

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

**REPLY OF RESPONDENT, COMMERCIAL AIR, INC.  
IN SUPPORT OF CROSS EXCEPTIONS**

Respondent, Commercial Air, Inc. (“Commercial Air”), by counsel, files this Reply in support of its cross exceptions.

## I.

### **INTRODUCTION**

On September 12, 2014, Commercial Air filed its Response and Cross Exceptions (“Cross Exceptions”), showing that Administrative Law Judge Paul Bogas correctly determined in his August 1, 2014 Decision (the “ALJ Decision”) that Commercial Air properly laid off employee Chris Lehr and properly discharged employee Charles Howard. Commercial Air also showed the ALJ Decision should have ended the matter at the *prima facie* inquiry because the General Counsel failed to satisfy his initial burden of proof.

On September 26, 2014, General Counsel filed General Counsel’s Answer to Respondent’s Cross-Exceptions to the Administrative Law Judge’s Decision (“General Counsel’s Answer”) and the Indiana State Pipe Trades Association and U.A. Local 440, AFL-CIO (the “Union”) filed Indiana State Pipe Trades Association and U.A. Local 440, AFL-CIO’s Answer to Respondent’s Cross Exceptions to the Administrative Law Judge’s Decision (the “Union’s Answer”). Both General Counsel’s Answer and the Union’s Answer failed to even acknowledge, let alone address the case law and evidence provided by Commercial Air in the Cross Exceptions. Instead, both General Counsel and the Union relied largely on points already rejected or found unpersuasive by Judge Bogas. As more fully explained below, Commercial Air’s Cross Exceptions should be sustained.

## I.

### **ARGUMENT**

In the ALJ's Decision, Judge Bogas recognized the shakiness of the General Counsel's *prima facie* showing with respect to the layoff of Mr. Lehr and the discharge of Mr. Howard. *ALJ Decision* at 15, 17. Judge Bogas nevertheless moved on to evaluate Commercial Air's stated reasons, eventually determining that Commercial Air's actions were proper and that no violation of the Act occurred. In its Cross Exceptions, Commercial Air affirmatively established the inquiry should have ended at the *prima facie* stage because the General Counsel failed to meet its burden of proof. Neither the General Counsel's Answer nor the Union's Answer substantively combat Commercial Air's Cross Exceptions.

#### A.

##### **Mr. Lehr's Layoff**

The crux of the General Counsel's inability to make a *prima facie* showing has always centered on timing. Commercial Air's Cross Exceptions extensively discussed the failure of timing in this case to raise a negative inference, including citation to analogous case law and the factual record in this case. *Cross Exceptions* at 29-32. Judge Bogas in fact recognized that a gap of at least three months occurred immediately prior to Mr. Lehr's layoff in which Commercial Air had no knowledge of continuing protected activities, nor did it engage in conduct during the period that would create more of a timing issue. *ALJ Decision* at 15-16.

The General Counsel and the Union failed to even address the case law and facts cited by Commercial Air, and they further failed to acknowledge the findings of Judge Bogas. Instead, both simply cited a case<sup>1</sup> indicating that negative inferences relating to motive may be drawn

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<sup>1</sup> This general citation to *Tinney Rebar Services, Inc.*, 354 NLRB 429 (2009), does not support the General Counsel's argument. In *Tinney*, to the extent timing was an issue at all, it involved an adverse action taken by an

from suspicious timing and that Mr. Lehr was let go within a few months of beginning an organizing campaign. *General Counsel's Brief* at 6; *Union's Brief* at 8.

Contrary to this characterization, 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 Union business agent John Kurek in April or May, 2012,<sup>2</sup> yet he admitted 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, 146. In all, Mr. Lehr was the only employee to sign a union authorization card, and even Union business agent John Kurek testified that the Commercial Air employees seemed to be happy with the working conditions at Commercial Air. *See Tr.* 207.

Even when the Union sent a formal notice of Mr. Lehr's status, Mr. Lehr remained employed. It was not until nearly four months thereafter, a point by which time Mr. Lehr had been attempting to organize employees 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. In any event, the closest measure of timing between protected activity and layoff spans nearly four months from November 12, 2012, to February 28, 2013.<sup>3</sup> Such a span cannot form the basis for an inference

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employer *immediately* after knowledge of protected activity. *Id.*, n.2. It did not involve a lapse of even a single day, let alone the nearly four month gap in the present case. Just like the present case, however, the Board ultimately affirmed the Administrative Law Judge's determination that no violation of the Act occurred.

<sup>2</sup> *Tr.* at 110-11. 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 support. 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.

<sup>3</sup> To the extent General Counsel and the Union imply that an active campaign occurred following the November 8, 2012 notice, the facts belie such an implication. Even so, they still have not identified any knowledge by Commercial Air of any ongoing efforts or established any other fact that would explain why Commercial Air would

of causation. *See Camaco Lorain Mfg. Plant*, 356 NLRB No. 143 (2011) (holding that a suspension occurring a full month after learning of union activity did not permit an inference of causation).

Similarly, neither the General Counsel nor the Union acknowledged or addressed Commercial Air's case law and factual showing that the General Counsel failed to establish the requisite animus. Rather, each relied on a newsletter Commercial Air distributed to its employees indicating that it preferred to remain union free despite Commercial Air's showing in its Cross Exceptions that 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). No party has even alleged that anything contained in the newsletter was improper or unlawful. As such, no animus can be established through the newsletter.

In sum, the General Counsel failed to establish suspicious timing or even improper anti-union animus because nearly four months passed between any known protected activity by Mr. Lehr and his layoff, and because employers are entitled to lawfully oppose unionization.

## **B.**

### **Mr. Howard's Discharge**

Judge Bogas correctly found that no evidence suggested Commercial Air knew of any protected activities by Mr. Howard. *ALJ Decision* at 17. In the Cross Exceptions, Commercial Air provided case law examples<sup>4</sup> and references to the facts that show why the lack of

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wait four months after finding out about Mr. Lehr's Union organizer status before taking an adverse action against him purportedly based on that status.

<sup>4</sup> *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

knowledge required dismissal for failure of the General Counsel to meet its *prima facie* burden. *See, Cross Exceptions* at 38-40.

The General Counsel's Answer and the Union's Answer again failed to even acknowledge Commercial Air's citation to case law, let alone address the case law or facts cited by Commercial Air. Instead, General Counsel and the Union simply assert knowledge of activities existed because Mr. Howard occasionally wore union clothing and rode to work with Mr. Lehr. *General Counsel's Answer* at 7; *Union's Answer* at 9.<sup>5</sup> Commercial Air, however, has already established in the Cross Exceptions that Mr. Howard's occasional use of clothing containing a union logo was not an act of protected activity but instead, by Mr. Howard's own words, merely "work clothes" worn since the beginning of his employment well before the onset of any organizing activity. *Cross Exceptions* at 39. Mr. Howard, himself, admitted Mr. Gatewood never indicated he had a problem with wearing such clothing, jackets, or stickers on his hardhat. *Tr.* at 185-86. Indeed, employees regularly wear such things, which never bothered Mr. Gatewood. *Tr.* at 331; *ALJ Decision* at 17. Thus, no knowledge of activities can be taken from Mr. Howard's work clothes.

The General Counsel and the Union ineffectively repeat their argument that knowledge of Union activities exists merely because Mr. Howard rode to work with Mr. Lehr.<sup>6</sup> According

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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).

<sup>5</sup> General Counsel and the Union allege Mr. Howard engaged in protected activity by talking with other employees about the Union and talking with the Union's business agent in the Summer of 2012. *General Counsel's Answer* at 7; *Union's Answer* at 8-9. Neither, however, even allege Commercial Air had knowledge of any such activity. To the contrary, as noted by Judge Bogas, no evidence of knowledge existed. *ALJ Decision* at 17.

<sup>6</sup> General Counsel and the Union each assert Mr. Gatewood knew that Mr. Howard rode to work with Mr. Lehr "everyday" and therefore allowed Mr. Howard to work the remainder of the day after Mr. Gatewood told him he was discharged. *General Counsel's Answer* at 7; *Union's Answer* at 9. Allowing an employee to work through the day after being discharged simply makes no sense. Rather, as Mr. Gatewood testified, he fired Mr. Howard at the beginning of the day, immediately followed by a 30-45 minute conversation in the break area in which Mr. Howard convinced Mr. Gatewood to give him one more chance. *Tr.* at 325-28. Thus, Mr. Howard's story that he was

to General Counsel, “it would not have been a stretch for Gatewood to guess that Howard . . . was also a supporter of the Union.” *General Counsel’s Answer* at 7. General Counsel, however, never provided evidence that Mr. Gatewood did, in fact, “guess” that Mr. Howard was a Union supporter or was involved in protected activities. Indeed, no evidence was presented that even Mr. Lehr engaged in Union activities at any point since November, 2012. *ALJ Decision* at 15-16. Judge Bogas therefore correctly rejected the General Counsel’s argument, finding “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.” *ALJ Decision* at 17.

Judge Bogas also correctly dispensed with the Union’s reference to Commercial Air’s internal form indicating Mr. Howard was laid off from the plumbing department for lack of work. Quite simply, the internal form was more consistent with Mr. Howard’s testimony than inconsistent, and it was completed by the plumbing foreman who had no role in Mr. Howard’s discharge. *ALJ Decision* at 18-19.<sup>7</sup> Mr. Howard even told Mr. Lehr he had been discharged for Mr. Howard’s “lack of production”. *Tr.* at 149-50. Thus, even before the discharge, all parties understood Mr. Howard was discharged for his performance, and Commercial Air has never relied on lack of work as the motivation for discharge.

The arguments of General Counsel and the Union attempting to establish improper animus are likewise deficient. Each argues that the element is satisfied by pointing not to conduct involving Mr. Howard but instead to Mr. Lehr – i.e., because Commercial Air disciplined Mr. Lehr immediately after the Union notified Commercial Air that Mr. Lehr was a

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allowed to continue working because Mr. Lehr was his ride home should not be credited. In any event, Mr. Howard did not in any way indicate that Mr. Gatewood knew about the driving arrangement prior to the day of the incident. *Tr.* at 167-68.

<sup>7</sup> Mr. Gatewood did not participate in creating the internal form and acknowledged the internal form is incorrect. *Tr.* at 43, 86.

Union organizer, Commercial Air must harbor animus toward Mr. Howard. The Union, however, never indicated Mr. Howard was an organizer or supporter, nor was Mr. Howard disciplined along with Mr. Lehr. With no knowledge of activities by Mr. Howard, Commercial Air could not have harbored animus toward the activities.

Finally, General Counsel and the Union indicate the timing of the discharge, coming within a few months of the organizing campaign, is suspect. As shown in the Cross Exceptions and above, Judge Bogas correctly rejected that argument because there simply is no evidence of Union activity after November, 2012, thereby creating at least a three month gap. *ALJ Decision* at 15-16.

### **III.**

#### **CONCLUSION**

For all of the foregoing reasons, Commercial Air respectfully requests that its cross exceptions be sustained and that the Complaint allegations relating to the layoff of Mr. Lehr and discharge of Mr. Howard be dismissed not only for the reasons cited by Judge Bogas, but also because the General Counsel failed to satisfy its prima facie burden.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was filed electronically on October 10, 2014 and served upon the following by electronic mail and by first-class, U.S. mail, postage prepaid:

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