

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 REPLY IN SUPPORT OF EXCEPTIONS

The General Counsel’s response is twice the length of the brief submitted by the employer, Shambaugh & Son, L.P. (“Shambaugh”). With that said, the majority of the response is devoted to non-controversial, largely undisputed facts having little or nothing to do with Shambaugh’s exceptions. When this smokescreen is cast aside, the General Counsel has offered very little to rebut the specific arguments presented by Shambaugh, with many of those arguments going entirely unaddressed. As further described herein, Shambaugh did not violate Section 8(a)(3) or (1) of the Act by refusing to hire Wiersema and the ALJ’s decision must be reversed.

A. The General Counsel Did Not Satisfy its Legal Burden as to the Existence of Animus or Causation

“[T]he General Counsel must, under the allocation of burdens set forth in *Wright Line*, . . . first show . . . that antiunion animus contributed to the decision not to hire the applicant[.]” *FES*, 331 N.L.R.B. 9, 12 (2000). This necessarily requires the General Counsel to first prove both the existence of animus *and* that such animus motivated the employment decision before any burden shifts to the employer. *Ctr. Constr. Co.*, 345 N.L.R.B. 729 (2005) (a “causal nexus is also required under the Board’s *FES* . . . analyses”). In the case at bar, the General Counsel has failed to satisfy these requirements as he provided no evidence of anti-union animus nor is there any nexus between the (nonexistent) animus and Shambaugh’s decision not to hire Wiersema.

Shambaugh is an exceedingly pro-union employer and Sheedy was friends with Wiersema. At most, Sheedy told Wiersema about a job opening with another company, Wiersema engaged in benign protected activity, and later Sheedy -- a relatively new Shambaugh supervisor who was familiar with the company's strict policy on violence -- chose not to hire Wiersema to work on a Shambaugh job site side-by-side with the same individuals who witnessed and dealt with Wiersema's prior threat of violence. [Hr. Tr. 240-241, 289, 291, 302-304]. That is the sum total of the General Counsel's evidence of anti-union animus *and* causation. This is insufficient to satisfy the General Counsel's legal burden.

B. The ALJ's Decision Contains Significant, Demonstrable Errors in its Characterization of Record Evidence

The General Counsel's response also chose to ignore crucial disconnects between the underlying decision and the record evidence. For example, documentary evidence clearly establishes that Wiersema was removed from the prior project following his threat of violence on September 21st. *Rogan Bros. Sanitation, Inc.*, 2015 NLRB LEXIS 258 (Apr. 8, 2015) ("documentary evidence clearly preponderates over testimonial evidence"). Likewise, there was absolutely no testimony that Nedra remained on the project after the insulating work was completed. [Hr. Tr. 292]. Nor was there testimony that the refusal to hire Wiersema was based on a generalized concern about violence as opposed to a desire to avoid forcing the Shambaugh employees involved in the prior incident to again work with Wiersema. [Hr. Tr. 240-241, 289, 291, 302-304]. These are *material* errors in the decision's characterization of record evidence and the General Counsel does nothing to explain them away.

C. The ALJ's Decision Repeatedly Disregards Undisputed Record Evidence in Favor of Unfounded Assumptions

Similarly, the General Counsel offers no explanation for critical reasoning errors in the underlying decision. For example, the decision acknowledges that witnesses uniformly testified

that Wiersema made his threats in the summer of 2007, thus “logic” dictates it necessarily occurred prior to September 21st -- the day Wiersema was removed from the project. [ALJ, p 10]. This is not logical. September 21st was, in fact, in the summer of 2007 and the temperature reached almost 90 degrees that day.

Similarly, the decision found it “implausible” an employer would refrain from disclosing why it chose not to hire a particular employee to a third-party and disregarded undisputed testimony on the point. [ALJ, p. 5-6, n.5]. There is no basis for concluding this was implausible. Many (if not most) employers are tight-lipped about hiring decisions and prior misconduct, and no explanation was provided as to why this routine approach was implausible in this case.

Moreover, different and conflicting standards were applied to the parties’ evidence. Despite recognizing it was “expected” that memories would fade over seven years, the veracity of Shambaugh’s witnesses was questioned for this reason. [ALJ, p. 8-9]. And, when the General Counsel’s witness testified unilaterally it was deemed “uncontroverted,” but when Shambaugh’s witness did the same it was characterized as “uncorroborated.” [ALJ, p. 5-6, fn. 5; p. 3, fn. 2]. There is no explanation for this seemingly unfair approach to the consideration of the case.

D. Despite the General Counsel’s Boilerplate Suggestion to the Contrary, Shambaugh’s Exceptions are Not Founded on Credibility Determinations

Instead of confronting the obvious legal, factual, and logical errors in the underlying decision, the General Counsel predictably retreats to argue about credibility. However, “credibility” is not a shibboleth and Shambaugh’s exceptions are not premised on it. Instead, the underlying decision must be reversed as the General Counsel failed to prove anti-union animus or that such animus contributed to Shambaugh’s decision *and* Shambaugh established that it would have taken the same action regardless of any animus. The ALJ’s decision was only able to reach the opposite conclusion by impermissibly watering-down the standard set forth in *FES*

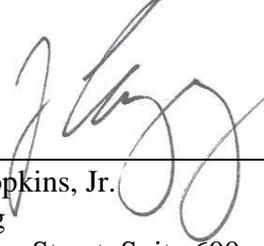
while disregarding key portions of the undisputed record both mistakenly and based on indefensible, non-evidenced based reasoning.

E. Conclusion: Shambaugh Did Not Violate the Act in Regard to Wiersema

Shambaugh did not violate Section 8(a)(3) or (1) of the Act by refusing to hire Wiersema or consider him for hire. Shambaugh's exceptions are warranted and the underlying decision cannot stand. Shambaugh holds no animus against unions in general or the Insulators or Wiersema in particular. The only animus established in this case is that Shambaugh prefers not to hire persons who have admittedly threatened its employees with physical violence on its own job site. This is both legitimate and lawful.

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AMENDED CERTIFICATE OF SERVICE

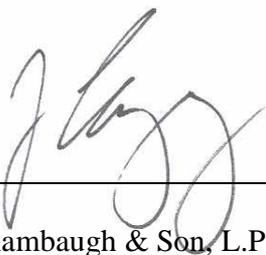
The undersigned hereby certifies that a copy of the foregoing *Respondent's Reply in Support of Exceptions* was e-filed with the Executive Secretary of the National Labor Relations Board, and was electronically served upon the following persons on the 9th day of November 2015:

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The undersigned further certifies that pursuant to the instructions of the Office of the Executive Secretary, a copy of the foregoing document was electronically served upon the following person on the 9th day of November, 2015:

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