

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

In the Matter of :
WOODMAN’S FOOD MARKET, INC. : CASE NO. 30-CA-078663
And :
UNITED FOOD AND COMMERCIAL :
WORKERS UNION, LOCAL 1473 :

**RESPONDENT’S EXCEPTIONS TO THE DECISION OF
ADMINISTRATIVE LAW JUDGE JEFFREY D. WEDEKIND**

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<u>Exception</u>	<u>Page: Line</u>	<u>Record</u>	<u>Grounds</u>
1. To the ALJ's finding that the job posting saying "directing the workforce" is a material fact in determining supervisory status.	2:30	GC Exh. 2	The ALJ is accepting as conclusory a job posting without any testimony of what the statement means.
2. To the ALJ's finding that the change of status form saying that Wydeven would be "in charge of the Auto Center" is a material fact in determining supervisory status.	2:31-32	GC Exh. 3	The ALJ is accepting as conclusory statements in a document without any testimony of what the statement means.
3. To the ALJ's finding that several statements in Wydeven's periodic evaluation are material facts in determining supervisory status.	2:33-38	GC Exh. 11 Tr. 64, 83	The ALJ is accepting as conclusory statements in an evaluation that was never explained to Wydeven.
4. To the ALJ's finding that "various employment records" indicating that the auto center manager is "also considered to be a Department Head" is a material fact in determining supervisory status.	2:40-41	GC Exhs. 11,13,20	The ALJ is accepting as conclusory statements in documents without any testimony as to what these statements mean.
5. To the ALJ's finding that the exclusion of the Auto Center Manager from the bargaining unit is a material fact in determining supervisory status.	2:41-3:3	Jt. Exh. 1 Tr. 120-121	The ALJ is assuming that the exclusion from the unit of the Auto Center Manager has some bearing on the supervisory status of Wydeven without taking any testimony regarding the actual reason for the exclusion of the position from the unit.
6. To the ALJ's statement that Wydeven "recommends whether the employees should be retained in the auto center or have the probationary period extended".	4:9-10	Tr. 42:22-23 Tr. 46-21-24 Tr. 49:18-24 Tr. 52:3-7 Tr. 53:22-54:5 Tr. 54:11 Tr. 86:14-Tr.87-14	The ALJ is ignoring that Wydeven made a recommendation only once (Forster) and that recommendation was rejected by the Store Manager. No other testimony or evidence exists that Wydeven made any other recommendations.
7. To the ALJ's statement that "it makes little sense that	5:40-41	Tr. 115:12-13	The ALJ is making an unsupportable assumption. He

Frederick would have involved Wydeven with the notice if he had no significant role in it”.			does not find Wydeven credible but then assumes what his role was with the Notice without any other testimony or documentary evidence on the matter.
8. To the ALJ’s statement that Wydeven’s testimony was not corroborated.	6:8-9	-----	The ALJ is ignoring well established Board precedent and shifting the burden of proof to the Employer. The ALJ is within his rights to find Wydeven not credible. However, the ALJ incorrectly implies that the burden is on the Employer to provide corroboration.
9. To the ALJ’s finding that “it is likely that...Wydeven participated in the investigation of the customer’s complaint, reported the findings, conclusions, and recommendations to Frederick, and completed and signed the notice...”	6:12-14	Tr. 115:12-15	The ALJ is ignoring testimony to the contrary by the only witness called by the Region. Since no other witness was called the ALJ is making an assumption that is wholly unsupported since, according to the ALJ, no credible testimony was taken on the issue.
10. To the ALJ’s finding that “It is inherently unlikely...that the company would have permitted Wydeven to attend Gosz’ termination meeting as a friend...”	6:30-32	Tr. 88:1-13	The ALJ is ignoring testimony to the contrary by the only witness called by the Region. Since no other witness was called the ALJ is making an assumption that is wholly unsupported since, according to the ALJ, no credible testimony was taken on the issue.
11. To the ALJ’s finding that “credible evidence establishes that Frederick follows Wydeven’s recommendations...”	7:35-36	Tr. 42:22-23 Tr. 46:21-24 Tr. 49:18-24 Tr. 52:3-7 Tr. 53:22-54:5 Tr. 54:11 Tr. 86:14-Tr.87-14	The ALJ is ignoring that Wydeven made a recommendation only once (Forster) and that recommendation was rejected by the Store Manager. No other testimony or evidence exists that Wydeven made any other recommendations.
12. To the ALJ’s finding that Mr. Wydeven exercises independent judgment as required under <i>Oakwood</i> . ¹	8:18-19	Resp. Exh. 1 Resp. Exh. 2 Resp. Exh. 19	The ALJ is ignoring that other clerical employees also provide information to the Store Manager. Further, the ALJ is ignoring that evaluations have also been done by Mr. Wydeven when he was a clerical employee.

¹ *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687, 693 (2006)

13. To the ALJ's finding that "to conclude that the 2010 evaluations show a "clerical" practice of using unit employees to evaluate each other requires an assumption that Wydeven was not a statutory supervisor in 2010".	8:Fn. 13	Tr. 108:7-9	The ALJ is ignoring uncontradicted testimony that Mr. Wydeven was an employee like everyone else in 2010. To say otherwise once again puts the burden of proof on the Employer to prove Mr. Wydeven was not a supervisor in 2010 before there was even a charge that he was.
14. To the ALJ's findings that "the two evaluations are little more than a historical curiosity".	9:27-28	Resp. Exh. 1 Resp. Exh. 2	The ALJ cannot dismiss as a "curiosity" company documents that clearly show evaluations were completed by non-supervisors.
15. To the ALJ's finding that "Wydeven's authority to direct employees is "responsible"".	10:19-20	-----	No testimony or documentary evidence was provided establishing material consequences to Wydeven if the alleged directions were not performed.
16. To the ALJ's finding that many of Mr. Wydeven's tasks are not "dictated or controlled by detailed instructions".	11:17	Tr. 109:9-10	The ALJ is ignoring the uncontroverted testimony that Mr. Wydeven spends "98 to 99 percent of the time" doing what everyone else does. The ALJ does not state what activity, in the other 2 percent of the time, is not "dictated or controlled by detailed instructions".
17. To the ALJ's finding that Mr. Wydeven is a conduit of information and therefore an agent of the Employer.	13:2	Tr.91:11	The ALJ is ignoring that Mr. Wydeven did not explain the evaluations in question and that the meetings were as brief as "a minute or two".
18. To the ALJ's finding that the exclusion of the Auto Center Manager from the bargaining unit is a material fact in determining agency status.	13:3-6	Jt. Exh. 1 Tr. 120-121	The ALJ is assuming that the exclusion from the unit of the Auto Center Manager has some bearing on the agency status of Wydeven without taking any testimony regarding the reason for the exclusion of the position from the unit. Further, the ALJ has incorrectly applied <i>Comau</i> . ²
19. To the ALJ's reliance upon secondary indicia in determining supervisory	11:25 – 12:12		There is no evidence of primary indicia, therefore secondary indicia cannot be relied upon to

² *Comau, Inc.*, 358 NLRB No. 73 (2012)

status.			prove supervisory status.
20. To the ALJ's Conclusions of Law that Respondent violated Sections 8(a)(1) and (5) as well as Sections 2(6) and (7) of the Act.	13:18-26	-----	The conclusions of law are wrong.
21. To the ALJ's recommended remedy.	13:30-40	-----	As there were no Unfair Labor Practices there should be no remedy.
22. To the ALJ's recommended Order.	14:13-15:25	-----	As there were no Unfair Labor Practices there should be no Order.
23. To the ALJ's recommended Notice To Employees.	Appendix	-----	As there were no Unfair Labor Practices there should be no Notice To Employees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have on this day served a copy of the within and foregoing "Exceptions To The Decision Of Administrative Law Judge Jeffrey D. Wedekind" upon the Board using the E-Filing system.

This is also to certify that I have on this day served a copy of the within and foregoing "Exceptions To The Decision Of Administrative Law Judge Jeffrey D. Wedekind" via email upon the parties as follows:

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This 1st day of November, 2012.



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