

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

JERRY RYCE BUILDERS, INC.,)		
)		
Respondent,)		
)		
and)	Case Nos.	13-CA-43917
)		13-CA-43918
ILLINOIS DISTRICT COUNCIL NO. 1,)		
INTERNATIONAL UNION OF)		
BRICKLAYERS AND ALLIED)		
CRAFTWORKERS, AFL-CIO,)		
)		
Charging Party.)		

**CHARGING PARTY’S ANSWERING BRIEF
IN RESPONSE TO RESPONDENT’S EXCEPTIONS**

Illinois District Council No. 1, International Union of Bricklayers and Allied Craftworkers, AFL-CIO (“Union”), through its attorneys Dowd, Bloch & Bennett, submits this Answering Brief in Response to Respondent’s Exceptions to the Decision of the Administrative Law Judge.

I. INTRODUCTION

On November 19, 2007, Administrative Law Judge Mark D. Rubin issued his Decision in this matter, finding that Respondent violated Sections 8(a)(1) and (3) of the Act by terminating employees Jack Probola and Andrzej Kwiecien on March 22, 2007 and by refusing to hire or consider for hire employees Luciano Padilla, Dwan Johnson and Humberto Juarez on March 9, 2007. The Judge also found that Respondent committed five independent violations of Section 8(a)(1). (ALJD 17 ll. 25-48.)

On December 27, 2007, Respondent filed its Exceptions, objecting to thirteen separate findings by the Judge. On the main, the Exceptions constitute mere disagreements with the Judge’s

credibility determinations. For the reasons that follow, the Exceptions are without merit, and the Board should affirm the Judges Decision in its entirety.

II. RESPONDENT’S EXCEPTIONS PROVIDE NO BASIS FOR THE BOARD TO REFUSE TO AFFIRM THE JUDGE’S RULINGS, FINDINGS AND CONCLUSIONS

Exception 1 - The Judge Properly Credited Andy Kwiecien and Jack Proboloa and discredited Gregor Padjasek

Exception 1 is, effectively, three separate exceptions. Respondent excepts to the Judge’s crediting of Andy Kwiecien and Jack Proboloa, and to his discrediting of Respondent witnesses Gregor Padjasek. (Exceptions 1.) Considering each of these three findings separately, it is apparent that Respondent provides no basis for the Board to conclude that a “clear preponderance of all the relevant evidence” shows that the Judge’s credibility determinations were incorrect.

Jack Probola

While Respondent nominally excepts to the Judge crediting Jack Probola, it does not cite a single piece of evidence or advance a single argument showing why his testimony was unreliable. Respondent criticizes some of the reasons given by the Judge for discrediting Gregor Padjasek (Resp. Exs 2) but, even assuming any of these criticisms were valid (they’re not), Respondent does not explain how they warrant a reversal of the Judge as to *Probola*. For this reason alone, the Judge’s finding with respect to Probola must be affirmed.

Andy Kwiecien

Respondent offers little more in support of its exception to the Judge’s crediting of Andy Kwiecien. Indeed, Respondent cites only *one factor* – a wage claim Kwiecien filed with the Illinois Department of Labor – to argue that the Judge erred in crediting Kwiecien. Even assuming for the sake of argument that Kwiecien’s statement in the wage claim was somehow relevant to his trial

testimony, however, that single factor cannot be grounds for reversing the Judge's credibility determination.

The Judge credited Kwiecien based on, among other things, his "impressive testimonial demeanor" *and* Probola's corroborative testimony. (ALJD 5 ll. 26-28.) As already noted, Respondent has offered no basis for discrediting Probola. In light of all the factors the Judge relied on to credit Kwiecien, a solitary and vague statement Kwiecien made in an unrelated claim form does not constitute a clear preponderance of all relevant evidence showing the Judge was wrong.

Moreover, contrary to Respondent's argument, Kwiecien's trial testimony was not undermined by his statement to the Illinois Department of Labor ("IDOL"). As the Judge correctly observed, Kwiecien's subjective *belief* at the time he completed the IDOL form on March 27, 2007 (Resp. Ex. 1) has no logical bearing the *evidence* establishing the actual reason for his discharge. Whatever Kwiecien might have believed (or asserted) at the time he completed the IDOL form, the actual reasons for the discharge were established by objective facts and logical inference drawn from those facts.

Kwiecien's statement to the IDOL does *not*, in any event, demonstrate that he believed his termination was a result of anything other than Union activity. Through the wage claim, Kwiecien was trying to recover money owed to him, not to obtain a determination regarding the reasons or legality of his termination. The reason for his termination had nothing to do with his entitlement to the money. For that reason, Kwiecien simply did not bother to go into detail on the form. (Tr. at 177 ll. 10-16.) The day *before* he filed the wage claim, however, his employer (the Union) filed a charge alleging that the termination was based on his Union activity. (GC Ex. 1(b).) The Union would not have filed a charge on Kwiecien's behalf, if he did not at that time believe he was terminated for

Union activity (and had not so informed his employer). Thus, the IDOL form provides no basis for questioning the Judge's crediting of Kwiecien.

Gregor Padjasek

Respondent provides no basis for reversing the Judge's finding that Padjasek's testimony was unreliable. The Judge explained in great detail how Padjasek's testimony was fraught with doubt. Early in Padjasek's direct examination, he described the critical March 22 conversation between Omielan, Kwiecien and Proboloa one way. (ALJD 5 ll. 6-17.) When Respondent's counsel asked if Padjasek remembered anything else, however, he described the conversation in a way that bore no resemblance to the earlier description. (ALJD 5 ll. 18-25.) On cross examination, Padjasek contradicted his direct testimony and his testimony on cross no fewer than seven times. (ALJD 5 ll. 31-49.) Padjasek also steadfastly, and implausibly, denied having ever spoken to *anyone* about the conversation before appearing at the trial. (ALD 5 n.9.) These factors combine to reveal a classic case of an uncertain witness, trying not to harm his bosses' case, searching for what to say rather than searching for the truth. Nothing Respondent points out in its exceptions alters that conclusion.

It is also a gross distortion of the record for Respondent to assert that Padjasek's testimony was "identical" to Kwiecien's and Probola's testimony in any respect. (Resp. Exs. 3.) As noted, Padjasek gave at least three *different* accounts of the conversation between Omielan, Kwiecien and Probola on March 22, none of which resembled the accounts provided by Kwiecien and Probola, which remained consistent through their testimony on direct and cross. (*Compare* ALJD 5 ll. 10-17, 18-22, 38-39 *with* ALJD 4 ll. 10-17, 20-27.) Given the disparity between Padjasek's account, on the one hand, and Kwiecien's and Probola's accounts on the other, and the many inconsistencies and

contradictions in Padjasek's testimony, the Judge had no choice but to credit Kwiecien and Probola over Padjasek.

Based on the foregoing discussion, it is evident that Respondent has not come close to demonstrating that a preponderance of all relevant evidence requires a reversal of the Judge with respect to Kwiecien's, Probola's or Padjasek's credibility.

Exception 2 - The Judge Properly Discounted Bogdan Omielan's Account of the March 22 Conversation

The Judge correctly concluded that, regardless of his demeanor, Omielan's assertion that Kwiecien and Probola unceremoniously walked off the job on March 22 was not believable. (ALJD 6, ll. 4-9.) There are at least three major factors supporting this conclusion.

First, as discussed above, Probola's and Kwiecien's testimony, which was properly credited, belied any suggestion that they quit. Both men testified that they told Omielan they wanted to *continue* working for Respondent, even if Omielan did not pay them any more money, and that Omielan still directed them to leave. (Tr. at 152:9-10, 12-13, 207:5-7.)

Second, Respondent's assertion that Probola and Kwiecien simply walked away is inherently implausible. Even without considering the numerous other implausibilities in Omielan's testimony that are evident in the record, his version of what transpired on March 22 makes no sense. He claims that, once he told Probola and Kwiecien that he would not pay more money, they simply walked off the job. (Tr. at 383:12-18, 384:105.) It is unthinkable that Probola and Kwiecien, whose principal purpose in going to work for the Company was to organize the employees, would immediately abandon that goal just because the Company denied them a raise. Respondent cites *Starcon, Inc. v. NLRB*, 176 F3d 948, 949 (7th Cir. 1999), for the proposition that salts might have a goal

manufacturing unfair labor practices against an employer, but Respondent's reliance on that case is wholly misplaced here. There is no evidence here that any of the Union's organizers had a goal other than organizing and, on the contrary, Probola and Kwiecien reaffirmed *in writing* on the day in question that they intended to organize the employees.

Moreover, if Kwiecien's and Probola's goal was to manufacture an unfair labor practice, it is inconceivable that they would have walked off the job, without reason, and rest the entire charge on an outright lie. This is especially true when Kwiecien and Probola confronted Omielan in the presence of three or four other bricklayers and two or three laborers. (Tr. at 206 ll. 2-3.) If Probola and Kwiecien were sufficiently calculating to build an unfair labor practice case against Respondent on fabricated testimony, using a lie and the "two-against-one strategy," they would not have conducted the critical meeting in front of seven neutral witnesses.

Similarly, is simply not true, as Respondent contends, that Kwiecien's and Probola's request for more money was inconsistent with the intention to organize (Resp. Exs. 4). Rather, asking for more money could have been a useful tool in organizing, whatever Respondent's response to the request. If Respondent acceded to the request, Kwiecien and Probola could then inform their coworkers of the power of collective action. If Respondent denied the request, Kwiecien and Probola could inform their coworkers that the only way any of them would earn what Union bricklayers earn was to become Union bricklayers.

Finally, Respondent's own evidence in support of its position was inconsistent. Omielan testified that when Kwiecien and Probola said they were not going to work for the money Omielan offered, he replied, "Well, then you will *not* work." (ALJD 5 ll.4-5) (emphasis added). Padjasek, on the other hand, testified that, after reading Kwiecien's and Probola's letter, Omielan told them

they could “go *back* to work.” (ALJD 5 l. 16) (emphasis added). Respondent cannot have it both ways.

For these reasons, the balance of the evidence clearly supports the Judge’s conclusion that Kwiecien’s and Probola’s version of the events of March 22 was more believable than Omielan’s version.

Exception 3 - The Judge Properly Concluded that Omielan Asked Probola Whether He Knew Other Bricklayers.

Respondent provides no basis for reversing the Judge’s finding that Omielan asked Probola to recommend additional bricklayers. For reasons already discuss, Respondent has not identified a single piece of evidence, much less a preponderance of the evidence, suggesting that the Judge’s decision to credit Probola in general was incorrect. These circumstances, alone, are sufficient to affirm the Judge in this regard. The record, however, is contains undisputed evidence that supports the Judge’s conclusion that Omielan sought additional employees from Probola.

Omielan’s need for more employees was made manifest when he actually hired Jaroslaw and Martine Sral on March 16 and 17. (Tr. at 90 ll.15-16, 21-22, 24-25.) Thereafter, Omielan told the Sral brothers that he needed more bricklayers, and Respondent does not challenge this evidence. (Tr. at 93 ll. 8-10, 129:3-11.) It certainly follows that, if Omielan would ask the Sral to recommend employees, he would also ask Probola.

For these reasons, the Board should affirm the Judge’s finding that Omielan asked Probola for bricklayers.

Exceptions 4 - The Judge Properly Concluded that Omielan Did Not Know Probola and Kwiecien Were Affiliated with the Union.

Respondent's contention that the Judge erred in discrediting Omielan's claim that he knew Probola and Kwiecien were affiliated with the Union must be rejected. Respondent's contention rests on the assertion that Kwiecien did not deny having participated in previous picketing against respondent and on Omielan's statement on March 22 that he "felt" Probola and Kwiecien were from the Union. (Resp. Exs. 7.) These contentions are absurd for two reasons. First, Respondent's counsel never asked Kwiecien whether he ever participated a picket against respondent. (Tr. at 154-71, 187, 182.) Second, Omielan did not testify that he said he felt Probola and Kwiecien from were from the Union. The testimony establishing that Omielan said he felt Probola and Kwiecien were from the Union came from Probola and Kwiecien, whose testimony Respondent asks the Board to discredit.

Even aside from these circumstances, however, the evidence fully supports the Judge's conclusion that Omielan did not know of Probola's and Kwiecien's Union affiliation at the time Omielan hired them. Omielan first testified that he had no idea about Kwiecien's Union activity and only later, after leading questions, testified that he believed Kwiecien was involved in the Union. This testimony is simply incredible, especially in light of the fact that Respondent disavowed any knowledge of Kwiecien's Union affiliation in its position statement submitted during the administrative investigation. (ALJD 3 ll. 40-51, 4 ll. 30-44.)

Exceptions 5 - The Judge Properly Concluded that Respondent Discharge Probola and Kwiecien in Violation of Section 8(a)(3).

Exception 5 is merely a conclusionary statement, "for the reasons stated," that the Judge erred in finding that Respondent discharged Probola and Kwiecien in violation of Section 8(a)(3).

(Respondent. Exs. 8.) For the reasons set forth above, and the additional reasons set forth in the Decision, the Judge's finding was correct.

Exceptions 6 - The Judge Properly Concluded that Respondent Failed to Hire Padilla, Johnson and Juarez Because of their Union Affiliation

Respondent provides no basis for reversing the Judge's conclusion that Respondent refused to hire Padilla, Johnson and Juarez Because of their Union affiliation. On the contrary, despite the detailed evidence recited by the Judge in support of his decision, Respondent cites only two factors to justify its exception. First, that there might have been ambient noise on the day Padilla, Johnson and Juarez applied, which might have affected Omielan's ability to hear what was said. Second, even though Respondent originally denied that Omielan had *any* knowledge that Padilla, Johnson and Juarez applied for jobs, Omielan should be given some credit for describing a conversation similar to that described by Padilla. These contentions are also absurd.

First, regardless of whether there was ambient noise at the job site that might have affected Omielan's hearing, everyone one of the Union's witnesses testified to the facts that establish the violation, *including* Probola. (ALJD 7 ll. 26-30.) Even if Probola only heard portions of the conversation, he heard portions that amply support the Judge's decision.

Second, Omielan's testimony was not, as Respondent contends, similar to the conversation Padilla described. A simple review of the Judge's decision reveals that Padilla's detailed and specific account of the conversation (ALJD 7 ll. 4-21) bears almost not resemblance to the cryptic account provided by Omielan (ALJD 7 ll. 33-39). Moreover, to the extent that there are any similarities between the two versions, the Board should bear in mind that Omielan was present in the court room during Padilla's testimony. That fact alone explains how Omielan could provide

testimony about an event at the trial, which was “similar” to Padilla’s, even though only months earlier Respondent denied that he had any knowledge whatsoever of the events.

Exceptions 7 - The Judge Properly Concluded that Respondent Harbored Union Animus

Respondent provided no basis for reversing the Judge’s finding of animus. Respondent’s exception in this regard focuses on a single statement by the Judge referring to Omielan’s brusque dismissal of the Union applicant’s requests for applicants. (Resp. Exs. 8-9.) Respondent completely ignores the Judge’s next statement, which was that the General Counsel established animus “as discussed above.” (ALJD 15 l. 12.) The Judge found that Respondent “repeatedly displayed animus during the entire period.” (ALJD 14 l. 14.) Because this other evidence is sufficient for the General Counsel to establish the element of animus, there is no basis for reversing the Judge, even assuming for the sake of argument that there were merit to any of Respondent’s points in Exception 7.

Exceptions 8 - The Judge Properly Concluded that Respondent Was Hiring

Respondent provides no basis for reversing the Judge’s finding that Respondent was hiring at the time Padilla, Johnson and Juarez applied. Rather, the evidence leaves little doubt that Respondent was hiring on and after March 9.

Respondent began advertising for bricklayers in January 2007. (GC Ex. 4.) While Respondent claims the advertisement was “stale,” Respondent also unduly isolates the advertisement from the other evidence of Respondent’s need for employees, which the Judge relied on in making his finding. (ALJD 13 ll. 43-56.)

Omielan confirmed his intention to hire additional employees by telling Probola and the Sral brothers, on at least six different occasions, that he needed more bricklayers. (Tr. at 93:8-10, 129:3-

11, 195:19-20, 196:16-17, 200:21-24.) Omielan's comments were made from late February through the end of March. (Tr. at 93:8-10, 129:3-11, 195:19-20, 196:16-17, 200:21-24.) Omielan's stated need for more employees on and after March 9, of course, was proven when he actually hired Jaroslaw and Martine Sral on March 16 and 17.

Respondent contends that the hiring of the Sral's is insufficient to establish that Respondent was hiring, even though Omielan hired them only a week he told Padilla he was not hiring, because Respondent allegedly only needed one bricklayer. (Respondent. Exs. 12.0 This contention, however, is belied by undisputed evidence showing that Respondent hired *both* Sral's and that *both* of them actually worked as a bricklayers. (Tr. at 123:25, 124:1-2.) Thus, Respondent's hiring of the Sral's conclusively establishes that there were jobs for at least two of the three applicants.

The record also establishes, of course, that there were two additional positions open as of March 22 when Respondent fired Probola and Kwiecien. Given the evidence concerning the large amount of work the Company was performing and under contract to perform, which Respondent does not deny, and Omielan's stated desire for more bricklayers, it can only be concluded that Respondent would have to fill the positions vacated by Probola and Kwiecien. That reality was confirmed by the fact that the Company hired two additional bricklayers in June. (GC Exs. 6, 7.) Thus, there can be no question that there were vacant positions for Padilla, Johnson and Juarez to fill at all relevant times.

Exceptions 9 - The Judge Properly Concluded that Johnson Was Qualified

Respondent's contention that the Judge erred in finding that Johnson was a qualified bricklayer can be easily dispatched.¹ As the Judge explained, the only actual evidence pertaining to Respondents' minimum requirements for bricklayers was "1 year experience learning the brick mason trade as a helper or apprentice." (ALJD 141. 13.) Respondent does not except to that finding (Resp. Exs. 12-13), and it is undisputed that Johnson worked as an apprentice bricklayer for *three to four years* and would become a journeyman bricklayer upon completion of 2,500 additional hours of on-the-job training. (Tr. at 46:13-24.)

Moreover, it is pure balderdash for Respondent to contend that the experience possessed by Jaroslaw Sral somehow constituted the minimum level of experience Respondent expected, which in turn showed that Johnson was not qualified (Resp. Exs. 13). The truth is that, aside from the job description, the record is devoid of any evidence that Respondent had any real minimum requirements for bricklayers. Rather, as established by Respondent's hiring of Kwiecien and Marcin Sral sight-unseen, Respondent put people to work without a care about how many years of experience they possess.

Exception 10 - The Judge Properly Found that the Independent Violations of Section 8(a)(1) Were Established by the Evidence.

Respondent provides no basis for reversing the Judge's finding with respect to the independent Section 8(a)(1) violations.

¹While Exception 9 objects to the finding that "all three bricklayers were qualified," Respondent actually only contests the Judge's finding with respect to Johnson. (Resp. Exs. 12-13.)

The Interrogations

Respondent contends that the Srals' testimony regarding their interrogation by Omielan should not be credited due to some alleged inconsistencies between the brothers' testimony. (Resp. Exs. 14.) Respondent contention, however, grossly distorts the record.

First, Jaroslaw Sral testified that Omeilan asked him, when he was alone on March 16, whether he belonged to a Union. (Tr. at 89 ll. 15-17, 21-22.) Marcin, naturally, would not recall this interrogation because he was not there. The Judge was, therefore, correct in finding that only Jaroslaw was interrogated on March 16. (ALJD 10 l. 14, 11 ll. 1-2.)

Second, Jaroslaw and Marcin also both recalled being interrogated on March 17. Jaroslaw testified that Omielan asked him about his Union status on the morning of March 17, when his brother Marcin was present. (Tr. at 93 ll. 21-25, 94 ll. 1-10.) Marcin then testified Omielan asked him about his Union status on the morning of March 17, when his brother Jaroslaw was present. (Tr. at 123 ll. 1-6.) Contrary to Respondent's contention (Resp. Exs. 14), although the brothers' recollections of the exact time and location of the March 17 interrogation might differ slightly, their testimony is otherwise in accord. As a result, the Judge correctly found that only Jaroslaw and Marcin were interrogated on March 17. (ALJD 11 ll. 1-5.)

The March 23 Meeting

Respondents contentions regarding the March 23 meeting are similarly wide of the mark. While Respondent points to several alleged inconsistencies in the Srals' testimony (Resp. Exs. 16-17), Respondent ignores the two most crucial factors relevant to the March 23 meeting. First, the Srals corroborated each other with respect to the threatening statements made by *Bogdan Omielan* at the meeting. Second, Respondent did not present a single witness to specifically deny the

statements attributed to Omielan. Although Izabela Omielan and Barbara Kasper testified about various statements made at the meeting, neither specifically denied the statements attributed to Bogdan Omielan. (Tr. at 248-60 270-301.) More importantly, although Omielan himself testified at trial, he did *not* deny the statements attributed to him at the meeting. Indeed, Omielan did not testify about the March 23 meeting *at all*. Under these circumstances, whatever issues Respondent may take with respect to the Srals' testimony, the balance of the evidence clearly warrants the findings made by the Judge. *See e.g., Mercedes Benz of Orland Park*, 333 NLRB 1017, 1035 (2001) (even "blanket" denials are insufficient to refute specific and detailed testimony advanced by the opposing sides' witnesses).

Exceptions 11 and 12 - The Judge Properly Concluded that Omielan's Statements Were Coercive

Respondent provides no basis for concluding that Omielan's statements were not coercive. Respondent's argument can be dismissed with ease. Respondent does not even contend that the statements attributed to Bogdan are not coercive. Rather, Respondent simply maintains that what that Izabela Omielan and Barbara Kasper said at the meeting were not coercive. (Resp. Exs. 18-19.) There is no basis in the law or logic to conclude that lawful statements by some employer officials somehow cleanse unlawful statements made by the employer's highest ranking official.

Moreover, Respondent is simply wrong in suggesting that the General Counsel was required to produce some evidence that the statements attributed to Omielan actually had a coercive effect. (Respondent. Exs. 19.) The law could not be more well settled that employer statements are evaluated objectively and that subject reaction is irrelevant. *See Amcast Automotive of Indiana*, 348 NLRB No. 47 (2006). Respondent does not deny that the statements attributed to Omielan are,

objectively, coercive. As result, Respondent plainly gives the Board no basis for reversing the Judge regarding the Section 8(a)(1) violations.

III. CONCLUSION

Based on all of the foregoing, the Union respectfully requests that the Board affirm the Judge's Decision in its entirety.²

Respectfully submitted,
DOWD, BLOCH & BENNETT

/s/ Robert S Cervone

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²Exception 13 is little more than a recapitulation of arguments made by Respondent in other exceptions. As such, Exception 13 does not require independent treatment.

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Union's Answering Brief to be served as follows:

On April 30, 2008 by E-File & Overnight Delivery of Three Copies

National Labor Relations Board
Division of Judges
Attention: Honorable Mark D. Rubin
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On April 30, 2008 by First Class Mail, Postage Prepaid

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