

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

In the Matter of	:	
	:	
MIKE-SELL’S POTATO CHIP CO.,	:	
	:	
Respondent,	:	CASE NO. 9-CA-072637
	:	
and	:	
	:	
BAKERY, CONFECTIONARY,	:	
TOBACCO WORKERS AND GRAIN	:	
MILLERS INTERNATIONAL UNION,	:	
LOCAL 57, AFL-CIO-CLC,	:	
	:	
Charging Party.	:	
	:	
	:	
	:	

**REPLY BRIEF OF RESPONDENT MIKE-SELL’S POTATO CHIP COMPANY TO THE
NATIONAL LABOR RELATIONS BOARD IN SUPPORT OF ITS EXCEPTIONS TO
THE DECISION OF ADMINISTRATIVE LAW JUDGE PAUL BOGAS**

I. INTRODUCTION

Respondent Mike-sell’s Potato Chip Company (“Mike-sell’s” or “Company”) hereby files this Reply Brief in Support of its Exceptions to the Decision and Order of Administrative Law Judge Paul Bogas (“ALJ”), which addresses the issues raised by the General Counsel in its Answering Brief to Respondent’s Exceptions (“Answering Brief”).¹

¹ Citations to the ALJ’s Decision and Order are parenthetically referenced as “ALJD, p. ____.” Citations to the General Counsel’s Answering Brief are parenthetically referenced as “GC Brief, p. ____.” Citations to the Company’s Brief in Support of Exceptions are parenthetically referenced as “MS Brief, p. ____.” Citations to Joint Exhibits, Respondent Exhibits, and General Counsel Exhibits are parenthetically referenced as “JX-____,” “RX-____,” and “GX-____,” respectively. Citations to Official Transcript pages are parenthetically referenced as “Tr. ____.”

II. ARGUMENT

- A. **Contrary to the assertions in the General Counsel’s Answering Brief, the ALJ’s credibility determinations are not entitled to deference because they are based on a subjective evaluation of the relative likelihood of each witness’s substantive testimony rather than an objective evaluation of each witness’s demeanor and conduct at the hearing.**

The National Labor Relations Board (“Board”) has long held that an ALJ is in no better position than the Board to assess inherent probabilities of substantive testimony, and the Board is not bound by credibility determinations based on such assessments. *In re Betances Health Unit, Inc.*, 283 NLRB 369, 370 (1987) (reversing credibility determinations based “on [the ALJ’s] assessment of the inherent improbability that [a particular] statement . . . was made”); *S&G Concrete Co.*, 274 NLRB 895, 897 (1985) (rejecting credibility determinations because “the Board is just as capable as the hearing officer of evaluating the inherent probabilities of the testimony”). Credibility determinations are entitled to deference only when they are based on “demeanor or conduct at the hearing.” *Kelco Roofing*, 268 NLRB 456, 456 (1983).

In *Kelco*, the Board reversed the ALJ’s credibility determinations because they were “not based on his observation of the witnesses’ demeanor, but, rather, on his assessment of the inherent probability of the conflicting testimony.” *Id.* This subjective evaluation of the *Kelco* witnesses’ respective testimony was reflected in the following illustrative passage of the ALJ’s opinion (among others):

I credit Singfield. His version is more believable and logical. Particularly since Singfield had worked for Respondent in the past, it would have been natural for Kelly to ask where Singfield had been working recently. When Singfield told Kelly that he had been working at Sanders, a firm which Kelly knew to be union, it would be perfectly natural for Kelly to ask if Singfield was now a member. Kelly’s suggestion that he simply volunteered the observation that Respondent was still non-union is unbelievable. It stands isolated and out of context, whereas Singfield’s version is natural and logical. I credit Singfield that the conversation occurred as related by him.

Id. at 458.

The ALJ's Decision in this case is plagued by the same subjective evaluation of inherent probabilities as was found in *Kelco*. That is, all of the ALJ's credibility determinations are based on his assessment of the relative likelihood of the substantive testimony itself; the credibility determinations are not based on the witnesses' objective demeanor and conduct at the hearing.² (See, e.g., ALJD, pp. 7-9.) The only difference between the improper credibility findings in this case versus *Kelco* is that, here—as the General Counsel emphasizes in its Answering Brief—the ALJ at least gave “lip service” to Board principles through a rote recitation that his credibility determinations were based on “demeanor and testimony” of the witnesses. (GC Brief, p. 3; ALJD, pp. 7-9.) The ALJ “cannot simply ignore relevant evidence bearing on credibility and expect the Board to rubber stamp his resolutions by uttering the magic word ‘demeanor.’” See, e.g., *In re Permaneer Corporation*, 214 NLRB 367, 369 (1974); see also *S&G Concrete Co.*, 274 NLRB 895, 897 (1985) (rejecting credibility determinations despite ALJ's “introductory reference to demeanor” because “it [was] clear that his decision to credit [one witness over another] was not based on demeanor but on ‘the circumstance of the layoff’”).

Demeanor is commonly understood to mean an individual's “behavior toward others” or “outward manner.” See, e.g., www.merriam-webster.com/dictionary/demeanor (last accessed 8/21/2012). Proper assessments of “demeanor” are based on “observing the witnesses while they testified.” *Standard Drywall Products*, 91 NLRB 544, 545 (1950) (emphasis added); see also *El Rancho Market*, 235 NLRB 468, 470 (rejecting credibility determinations where, “although the [ALJ] referred generally to the demeanor factor, it does not appear that specific credibility resolutions were based on his observations of the witnesses' testimonial demeanor”). For

² As explained in the Company's Brief in Support of Exceptions, the ALJ selectively chose which testimony to consider (and to what extent) by discounting certain testimony and ignoring other testimony all together. (See generally MS Brief, pp. 14-28.)

example, proper assessments of demeanor are reflected in the following excerpts of ALJ opinions:

- “[The witness] did not appear to have the demeanor of a person prone to anger. . . . I was impressed by [the witness’s] favorable testimonial demeanor. He appeared to be doing his best to give an accurate and truthful account of what occurred. . . . All three . . . witnesses . . . exhibited impressive testimonial demeanor coupled with extremely thoughtful, detailed recollection of the events.” *Dist. Council 711, Int’l Union of Painters & Allied Trades*, 351 NLRB 1139, 1145-46 (2007) (emphasis added).
- The ALJ decided to credit certain witnesses because “they appeared . . . to be more forthright and less evasive than [other] witnesses.” In contrast, the other witnesses were “vague and unclear,” “prone to excessively emphatic responses,” and “lack of recollection.” *J.J. Cassone Bakery, Inc.*, 350 NLRB 86, fn.4 (2007) (emphasis added).
- “[Witness A’s] denials of the conversation were limited to a single answer response to limited portions of the purported conversations. . . . His response was highly agitated and uncertain and his overall demeanor unconvincing with respect to this issue. [Witness B] on the other hand, was an assured, confident, fluent and certain witness. She appeared to have no motivation to give testimony adverse to [one party] and she impressed me as being an objective, unbiased witness. I therefore credit her testimony.” *Deister Concentrator Co.*, 253 NLRB 358, 389 (1980) (emphasis added).
- “[Witness A] impressed me as an honest and candid witness despite his language difficulties,” whereas “[Witness B] was evasive, hostile and inconsistent in his testimony” and exhibited an “emotional demeanor on the witness stand” that would seem to “confirm [Witness A’s] testimonial description of [Witness B’s] conduct in this case.” *Mutual Maintenance Service Co., Inc.*, 244 NLRB 211, 213 (1979) (emphasis added).
- The ALJ explained that [Witness A] “appeared as [a] reluctant witness,” and that “[t]hroughout his testimony, [Witness A] appeared restless and his testimony came off as lethargically evasive and indefinite.” *Pet Incorporated, Dairy Group*, 229 NLRB 1241, 1241 (1977).

In stark contrast to these conduct-based demeanor assessments, the ALJ in this case mentions nothing about the witnesses’ relative confidence, forthrightness, evasiveness, level of detail, eye contact, body language, or general attitude on the witness stand. Instead, just as in *Kelco*, the ALJ’s Decision reflects that the “demeanor” assessments are based on the witnesses’ substantive testimony rather than on their behavior at the hearing:

I also found that Wille was a less than fully credible witness based on her demeanor and testimony as whole. She seemed at times overly anxious to give testimony that was supportive of the [Company's] position. For example, in an effort to show that it was not unusual for the parties to make unwritten agreements to modify the CBA, Wille discussed the circumstances surrounding unwritten agreements that the parties had supposedly reached to allow special assignments for "peeler" employees and to permit employees to take vacation without the contractually required notice. . . . In addition, [Wille] gave the impression of being extremely impatient to see the health care changes implemented for the B&C Unit. This is shown, *inter alia*, by her premature filing of the reopening notice and her insistence on going ahead with a date for federal mediation even after Newsome stated that the Union could not be present on that day. By the time of the December 14 meeting, that impatience would have been further aggravated by the Union's resistance to the changes and by the revelation that the November 8 reopening notice was void and that the reopening timelines would run again from Fuller's December 6 letter.

On the other hand, I found Campbell and Newsome to be credible based on their demeanor and the record as a whole. Their testimony regarding what was said at the December 14 meeting was quite consistent and mutually corroborative. Moreover, Campbell's and Newsome's post-December 14 behavior was consistent with their testimony that no agreement was reached. After Campbell received his January 12 paycheck showing the reduction in health care benefits, he contacted Newsome to tell him about the change. On January 13, Newsome complained to Wille that [Mike-sell's] had made the reductions without the Union's consent or an arbitrator's ruling. This is precisely what I would expect Campbell and Newsome to do if, as they testified, the reductions had been made without their consent. There is no obvious explanation for why Campbell and Newsome would agree to the reductions and then turn around and object as soon as [Mike-sell's] distributed paperwork revealing that those reductions had been implemented. If, as [Mike-sell's] asserts, Campbell and Newsome were trying to delay the implementation of the reductions I believe that they would not have agreed to those reductions within minutes of starting negotiations on December 14. Rather, they would have done exactly what they testified that they did—refuse to agree and require [Mike-sell's] to go through all the steps in the contractual reopening process.

(ALJD, pp. 8-9 (emphasis added).)

As demonstrated by these passages, while the ALJ criticized Wille as seeming "overly anxious to give testimony that was supportive of the [Company's] position" and as giving "the impression of being extremely impatient to see the health care changes implemented," the ALJ only reached these conclusions because of Wille's substantive testimony and the ALJ's

speculation about it—not based on Wille’s testimonial demeanor.³ Likewise, while the ALJ seemed to praise the credibility of Campbell and Newsome, this was based on their substantive testimony and the ALJ’s speculation about it—not based on their testimonial demeanor.⁴ It is clear that the superficial references to “demeanor” in the ALJ’s Decision are not supported by behavior-based assessments. To extend any deference to the ALJ’s credibility determinations under these circumstances would exalt form over substance. *In re Betances Health Unit, Inc.*, 283 NLRB at 370; *S&G Concrete Co.*, 274 NLRB at 897; *Kelco Roofing*, 268 NLRB at 456. *In re Permaneer Corporation*, 214 NLRB at 369.

B. Even if the ALJ’s findings were based in part on the witnesses’ demeanor, the record as a whole does not support his credibility determinations.

Contrary to the assertions in the General Counsel’s Answering Brief, the ALJ indeed took testimony out of context, ignored certain evidence, and failed to recognize inconsistencies in the Union’s testimony. The General Counsel attempts to rehabilitate the ALJ’s finding that the Union witnesses’ testimony was “quite consistent” by suggesting that this wording was intended as some sort of implied recognition of “minor discrepancies” in the witnesses’ testimony. (GC Brief, p. 6.) But the ALJ’s Decision only acknowledges a single contradiction between the

³ A proper demeanor assessment would have inevitably resulted in an acknowledgement that Ms. Wille was forthright and steadfast in her testimony, and she gave a consistent and detailed explanation of events. (Tr. 141-217.) The General Counsel elicited nothing on cross examination that would suggest Ms. Wille had changed her story or was not telling the truth about what occurred before, during, or after the December 14th bargaining session. Furthermore, Ms. Wille provided legitimate explanations to support her actions during the 2011 reopener and her substantive testimony about historical unwritten agreements, none of which were rebutted by the Union witnesses or the General Counsel’s Answering Brief. (MS Brief, pp. 25-26.)

⁴ A proper demeanor assessment would have at least acknowledged that Mr. Newsome’s and Mr. Campbell’s testimony was self-serving and vague, and their demeanor on cross examination was evasive and defensive. (MS Brief, p. 27 (referencing examples of vague testimony).)

testimony of Union witnesses,⁵ which suggests that the ALJ ignored the following inconsistencies:

- Mr. Clark denied that Ms. Wille referenced her upcoming bargaining session with the Union at the December 12th informational meeting, whereas both Ms. Wille and Mr. Campbell explained that Ms. Wille did indeed disclose that she would be meeting with the Union about the proposed changes. (*Compare* Tr. 124-25 with Tr. 97, 155, 207; *see also* MS Brief, p. 21.)
- Mr. Campbell testified that the Union would not agree to any change whatsoever “unless it was going to be for the better” and thus did not mention any alternative proposals raised by the Union during the December 14th bargaining session. In contrast, Mr. Newsome testified that the Union proposed a number of alternatives during the December 14th bargaining session, one of which Mr. Campbell denied being discussed.⁶ (*Compare* Tr. 94, 98-100 with Tr. 34-35; *see also* MS Brief, p. 22.)
- Mr. Newsome denied that Ms. Wille ended the December 14th bargaining session by announcing that the changes would be implemented for the Union on January 1st, whereas Mr. Campbell admitted that Ms. Wille stated as much. (*Compare* Tr. 80 with Tr. 110, 112; *see also* MS Brief, p. 23.)

⁵ Mr. Newsome testified that the December 14th bargaining session occurred in a downstairs conference room, while Mr. Campbell testified that it took place upstairs in Ms. Wille’s personal office—an inconsistency that the ALJ hastily dismissed as not being “meaningful.” (ALJD, p. 9 at fn.6; *compare* Tr. 33 with Tr. 98, 108-09.) Because the ALJ took the time to reference this particular inconsistency as not being “meaningful,” it stands to reason that he would have at least mentioned any other inconsistencies (meaningful or not) that he recognized in the testimony.

⁶ The General Counsel, in its Answering Brief, insists that “there is no principle in law or life that says conversations cannot veer outside the scope of what parties previously agreed to discuss.” (GC Brief, p. 6.) While that may be true, it does not change the fact that the ALJ ignored the inherent inconsistencies between the testimony and actions of two Union witnesses.

- Mr. Newsome claimed that the agreement to pay Maintenance Mechanics at a rate higher than in the Labor Agreement is reflected in a “letter” signed by both the Company and the Union, whereas Mr. Campbell confirmed that this pay raise was based on a purely verbal agreement.⁷ (*Compare* Tr. 83-87 with Tr. 114-16; *see also* MS Brief, p. 23.)

In addition to ignoring inconsistencies in the Union’s testimony, the ALJ glossed over and/or misconstrued several undisputed facts in the record that—if properly considered—would have compelled a different result. This kind of “selective analysis” is improper, especially where the inferences drawn from ignoring certain evidence are contrary to direct, un rebutted testimony. *See, e.g., NLRB v. Cutting, Inc.*, 701 F.2d 659, 665-69 (7th Cir. 1983). Here, the ALJ’s credibility determinations are belied by the following undisputed facts:

- The parties had a contentious relationship and “loud and boisterous disagreements,” which provides important context for Ms. Wille’s actions before, during, and after the December 14th bargaining session and for Ms. Wille’s reasonable understanding that the parties had come to an agreement.⁸ (MS Brief, pp. 3, 15.)

⁷ The General Counsel, in its Answering Brief, disingenuously argues that testimony about the parties’ other unwritten mid-term agreements “is wholly irrelevant to . . . whether an agreement was reached on December 14, 2011.” (GC Brief, p. 6.) However, the ALJ amply demonstrates the relevancy of the parties’ mid-term bargaining practices by concluding that “it is simply not credible that Wille, having secured the Union’s agreement, would neglect to confirm that agreement in writing.” (ALJD, p. 8.) Testimony about the parties’ historical unwritten mid-term agreements to deviate from the express language of the Labor Agreement—which is precisely the issue in this case—is far more relevant than the General Counsel’s proffered evidence of the parties’ historical negotiations for successor Labor Agreements. (Tr. 43-48, 196-98; GX-22; GX-23; GX-24; GX-25.)

⁸ The General Counsel, in its Answering Brief, argues that the ALJ “did not ignore such evidence, but properly accorded it little weight.” (GC Brief, p. 8.) It is inconceivable how the ALJ can be credited with considering the parties’ contentious relationship when it is not mentioned anywhere at all in the ALJ’s Decision.

- The Labor Agreement has no integration clause, and the parties have a historical practice of negotiating unwritten agreements on mid-term issues that result in permanent deviations from the express terms of the Labor Agreement.⁹ (MS Brief, pp. 3-4, 16-17.)
- The long-and-drawn-out 2008 reopener (and the Company’s triumphant win at arbitration) provided strong motivation for the Company’s diligence—and the Union’s delay and underhanded tactics—during the 2011 reopener. (MS Brief, pp. 4, 17-18.)
- The 2011 reopener correspondence initiated and continued by Mike-sell’s reflects an effort to comply with each step of the time-sensitive contractual process, whereas the Union’s actions before, during, and after the December 14th bargaining session reflect an obvious attempt to avoid and delay the contractual reopener process at every juncture.¹⁰ (MS Brief, pp. 6-10, 18-20.)
- Accounts of the December 12th information meeting exposed significant inconsistencies in the Union’s testimony and overall version of events. (MS Brief, pp. 10-11, 20-21.)
- Despite insisting that it had no obligation to pursue a continuation of steps in the reopener process, the Union made a belated demand to bargain outside the contractual timelines. (MS Brief, pp. 21-22.)

Had the ALJ meaningfully considered these undisputed facts, he would have had no choice but to recognize the inherent inconsistencies in the Union’s testimony and proffered case theory. These undisputed facts lead to the undeniable conclusion that an agreement was reached

⁹ The fact that Mike-sell’s has admitted to the existence of these unwritten agreements—all of which were proposed by the Union, not the Company—further demonstrates Ms. Wille’s credibility. Mike-sell’s has nothing to gain by providing sworn testimony regarding the existence of unwritten agreements—favorable to the Union—that serve to bind and restrict the Company from following the terms of the Labor Agreement as written.

¹⁰ Beyond referencing the first communication from each side, the ALJ pays little heed to the “flurry of correspondence” between the parties. (ALJD, p. 4.) However, the substance and tenor of these communications are critical in determining each party’s intentions before, during, and after the reopener.

between the parties on December 14, 2011, as Mike-sell's had nothing to gain by fabricating an agreement between the parties and by suddenly ignoring the reopener process that the Company had previously pursued so diligently in accordance with contractual timelines.

III. CONCLUSION

For the foregoing reasons, as well as those previously explained in the Company's Brief in Support of Exceptions to the ALJ's Decision, the Company's exceptions should be granted, the ALJ's ruling should be reversed, and the General Counsel's Complaint should be dismissed because:

The record as a whole does not contain a preponderance of evidence that the parties reached an agreement at the December 14th bargaining session;

The record as a whole does not contain a preponderance of evidence to support the ALJ's witness credibility assessments, factual findings, conclusions of law, remedy, and order; and

The record as a whole does not contain a preponderance of evidence that the Company violated Sections 8(a)(1) and 8(a)(5) of the Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2012, Respondent Mike-sell's Potato Chip Company's Reply Brief in Support of its Exceptions to the Decision of Administrative Law Judge Paul Bogas was electronically filed through the National Labor Relations Board website (www.nlr.gov), with copies sent to the following in the manner described below:

By Federal Express, overnight delivery, eight (8) copies to:

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