

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SHAMBAUGH & SON, L.P.

and

Case Nos. 25-CA-141001
25-CA-145447

INTERNATIONAL ASSOCIATION OF
HEAT AND FROST INSULATORS AND
ALLIED WORKERS, LOCAL #41

RESPONDENT'S EXCEPTIONS TO ALJ'S DECISION

Pursuant to Section 102.46 of the Board's Rules and Regulation, Respondent Shambaugh & Son, L.P. ("Shambaugh"), by counsel, takes exception to the Administrative Law Judge's Decision dated September 17, 2015, with regard to the following findings:

1. That when supervisor Dean Sheedy informed a representative of the temporary employment agency that Ryan Wiersema was actually employed by the union despite stating he was unemployed, he did not also state that Shambaugh would not hire Wiersema "for other reasons." The ALJ deemed Sheedy's testimony on this point "uncorroborated," but just two pages earlier referred to certain testimony provided only by Wiersema as "uncontroverted." [ALJ, p. 5-6, fn. 5; p. 3, fn. 2].

2. That when supervisor Dean Sheedy informed a representative of the temporary employment agency that Ryan Wiersema was actually employed by the union despite stating he was unemployed, he did not also state that Shambaugh would not hire Wiersema "for other reasons." The ALJ deemed it "implausible" that Sheedy would state this without specifying the precise reasons. The ALJ points to no evidence and offers no explanation as to why it is implausible for a supervisor to refrain from sharing the details of personnel issues involving violent misconduct with a third-party. [ALJ, p. 5-6, fn. 5].

3. That “Stanton corroborated Wiersema’s account.” [ALJ, p. 7]. Despite being the General Counsel’s witness, the evidence reveals that Stanton (like every other witness that testified) contradicted Wiersema’s account of Shane Shepherd’s comments. [Hr. Tr. 62].

4. That Wiersema’s “vivid detailed recall of what occurred, including everything he and Shephard said to one another and other specifics concerning where Wiersema was and what he was working on at the time” are “indicative of reliable, credible testimony” while other witnesses use of “qualifiers such as ‘basically’” and use of “generalities” somehow “detract from the believability of their testimony.” [ALJ, p. 9]. The ALJ just one page earlier explained that it “would be expected” for witnesses to “struggle[] to pinpoint” exact details of “an event which occurred some 7 years ago.” [ALJ, p. 8]. Essentially, the ALJ concluded Respondent’s witnesses were not testifying truthfully based on circumstances he himself indicated would be entirely expected.

5. That Wiersema’s “vivid detailed recall of what occurred, including everything he and Shephard said to one another and other specifics concerning where Wiersema was and what he was working on at the time” are “indicative of reliable, credible testimony.” [ALJ, p. 9]. In addition to being contradicted in some respect by every other witness, the record evidence actually reveals that Wiersema’s own testimony contradicted itself as to aspects of the incident. For example, Wiersema first testified that he did not believe he had his knife at the time of the incident, then testified he may have had his knife, and finally acknowledged that he had his knife in his hip pouch. [Hr. Tr. 136, 137, 162].

6. That “[a]s to the timing of the incident, witness testimony was consistent that the incident occurred in either the spring or summer 2007,” and “[t]hat means Wiersema remained on the job after the incident, because he did not leave until September 21, 2007.” [ALJ, p. 9].

However, in direct contradiction to this finding, the ALJ specifically and correctly noted that September 21st was in the Summer of 2007. [ALJ, p. 10, fn. 6]. Also, the only witness who specified a particular date did, in fact, identify September 21st as the date of the incident. [Hr. Tr. 238.]. Essentially, the ALJ found Wiersema continued working after the incident “as a matter of logic,” despite being contradicted by the very facts he relied upon. [ALJ, p. 10].

7. That there is “inconclusive documentary evidence” as to whether Wiersema remained on the job after the incident. [ALJ, p. 9]. “[R]ecords from NEDRA establish definitively that [Wiersema] worked on the project until September 21, 2007” and “NEDRA’s invoices . . . establish that NEDRA worked on the project through December 2007 and again in March 2008 before Wiersema’s resignation.” [ALJ, pp. 89].

8. That despite Wiersema leaving in September 2007 and NEDRA continued on the job through December 2007 (and beyond,) “it does not necessarily mean he was pulled off the job early because the insulators sometimes finish their job before the end of NEDRA’s work.” [ALJ, p. 9]. In reaching this conclusion, the ALJ relied exclusively upon the testimony of Cody Love, a long-time Shambaugh employee who has never worked for NEDRA. [*Id.*] The ALJ made two crucial mistakes in this regard. First, NEDRA was exclusively an insulation contractor and there is absolutely no evidence that it stays on a job after insulating work is done. It seems the ALJ erroneously relied upon the statement by Cody Love that, “So a lot of times when the insulators are done, we might still be there a little while longer.” [Hr. Tr. 292]. But, “we” cannot refer to NEDRA employees as Cody Love never worked there. Second, this finding simply ignores Cody Love’s much more specific testimony – on the very same pages of the transcript – that he never saw Wiersema back on the job after threatening a coworker, he recalled

specific details of Wiersema's replacement (e.g., he was "a big-time Ohio State fan"), and NEDRA remained on the job for a couple months after the incident. [Hr. Tr. 291-292].

9. That "[i]f the Respondent's reason is pretextual, the General Counsel has satisfied his *FES/Wright Line* burden." [ALJ, p. 11]. In this case, there is no evidence of union animus whatsoever. Moreover, there is no legitimate evidence of a causal connection between Wiersema's union activity and Shambaugh's employment decisions. Thus, the burden never shifted to Shambaugh to "show it would have taken the same action for that reason, absent protected conduct." Essentially, the ALJ has put the cart before the horse and has used the second step of the analysis (*i.e.*, the employer's stated reason for its action) to jettison the General Counsel's obligation to show union animus – a result not supported by the cited decisions, as explained in Respondent's Brief in Support of Exceptions.

10. That Sheedy had claimed "Wiersema was violent and unfit for employment" and this was not believable because Sheedy noted that there was a job opening with a related company. [ALJ, p. 11]. In reality, Sheedy did not state that Wiersema was unfit for all employment and instead stated he was unfit to work for Shambaugh with the same employees who had been involved in the prior incident (e.g., Cody Love who was scared of him and Ed Love who caused his removal from the prior job). [Hr. Tr. 241].

11. That "an incident which did not warrant Wiersema's termination when it occurred cannot be a credible ban to his hiring some 7 years later." [ALJ, p. 12]. This is a straw man. The prior incident clearly resulted in Wiersema's removal from a Shambaugh job site that employed Ed Love and Cody Love and properly resulted in essentially the same result now.

12. That Sheedy "repeatedly express[ed] his willingness to help Wiersema get a job" and "would let him know if Shambaugh had any openings." [ALJ, p. 4 & 12]. The ALJ cites

nothing in support of this proposition. In reality, Sheedy mentioned to Wiersema a job opening at EMCOR. He also testified that he was in a new position at Shambaugh, knew of its strict policies on violence, recognized that several Shambaugh employees had been directly involved in the prior incident, and he simply did not “want any issues,” so Wiersema was not a good fit for his division at Shambaugh. [Hr. Tr. 240-241]. Of course, none of this was true of EMCOR.

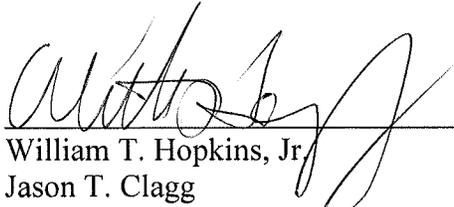
13. That Sheedy did not hire Wiersema because of a concern he would “become violent on the job” and this is undermined by him mentioning a job opening at EMCOR. [ALJ, p. 12]. However, Sheedy explained (and the ALJ disregarded without any analysis) that he was in a new position at Shambaugh, knew of its strict policies on violence, recognized that several Shambaugh employees had been directly involved in the prior incident, and he simply did not “want any issues.” [Hr. Tr. 240-241]. This is analytically different than a generalized concern over violence.

14. That the sequence of events between when Sheedy informed Wiersema of the EMCOR job opening in February 2014 and Sheedy’s refusal to hire Wiersema is “eye opening.” [ALJ, p. 12]. As repeatedly explained above, a job with another company is distinctly different from a job at Shambaugh with the very same employees involved in the prior incident and the ALJ was wrong to somehow conclude there is a tension between mentioning the former while rejecting the latter. [Hr. Tr. 240-241].

15. That Shambaugh violated Section 8(a)(3) and (1) of the Act by refusing to hire Wiersema on or about June 24, 2014, and thereafter refusing to consider Wiersema for hire. [ALJ, p. 15]. As explained above, there is no evidence of union animus in this case and, even if there was, Sheedy has presented a legitimate, non-discriminatory reason for its actions.

Respectfully submitted,

BARNES & THORNBURG LLP

A handwritten signature in black ink, appearing to read "W. Hopkins, Jr.", is written over a horizontal line.

William T. Hopkins, Jr.

Jason T. Clagg

110 East Wayne Street, Suite 600

Fort Wayne, Indiana 46802

Telephone: (260) 423-9440

Facsimile: (260) 424-8316

ATTORNEYS FOR SHAMBAUGH & SON, L.P.

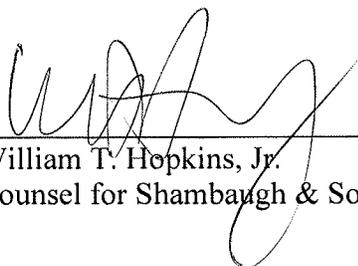
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing RESPONDENT'S EXCEPTIONS TO ALJ'S DECISION was e-filed with the Executive Secretary of the National Labor Relations Board and was electronically served upon the following persons on this 15th day of October 2015.

Rik Lineback, Regional Director
National Labor Relations Board
Region Twenty-Five
Room 238, Minton-Capehart Federal Building
575 North Pennsylvania Street
Indianapolis, Indiana 46204
rik.lineback@nrlb.gov

Raifael Williams
Counsel for General Counsel
National Labor Relations Board
Region Twenty-Five
Room 238, Minton-Capehart Federal Building
575 North Pennsylvania Street
Indianapolis, Indiana 46204
raifael.williams@nrlb.gov

Ryan Wiersema
INTERNATIONAL ASSOCIATION OF
HEAT AND FROST INSULATORS
AND ALLIED WORKERS, LOCAL #41
3626 North Wells Street
Fort Wayne, Indiana 46808-4005
aw41org@insulators.org



William T. Hopkins, Jr.
Counsel for Shambaugh & Son, L.P.