 53. Mr. Rayburn's layoff had nothing to do with Union

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such an agreement because the work schedule on the Grissom Project fluctuated with the military needs of the owner, which included, among other things, prohibiting access to the job site or work on days in which military members killed in action were brought back to the military base. *Tr.* at 302-03.

activities, as Mr. Gatewood had no knowledge as to whether Mr. Rayburn supported or was otherwise talking to the Union. *Tr.* at 312; *ALJ Decision* at 16:1-6. A few weeks later, as the IPS 107 Project wrapped up entirely, Commercial Air laid off Mr. Evans effective February 28, 2013. *Tr.* at 53-54; *GC Ex.* 8.<sup>6</sup>

With respect to the Grissom Project, Mr. Wildrick, the lead plumber on the project, determined that work had slowed enough that only one plumber was necessary to complete the plumbing work on the project. *Tr.* at 316. Mr. Wildrick communicated his assessment by telephone to Mr. Gatewood, who followed up by sending Mr. Young, the plumbing supervisor, to the job site to confirm Mr. Wildrick's assessment. *Tr.* at 316. Mr. Young agreed with Mr. Wildrick's assessment, and Mr. Lehr was laid off effective March 1, 2013, leaving Mr. Wildrick, the lead plumber on the Grissom Project from its inception, to wrap up the plumbing work. *Tr.* at 40, 87, 316-17; *ALJ Decision* at 16:41-49. Commercial Air's records clearly show Mr. Lehr was laid off as a result of "work slow down / plumbing department labor reduction." *GC Ex.* 5; *ALJ Decision* at 16:10-20. In speaking with Mr. Lehr about the layoff decision, Mr. Young explained the layoff was because the work was running slow and would hopefully pick up. *Tr.* At 122-23. Mr. Gatewood also expressly indicated to Mr. Lehr that Commercial Air was attempting to secure a few large projects that would allow Mr. Gatewood to bring Mr. Lehr back in a month or so. *Tr.* at 317. Commercial Air, however, did not receive the projects, and Mr. Lehr could not be brought back. *Tr.* at 317.

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<sup>6</sup> Approximately two weeks after laying off Mr. Evans, Mr. Gatewood recalled Mr. Evans to perform some punch list work on the IPS 107 Project and a previous project on which Mr. Evans worked. *Tr.* at 55-56; 82-84. Mr. Gatewood chose Mr. Evans to perform the punch list work because Mr. Evans had been the lead plumber on the IPS 107 Project as well as the other punch list project. *Tr.* at 312-14. In addition, Mr. Lehr was responsible for much of the IPS punch list problems, and Mr. Gatewood did not wish to pay Mr. Lehr to redo the work he had already been paid to do. *Tr.* at 314, 367. Also, Mr. Evans was quicker. *Tr.* at 314.

Mr. Wildrick's hours did not increase as a result of Mr. Lehr's layoff. *Tr.* at 317-18; *R.Ex.* 16. Mr. Lehr admits he and Mr. Wildrick were the only employees working as plumbers. *Tr.* At 150. Moreover, no plumbers were moved to the Grissom Project to take over for Mr. Lehr. *Tr.* at 318; *ALJ Decision* at 11:23-38, 12:1-4.<sup>7</sup>

## G.

### **Commercial Air Is Left With Work For Only Two Journeyman Plumbers**

With the dwindling available plumbing work, Commercial Air was left with only two plumbers: Young, who managed the plumbing department, and Wildrick, the lead plumber on the Grissom Project. *ALJ Decision* at 16:13-20 In the second week of March, Commercial Air brought Mr. Evans back to work in order to handle some punch list items identified by the architect on the IPS 107 Project as in need of finishing or correcting. *Tr.* at 55-56, 82-84, 312-14. A list of items had also been created for a previous project on which Mr. Evans had worked. *Tr.* at 55-56, 82-84, 312-14. After completing the punch list items, Mr. Evans continued performing some amount of plumbing work each week until he was discharged in August, 2013. *ALJ Decision* at 11:2-4; 16:41-50, 17:1-6.

The only other employees associated with plumbing in any capacity since March, 2013, were two employees who participated in plumbing apprenticeship school. *ALJ Decision* at 12:19-33. Brian Moore, who was hired as an insulator and who continues working as a full time insulator even now, enrolled in the plumbing apprenticeship program sometime prior to August, 2012. *Tr.* at 60-61, 81-82, 282; *GC Ex.* 17; *see ALJ Decision* at 12:19-33. Similarly, Dave

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<sup>7</sup> Mr. Young performed work on the Grissom Project on March 4 and 5, but no time thereafter. *GC Ex.* 11. Similarly, sheet metal and piping work continued on the Grissom Project, and Mr. Moore performed piping work March 20-22. *R.Ex.* 30 (p. 15 of 27). Mr. Moore did not perform any other work whatsoever on the Grissom Project. *R.Ex.* 30. Similarly, the records confirm no other plumbing work was performed on the Grissom Project. *GC Ex.* 16. Indeed, the records show even Mr. Wildrick ceased regular plumbing work at the project by the end of April, 2013, performing only 8 ½ hours thereafter (the second week of June). *Id.*

Richardson, a long-time Commercial Air employee hired to work in the shop before working as a sheet metal worker and then performing piping work, enrolled in the apprenticeship program sometime prior to September, 2011. *Tr.* at 60, 61, 81-82, 283-84; *see ALJ Decision* at 12:19-33. Mr. Richardson continued to perform full time sheet metal and piping work after enrolling in the plumbing apprenticeship program until his employment was terminated in June, 2013. *Tr.* at 284. *R.Ex.* 31; *see ALJ Decision* at 12:19-33.

In Indiana, commercial plumbing work may only be performed by licensed plumbers. *Tr.* at 78-79, 234. As such, employees enrolled in a plumbing apprentice program are not permitted to perform plumbing work themselves. *GC Ex.* 28; *see ALJ Decision* at 12:19-33. Rather, any plumbing tasks must be performed alongside a licensed, journeyman plumber. *GC Ex.* 28. Mr. Gatewood allowed Mr. Richardson and Mr. Moore to enter the apprenticeship program because he has no problem with employees furthering their education and abilities. *Tr.* at 284. Each, however, continued on in their normal sheet metal and piping duties. *Tr.* at 282, 284; *R.Ex.* 30-31; *see ALJ Decision* at 12:19-33. Mr. Gatewood did not guarantee either of them journeyman plumbing work after they completed the program. *See ALJ Decision* at 12:19-33. In fact, Commercial Air employs other sheet metal and piping employees who carry plumbing cards but who nevertheless perform no plumbing work because the card is “a good thing to have in your back pocket.” *Tr.* at 284.

## H.

### **Charles Howard’s Poor Performance Results In Discharge**

Commercial Air hired Charles Howard in April, 2011 to perform pipefitting/welding work. *Tr.* at 41, 158-59; *GC Ex.* 7. Mr. Howard was also a licensed plumber, but the vast

majority of his work involved pipefitting.<sup>8</sup> *Tr.* at 41, 158-59; *ALJ Decision* at 8:29-31. Throughout Mr. Howard's employment, he exhibited minor examples of poor performance on several occasions. *Tr.* at 320; *ALJ Decision* at 18:6-16.<sup>9</sup> Mr. Howard also exhibited poor performance on three major occasions. *Tr.* at 320; *ALJ Decision* at 18:6-16. Mr. Howard's poor performance ultimately resulted in his discharge. *Tr.* at 325-30; *ALJ Decision* at 18:18-19.

Mr. Howard's first major instance of poor performance occurred on a project at Tech High School in the mezzanine air handler room. *Tr.* at 320; *ALJ Decision* at 8:37-41, 18:7-9. Mr. Howard spent an excessive amount of time piping up the air handlers. *Tr.* at 320; *ALJ Decision* at 8:37-41, 18:7-9. Mr. Gatewood assessed Mr. Howard's excessive time based on Mr. Gatewood's 30 years of experience in doing the work himself, along with Commercial Air's estimate chart used by Commercial Air to estimate labor time and cost when bidding for work. *Tr.* at 320-21. Mr. Gatewood explained to Mr. Howard that Mr. Howard possessed all of the knowledge of a good pipefitter, knowledge that "so many guys" do not have, but that Mr. Howard for whatever reason could not "put it into practice" or he "just won't use" that knowledge. *Tr.* at 321-22. Mr. Gatewood's goal was to spur Mr. Howard to "make him want to work faster and do more." *Tr.* at 322. Indeed, Mr. Gatewood in all disciplinary conversations maintains a goal of making the person a better employee. *Tr.* at 322.<sup>10</sup>

Second, also at Tech High School while working on boilers, Mr. Gatewood noticed Mr. Howard was too slow in cutting the boilers up. *Tr.* at 322-23; *ALJ Decision* at 8:41-44, 18:9-11.

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<sup>8</sup> Mr. Howard was classified in Commercial Air's internal system as a plumber, although all parties agree that he performed pipefitting/welding work. *See, Tr.* at 41-42,158; *GC Ex. 7; GC Ex. 11.*

<sup>9</sup> Mr. Howard was verbally counseled several times for tardiness and was suspended for a day in April, 2012. *Tr.* at 44. It was Mr. Howard's poor work performance, alone, however, that caused his discharge. *Tr.* at 46.

<sup>10</sup> Mr. Gatewood does not specifically remember Mr. Howard's response to that particular conversation, but he does remember that Mr. Howard always had an excuse. *Tr.* at 322. Mr. Gatewood even told Mr. Howard before that "if you'd get rid of your excuses and just get to work, you'd find out life's a lot easier." *Tr.* at 322.

Mr. Gatewood even worked alongside Mr. Howard the following day, and Mr. Gatewood worked at twice the pace Mr. Howard worked. *Tr.* at 323; *ALJ Decision* at 8:45-46. According to Mr. Howard, cutting up the boilers was a two-person job, but Mr. Howard had a helper with him at all times and Mr. Howard only had to run the torch (which the helper could not do) without doing the heavy lifting. *Tr.* at 323.

Finally, at the Grissom Project, Ken Working, the lead pipefitter on the project, placed several calls to Mr. Gatewood indicating Mr. Howard was “really, really slow.” *Tr.* at 324. Mr. Gatewood therefore instructed Mr. Working to place Mr. Howard on hooking up expansion tanks to compressors. *Tr.* at 324. Mr. Working, however, called to tell Mr. Gatewood that Mr. Howard had installed only one valve the entire day and had been instead listening to his ear buds and playing on his phone. *Tr.* at 324. Mr. Gatewood therefore went to the job site early the next morning to see what had been accomplished on the air compressors, and he created a list of tasks that had been performed. *Tr.* at 324; *R. Ex.* 10. Because the amount of work performed was not even close to an acceptable level, Mr. Gatewood decided to discharge Mr. Howard. *Tr.* at 324; *ALJ Decision* at 18:11-15.

When Mr. Howard appeared for work, Mr. Gatewood told him he was fired because he had not completed “near enough” work. *Tr.* at 325-26; *ALJ Decision* at 18:11-15. Mr. Howard indicated that he was waiting on parts, but Mr. Gatewood specifically noticed all of the parts were on the site. *Tr.* at 326. Mr. Gatewood also told Mr. Howard that even if he had been waiting for parts, he should have worked on other tasks rather than sitting around waiting. *Tr.* at 326. Mr. Howard explained how sorry he was, that he could not afford to lose his job, that he had just gone through “a lot of stuff” and that he needed one more chance. Mr. Gatewood relented, agreeing to give Mr. Howard one more chance. *ALJ Decision* at 18:11-15. The

conversation started and ended in the break area, lasted for 30-45 minutes, and it concluded with Mr. Gatewood giving Mr. Howard one more chance. *Tr.* at 328.<sup>11</sup> Mr. Gatewood was clear in indicating to Mr. Howard that any further performance issues would result in discharge and that there would be no discussing the matter. *Tr.* at 186; *ALJ Decision* at 18:11-15.

Mr. Gatewood monitored Mr. Howard's performance the remainder of the day, and he noted Mr. Howard did exactly what Mr. Gatewood expected of him. *Tr.* at 327. Mr. Gatewood expressly told Mr. Howard "now that's the way I expect you to work." *Tr.* at 327. Mr. Howard, however, when outside the direct oversight of Mr. Gatewood, reverted back to his prior performance. *Tr.* at 327-28. Mr. Gatewood had Mr. Howard and another pipefitter install air taps, and Mr. Howard performed at a much slower pace than the other pipefitter. *Tr.* at 328. Mr. Howard's taps were also installed unacceptably crooked. *Tr.* at 329. Similarly, Mr. Howard took four days to complete six welded stands while another pipefitter completed the same number in a day and a half. *Tr.* at 328. Mr. Gatewood therefore told the job foreman to tell Mr. Howard to collect his tools and that he was discharged. *Tr.* at 329-330; *ALJ Decision* at 18:11-16.<sup>12</sup>

Mr. Gatewood never discussed the Union with Mr. Howard. *Tr.* at 331. Mr. Howard, in fact, never indicated he supported the Union. *Tr.* at 331; *see ALJ Decision* at 17:14-21. In fact, Mr. Howard had been fined and expelled by the Union for working for a non-union contractor, and he indicated he would only be interested in helping the Union if his fine was waived. *Tr.* at

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<sup>11</sup> Mr. Howard averred that he was left stranded on the job site all day because he rode to work with Mr. Lehr and that Mr. Gatewood did not let him know until the end of the day that he would give Mr. Howard another chance. *Tr.* at 167-68. Mr. Howard, however, did not in any way rebut Mr. Gatewood's testimony, including testimony that Mr. Howard was given tasks that day by Mr. Gatewood, that he worked hard on the tasks, and Mr. Gatewood told him "now that's the way I expect you to work." *Tr.* at 327. Moreover, it simply makes no sense for an employer to allow a discharged employee to remain on a job site.

<sup>12</sup> Mr. Howard's termination sheet incorrectly indicated lack of plumbing work was a reason. *GC Ex.* 6. Mr. Gatewood, however, personally discharged Mr. Howard for poor performance. *Tr.* at 86-87. Mr. Gatewood did not participate in creating *GC Ex.* 6 and acknowledged *GC Ex.* 6 is incorrect. *Tr.* at 43, 86.

162. Mr. Howard's fine has not been waived by the Union. *Tr.* at 190.<sup>13</sup> Mr. Howard nevertheless occasionally wore Union clothing to work, and he did so from the beginning of his employment in April 2011. *Tr.* at 175, 180-81, 331. Many at Commercial Air commonly wore union clothing, which did not bother Mr. Gatewood. *Tr.* at 331.

## I.

### **Commercial Air's Workforce Has Been Cut In Half Due To Lack Of Work**

In all, Commercial Air's workload, and necessarily by extension its workforce, has been drastically reduced. Whereas Commercial Air employees numbered "in the high 30's" in late 2012, including five individuals who performed journeyman plumbing work,<sup>14</sup> Commercial Air now employs right around 20 workers, including only two individuals who perform journeyman plumbing work. *Tr.* at 20, 285, 311; *see ALJ Decision* at 16:8-20. Commercial Air's number of employees is not seasonal but is instead based on the economy and whether bids are awarded to the Company. *Tr.* at 21. Mr. Gatewood told Mr. Lehr in August, 2012, that plumbing work was drying up. *Tr.* at 290. Mr. Howard even recognized in February, 2013, the work was getting tighter. *Tr.* at 186. The workload has not improved. *Tr.* at 311.

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<sup>13</sup> There was tepid support for the Union prior to, during, and after Mr. Lehr's organization efforts. The hearing transcript shows that only three employees (Mr. Lehr, Mr. Howard, and Mr. Rayburn) attended any meetings with the Union, with Mr. Rayburn only attending one meeting at which he voiced his displeasure at being fined by the Union. *Tr.* 112, 207-209. Additionally, the General Counsel did not and cannot show that any other Commercial Air employee other than Mr. Lehr signed a union authorization card during the period of January 1, 2012 to March 31, 2013. *See Tr.* at 135 (stating that he signed a union authorization card in November, 2012). Simply stated, Mr. Lehr, who came to Commercial Air in 2011 as a Union Salt in order to garner support for the Union, was unable to get any other employee to support the Union's organizing efforts at Commercial Air despite ramped up organizing efforts in May, 2012. Indeed, Mr. Lehr, himself, lost interest in organizing and stopped communicating with the Union altogether until Mr. Kurek tracked him down and urged him to start talking to employees about the Union again. *Tr.* at 205-06. Even Union business agent Kurek testified that the Commercial Air employees seemed to be happy with the working conditions at Commercial Air. *See Tr.* 207.

<sup>14</sup> Mr. Young, Mr. Lehr, Mr. Wildrick, Mr. Evans, and Mr. Rayburn were Commercial Air's only journeyman plumbers during the relevant time period. Charles Howard was identified as a plumber (*see, e.g., GC Ex. 6*), but as Mr. Howard, himself, noted, he was hired to do piping work. *Tr.* at 41, 158-59.

#### IV.

#### **ARGUMENT**

Commercial Air, as recognized by Judge Bogas in the Decision, focused on providing first class mechanical contracting services, navigating employee misconduct issues and a work slowdown completely upon the merits and without regard to union activity or sympathy. The Exceptions filed by the General Counsel and the Union point to no legal errors in the Decision, but instead make credibility judgments and argue that they would have weighed the credibility and evidence in a way that comes out in their favor. The Board's established policy refusing to overturn credibility determinations is well established. *Standard Dry Wall Products*, 91 NLRB 554 (1950), enf'd 188 F.2d 362 (3rd Cir. 1951). The Exceptions lack merit and should be rejected.

#### A.

#### **Substantial Evidence Supports The Conclusion That Lehr Was Not Threatened**

Mr. Lehr, after indicating he was being pressured by the Union to leave Commercial Air, was asked by Mr. Gatewood to provide advance notice in the event he resigned to go back to the Union. Mr. Lehr recited a different version, alleging he would not be re-hired if he left for the Union and attempted to come back to Commercial Air. Judge Bogas, after considering the evidence, rejected Mr. Lehr's version.<sup>15</sup> General Counsel's exception to the finding lacks merit, as it seeks to overturn a credibility resolution made by Judge Bogas.

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<sup>15</sup> General Counsel and the Union, at most, are left to argue that Judge Bogas actually found no reason to credit either individual's statement over the other. *See ALJ Decision* at 4. To the extent there is no basis for crediting one side's version over the other, however, General Counsel has failed to satisfy its burden. *American, Inc.*, 342 NLRB 768 (2004)(holding General Counsel failed to meet its burden when there was no basis for crediting one witness over the other).

Judge Bogas rejected Mr. Lehr's version of events because General Counsel failed to introduce any of the logs Mr. Lehr made, despite Mr. Lehr's indication that the logs were intended to capture just such a statement, had it actually been made. *ALJ Decision* at 4. Similarly, no charge was filed immediately after the alleged statement, and none of the charges in this case recount the language Mr. Lehr alleges he heard. *ALJ Decision* at 4.

Both General Counsel and the Union gloss over the lack of documentation, with General Counsel essentially admitting that Mr. Lehr did not make a record of the alleged conversation. *General Counsel's Brief* at 8-9. This admission makes Judge Bogas' point, as testimony from both Mr. Lehr and Mr. Kurek established the following:

- He was making a log and providing it to the Union regarding "things that were specifically said, positive or negative about the Union" at the worksite. *Tr.* at 205-206; 111-112; *ALJ Decision* at 4.
- Mr. Kurek told him to start a conversation with Mr. Gatewood about the union and to report back to Mr. Kurek. *Tr.* at 209-210.
- The log contained details of unfair labor practices allegedly committed by Commercial Air. *Tr.* at 112, 245.

The absence of a log corroborating Mr. Lehr's version of events is particularly important in the present matter because Mr. Lehr's failure to provide the logs was expressly addressed in his cross-examination. *Tr.* at 112-113, 245. General Counsel and the Union had the opportunity to rehabilitate this failure by introducing a responsive log or at least explaining why the log did not contain a reference to the alleged statement. Both were silent. The silence is telling. *UAW v. NLRB*, 459 F.2d 1329, 1342 (D.C. Cir. 1972) (failure to produce records in the face of the

opposing party's assertion that the records exist and would be relevant results in an adverse inference).<sup>16</sup>

The above eviscerates General Counsel's assertion that Judge Bogas' Decision was not supported by the record. *General Counsel's Brief* at 7. Further evidence in the record, however, supports the ALJ Decision. While Mr. Lehr was working on the IPS 107 Project, he phoned Mr. Gatewood and the two met in the school gymnasium. Mr. Lehr told Mr. Gatewood that he was being pressured by the Union to go back to the hiring hall because they had a job available for him. Mr. Lehr also indicated that his family was split as to which way to go, as some wanted him to stay at Commercial Air and some wanted him to quit Commercial Air and go to the hiring hall. *Tr.* at 289-90.

Mr. Gatewood told Mr. Lehr that he understood, that Mr. Lehr had a decision to make, and that he should do what is best for Mr. Lehr's family. *Tr.* at 145, 290. Mr. Gatewood also indicated that although Commercial Air was having trouble obtaining plumbing jobs, it was trying to find continuous work. Mr. Gatewood then reminded Mr. Lehr that Mr. Albaugh, the Commercial Air employee who referred Mr. Lehr to Commercial Air, had just left without providing advance notice. Mr. Gatewood therefore told Mr. Lehr that if he decided to leave, it would be professional to provide advance notice. Mr. Gatewood further stated that those who left without providing such notice and sought to come back to Commercial Air have been denied re-employment. *Tr.* at 289-90.

Mr. Lehr nevertheless alleged that although Mr. Gatewood was very kind when Mr. Lehr indicated he had to make a choice as to whether to remain with Commercial Air or quit to go

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<sup>16</sup> The Union asserts that Judge Bogas should not treat this failure to produce documentation as important because Judge Bogas did not use the lack of Commercial Air documentation relating to the downturn in plumbing work to discredit Commercial Air's assertion of a downturn. Commercial Air, however, was never confronted on direct or cross-examination about an absence of documentation.

back to the Union, Mr. Gatewood stated that Union guys never stick around and that he just cannot hire guys back after they have gone to a union job. *Tr.* at 109, 113. Such a statement simply does not make sense. Mr. Lehr came from the Union and was currently on the bench/layoff, and he and Mr. Gatewood discussed his Union background in the job interview. *Tr.* at 109, 287-88. If Mr. Gatewood was troubled by a Union member never sticking around due to being called back to the Union, it would not make sense to hire Union members in the first place. Mr. Gatewood, however, hired Mr. Lehr as well as several other Union members. In fact, a majority of the journeyman in the trades Commercial Air employs served in the Union's apprenticeship program. *Tr.* at 234.

The truth is, as he testified, Mr. Gatewood "had no problem at all" with Mr. Lehr's potential to return to the Union. *Tr.* at 288-90. What Mr. Gatewood had a problem with involved past instances in which employees responded to a call to return to a former job by picking up their tools and leaving immediately without providing notice. *Tr.* at 287. Mr. Gatewood even reminded Mr. Lehr in the gymnasium at IPS 107 that Mr. Albaugh, the Commercial Air employee who referred Mr. Lehr to Commercial Air, just left without notice and Mr. Gatewood did not want Mr. Lehr "doing what Mr. Albaugh just did." *Tr.* at 290.

Mr. Lehr could not deny that Mr. Gatewood referenced providing two weeks notice in the conversation. *Tr.* at 146. General Counsel and the Union nevertheless argue that Mr. Lehr's version of the conversation is plausible because Mr. Gatewood allegedly made a similar statement to Mr. Howard while hiring Mr. Howard. Mr. Howard's Board affidavit in support of the Charges, however, is silent with respect to such a statement and provides no hint that such a

statement had been made. *Tr.* at 192, 93, 195. Moreover, Mr. Gatewood stated in no uncertain terms that he never discussed the Union with Mr. Howard. *Tr.* at 331.<sup>17</sup>

The evidence establishes and the ALJ Decision confirms that Mr. Lehr's version of the conversation did not occur. That being said, even if Mr. Lehr's version could be believed, the version does not create a violation of the Act. Specifically, in *Cobb Mech. Contractors, Inc.*, the Administrative Law Judge analyzed an allegation that the employer told an applicant that he would not hire former employees who had joined the Union because they "quit on me." 2009 WL 5138341 (Div. of Judges Dec. 28, 2009). The Judge correctly noted that an individual quitting severs the employment relationship and cannot be considered protected activity. As a result, an employer's statement regarding such conduct does not "relate to" protected activity as required under Section 8(a)(1) of the Act. No violation therefore existed and the Judge recommended dismissal of the allegation. *Id.*

Here, even if Mr. Lehr's account could be believed, which it cannot, the statement amounts to nothing more than what was said by the employer in *Cobb*. Just like in *Cobb*, Mr. Lehr claims he was told quitting to go to a union employer would preclude re-employment, and just like in *Cobb*, such a discussion about quitting does not relate to protected activity. As such, just like in *Cobb*, even if the exceptions of the General Counsel and the Union could be sustained, the portion of the Case alleging a violation of Section 8(a)(1) of the Act should nevertheless be dismissed.

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<sup>17</sup> Judge Bogas' finding that Mr. Gatewood made the statement to Mr. Howard should not be adopted. *See ALJ Decision* at 4, lines 42-45; at 12, note 9; at 17, lines 36-52.

## B.

### **Judge Bogas' Finding That Commercial Air Lawfully Laid Off Mr. Lehr Should Stand**

In the ALJ Decision, Judge Bogas found that Mr. Lehr's layoff was proper due to a lack of plumbing work. *ALJ Decision*, at 16. General Counsel and the Union filed exceptions, stating generally that insufficient evidence of a plumbing downturn at Commercial Air existed. General Counsel and the Union are wrong.

#### 1.

### **Commercial Air Established A Downturn In Plumbing Work Prompted Mr. Lehr's Layoff**

General Counsel and the Union cite the ALJ Decision for the proposition that they satisfied their *prima facie* burden, thereby obligating Commercial Air to prove that it would have made the same layoff decision even absent any protected activity by Mr. Lehr. General Counsel and the Union then charge Judge Bogas with error, alleging Commercial Air should have provided more evidence than it did. General Counsel and the Union, however, ignore Judge Bogas' finding that the *prima facie* showing by General Counsel was significantly weakened by the lapse in time between protected activities and adverse action. *ALJ Decision* at 15. And, "the *prima facie* case and the affirmative defense available under *Wright Line* are linked: the weaker the *prima facie* case, the easier it is for the employer to establish that it would have taken the adverse action regardless of the employee's protected activity." *Sears, Roebuck & Co. v. N.L.R.B.*, 349 F.3d 493, 503 (7th Cir. 2003). Commercial Air overcame General Counsel's weak *prima facie* showing, and the exceptions should therefore be rejected.

As Commercial Air's plumbing projects dwindled, it began laying off plumbers, eventually getting to Mr. Lehr. Where, as here, layoffs result from a downturn in business, there is no basis for a claim of discrimination under Sections 8(a)(1), 8(a)(3), or 8(a)(4) of the Act. *Jones Sausage Co. and Jones Abattoir Co.*, 118 NLRB 1403, 1414-15 (1957) ("But squarely

opposed to any such inference [of discrimination] is the direct evidence . . . that the February layoffs were an economic measure to which the Respondents resorted because of a decline in their business.”). *See also, G&H Prods. v. N.L.R.B.*, 714 F.2d 1397, 1402 (7th Cir. 1983) (citing *NLRB v. Wright Line, a Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980) (enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982))). General Counsel and the Union argue in their exceptions that Commercial Air did not necessarily need to lay off Mr. Lehr, but their arguments ring hollow.

a. Commercial Air experienced a substantial drop in plumbing work, and it responded by laying off plumbers, including Mr. Lehr. The downturn in Commercial Air’s business is undeniable.<sup>18</sup> Mr. Lehr admits Mr. Gatewood told him in August, 2012, that Commercial Air was having a hard time finding new plumbing jobs but that they were trying. *Tr.* at 122-123, 290. Mr. Howard even acknowledged that things were tightening in February, 2013. *Tr.* at 186. Plumbing work at IPS 107 was completed in February, 2013, and the Grissom Project was beginning to wind down in March, 2013, to the point that only one plumber was regularly needed at the job site. *Tr.* at 316. Indeed, Commercial Air’s overall workforce has been reduced in employees from “the high 30’s” to only 20 employees. *Tr.* at 20. At the time of the hearing, only two of those employees, Mr. Young and Mr. Wildrick, were performing journeyman plumbing work. *ALJ Decision* at 11.

When Commercial Air made its layoff decisions, it contemporaneously created an Employee Discharge/Layoff Checklist, identifying “work slow down / plumbing department labor reduction” as the reason for the decision. *See, e.g., GC Ex. 5* (for Mr. Lehr), *GC Ex. 8* (for

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<sup>18</sup> General Counsel introduced a newsletter created by Commercial Air November 21, 2012, which compared job security with the Union and with Commercial Air. *Tr.* at 38; *GC Ex. 4*. At the time of the newsletter, no layoffs had occurred and current plumbing work existed at Commercial Air, until the then in-progress jobs began winding down in the first quarter of 2013, the time of the layoffs. *Tr.* at 38, 75-76, 80.

Mr. Evans), *GC Ex. 9* (for Mr. Rayburn). Mr. Lehr admitted he was told at the time of the layoff that it was due to a slowdown in plumbing work. *Tr.* at 131. Mr. Lehr further admitted that although as much as 20-30 percent of the plumbing work was left to do, it was work of a different type than he had been performing. *ALJ Decision* at 11.

Commercial Air established that after Mr. Lehr was laid off, it did not contract out any plumbing work. *Tr.* at 317-318 Likewise, Commercial Air did not hire any new plumbers following Mr. Lehr's layoff, nor did it replace Mr. Lehr on the Grissom project. *Tr.* at 317-318; *GC Ex. 7*<sup>19</sup>. Judge Bogas expressly found that Mr. Gatewood credibly testified to these facts. *ALJ Decision* at 11.

b. Judge Bogas correctly dispensed with the references to two plumbing apprentices. General Counsel and the Union assert in their exceptions the continued presence of two plumbing apprentices (which was down to one by the time of the hearing)<sup>20</sup> while Mr. Lehr was on layoff is somehow improper. Apprentices cannot perform work as journeyman plumbers or otherwise take the place of journeyman plumbers, nor can they work alone. *GC Ex. 28*; *Tr.* at 346. Moreover, Commercial Air has followed its approved apprenticeship plan in holding a one-to-one ratio of journeymen to apprentices. *GC Ex. 28* (p.3). Quite simply, even if the apprentices had been performing plumbing tasks, which they were not, Mr. Lehr cannot step into an apprentice role and force the layoff of apprentices. The exceptions should be rejected on this basis without the need for further analysis.

Even if the exceptions could survive the above, they are nevertheless without merit. The timesheets of the two apprentices, which they fill out themselves, confirm they did not perform

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<sup>19</sup> Contrary to the General Counsel's assertion that Commercial Air relies only on the testimony of Mr. Gatewood, the employee list, with hire dates, shows that no plumbing workers were hired since well *before* Mr. Lehr's layoff.

<sup>20</sup> *Tr.* at 282.

plumbing work. *R.Ex.* 30-31; *Tr.* at 342, 344. Indeed, Mr. Moore, who was hired as an insulator and who continues working as a full time insulator even now, enrolled in the plumbing apprenticeship program sometime prior to August, 2012. *Tr.* at 60-61, 81-82, 282; *GC Ex.* 17. Similarly, Mr. Richardson, a long-time Commercial Air employee hired to work in the shop before working as a sheet metal worker and then performing piping work, enrolled in the apprenticeship program sometime prior to September, 2011. *Tr.* at 60, 61, 81-82, 283-84. Mr. Richardson continued to perform full time sheet metal and piping work after enrolling in the plumbing apprenticeship program until his employment was terminated in June, 2013. *Tr.* at 284. *R.Ex.* 31.

The Union nevertheless argues that Mr. Moore's timecard for the week of March 24, 2013, shows he performed 30.5 hours of plumbing work on the Grissom job, and the timecard for the week of April 5, 2013 shows he performed plumbing work on two other projects. *Union's Brief* at 18, n.5. To the contrary, Mr. Moore's timecard shows he performed *piping* work during the week of March 24, which is the classification used for insulators on most public jobs and is entirely distinct from plumbing work. *R.Ex.*30 (p.15); *Tr.* at 64, 283, 338.<sup>21</sup> Similarly, during the week of April 5, Mr. Moore performed *sheet metal* work on the Shortridge project and *piping* work on the IPS 107 project, but *no* plumbing work. *R.Ex.*30 (p.13).<sup>22</sup>

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<sup>21</sup> Timecard designations for the classifications identify "pl" as plumbing work and "p" as piping work. *Tr.* at 64.

<sup>22</sup> Judge Bogas correctly found that the apprenticeship records Mr. Moore and Mr. Richardson turned in to the school did not establish that they were doing plumbing work. *Decision*, p.12. Indeed, as noted by Judge Bogas, Mr. Lehr signed several of Mr. Richardson's records, none of which match up with the hours reported on his timecard, and Mr. Lehr did not even try to explain the disparity or the nature of the work performed. *Cf., e.g.*, the apprentice record, *GC Ex.* 17 (p.15)(asserting 10 hours worked each work day in November, 2012) with Mr. Lehr's timecards, *R. Ex.* 12 (pp. 14-16)(showing Mr. Lehr regularly worked only 8 hours). *See also, GC Ex.* 17 (pp. 18-20)(asserting 10 hours worked each day) and the time records, *R. Ex.* 31 (pp. 9-22)(showing Mr. Richardson worked only 8 hours each day, with only a few exceptions). The Union takes exception with Judge Bogas' finding that Mr. Lehr, because he signed several records, could have provided testimony to establish whether plumbing work was being performed. *Decision*, p.12; *Union's Brief* at 18, n.6. According to the Union, no testimony authenticated Mr. Lehr's signatures on *GC Ex.* 17. However, it was General Counsel's own exhibit, and testimony established both that the sheets were filled out by the apprentices' supervisor and that Mr. Lehr was a supervisor with respect to the records. *Tr.* at 360.

The Union's citation to *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 506 (2007), and *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997), fares no better. The Union uses those cases in support of its assertion that an adverse inference may be available "when an employer offers inconsistent evidence." *Union's Brief* at 18. Commercial Air, however, did not offer inconsistent evidence, as it was General Counsel who offered the apprenticeship school records in an attempt to rebut Commercial Air's evidence. The above cases, on the other hand, involve employers who provided one reason for taking action, only to provide a wholly inconsistent reason at trial, which simply does not fit the Union's juxtaposition here. Finally, even if the Union could force this instance into the above cases, the cases indicate an adverse inference is *permitted*, not mandated. Here, where Mr. Moore and Mr. Richardson authored both sets of records, only one of which was checked and relied upon as accurate to pay the employees at the appropriate journeyman sheet metal or piping (insulation) wage rate, no adverse inference would be warranted. *See Tr.* at 264-65 (showing Chris Gatewood receives the time cards each employee emails to the office and reviews them for accuracy as to what work they performed and the hours they wrote down, and he then authorizes processing through payroll). *See also, Tr.* at 266 (showing Chris Gatewood noticed an error in employee reporting and investigated the error).

c. The work performed by Mr. Evans does not diminish the actuality of a downturn in plumbing work. The exceptions allege that Judge Bogas improperly minimized work performed by Mr. Evans after he had been laid off. Mr. Evans was indisputably laid off effective February 28, 2013. *Tr.* at 53-54; *GC Ex. 8*. As Judge Bogas noted, Mr. Evans was

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Judge Bogas therefore made a fair inference that Mr. Lehr's signature was authentic and that he could have testified as to work performed by apprentices.

properly recalled week ending March 17, 2013 to perform punch list work<sup>23</sup> to finish up a job for which he had served as the lead plumber and continued working on punch list and other work thereafter. *ALJ Decision* at 16; *GC Ex. 10* (p.2).<sup>24</sup>

General Counsel nevertheless attempted at the hearing to infer Mr. Lehr should have been called back to work instead of Mr. Evans and that Mr. Evans was only chosen because he was friends with Mr. Young, the plumbing foreman. *Tr.* at 71. To the extent General Counsel's inference controlled, choosing one employee to recall over another based on friendship is undeniably permissible. Furthermore, Mr. Lehr estimated that 20%, or, "several weeks" of work remained on the project when he was laid off. *Tr.* at 127; *ALJ Decision* at 11:23-31; 16:37-39. It is, however, uncontradicted that, aside from two days of work by Mr. Young, Mr. Wildrick wrapped up the plumbing work alone. *ALJ Decision* at 11:23-31; *GC Ex. 11, 16*. And, as recognized by Judge Bogas, Mr. Wildrick admitted the type of work he had been performing on the Grissom project was essentially complete. *ALJ Decision* at 16.

In the end, the General Counsel and the Union are left to argue that Mr. Evans should have been let go again once he completed the punch list work and that Mr. Lehr should have then been chosen to come back to work.<sup>25</sup> As Judge Bogas recognized, there is nothing facially

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<sup>23</sup> Punch list items can involve both repair work for incorrectly installed work, or it can involve something the architect simply wishes to have performed, prompting interpretation and negotiation by the parties. *Tr.* at 367-68. Mr. Gatewood did not note any incorrect work for which Mr. Evans had been responsible.

<sup>24</sup> Mr. Gatewood expressly stated that he recalled Mr. Evans because the work involved a "punch list" of items to be completed on IPS 107 Project and another project submitted to Commercial Air by the architect on the projects, and Mr. Evans had been the lead plumber on the projects with the best knowledge of the work needed. *Tr.* at 55-56, 82-84, 313-16. In addition, Mr. Gatewood was hesitant to recall Mr. Lehr to perform the work because Mr. Lehr was responsible for the code-violating repair work identified on the punch list. *Tr.* at 314-15.

<sup>25</sup> General Counsel notes that Judge Bogas focused on Mr. Evans' recall to perform punch list work and did not discuss Mr. Evans' continued work following the April 14, 2013 completion of punch list work. *General Counsel's Brief* at 11. Judge Bogas, however, expressly found that Commercial Air laid off Mr. Evans on February 28, 2013 and "recalled Evans less than 2 weeks later on March 11." *ALJ Decision* at 11. Judge Bogas also noted that "[a]t around the time of Lehr's termination, the Respondent reduced its total number of plumbers from six to three and a year later, at the time of trial, the Respondent was down to only two plumbers." *ALJ Decision* at 16. Those three

suspect about continuing to use Mr. Evans, who Commercial Air was already using, rather than to lay Mr. Evans off expressly in order to recall Mr. Lehr. *ALJ Decision*, pp. 16-17. Quite simply, General Counsel and the Union seek to substitute their business judgment where the Board necessarily leaves such decisions to employers. *C.E. Netco/C-E Invalco*, 272 NLRB 502 (1984); *TTT West Coast, Inc.*, 2000 WL 33665558 (Div. of Judges Oct. 24, 2000).

d. The work level at the Grissom project following Mr. Lehr's layoff supports Judge Bogas' conclusion that a downturn existed. General Counsel and the Union attempt to challenge the downturn in plumbing work by taking a scattershot approach to work at the Grissom project, itself. As shown above, the Union's argument that Mr. Moore performed plumbing work on the Grissom site following Mr. Lehr's layoff has been conclusively dismantled. The remaining arguments likewise fail.

The fact that Mr. Wildrick continued to perform work on the Grissom project as the lead and only plumber supports the conclusion reached by Mr. Wildrick, Mr. Gatewood and Mr. Young that only one plumber was needed to finish the Grissom project. Quite simply, Mr. Wildrick was the lead plumber on the Grissom project, had been on that project since its inception, and was the plumber most familiar with the job. *ALJ Decision* at 16; *Tr.* at 316. Moreover, Mr. Wildrick's workload as he finished the Grissom project remained right at 40 hours per week following Mr. Lehr's layoff. *GC Ex. 16* (pp.13-17).<sup>26</sup>

In addition, General Counsel and the Union incorrectly emphasize the overall payroll hours at the Grissom project in their attempt to fend off judgment. Although Judge Bogas noted

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were Mr. Young, Mr. Wildrick, and Mr. Evans. At no time did Judge Bogas in any way indicate a belief that Mr. Evans was again laid off after the punch list items were completed.

<sup>26</sup> The Union boldly proclaims that Mr. Wildrick worked overtime after Mr. Lehr was laid off, yet it can point to only a single hour of overtime. *Union's Brief* at 15, n.3. A single hour in a month hardly supports the Union's position that Mr. Lehr did not need to be laid off.

the overall payroll hours for the Grissom project showed downward variability “but not a dramatic decline,”<sup>27</sup> the overall payroll hours included all three Commercial Air trades (sheet metal, piping, and plumbing). *Tr.* at 63-66.<sup>28</sup> Mr. Lehr admitted that he and Mr. Wildrick were the only individuals performing plumbing work, and no other plumbers replaced Mr. Lehr. *Tr.* at 150, 317-318. Thus, the plumbing hours did in fact dramatically decrease with Mr. Lehr’s layoff.

e. Summary. Commercial Air established that a downturn in plumbing work caused Mr. Lehr’s layoff. Thus, even if Commercial Air could properly be tasked with the burden of proving by a preponderance that it would have made the same decision absent Mr. Lehr’s protected activity, Commercial Air has met that burden. As explained below, however, Commercial Air did not bear such a burden because General Counsel failed to satisfy its burden of establishing a *prima facie* case.

## 2.

### **General Counsel Failed To Meet Its *Prima Facie* Burden**

a. The timing does not establish a causal connection. Judge Bogas recognized the *prima facie* case with respect to Mr. Lehr’s layoff was “less compelling” because the timing was “not as suspect” as with the one-day suspension four months earlier *ALJ Decision* at 15. Specifically, nothing in the record suggested Commercial Air knew of any protected activities occurring between November 12, 2012 and the February 28, 2013 layoff, no representation petition or unfair labor practice charge was filed during that time, and nothing indicated an

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<sup>27</sup> *ALJ Decision* at 11.

<sup>28</sup> The federal prevailing wage determination established for the Grissom project identified both pipefitters and plumbers in the same wage classification, but Commercial Air’s piping classification workers performed separate work from its plumbers. *Tr.* at 57-58, 337-338. Although the certified payroll reports for the Grissom project do not identify whether an employee performed piping work or plumbing work, Commercial Air’s payroll records provide the breakdown. *Cf GC Ex.11(p.1)*(identifying Clifton Allred) with *GC Ex.16(p.1)*(showing Mr. Allred performed piping work as opposed to plumbing work).

organizing campaign was still going on, much less that one was gaining momentum. *ALJ Decision* at 15-16. Moreover, Judge Bogas recognized that Commercial Air engaged in no antiunion activity during that period. *ALJ Decision* at 16. These findings by Judge Bogas, along with the remainder of the record, establish that General Counsel failed to meet the *prima facie* burden, thereby requiring dismissal before the burden was shifted to Commercial Air.<sup>29</sup>

Although timing can be a factor considered in determining motivation or causal connection, timing, alone, is insufficient. See *Vulcan Basement Waterproofing of Illinois, Inc. v. N.L.R.B.*, 219 F.3d 677, 688 (7th Cir. 2000) (rejecting a claim because the General Counsel relied only upon the timing of events).

In *Vulcan*, the employer fired union supporting employees the very first business day after receiving an election petition, and the General Counsel sought to prove animus and causation through that timing. The Seventh Circuit rejected the Board's decision, holding the Board erred by applying, in effect, "a presumption that the discharge of a union adherent during an organizing campaign is motivated by hostility to the union, a presumption that can be rebutted only by showing that the discharge was for good cause – and maybe not even then." *Id.* at 690.

The *Vulcan* case does not stand on an island. In *Interbake Foods*, 2013 WL 4715677 (Div. of Judges Aug. 30, 2013), the ALJ rejected the General Counsel's emphasis on timing – the fact that seven union adherents were discharged during an organizing campaign. Doing so improperly presumed that the discharges were the result of the organizing campaign merely

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<sup>29</sup> A portion of the *prima facie* case Judge Bogas identified relied on the finding that Mr. Gatewood improperly changed Mr. Lehr's schedule on November 12, 2012 to working five eight-hour days as opposed to a previously agreed four ten-hour days. *ALJ Decision* at 13. This finding is incorrect. Mr. Lehr admitted he found out about the "five 8's" schedule the previous week – i.e., before the notice of organizing activity and the original Charge were sent to Commercial Air. *Tr.* at 118.

because they occurred during the organizing campaign.<sup>30</sup> Similarly, in *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143 (2011), the Board rejected a proposed inference of timing-based causation, recognizing that as the time between protected activity and discipline increases, so does the likelihood that the two are coincidental. Timing, alone is therefore insufficient to establish causation. *Id.*, citing *Neptco, Inc.*, 346 NLRB 18, 20 (2005)(dismissing the case because mere coincidence in timing is not sufficient evidence of animus).

In the present case, not even the timing supports an inference of causation. *ALJ Decision* at 15:49-52, 16:1-6. Mr. Gatewood learned in May 2012 that the Union had implemented a campaign to organize Commercial Air's workers. *Tr.* at 200; *ALJ Decision* at 3:36-42. Mr. Lehr indicated he started talking with employees about the Union even before he met with Mr. Kurek from the Union in April or May, 2012,<sup>31</sup> yet Mr. Gatewood never told Mr. Lehr that he could not organize Commercial Air's workers, never threatened Mr. Lehr with discipline for attempting to organize the workers, and never indicated in any way that he would take work away from Mr. Lehr for attempting to organize workers. *Tr.* at 134. Mr. Gatewood was receptive to the campaign and discharged no one in association with the campaign.

Even after the Union provided formal notice that Mr. Lehr was an organizer in early November, 2012, Mr. Lehr remained employed. It was not until four months thereafter, a point by which time the organizing campaign had been ongoing for almost a year, that Mr. Lehr was laid off. What is more, Mr. Lehr was not the first plumber to be laid off. *ALJ Decision* at 10:32-

34 In any event, the closest measure of timing between protected activity and discharge spans

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<sup>30</sup> The ALJ continued – “In our democracy, the Board’s authority ultimately depends on public acceptance, particularly by its constituencies (labor and management) and the lawmakers who oversee its operations. In turn, that support can only be obtained by the balanced, neutral, and practical assessment of the conduct of the parties involved in our cases. This goal is best achieved by a wide-ranging evaluation that rejects rote presumptions and focuses on the objective and dispassionate appraisal of the realities of the workplace.” *Id.*

<sup>31</sup> *Tr.* at 110-11.

nearly four months from November 12, 2012, to March 1, 2013. Such a span cannot form the basis for an inference of causation. *See Camaco, infra* (holding that a suspension occurring a full month after learning of union activity did not permit an inference of causation).

b. No animus toward protected activity existed. Proof of animus on the part of Commercial Air toward Union organizing activity is a necessary prerequisite to liability. *American, Inc.*, 342 NLRB 768 (2004). Commercial Air, however, displayed no animus toward such activities, thereby requiring dismissal of the allegations.

In *American*, the Board rejected the General Counsel's attempt to establish unlawful motivation through testimony that a shop manager threatened to close its doors before allowing a union. *Slip op.* at \*1. The Board did so because the shop manager denied making the statement and the ALJ found "no basis for crediting the testimony of either Mr. Martin or Mr. Warholm over the other." *Id.* In the absence of credited testimony, held the Board, the General Counsel failed to meet its burden of proof. *Id.*

Mr. Gatewood first received notice of the Union's organizing campaign in May, 2012, when he met with Mr. Kurek. *Tr.* at 200-01. Mr. Gatewood at that time discussed bringing Union fitters to work alongside Commercial Air's regular employees. *Tr.* at 74. Mr. Gatewood willingly agreed to meet with the Union, and he was not opposed to using Union labor. *Tr.* at 229-30. Mr. Gatewood was also "definitely" interested in the Union's training opportunities. *Tr.* at 230. Moreover, Mr. Lehr and Mr. Howard each admitted Mr. Gatewood never addressed their Union activities and never threatened discipline or other adverse action of either of them for wearing Union clothing or attempting to organize workers. *Tr.* at 146, 159-60, 174-75, 185-86, 331.

Judge Bogas nevertheless found that evidence of animus exists in a 2011 statement Mr. Howard attributed to Mr. Gatewood regarding being unable to return to Commercial Air if he resigned to go to the Union and a newsletter to employees explaining that Commercial Air opposed unionization. As shown above, a statement regarding resignation is not a protected activity. Moreover, animus may not be attributed to an employer merely because the employer opposes a union organizing campaign. *Affiliated Foods, Inc.*, 328 NLRB No. 165 (1999) (no animus found where employer stated that unions were detrimental and it would take all lawful steps to oppose the union at its facilities)..

Quite simply, General Counsel failed to establish animus by Commercial Air toward Union activities. Just like in *American* and *Affiliated Foods*, the allegation should therefore be dismissed.

### C.

#### **Judge Bogas Correctly Found Mr. Howard's Poor Performance, Alone, Caused Discharge**

Commercial Air discharged Mr. Howard due to his repeated instances of poor work performance. Mr. Gatewood even provided Mr. Howard with a final chance to improve, but Mr. Howard chose not to maintain the required professional level of effort. Simply stated, Judge Bogas correctly recognized Howard's release from Commercial Air had nothing to do with union support. *ALJ Decision* at 18. Nevertheless, the burden should not have even shifted to Commercial Air because General Counsel failed to make a *prima facie* showing.

### 1.

#### **Howard Would Have Been Discharged Regardless of Protected Activity**

As found by Judge Bogas, Mr. Howard would have been discharged regardless of any protected activity. The exceptions filed by General Counsel and the Union essentially assert

Judge Bogas failed to consider countervailing factors such as whether Commercial Air offered inconsistent reasons for its decision and whether Mr. Howard's decision to ride to work with Mr. Lehr in January is a protected activity. The exceptions are without merit. Indeed, Judge Bogas properly addressed these issues in the ALJ Decision.

In the ALJ Decision, Judge Bogas noted that, aside from Mr. Gatewood's testimony establishing Mr. Howard was discharged for poor performance, paperwork filled out by Mr. Young, the plumbing foreman, referenced a work slowdown in the plumbing department as the cause. *ALJ Decision* at 18. Mr. Young, however, was not involved in the decision, but rather, Mr. Gatewood made the decision and communicated the decision to Mr. Price, who informed Mr. Howard. *ALJ Decision* at 19. Moreover, the paperwork actually supported Mr. Gatewood's testimony concerning past productivity and disciplinary issues relating to Mr. Howard. *Id.* Indeed, Mr. Howard knew from the first moment his performance, not a lack of work, was the basis for his discharge. *Tr.* at 169. Mr. Howard even told Mr. Lehr he was discharged for lack of production. *Tr.* at 149-50. And, Commercial Air, from its first response to the unfair labor practice charge, identified poor performance as the reason for Mr. Howard's discharge. *Tr.* at 49.

Likewise, Judge Bogas properly rejected General Counsel's argument that Mr. Howard's decision to start carpooling to the jobsite in Mr. Lehr's company-provided vehicle in January, 2013, somehow suggested knowledge of Mr. Howard's union activities. *ALJ Decision* at 17. In short, "the simple fact that the two shared the use of a company truck does not suggest that they shared the same view about the Union or any other workplace issue." *Id.* Indeed, the Grissom jobsite was described by Mr. Lehr as "very far away." *Tr.* at 132. The opportunity to ride in a company vehicle and save on travel expenses is the natural inference.

Mr. Howard's work speed simply did not match Commercial Air's legitimate expectations. It is well settled that a charging party cannot sustain a claim under the Act if he would have been terminated in the absence of any alleged protected activity. See *In re E.A. Sween Co.*, 2009 WL 3422395 (Div. of Judges Oct. 23, 2009) (finding employer did not violate the Act where employee failed to meet performance minimum standards); *In re River Ranch Fresh Foods, LLC*, 351 NLRB No. 15 (2007) (reversing ALJ's finding that employer violated Act and holding reason for employee discharge was not pretextual where employee performed poorly and would have otherwise been discharged).

In February, 2013, at the Grissom Project, Mr. Working, the lead pipefitter on the project, placed several calls to Mr. Gatewood indicating Mr. Howard was "really, really slow." *Tr.* at 324. Mr. Gatewood therefore instructed Mr. Working to place Mr. Howard on hooking up expansion tanks to compressors. *Tr.* at 324. Mr. Working, however, called to tell Mr. Gatewood that Mr. Howard had installed only one valve the entire day and had been instead listening to his ear buds and playing on his phone. *Tr.* at 324. Mr. Gatewood therefore went to the job site early the next morning to see what had been accomplished on the air compressors, and he created a list of tasks that had been performed. *Tr.* at 324; R. Ex. 10.<sup>32</sup> Because the amount of work performed was not even close to an acceptable level, Mr. Gatewood decided to discharge Mr. Howard. *Tr.* at 324.

When Mr. Howard appeared for work, Mr. Gatewood told him he was fired because he had not completed "near enough" work. *Tr.* at 325-26. Mr. Howard indicated that he was waiting on parts, but Mr. Gatewood specifically noticed all of the parts were on the site. *Tr.* at

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<sup>32</sup> General Counsel attempted to discredit the list made by Mr. Gatewood as an attempt by Mr. Gatewood to cover himself because he was getting ready to fire Mr. Howard. *Tr.* at 356-57. The fact that a list was made, however, does not call into question the veracity of the underlying assessment by Mr. Gatewood of Mr. Howard's performance deficiencies.

326. Mr. Gatewood also told Mr. Howard that even if he had been waiting for parts, he should have worked on other tasks rather than sitting around waiting. *Tr.* at 326. Mr. Howard explained how sorry he was, that he could not afford to lose his job, that he had just gone through “a lot of stuff” and that he needed one more chance. Mr. Gatewood relented, agreeing to give Mr. Howard one more chance. The conversation started and ended in the break area, lasted for 30-45 minutes, and it concluded with Mr. Gatewood giving Mr. Howard one more chance. *Tr.* at 328. Mr. Gatewood was clear in indicating to Mr. Howard that any further performance issues would result in discharge and that there would be no discussing the matter. *Tr.* at 186.

Mr. Gatewood monitored Mr. Howard’s performance the remainder of the day, and he noted Mr. Howard did exactly what Mr. Gatewood expected of him. *Tr.* at 327. Mr. Gatewood expressly told Mr. Howard “now that’s the way I expect you to work.” *Tr.* at 327. Mr. Howard, however, when outside the direct oversight of Mr. Gatewood, reverted back to his prior performance. *Tr.* at 327-28. Mr. Gatewood had Mr. Howard and another pipefitter install air taps, and Mr. Howard performed at a much slower pace than the other pipefitter. *Tr.* at 328. Mr. Howard’s taps were also installed unacceptably crooked. *Tr.* at 329. Similarly, Mr. Howard took four days to complete six welded stands while another pipefitter completed the same number in a day and a half. *Tr.* at 328. Mr. Gatewood therefore told the job foreman to tell Mr. Howard to collect his tools and that he was discharged. *Tr.* at 329-330.

Mr. Howard could not have been surprised by Mr. Gatewood’s assessment that Mr. Howard worked at a sub-par pace. Mr. Gatewood spoke to Mr. Howard on at least two other occasions about slow work performance, one of which involved Mr. Gatewood actually working alongside Mr. Howard and performing at twice Mr. Howard’s pace. *Tr.* at 320-23. Mr. Howard admitted that Mr. Gatewood counseled him on slow work performance at least three times, *Tr.* at

179-80, 184. Mr. Howard even admitted he asked Mr. Price whether he worked too slowly, and Mr. Price “told [Mr. Howard] that he, too, thought [Mr. Howard] could go faster.” *Tr.* at 184.<sup>33</sup>

The exceptions attempt to mitigate Mr. Howard’s poor performance by pointing to the October, 2012 NASCAR outing and the December, 2012 Christmas party, both of which according to the General Counsel indicate Mr. Howard’s performance was acceptable. It is without dispute, however, that Mr. Gatewood was unhappy with Mr. Howard’s performance in February, 2013, that Mr. Gatewood gave Mr. Howard a last chance to improve, and that Mr. Gatewood discharged Mr. Howard because he had not improved. It is likewise undisputed that Mr. Gatewood had counseled Mr. Howard on previous occasions for the very same slow work performance. General Counsel therefore cannot use events occurring several months prior to the discharge as an indicator of circumstances present at the time of discharge.<sup>34</sup>

Finally, the exceptions assert that Mr. Gatewood provided no evidence of others who had been discharged for poor performance. To the contrary, Mr. Gatewood identified Jack Price as someone who was discharged for the same reason as Mr. Howard. *Tr.* at 330. And Mr. Gatewood showed Mr. Howard that he was not even keeping up with Jack Price. *Id.*

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<sup>33</sup> Throughout Mr. Howard’s testimony, he exhibited through direct contradictions, an unwillingness to initially admit to anything he portrayed as placing him in a bad light. For example, Mr. Howard denied that Mr. Price told Mr. Howard that he thought he was working too slowly, and Mr. Howard only changed his story when confronted with his Board affidavit. *Tr.* at 183-84. Likewise, Mr. Howard initially denied that Mr. Gatewood told Mr. Howard he was constructing stands too slowly on the Grissom Project. *Tr.* at 178-79. Upon further questioning, however, Mr. Howard admitted Mr. Gatewood said “you are not working quickly enough” and that Mr. Gatewood probably even told Mr. Howard that he could have done that job in half the time that he actually did it. *Tr.* at 182-83. Mr. Howard’s slanted testimony should be called into question in its entirety due to his tendency to lie.

<sup>34</sup> Mr. Howard, of course, disagrees with Mr. Gatewood’s assessment of his work speed even though Mr. Howard admitted Mr. Price also told him he was working too slowly. As Mr. Gatewood noted, Mr. Howard is also prone to providing excuses for each of his shortcomings. *Tr.* at 322. Indeed, Mr. Howard exhibited a tendency to deny in his hearing testimony any fact that placed him in a negative light, only to admit the fact when confronted with the truth. In any event, these circumstances, at most, show that Mr. Howard would not have been discharged if it were up to him. Substituting his own business judgment for that of Mr. Gatewood, however, is improper. See *TTT West Coast, Inc.*, 2000 WL 33665558 (Div. of Judges Oct. 24, 2000)(recognizing it is well settled that the Board may not second guess an employer’s good faith judgment in business decisions); *C.E. Natco/C-E Invalco*, 272 NLRB 502, 505-06 (1984)(holding the ALJ improperly substituted her business judgment for that of the employer when she disbelieved the employer was truly concerned for plant safety and sabotage simply because the employer failed to take particular responsive measures).

2.

**No *Prima Facie* Case Was Established Relating to Mr. Howard**

Judge Bogas identified several problems with General Counsel's ability to satisfy its *prima facie* burden before eventually deciding that sufficient evidence exists "although the question is not free from doubt." *ALJ Decision* at 17. Importantly, Judge Bogas noted that although Mr. Howard engaged in activities in support of the Union during his employment, no evidence suggested Commercial Air knew of the activities. *ALJ Decision* at 17. The *ALJ Decision* should have gone on to conclude that General Counsel failed to establish a *prima facie* case.

It is well settled that lack of knowledge of union activity is fatal to a charging party's case. *See, Gold Coast Restaurant Corp.*, 304 NLRB 750, 751 (1991)(holding that no knowledge existed even though the timing of the discharge was suspicious, coming within a week of the signing of authorization cards, and even though the discharged employees were long time union members and discussed the union freely at work); *Winn-Dixie Stores, Inc.*, 153 NLRB 276 (1965)(holding no knowledge existed with respect to the charging party even though the employer knew of a general union campaign).

Here, Commercial Air was unaware of any union support or activity by Mr. Howard. *ALJ Decision* at 17:16-34. Mr. Gatewood never discussed the Union with Mr. Howard during his employment. *Tr.* at 331. Mr. Howard, in fact, never indicated he was supportive of or active in the Union. *Tr.* at 331; *ALJ Decision* at 17:22-23. Similarly, although Mr. Kurek expressly identified Mr. Lehr as an organizer, he did not notify Mr. Gatewood in any way that Mr. Howard was involved with the Union activity. *Tr.* at 249; *ALJ Decision* at 17:31-34. Thus, *Gold Coast*

and *Winn-Dixie* require dismissal of this aspect of the Charges due to the General Counsel's inability to establish Commercial Air's knowledge of union activity by Howard.

At the hearing, the General Counsel attempted to emphasize the fact that Mr. Howard nevertheless occasionally wore Union clothing to work, but Mr. Howard did so from the beginning of his employment in April 2011. *Tr.* at 175, 180-81, 331; *ALJ Decision* at 17:16-34. Mr. Howard could not have worn the clothing as a measure of support for the Union, as he had been expelled from and fined by the Union. *Tr.* at 162. Rather, as Mr. Howard characterized the clothing, "they were work clothes." *Tr.* at 164; *ALJ Decision* at 17:16-45. Moreover, Mr. Howard did not meet with the Union as an employee of Commercial Air until Summer 2012 even though he wore the clothing from the beginning of his employment. *Tr.* at 159-60, 174-75; *ALJ Decision* at 17:16-45. Many at Commercial Air commonly wore union clothing, which did not bother Mr. Gatewood. *Tr.* at 331; *ALJ Decision* at 17:39-43. Mr. Howard even admitted that Mr. Gatewood never indicated he had a problem with Mr. Howard wearing Union clothing, jackets, or stickers on his hardhats. *Tr.* at 185-86. Quite simply, Mr. Howard's occasional wearing of Union clothing across the entire span of his employment does not support a claim that Mr. Gatewood somehow had knowledge of Howard's Union activity, which by Mr. Howard's own account did not start until Summer, 2012. *Gold Coast*, 304 NLRB at 751 (finding no knowledge of card signings even though employees at issue were long-time union supporters who were vocal in their support).

Despite a lack of knowledge by Commercial Air of Mr. Howard's Union activity and the General Counsel's inability to show anti-union animus, the General Counsel likewise failed to establish a causal connection between Mr. Howard's activities and any animus toward the activities. To the contrary, General Counsel elicited testimony from Mr. Howard that despite

Mr. Howard's Union activity, Mr. Gatewood invited Mr. Howard on a company-sponsored trip to a NASCAR race in Talladega, Alabama whereby Mr. Gatewood thanked all of the employees on the trip for their good work. *Tr.* at 172-73. Further, Mr. Howard acknowledged receipt of a \$500 bonus at the 2012 Christmas party, at which Mr. Gatewood told Mr. Howard he was glad he hired Mr. Howard. *Tr.* at 172. What is more, Mr. Howard, himself, understood that Mr. Gatewood, in making the discharge decision, was motivated by the fact the job was not going very well. *Tr.* at 186. Specifically, Mr. Howard stated the work was getting tighter near the end of his employment – “everybody was tense and was – felt kind of a grip tightening on them because I don't believe the job was going as well as it should have, and he was looking for a way to get rid of – you know, to lessen that.” *Tr.* at 186.

Axiomatically, Mr. Howard's practice of wearing of Union clothing from the beginning of his employment in April, 2011 can raise no inference of causation with respect to his discharge two years later. Likewise, a statement about re-hire Mr. Howard states was made during his interview two years prior is insufficient.

Even if General Counsel and the Union could create an inference of protected activity through simply carpooling to a jobsite, which it cannot, no inference of causation due to timing is permissible. General Counsel simply cannot satisfy its burden through mere coincidence in time, alone. *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143 (2011)(rejecting a causal inference because employer became aware of union activity in April but did not suspend the employee until May), citing *Neptco, Inc.*, 346 NLRB 18, 20 (2005)(dismissing allegations that were supported by nothing other than timing).

## D.

### **The Credibility Issues Relating To Mr. Gatewood Pale In Comparison To Those Of Mr. Lehr and Mr. Howard**

The exceptions question Mr. Gatewood's credibility primarily by indicating he should not have signed off on the apprentice paperwork for Mr. Moore and Mr. Richardson when they had not actually been performing apprentice plumbing tasks. The exceptions essentially call for disregarding all of Mr. Gatewood's testimony as a result. Such an approach lacks merit, as Judge Bogas found Mr. Gatewood to be largely credible, even through his testimony about the apprentice paperwork. *ALJ Decision* at 11:27-38; 12:26-33; 16:18-20.

Contrary to the arguments contained in the exceptions, Mr. Gatewood's testimony actually enhances his credibility. First, Mr. Gatewood *self-reported* his role in signing a few of the documents. *Tr.* at 360. Mr. Gatewood also stated forthright that he took their word for it without pulling their timecard to see if they were accurate, although he does not think they were doing plumbing work. *Tr.* at 360-362. In other words, he testified as to what was accurate as opposed to what may have been in his best interest. Thus, at most, Mr. Gatewood was less diligent than he should have been when the individual approached him for a signature.

General Counsel's assertion that GC Ex. 13 harms Mr. Gatewood's credibility for what it reveals about Mr. Evans' layoff likewise misses the mark. That exhibit, a position statement, was entered into evidence solely for the limited purpose of identifying Commercial Air's representations as to why *Mr. Howard* was let go. *Tr.* at 50-51. General Counsel's reference to GC Ex. 13 for any other purpose is improper and General Counsel's reference and argument should be disregarded.

Finally, Judge Bogas' decision to credit Mr. Gatewood is bolstered by the credibility issues of Mr. Howard and Mr. Lehr. Certainly, their testimonies must be assessed in light of

their separation from Commercial Air, their pro-union sentiments, their incentives to promote the Union's interests in this matter, and their personal stake in the outcome of this matter. Because both Mr. Lehr and Mr. Howard are subject to significant fines for working for non-union contractors, each has an overwhelming interest in providing testimony that supports the Union. Their testimony on contested matters should therefore not be credited.

Before becoming employed at Commercial Air, Mr. Howard was fined by the Union for working at a non-union job. *Tr.* at 163, 223. In the fall of 2012, Mr. Howard was approached by Mr. Kurek who asked Mr. Howard if he would be interested in helping the Union come into Commercial Air. *Tr.* at 160-61, 223. Mr. Howard agreed to help if he could get his fine erased, which would effectively allow him back into the Union. *Tr.* at 163, 189-91, 223. Additionally, Howard supported and was in favor of the Union at Commercial Air. *Tr.* at 165, 190-91, 223. Mr. Howard was discharged by Commercial Air on or about February 26, 2013. *Tr.* at 43, 223.

Mr. Lehr is currently a union member. *Tr.* at 108, 223. In 2012, Mr. Lehr was a member of the Union, but like Howard, was working for a non-union company (Commercial Air) when he was approached by the Union. *Tr.* at 21, 160, 206, 223. A former union business agent alerted union Organizer, Mr. Kruek, to the fact that Mr. Lehr was working at Commercial Air, but that he [the former agent] had lost touch with Mr. Lehr. *Tr.* 13-14, 160, 206, 223. Mr. Kurek tried for months to physically meet with Mr. Lehr. *Tr.* at 206, 223. When they did meet, Mr. Kurek told Mr. Lehr about the salting technique and also told Mr. Lehr that he needed to "stay in touch" and report to me [Kurek]." Mr. Gatewood testified that Mr. Lehr told him he was being "pressured" by the Union. *Tr.* at 68, 160. Although Mr. Lehr worked at a non-union signatory, he was not fined by the Union. *Tr.* at 21, 160. In all likelihood, Mr. Lehr was not

fined because he agreed to spearhead the Union's organization efforts at Commercial Air. *Tr.* at 21-22, 160.

In making credibility findings, a witness' membership, union support, personal interest in the outcome of the matter, or any other bias, are taken into account. *T. Steele Constr., Inc. & Int'l Union of Operating Engineers, Local 150, AFL-CIO*, 348 NLRB No. 79 (Nov. 30, 2006; *Sears Roebuck De Puerto Rico*, 284 NLRB 258, 269 (1987) (testifying employee's credibility "was necessarily evaluated through the prism of her obvious devotion to the Union . . .").

Here, both Mr. Howard and Mr. Lehr (1) are union supporters; (2) are or were Union members; (3) were let go by Commercial Air; (4) are being incentivized by the Union to assist it in organizing Commercial Air; and (5) have a personal monetary interest in the outcome of this matter by virtue of the Board's request for backpay. *See GC Ex. 1(f)*, ¶ 10. In light of the above, their testimony is inherently untrustworthy and should not be credited on disputed matters. *California Pellet Mill Co.*, 219 NLRB 435, 446 (1975) ("Robinson, an avid union proponent, whose perfervid interest amounted to bias, rendered some of her testimony with respect to certain critical aspects of this case untrustworthy. Such testimony which is in conflict with the findings of facts herein is not credited"); *Bridgestone/Firestone, Inc.*, 335 NLRB 941, 951, n.2 (2001) (crediting one witness' testimony over another based on the witness' personal stake in the outcome of the case); *Nat'l Ass'n of Letter Carriers*, 2011 WL 1229767 (N.L.R.B. Div. of Judges Apr. 1, 2011) (finding a witness credible because she was not shown to have any personal bias against the charging party or in favor of the respondent); *In re Kentucky Gen., Inc.*, 334 NLRB 154, 164, n.8 (2001) (finding a witness credible because he was not a member of the union, had nothing to gain through his testimony in the case, and had a successful and amicable employment relationship with the employer).

**IV.**

**CONCLUSION**

For all of the foregoing reasons, Commercial Air respectfully requests a decision in its favor, dismissal of the Complaint, and for all other necessary and proper relief.

Respectfully submitted,

/s/ A. Jack Finklea

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was filed electronically on September 12, 2014 and served upon the following by first-class, U.S. mail, postage prepaid:

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