

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

MIKE-SELL'S POTATO CHIP CO.

and

Case 9-CA-072637

BAKERY, CONFECTIONERY, TOBACCO
WORKERS AND GRAIN MILLERS
INTERNATIONAL UNION, LOCAL 57, AFL-CIO-CLC

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS**

I. INTRODUCTION:

On July 3, 2012, Administrative Law Judge Paul Bogas issued his Decision and recommended Order in the above-captioned matter, finding that Respondent violated Section 8(a)(1) and (5) when, on January 1, 2012, it implemented changes to the contractual health and welfare benefits provided to employees represented by the Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 57, AFL-CIO-CIC without following the procedures set forth in the contractual reopening clause and without the Union's consent. (ALJD p. 11, ll. 19-22) ^{1/} On July 3, 2012, pursuant to Section 102.45 of the Board's Rules and Regulations ("Rules and Regulations"), this case was transferred to the Board. On July 30, 2012,

^{1/} References to the official transcript will be designated as (Tr. ____); references to the Administrative Law Judge's Decision will be designated as (ALJD p. ____, ll. ____); and references to Respondent's Brief in Support of its Exceptions will be designated as (Resp. Brief p. ____).

Respondent filed timely exceptions to the Judge's Decision together with a brief in support of its exceptions ("Respondent's Brief"). ^{2/}

Counsel for the Acting General Counsel herein submits its answering brief to Respondent's 37 exceptions and asserts that the exceptions have no basis in fact, are unsupported by Board law and policy, and should be rejected. Based on the arguments in Respondent's brief, its exceptions appear to be based on what Respondent perceives to be the Administrative Law Judge's erroneous determinations of credibility and disregard for certain evidence and testimony. Contrary to Respondent's claims, the Administrative Law Judge's findings that Respondent violated the Act as set forth in his Conclusions of Law are overwhelmingly supported by both the record evidence and Board law. This answering brief will respond to the issues raised in Respondent's brief.

II. ANSWER TO RESPONDENT'S EXCEPTIONS:

A. The Administrative Law Judge's credibility determinations are firmly grounded in the record evidence and should be adopted by the Board. ^{3/}

The outcome in the present case necessarily rests on the answer to one question: Did the parties reach an agreement at their December 14, 2011 negotiation session? Because it is undisputed that no written agreement was reached or drafted, and because there is conflicting testimony about what happened at the meeting, this question depends primarily upon the resolution of witness credibility. It is well established that the credibility resolutions of Administrative Law Judges should be given a great deal of weight and should be overturned only "where the clear preponderance of all the relevant evidence convinces the Board that they are

^{2/} Counsel for the Acting General Counsel also filed exceptions to the Judge's proposed order on July 31, 2012.

^{3/} Respondent failed to specify in its Brief the specific exceptions to which its various arguments relate. See, Board's Rules and Regulations Section 102.46(c)(2). Accordingly, in answering Respondent's Exceptions, Counsel for the Acting General Counsel can only guess as to which arguments in Respondent's Brief were advanced in support of each Exception. Rather than guessing which exceptions each argument relates to, this brief will directly address the arguments made in Respondent's brief.

incorrect.” *Standard Drywall Products*, 91 NLRB 544 (1950), enf’d. 188 F.2d 362 (3rd Cir. 1951). Here, the Judge correctly credited the testimony of the Union’s witnesses over the testimony of Sharon Wille and found that no agreement was reached.

Respondent argues that the Board should overturn the Administrative Law Judge’s determination that no agreement was reached because it was “based on his own subjective evaluation of the relative likelihood” of various testimonies. This is not the case. The Judge’s decision is unambiguously based on his credibility determinations and supported by a preponderance of all relevant evidence. For example, in considering Sharon Wille’s testimony, the Judge stated that he based his findings on Wille’s demeanor and testimony as a whole. (ALJD p. 7, ll. 6-8, ALJD p. 8, ll. 19-20) Moreover, *Kelco Roofing*, 268 NLRB 456, which Respondent cites in support of its argument, is distinguishable. In *Kelco*, the Judge made no mention of demeanor whatsoever, and solely weighed the probabilities of witness accounts. In contrast, in the present case, the Judge did discuss the witnesses’ demeanors and based his credibility determinations in part on his assessment of those demeanors.

Moreover, even if the Judge’s findings did not stem from his direct observations of witness demeanor, his analysis of the inherent probabilities supporting his credibility resolutions is well-founded. As the judge concluded, it is both implausible and extreme that union representatives would be “happy and smiling” during a meeting at which Respondent was attempting to force substantial reductions on its members. It is also implausible that the Union would agree that management had a right to change employees’ benefits after a flurry of e-mails and disagreements regarding those benefits. The clear preponderance of all relevant evidence supports the Judge’s conclusions.

Respondent argues that the Board should overturn the Administrative Law Judge's determination that Sharon Wille was "less than a fully credible witness." (Resp. Brief pp. 23-28; ALJD p. 8, l. 19) Such a measure is not supported by a preponderance of all the relevant evidence. In his decision, the Judge correctly set forth the basis for his credibility findings (for example, Wille's demeanor and testimony as a whole) (ALJD p. 8, ll. 19-20, ALJD p. 7, ll. 6-8), and discussed those findings with respect to the witnesses whom he believed as opposed to those he disbelieved. It is apparent that the Judge's findings were based in part on his observation of the witnesses; for example, Wille "gave the impression of being extremely impatient to see the health care changes implemented" and seemed "overly anxious to give testimony that was supportive of the Respondent's position." (ALJD p. 8, ll. 20-21) Regardless, in addition to these subjective evaluations of witness demeanor, credibility resolutions may also be based on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole - so called "derivative inferences." *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996). The Judge's conclusions in this case are well supported by these derivative inferences.

In support of its contention that Wille's testimony should be credited, Respondent argues that the Administrative Law Judge improperly "criticizes Ms. Wille's testimony because it was not corroborated (ALJD, p. 5 at fn.3, 9-10)." Respondent egregiously misstates the Administrative Law Judge's declaration. In fact, the cited passage simply noted that "Neither the insurance broker, nor any other potential witness, was called by the Respondent to corroborate Wille's account of the December 12 meeting (emphasis added)," and notes that two other witnesses contradicted Wille's account of that meeting. The Judge's decision says nothing further about Wille's corroboration, or lack thereof. As such, any argument implying that

Wille's testimony was ignored or rejected because of the absence of corroboration should be disregarded. Additionally, the case Respondent cites in support of its contention, *In re Skippy Enterprises, Inc.*, 211 NLRB 222, 225 (1974) is distinguishable. In *In re Skippy Enterprises, Inc.* the uncontradicted testimony was disregarded solely because of the absence of corroboration. Conversely, in the present case there is also an additional element of two contradicting witnesses. Finally, the Judge correctly ruled that since there is no complaint allegation that Respondent violated the Act by its statements at the December 12 meeting, it is unnecessary to resolve this credibility question, so the Judge's comments about Wille's testimony on that date are essentially moot.

Respondent also argues that the Administrative Law Judge improperly found Wille's notes from the December 14 meeting to be "less reliable" than Newsome's notes. Respondent is again incorrect. First, the Rules of Evidence cited by Respondent have to do with the admissibility of the notes, not how much weight they are accorded in comparison to other evidence. In the present case, the Administrative Law Judge received Wille's notes into evidence. The Administrative Law Judge then correctly found them to be less reliable than Newsome's notes based on Wille's testimony that she could not recall when the notes were taken. (ALJD pp. 9-10, ll. 29-30, 1-3; Tr. 176-177) Wille's credibility was further undermined by her eager testimony in support of Respondent's position about events that she only learned through hearsay, not direct knowledge, including details about how the events unfolded. (Tr. 190-191, 199; ALJD p. 8, ll. 20-28)

Respondent, in its brief, claims that the Union's testimony is inconsistent, and states that these inconsistencies between the testimonies of Union witnesses were ignored or hastily discounted by the Administrative Law Judge. To the contrary, the Judge did consider the minor

inconsistencies in the testimony of the Union's witnesses and found them to be insignificant. The Judge correctly found the testimony of Clark and Newsome regarding what was said at the December 14 meeting to be "quite consistent and mutually corroborative." (ALJD p. 9, l. 11) Tellingly, the Judge does not say that the testimonies were fully consistent, only "quite consistent" - a reference to the existence of, and his consideration of, the minor discrepancies that Respondent cites and their general insignificance in comparison to Wille's less than credible demeanor.

In its brief, Respondent focuses on an inconsistency about whether an agreement to pay Maintenance Mechanics at a higher rate than in the Labor Agreement is reflected in writing or is a purely verbal agreement. (Resp. Brief p. 23) Any inconsistency about this issue is wholly irrelevant to the question at hand: whether an agreement was reached on December 14, 2011.

Finally, Respondent argues that Campbell's (uncontradicted) testimony about what was said *before* entering the December 14 session is somehow inconsistent with what was said *at* the December 14 session. This challenges all logic, as there is no principle in law or life that says conversations cannot veer outside the scope of what parties previously agreed to discuss. Respondent also overstates what Campbell testified concerning the December 14 meeting. Contrary to Respondent's argument, Campbell did not deny that Newsome made alternative proposals during the December 14, 2011 meeting. He did not address that particular issue at all. Nor did Campbell deny discussing postponing changes until June 2012- he simply stated that he does not recall. (Tr. 100) As such, it appears that Respondent is confusing inconsistent testimony with uncorroborated testimony. As Respondent has argued, there is no principle of law applicable to Board proceedings that requires the testimony of interested witnesses to be ignored or rejected simply because of the absence of corroboration. *In re Skippy Enterprises*,

Inc., 211 NLRB 222, 225 (1974). There is no direct inconsistency between what was said at the meeting regarding proposals. At most, there is no corroboration, and that lack of corroboration is an insufficient basis to reject witness testimony. *Id.*

B. Contrary to Respondent’s Brief, the Administrative Law Judge Did Not Disregard Certain Evidence and Testimony:

In its brief, Respondent argues that in several instances in this case, the Administrative Law Judge took testimony out of context and/or failed to consider other evidence that conflicted with his conclusions. The Judge did not ignore relevant evidence. Rather, the Judge properly drew inferences from the record as a whole. It is well settled that an administrative law judge properly may base credibility determinations on the weight of the respective evidence, established or admitted facts, inherent probabilities, “and reasonable inferences which may be drawn from the record as a whole.” *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996). This is exactly what the Judge did here, and the record supports the Judge’s findings and determinations.

In urging the Board to reverse the Judge’s findings of a violation, Respondent asserts that the Judge ignored the following: “Mike-Sell’s had nothing to gain by fabricating an agreement between the parties and suddenly ignoring the reopener process. . .” Nothing could be further from the truth. The record reflects that Respondent gained all of the concessions in its health and benefits plans it wanted, and did so within its own desired time frame. Based on the record, and what Respondent refers to as the Union’s “delay tactics,” it is highly unlikely that the changes would have been implemented in the time frame desired by Respondent had the parties gone through all the steps of the contractual process.

In urging the Board to reverse the Judge’s finding of a violation, Respondent asserts that the Judge also ignored the parties’ contentious relationship, their bargaining history, and the lack

of written agreements on mid-term bargaining issues. The Judge did not ignore such evidence, but properly accorded it little weight. The evidence regarding the parties' bargaining history is less relevant to whether an agreement was reached in this particular instance, on December 14, 2011, than testimony about what actually happened on December 14. Regardless, it is obvious that the Judge did consider this evidence, as he makes reference to the parties' bargaining history in his decision. (ALJD pp. 3-4) The lack of written agreements on mid-term bargaining issues was likewise considered, but correctly not given any weight, as the Judge noted that "[t]he issue presented in this case is whether the parties reached an oral agreement at all, not whether such an agreement is enforceable." (ALJD p. 8, ll. 46-47) The Judge correctly determined that an agreement was not reached based on the credibility of the witnesses and the record as a whole.

III. CONCLUSION:

The Administrative Law Judge's Decision finding that Respondent violated the Act is fully supported by the record and extant Board law. Respondent failed to raise any exceptions of law or fact that would warrant reversal of the Judge's Decision. For these reasons, and based on the foregoing, the Board should reject all of Respondent's exceptions and issue an Order in due course consistent with the Judge's recommendations. ^{4/}

Dated at Cincinnati, Ohio this 14th day of August 2012.

Respectfully submitted,



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^{4/} Except for the portions of his Order excepted to in the General Counsel's previously filed Exceptions.

CERTIFICATE OF SERVICE

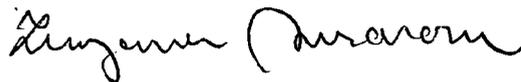
August 14, 2012

The undersigned hereby certifies that the foregoing Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions was served by electronic mail to the following persons:

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