

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 BRIEF IN SUPPORT OF EXCEPTIONS

Pursuant to Section 102.46 of the Board's Rules and Regulation, Respondent Shambaugh & Son, L.P. ("Shambaugh"), by counsel, has taken exception to the Administrative Law Judge's Decision dated September 17, 2015, and submits this brief in support thereof.

I. STATEMENT OF THE CASE

In 2007, Dean Sheedy and Ryan Wiersema worked for an insulation contractor called NEDRA. Sheedy was a supervisor for NEDRA and Wiersema was an hourly employee. At that time, NEDRA was hired to perform insulating work on a Shambaugh job site. On September 21, 2007, Wiersema threatened a Shambaugh employee with violence on the site. While most witnesses recalled Wiersema holding a long knife and threatening to gut the employee, Wiersema testified that he "only" threatened to knock the employee's teeth down their throat. The incident was witnessed by Shambaugh employee Cody Love. And, Wiersema's immediate removal from the job site was demanded by Shambaugh supervisor Ed Love.

By 2014, Sheedy had become a supervisor for Shambaugh while Ed Love and Cody Love continued to work for Shambaugh in the same capacities. Shortly after Sheedy became a Shambaugh supervisor, Wiersema applied for a job (through a temporary agency) and Sheedy declined to hire him. Sheedy explained his decision by noting that he was in a new supervisory position at Shambaugh, he knew of its strict policies on violence, he recognized that Ed Love and

Cody Love had been directly involved in the prior incident, and he simply did not “want any issues.”

Nevertheless, the ALJ concluded that Shambaugh illegally refused to hire (and thereafter consider for hire) Wiersema in violation of Sections 8(a)(3) and (1) of the Act and ordered Shambaugh to employ Wiersema, among other remedies. This decision cannot stand as the ALJ made a number of legal, factual, and logical errors to arrive at this conclusion.

II. QUESTIONS PRESENTED

- 1) Regardless of whether it was a threat with a knife or a promise to knock a coworker’s teeth out, did the ALJ improperly dismiss the import of Wiersema’s history of violence on a Shambaugh job site in regard to Shambaugh employees? (Exception Nos. 3, 4, 5, 15).
- 2) Did the ALJ erroneously conclude Wiersema continued working on the job site following the incident despite uncontroverted documentary evidence to the contrary? (Exception Nos. 6, 7, 8, 15).
- 3) Did the ALJ mischaracterize interactions between Sheedy and Wiersema regarding an opening with another company as a willingness by Sheedy to hire Wiersema? (Exception Nos. 6, 12, 13, 15).
- 4) Did the ALJ misstate Sheedy’s uncontroverted explanation as to why he did not hire Wiersema as a generalized concern about violence, when Sheedy made it clear it was the more specific concern about placing Wiersema back on a Shambaugh job site with the very same Shambaugh employees involved in the prior incident, particularly in light of Shambaugh’s strict policy on violence and the fact Sheedy had just become a supervisor? (Exception Nos. 1, 2, 10, 11, 14, 15).

- 5) Did the ALJ deviate from established law by relieving the General Counsel of his burden of establishing anti-union animus? (Exception Nos. 9, 15).
- 6) Did the ALJ improperly conclude that anti-union animus existed despite nothing in the record demonstrating as much? (Exception Nos. 9, 15).

III. ARGUMENT & AUTHORITY

This case boils down to, “Why was Wiersema not hired in June 2014?” The answer is equally simple – he had been previously thrown off a Shambaugh job site for threatening a Shambaugh union member with violence. Since the record evidence establishes as much -- without even a hint of anti-union animus -- the ALJ’s decision cannot stand.

A. The Applicable Legal Standard

The claimed failure to hire (and failure to consider for hire) is analyzed under the familiar *Wright Line* analysis. 251 NLRB 1083 (1980). As a threshold issue, the General Counsel must demonstrate that “antiunion animus contributed to the decision not to hire” Wiersema. *FES*, 331 NLRB 9, 13 (2000). In fact, the General Counsel would need to “prove that antiunion animus was a substantial or motivating factor in the employer’s decision to make [an] adverse employment decision[.]” *Int’l Union of Operating Eng’rs, Local 150 v. NLRB*, 325 F.3d 818, 829 (7th Cir. 2003) (internal quotation and citation omitted); *W&M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1349 (D.C. Cir. 2008) (requiring that “protected union conduct was a motivating factor in [the employer’s] decisionmaking process”). Proof of antiunion animus in the hiring decision is an essential element of the General Counsel’s *prima facie* case. *E & I Specialists, Inc. & Int’l Brotherhood of Elec. Workers, Local 343*, 349 NLRB 446, 450 (2007). Only if the General Counsel makes this showing does the burden shift to Shambaugh to prove it “would not have hired [Wiersema] even in the absence of [his] union activity or affiliation.” *Int’l Union*, 325 F.3d at 827. In summary, “there must be a showing that the employer

maintained animus against [] union membership or sympathy, and the employer refused to hire the applicant because of such animus.” *Euro Builders, Ltd.*, 2014 NLRB LEXIS 810 (Oct. 24, 2014), *adopted by* 2014 NLRB LEXIS 945 (Dec. 9, 2014) (emphasis added).

B. The Prior Incident: Wiersema Threatened a Shambaugh Employee and was Immediately Removed from the Shambaugh Job Site

The consistent testimony and documentary evidence makes it clear that Wiersema made a violent threat on a Shambaugh job site against a Shambaugh employee in September 2007 and was immediately removed from the project. The ALJ’s conclusions to the contrary are unfounded and must be reversed.

i. There is No Dispute that Wiersema Previously Threatened a Shambaugh Employee with Violence

Numerous witnesses testified regarding just how Wiersema was thrown off a Shambaugh job site for pulling a knife with a seven-inch blade on a Shambaugh union member and threatening to “gut” him. [Hr. Tr. 5, 288, 295, 301]. Wiersema denied this allegation and claimed he did not pull a knife and only threatened to “knock [his] teeth down [his] throat.” [ALJ, p. 7; Hr. Tr. 135-136]. While the ALJ ultimately resolved this disparity in favor of Wiersema’s version of events, the stated reasons for doing so are inaccurate and are undermined by the ALJ’s own decision. For example, the ALJ determined that witnesses reasonably had difficulty recalling particular aspects of Wiersema’s violent threat, given the seven-year time lapse between Wiersema’s threat and the date of the hearing. [ALJ, p. 8]. Nonetheless, the ALJ discredited witnesses on the basis of their lack of exact recall. [ALJ, p. 9].

More importantly, however, the ALJ necessarily concluded that threatening to “knock your teeth down your throat” is not problematic in itself. *J.J. Cassone Bakery, Inc.*, 350 NLRB 86, 87 (2007) (Board reversed ALJ and concluded employer satisfied *Wright Line* where employee, without a knife, said “I will break your bones and I will knife you”). Regardless of

which version of events is accurate, the incident was serious enough to warrant Wiersema's removal from the job site (as discussed below.) The suggestion that such a threat is not a legitimate basis for refusing to hire an applicant is legally unsound and has nothing to do with credibility.

ii. Consistent Testimony and Documentary Evidence Prove Wiersema was Removed from the Shambaugh Job Site Before the Project Concluded

The ALJ's decision states that "witness testimony was consistent that the incident occurred in either the spring or summer 2007," the only witness who specified a particular date indicated it occurred on September 21st, and September 21st was still part of the summer. [ALJ, p. 9, 10, fn. 6]. The ALJ also held that "records 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." [ALJ, p. 8]. In direct contradiction to the "consistent" witness testimony and the documentary evidence, the ALJ accepted Wiersema's account that he continued working on the job site after the incident (presumably implying it was less serious than alleged.) *Rogan Bros. Sanitation, Inc.*, 2015 NLRB LEXIS 258 (Apr. 8, 2015) ("documentary evidence clearly preponderates over testimonial evidence").

The ALJ made two errors to arrive at this mistaken conclusion. First, the ALJ essentially concluded that because September 21st was near the end of the summer, the witnesses must have meant it happened earlier and, as a result, Wiersema must have worked on the job site after the incident. [ALJ, p. 10]. The ALJ not only discounted the fact that September 21st precedes the start of autumn, he inaccurately concluded that Wiersema's last day could not have been September 21st, reasoning "it is doubtful, as a matter of logic, that Sheedy, or any other witness, would recall and testify that the incident occurred in the summer, much less the early spring, had

it happened on September 21.” [ALJ, p 10]. Not only is there no legal or factual support for this conclusion, governmental weather records reveal it was 87 degrees on September 21st. (Ex. A - *National Oceanic & Atmospheric Administration Record of Climatological Observations*, 9/21/2007).¹

Second, the ALJ suggested that even though a third-party’s records establish that Wiersema stopped work on September 21st while NEDRA continued through December, he was not necessarily pulled from the project because the NEDRA insulators sometimes finish their job before the end of NEDRA’s work. [ALJ, p. 9]. This is just wrong. NEDRA was exclusively an insulation contractor and there is absolutely no evidence that it stays on a job after insulating work is finished. [Hr. Tr. 90-91, 139 (NEDRA is a mechanical insulating contractor)]. 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. Also, this 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].

C. **The Legitimate Reason for Not Hiring Wiersema: Sheedy, a Novice Shambaugh Supervisor, Did Not Want to Be Responsible for Placing Wiersema Back in the Exact Same Environment**

Sheedy was a novice Shambaugh supervisor in 2014. [Hr. Tr. 11, 241]. He then received word from a temporary employment agency used by Shambaugh that Wiersema had indicated he

¹ The ALJ took administrative/judicial notice that the first day of fall was September 23, 2007. [ALJ, p 10, fn. 6]. The Board can certainly take administrative/judicial notice of an official and reliable record concerning the summer temperatures on September 21, 2007. *See In Re San Manuel Indian Bingo & Casino*, 341 NLR.B 1055, 1064 n 3 (2004).

was unemployed and had applied for a job as a Shambaugh insulator. [Hr. Tr. 38-39]. Sheedy responded that he was aware that Wiersema was, in fact, employed by the union, but that he was not interested in hiring Wiersema for other reasons. [Hr. Tr. 39]. The other reason, which Sheedy chose not to share with the agency, was the prior incident. [Hr. Tr. 39-40]. Sheedy, as a new supervisor who was well aware of Shambaugh's strict policies regarding violence, did not want to be responsible for bringing Wiersema back to a Shambaugh job site to work side-by-side with the very individuals involved in the prior incident (*e.g.*, Ed Love and Cody Love). There is absolutely nothing in the record to the contrary. The ALJ rejected this uncontroverted testimony, yet failed to provide any reasoned basis for doing so.

i. Sheedy's Willingness to Help Wiersema Find Work is Not Equivalent to Placing Him Back with the Same Coworkers Involved in the Prior Incident

Sheedy has been acquainted with Wiersema for years. In fact, the two would speak on the telephone and occasionally meet for lunch or coffee and would discuss all sorts of matters related to life in general. [Hr. Tr. 240]. During such conversations, Wiersema would sometimes complain about his job and ask Sheedy if he knew of any openings. [*Id.*]. On one occasion, Sheedy informed Wiersema of a job posting at a company called EMCOR. EMCOR is a distinct company, but is affiliated with Shambaugh. Sheedy has no role at EMCOR and knows very little about it. [Hr. Tr. 12 (Sheedy confirming he does not know what EMCOR does)].

With these circumstances as a foundation, the ALJ made a leap of logic to conclude that because Sheedy had been willing to point out job openings to Wiersema at a different company, it must necessarily be pretextual for him to decline to hire Wiersema later. [ALJ, p. 12]. This overlooks the realities of the situation and essentially compares apples to oranges. The ALJ offers no basis for discounting Sheedy's testimony that the reason he declined to hire Wiersema was that he did not want to be responsible for putting him back in the very same situation with

the very same people involved in the prior incident – a factor that clearly distinguishes the present circumstances from a job opening at EMCOR. [Hr. Tr.240-241]. Also, Sheedy has no knowledge of whether EMCOR’s policies are as strict as Shambaugh’s. [Hr. Tr. 278-279].

ii. Sheedy’s Decision Not to Place Wiersema Back with the Same Coworkers Involved in the Prior Incident is Not Equivalent to a Generalized Concern About Violence

On a related note, the ALJ also concluded that Sheedy’s reason for refusing to hire Wiersema must be pretextual because if he was concerned about Wiersema’s violent propensities, he would have fired him from NEDRA (as opposed to just removing him from the Shambaugh job site) and would not have recommended him for work at EMCOR. [Hr. Tr. 12]. With that said, Sheedy did not base his decision on a generalized concern about violence. Instead, as a new supervisor, he did not want to bring Wiersema back to a Shambaugh job site where he would essentially be trumping Ed Love’s supervisory authority (as he had required Wiersema’s removal after the incident) and would be asking Cody Love to uncomfortably work side-by-side with Wiersema (as he had seen Wiersema “freak[] out” and “scare” a coworker by threatening him with violence.) [Hr. Tr.240-241, 289, 291, 302-304].

Sheedy declined to hire Wiersema for specific, uncontroverted reasons that were peculiar to his division at Shambaugh. Those reasons are not undermined by providing assistance to Wiersema in finding other work nor are they based on a general fear of Wiersema’s violent tendencies. And, there is no record evidence suggesting as much.

D. The Total Absence of Evidence of Anti-Union Animus

Of course, before any obligation arises for Shambaugh to prove anything (*i.e.*, that it would have taken the same action in spite of an alleged anti-union animus,) the General Counsel must first show that animus existed. However, in this matter, there is a total absence of evidence of animus.

Both a preference to remain nonunion and “knowledge that a pool of applicants is union affiliated and the subsequent failure to hire any of them [are] insufficient to support a finding of animus.” *E & I Specialists*, 349 NLRB at 450. Contrary to these established principles, the ALJ in this case relied on Sheedy’s knowledge of Wiersema’s union affiliation and the mere fact that in the spring of 2014, the Insulators bannered Shambaugh to find that the General Counsel had established a *prima facie* case. [Hr. Tr. 263]. That is it. And, in regard to the bannering, Sheedy indicated that whether the company was interested in an agreement was “above his pay grade” while Shambaugh’s vice president testified that such-bannering did not change his willingness to sign a contract with the union. [Hr. Tr. 275-276, 290]. Essentially, the existence of benign protected activity is the sum total of the General Counsel’s “proof” of animus. The mere existence of protected activity cannot possibly be sufficient to constitute animus and carry the day.

The ALJ also disregarded evidence of Shambaugh’s pro-union record despite the fact that “[a]n employer’s main defense against a finding of antiunion animus is a showing that it actually hired union applicants.” *E & I Specialists*, 349 NLRB at 450. In this case, the record evidence demonstrates that Shambaugh is an exceedingly pro-union employer. Shambaugh is a signatory to more than 100 labor agreements (as evidenced by “two solid file cabinets” containing nothing but agreements), it spoke out against the repeal of Indiana’s common wage law, it testified against Indiana’s right to work law, and it is a member of Top Notch – a building trades and employer cooperative whose purpose is the promotion of union industry. [Hr. Tr.255, 258-263].

Peculiarly, there was also other uncontroverted evidence that Sheedy knew of Wiersema’s union affiliation, yet specifically stated he was not interested in hiring Wiersema for “other reasons.” [Hr. Tr. 39]. The ALJ then discounted this as “uncorroborated,” but did so just

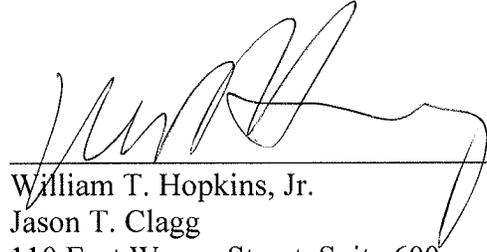
two pages after he credited certain testimony of the General Counsel's witness' unilateral testimony as "uncontroverted." [ALJ, p. 5-6, fn. 5; p. 3, fn. 2]. While not dispositive, it also seems clear that the ALJ considered testimony in a blatantly disparate manner.

IV. CONCLUSION

The undisputed evidence demonstrates that Shambaugh is a pro-union employer, and that supervisor Sheedy's hiring decision stemmed from Wiersema's conflicts with Shambaugh employees, not from any anti-union animus. The Administrative Law Judge erred by mistakenly disregarding the undisputed evidence. In addition, the Administrative Law Judge erred as a matter of law, by finding that the General Counsel established a prima facie case. Accordingly, Shambaugh respectfully requests that the Board reverse the Administrative Law Judge's decision.

Respectfully submitted,

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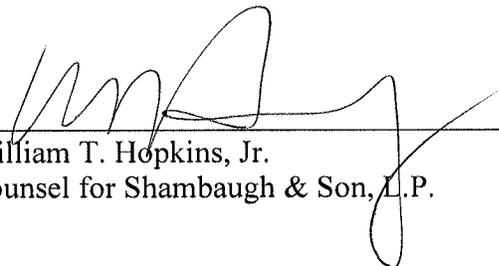
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS 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:

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EXHIBIT A

Record of Climatological Observations
These data are quality controlled and may not be identical to the original observations.
Generated on 10/15/2015

P r e l i m i n a r y	M o n t h	D a y	Temperature (F)		at O b s e r v a t i o n	Precipitation(see *)			At Obs Time	Evaporation		Soil Temperature (F)					
			24 hrs. ending at observation time	Min.		Max.	24 Hour Amounts ending at observation time	Rain, melted snow, etc. (in)		F l a g	Snow, ice pellets, frazil (in)	F l a g	Snow, ice pellets, frazil, ice on ground (in)	24 Hour Wind Movement (mi)	Amount of Evap. (in)	4 in depth	
												Ground Cover (see *)	Max.	Min.	Ground Cover (see *)	Max.	Min.
2007	9	1	79	52		0.00		0.0	0								
2007	9	2	83	54		0.00		0.0	0								
2007	9	3	86	54		0.00		0.0	0								
2007	9	4	88	59		0.00		0.0	0								
2007	9	5	91	59		0.00		0.0	0								
2007	9	6	84	64		0.00		0.0	0								
2007	9	7	84	70		0.00		0.0	0								
2007	9	8	78	69		0.57		0.0	0								
2007	9	9	78	64		0.63		0.0	0								
2007	9	10	76	61		0.00		0.0	0								
2007	9	11	72	53		0.26		0.0	0								
2007	9	12	69	46		0.00		0.0	0								
2007	9	13	77	47		0.00		0.0	0								
2007	9	14	72	49		0.00		0.0	0								
2007	9	15	62	42		0.00		0.0	0								
2007	9	16	67	40		0.00		0.0	0								
2007	9	17	77	43		0.00		0.0	0								
2007	9	18	84	52		0.00		0.0	0								
2007	9	19	86	58		0.00		0.0	0								
2007	9	20	85	60		0.00		0.0	0								
2007	9	21	87	59		0.00		0.0	0								
2007	9	22	78	53		0.00		0.0	0								
2007	9	23	83	49		0.00		0.0	0								
2007	9	24	92	56		0.00		0.0	0								
2007	9	25	85	66		0.21		0.0	0								
2007	9	26	70	62		0.05		0.0	0								
2007	9	27	74	52		0.03		0.0	0								
2007	9	28	74	48		0.00		0.0	0								
2007	9	29	78	44		0.00		0.0	0								
2007	9	30	83	48		0.00		0.0	0								
Summary			79.4	54.5		2.47		0.0	0								

The "*" flags in Preliminary indicate the data have not completed processing and quality control and may not be identical to the original observation. Empty, or blank, cells indicate that a data observation was not reported.

*Ground Cover: 1=Grass; 2=Fallow; 3=Bare Ground; 4=Brome grass; 5=Sod; 6=Straw mulch; 7=Grass muck; 8=Bare muck; 9=Unknown

*s- This data value failed one of NCDC's quality control tests.

*T- values in the Precipitation category above indicate a TRACE value was recorded.

*A- values in the Precipitation Flag or the Snow Flag column indicate a multiday total, accumulated since last measurement, is being used.

Data value inconsistency may be present due to rounding calculations during the conversion process from SI metric units to standard imperial units.