

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COMMERCIAL AIR, INC.

and

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

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

GENERAL COUNSEL'S
ANSWER TO RESPONDENT'S CROSS-EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE'S
DECISION

Comes now Counsel for the General Counsel and respectfully submits the following answer to Respondent's Cross-Exceptions to the decision of the Administrative Law Judge in this matter which was issued on August 1, 2014. Respondent filed two cross-exceptions to that decision: 1) Respondent excepted to the finding that the General Counsel met its *prima facie* burden of proof with respect to the layoff of Chris Lehr; and 2) Respondent excepted to the finding that the General Counsel met its *prima facie* burden of proof with respect to the layoff of Charles Howard. The General Counsel asserts that both of these cross-exceptions should be denied in their entirety and that these two findings by the Administrative Law Judge be affirmed. In support of this position, the General Counsel offers the following:

I. STATEMENT OF FACTS

Respondent is a mechanical services contractor that provides HVAC, plumbing and sheet metal fabrication services for the construction industry in central Indiana. (TR 20) It has an

office and main place of business in Lebanon, Indiana. (TR 20) Tim Gatewood is Respondent's Owner and President. (TR 18) As of March 2013, Respondent employed approximately 27 employees as pipefitters, plumbers, sheet metal workers, and laborers. (G.C. Ex. #7) Based on Respondent's records, five of these employees were classified as plumbers, including discriminatees Chris Lehr and Charles Howard. (G.C. Ex. #7)

Chris Lehr was hired as a plumber in February 2011. (TR 107, 110) Before he was hired, Lehr was interviewed by Tim Gatewood. (TR 109) During that interview Gatewood told Lehr, a member of U.A. Local 440 (herein referred to collectively with the Indiana State Pipe Trades as the Union) that Gatewood had hired union members before and that if they left Respondent, Gatewood refused to rehire them. (TR 109) Beginning in May 2012, Lehr began meeting with Union organizer John Kurek as part of the Union's efforts to organize Respondent. (TR 111) Lehr also invited Respondent employees Charles Howard and Josh Raburn to attend these meetings, and those two employees did attend several meetings with Kurek. (TR 112)

In November 2012 the Union decided to actively campaign with Respondent's employees. (TR 212) On Thursday November 8, 2012, Kurek sent a fax to Gatewood informing him that Lehr was a "volunteer union organizer". (TR 214) The Union's fax was transmitted at 7:27 am. (G.C. Ex. #15) A copy of the letter was also sent via certified mail. (TR 214) Also on November 8, the Union filed an unfair labor practice charge in Case 25-CA-092821, which was served on the Respondent by regular mail on the same day, alleging that the Respondent had unlawfully threatened and intimidated an employee on or about August 17, 2012. (G.C. Ex. #1(a)) Respondent received a copy of that charge on November 9, 2012. (R. Ex. #14) Respondent knew that the charge was referring to the August conversation between Gatewood and Lehr. (G.C. Ex. #12)

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

On November 21, 2012, Respondent sent a memo to all employees informing them that a union had expressed interest in its operations and that Respondent's position was that it was not in favor of a union. (G.C. Ex. #4) The memo also said Respondent was able to conduct its business without needing to lay off employees and that there was plenty of work for Respondent's employees. (G.C. Ex. #4)

In April 2011 Respondent hired Charles Howard, a former Union member, as a pipefitter/welder. (TR 157-158) Howard was interviewed by Tim Gatewood before Howard was hired by Respondent. (TR 157) Howard and Gatewood discussed Howard's prior

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

Sometime around the middle of February 2013 Howard was working at the Grissom jobsite when Gatewood came to where Howard was working and started yelling at him that he had nothing to show for the time Howard had been working there. (TR 166-167) Gatewood told Howard that he was discharged but that Gatewood would allow him to finish the day because Gatewood knew that Lehr was Howard's ride. (TR 167-168) Howard tried to explain that he was behind schedule because of missing materials. (TR 167) By the end of the day, some of the missing material had arrived, and Howard completed more of the work. (TR 168) Gatewood told Howard that he could stay but that next time Gatewood was not satisfied with Howard's work, there would be no conversation. (TR 169) On February 26, 2013, Supervisor Jamey Price approached Howard and told him that he was being let go and that if Howard had any questions, he needed to talk to Gatewood. (TR 169) Howard spoke to Gatewood who told him to remember that he had said there would be no talk next time and refused to explain what Howard had done wrong. (TR 169) On March 1, 2013, Lehr was also laid off while still working at Grissom. Lehr

was told that this was because of a lack of plumbing work. (TR 122) However, Respondent's records showed no such shortage of work. (GC Exs. #10, 11, 25)

II. ANALYSIS

1. Cross-Exception 1

As set forth above, Respondent discharged Chris Lehr on March 1, 2013. In his decision the Administrative Law Judge found that the General Counsel met his initial burden of establishing that Lehr's protected activity was a motivating factor in his discharge. (ALJD p. 15, ll. 44-52) Respondent has now filed a cross-exception to that finding. To prove that an employee's discharge violates Section 8(a)(1) and (3) of the Act, the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected activity was a motivating factor in the employer's decision to discharge the employee. Manno Electric, Inc., 321 NLRB 278, 280-81 (1996) *enforced*, 127 F.3d 34 (5th Cir. 1997). Once the General Counsel makes a showing of discriminatory motivation, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. Wright Line, 251 NLRB 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

The General Counsel met its burden in this matter of demonstrating that Lehr's protected activities were a motivating factor in Respondent's decision to discharge him. First, Lehr engaged in protected activity, and Respondent had knowledge of that activity. Lehr spoke to other employees about unionization and distributed Union literature to other employees; he wore union shirts and other attire, and met on a regular basis with the union organizer. (TR 119-120) Most importantly, the Union sent Respondent a letter on November 8, 2012 which identified

Lehr as a volunteer Union organizer. (TR 214) Respondent was so concerned with Lehr's activity that shortly after it was notified of Lehr's status as a volunteer Union organizer, Respondent sent out an anti-Union memo to all of its employees. (G.C. Ex. #4). The above amply demonstrates Respondent's knowledge of Lehr's protected activity.

Second, Respondent was openly hostile towards Lehr's Union activity. Respondent's hostility towards this Union activity is most clearly demonstrated by Respondent's suspension of Lehr in retaliation for those Union activities. (TR 31) The Administrative Law Judge found that Respondent violated Section 8(a)(1), (3) and (4) of the Act when it suspended Lehr on November 12, 2012 in retaliation for his protected activities. (ALJD, p. 15, ll. 34-37) Respondent has not excepted to this finding by the Administrative Law Judge. Respondent also quickly responded to Lehr's organizing activities by sending a memo to employees stating that Respondent was opposed to its employees being represented by the Union. (G.C. Ex. #4)

In addition the timing of Lehr's discharges was highly suspect. Lehr was discharged within a few months of beginning an open Union organizing campaign after working for Respondent with minimal issues for over two years. It is well-settled under Board law that inferences of animus or discriminatory motive may be drawn from suspicious timing. Tinney Rebar Services, 354 NLRB 429, 437 (2009). Based on the above evidence of protected activity by Lehr, Respondent's knowledge of and hostility towards that protected activity, and the timing of the discharges, the Administrative Law Judge correctly found that the General Counsel has established a *prima facie* case of discriminatory motivation in the discharge of Lehr.¹

¹ The General Counsel has previously filed exceptions in this matter to the Administrative Law Judge's finding that Respondent met its burden of establishing that it would have discharged Lehr even absent his protected activities.

2. Cross- Exception 2

As set forth above, Respondent discharged Charles Howard on March 1, 2013. In his decision the Administrative Law Judge found that the General Counsel did meet his initial burden of establishing that Howard's protected activity was a motivating factor in his discharge. (ALJD p. 17, ll. 36-52) Respondent has now filed a cross-exception to that finding. For many of the same reasons set forth above regarding the discharge of Chris Lehr. The Administrative Law Judge correctly found that the General Counsel met his initial evidentiary burden regarding Howard's discharge.

Like Chris Lehr, Charles Howard also engaged in protected activity, and Respondent had knowledge of that activity. Howard also discussed the Union with other employees and met with Union organizer Kurek on a regular basis. (TR 164) It is true that the Union never identified Howard to Respondent as a Union supporter. However, Respondent knew Howard to be a former Union member who wore Union shirts to work and had Union stickers on his hardhat. (TR 158, 163-164) Respondent also knew that Howard rode to the job everyday with Chris Lehr, the Union's main proponent among Respondent's employees. (TR 168) When Gatewood initially discharged Howard, Gatewood told Howard that he could finish the day because Gatewood knew that Lehr was Howard's ride. (TR 168) Howard was clearly connected to Lehr in Gatewood's mind. It would not have been a stretch for Gatewood to guess that Howard, who he knew to be a former Union member and who he knew to ride to work everyday with an open Union supporter, was also a supporter of the Union. The evidence thus supports the conclusion that Respondent had knowledge of Howard's Union activity and support.

Second, Respondent was openly hostile towards such protected activity. As set forth above, Respondent's hostility towards employees' union activity was most clearly demonstrated

by Respondent's suspension of Lehr in retaliation for those Union activities. (TR 31) The Administrative Law Judge found that the suspension was in retaliation for Lehr's protected activities (ALJD, p. 15, ll. 34-37), and Respondent did not except to this finding. Respondent's owner Tim Gatewood also told Howard when Howard was hired by Respondent that if Howard ever left Respondent to work for a union contractor, Gatewood would never rehire him. (ALJD p. 14, ll. 11-13)

In addition just as with Lehr, the timing of Howard's discharges was highly suspect. Howard was discharged within a few months of the commencement of a Union organizing campaign after working for Respondent with minimal issues for nearly two years. Based on the above evidence of protected activity by Howard, Respondent's knowledge of and hostility towards that protected activity, and the timing of the discharge, the Administrative Law Judge correctly found that the General Counsel has established a *prima facie* case of discriminatory motivation in the discharge of Howard.²

III. CONCLUSION

Based on the above, the General Counsel respectfully requests that Respondent's cross-exceptions be denied and that the Board uphold the Judge's findings that the General Counsel met its *prima facie* burden of proof with respect to the discharges of Chris Lehr and Charles Howard.

² The General Counsel has previously filed exceptions in this matter to the Administrative Law Judge's finding that Respondent met its burden of establishing that it would have discharged Howard even absent his protected activities.

Dated at Indianapolis, Indiana this 26th day of September 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael Beck". The signature is fluid and cursive, with the first name "Michael" and last name "Beck" clearly distinguishable.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of General Counsel's Answer to Respondent's Cross-Exceptions to the Administrative Law Judge's Decision was served on the following individuals by electronic transmission on September 26, 2014.

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A handwritten signature in black ink, appearing to read "Michael Beck", written in a cursive style.

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