

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 17**

**Stahl Specialty Company,**

**Respondent,**

**and**

**CASE 17-CA-088639**

**International Brotherhood of  
Electrical Workers Local #1464  
affiliated with the International Brotherhood  
of Electrical Workers, ALF-CIO,**

**Charging Party.**

**Charging Party's Answering Brief to Respondent's Exceptions**

Pursuant to Section 102.46(d) of the National Labor Relations Board's Rules and Regulations, the Charging Party, by and through its undersigned counsel, submits the following Answering Brief to Respondent's Exceptions filed in the above-captioned matter. Charging Party further incorporates and adopts by this reference the arguments, authorities, and brief filed by Counsel for the General Counsel as though fully set out herein. The following arguments are offered in supplement to those set forth in the Answering Brief to Respondent's Exceptions filed by Counsel for the General Counsel.<sup>1</sup>

**I. The Administrative Law Judge's Decision Must Be Upheld in its Entirety.**

**A. The Issuance of the Complaint and the ALJ's Decision Are Not Invalid.**

In its Exceptions and Brief in Support, Respondent suggests that the Acting General Counsel lacked authority to issue the Complaint and the Administrative Law Judge ("ALJ")

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<sup>1</sup> References to Respondent's Brief in Support of Its Exceptions to the Decision of the Administrative Law Judge will hereinafter be cited to as "Resp. Br. \_\_\_\_." References to the Administrative Law Judge's decision will be cited as "ALJ \_\_\_\_."

lacked authority to issue a decision in this matter because they were appointed by an “unconstitutionally-comprised National Labor Relations Board.” Resp. Br. 19. A similar argument was recently rejected in *Soaring Eagle Casino and Resort*, 359 NLRB No. 92 n.1 (2013). In that case, the Board stated that it “recognize[d] that the United States Court of Appeals for the District of Columbia Circuit has concluded that the President’s recess appointments were not valid.” *Soaring Eagle*, 359 NLRB at n.1 (citing *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted 133 S.Ct. 2861 (2013)). However, the Board further noted that the *Noel Canning* court itself acknowledged that its decision was in conflict with at least three other courts of appeals. *Id.* (citing *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied, 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962)). As stated by the Board, “[t]his question remains in litigation, and until such time as it is ultimately resolved, the Board is charged to fulfill its responsibilities under the Act.” *Soaring Eagle*, 359 NLRB at n.1. As a result, the Complaint and ALJ’s decision in this case were not improperly issued.

**B. The ALJ’s Credibility Determinations are Readily Supported by the Evidence.**

The crux of Respondent’s arguments in its Brief in Support of Its Exceptions is an attack on ALJ Christine E. Dibble’s credibility findings in her decision pertaining to the various witnesses who gave testimony at the hearing. Such credibility determinations typically depend on a variety of factors, including the context of the witness’ testimony, the witness’ demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd.* 56 Fed. Appx. 516 (D.C. Cir.

2003). An administrative law judge is undoubtedly in the best position to assess these factors. As a result, because “the demeanor of witnesses is a factor of consequence in resolving issues of credibility, and as the Trial Examiner, but not the Board, has had the advantage of observing the witnesses while they testified, it is our policy to attach great weight to a Trial Examiner's credibility findings insofar as they are based on demeanor.” *Standard Dry Wall Products*, 91 NLRB at 545. Because of this unique position that the ALJ is placed in, “the Board’s established policy is not to overrule an administrative law judges credibility resolutions unless the clear preponderance of *all* the relevant evidence convinces us that they are incorrect.” *Jag Healthcare, Inc.*, 359 NLRB No. 88 n.5 (2013) (citing *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951)) (emphasis in *Standard Dry Wall*).

ALJ Dibble found Respondent’s two key witnesses, Krishnan Venkatesan (plant manager) and James Spalding (president), to be non-credible throughout her decision. In fact, she noted that, “[b]ased on the evasive, confusing, and vague responses Venkatesan gave on both direct and cross-examination, his overall demeanor, and the totality of the evidence, I find he was not a credible witness.” ALJ 12 n.28. She further found that “[i]n my many years as a judge, I have never had a witness whose testimony I have found more worthy of discredit than Venkatesan’s.” ALJ 18 n.37.

Respondent contends that the ALJ was prejudiced by Venkatesan’s “somewhat heavy accent” and “dry delivery” without, however, giving any basis for which to ground these beliefs upon. Resp. Br. 20. Respondent further argues that his “failure to remain upbeat,” “forgetting to speak clearly into the microphone,” and “tendency to trail off at the end of answers” were natural responses to the manner in which he was questioned. *Id.* Instead, these are actually natural reactions for someone who is not being forthcoming with his testimony. The ALJ therefore

correctly surmised that Venkatesan's behavior on the witness stand were clear indications of his evasiveness and deceit.

The ALJ found Spalding almost as untrustworthy as Venkatesan, also discrediting his testimony throughout her decision. *See, e.g.*, ALJ 6 n. 17; ALJ 8 n. 19 (“Throughout the trial I found that Spalding was not a credible witness.”); ALJ 9 and n.20; ALJ 10 and n.22; ALJ 18 n.37 (“I found Spalding's testimony was evasive and calculated to be misleading.”). Taken together, the ALJ made clear her distrust of these two Respondent witnesses: “I will again emphasize that I do not find credible the majority of [Spalding and Venkatesan's] overall testimony.” ALJ 18 n.37.

The ALJ was unwavering in her appraisal of Respondent's witnesses' complete unreliability and indeed was in the best position to make these assessments. She gave ample rationale and foundation to support her determinations. Given the Board's policy to attach great weight to these credibility resolutions, and given further how fundamental these determinations were to the ALJ's overall conclusions, it is clear that every aspect of her decision should be upheld.

### **C. The ALJ Correctly Found that Respondent Unlawfully Discharged Armstrong.**

The ALJ found that Respondent terminated Patrick Armstrong, a known union supporter, for discriminatory reasons in violation of Sections 8(a)(1) and (3) of the Act. Specifically, Respondent failed to conduct a fair and meaningful investigation into allegations of misconduct and failed to follow its progressive discipline policy. ALJ 18-24. The ALJ further found that Respondent's proffered reasons for disciplining Armstrong were pretext for discrimination. ALJ 24. Armstrong's “prior history of discipline, in combination with the most recent charge, would likely not lead to termination but for discriminatory animus.” ALJ 24.

Respondent's exceptions on this issue rely heavily on attempting to overturn the ALJ's credibility determinations. Consistent with her findings throughout the decision, however, the ALJ "discredit[ed] Venkatesan's testimony in its entirety" on this issue. ALJ 19. She was also "skeptical of the truthfulness of [Ken Stewart's] overall testimony," another key Respondent witness on this point. ALJ 22 n.38. These are merely a few examples indicating how the ALJ evaluated Respondent's witnesses pertaining to Armstrong's unlawful discharge.

As previously discussed, the ALJ is in the best position to assess witnesses' demeanor, weigh the relevant evidence, and make credibility determinations based on these (and other) factors. The ALJ repeatedly found that Respondent's witnesses were untrustworthy and gave false or misleading testimony. Unless a clear preponderance of *all* the relevant evidence shows that the ALJ's credibility resolutions are incorrect, the determinations must stand. *Standard Dry Wall*, 91 NLRB at 545. Respondent's exceptions fall far short of meeting this requirement.

**D. The ALJ Properly Found that Respondent Engaged in Unlawful Surveillance of Handbilling.**

The ALJ held that Respondent, through Jeanne Adams, unlawfully conducted surveillance of employees' handbilling in violation of Section 8(a)(1) of the Act. ALJ 26. The ALJ focused her surveillance analysis on the actions of Adams, who on "at least 8 to 12 occasions [] parked her car in the driveway leading to the hourly employees' parking lot and observed the handbilling for 'a few minutes' each time." ALJ 25. There was no evidence showing that she parked her car in this location prior to the handbilling, and the surveillance ended after the unfair labor practice charges were filed. *Id.* The ALJ further found that Venkatesan, meanwhile, had also "admitted to observing the handbilling on 2 occasions...." *Id.*

Respondent argues that its observations of the employees' and union's handbilling efforts did not rise to the level of unlawful surveillance. Resp. Br. 31. Respondent's Brief, however, completely ignores the ALJ's findings regarding Adams' surveillance and merely argues that Venkatesan's actions were not sufficient to conclude that surveillance had been conducted. Because Respondent's Brief is completely devoid of any refutations to the ALJ's determinations regarding Adams' surveillance – the primary focus of her surveillance analysis – the ALJ's findings must stand.

**E. Respondent Interrogated Armstrong About His Protected Activities.**

The ALJ held that Respondent violated Section 8(a)(1) of the Act by improperly interrogating Armstrong about his union activity. ALJ 28. The record established that on or about July 26, 2012, Stewart had a discussion with Armstrong after a mandatory employee meeting where Respondent's president had given an anti-union speech. The ALJ properly found that the evidence showed that the primary purpose of Stewart's talk "was to specifically ask [Armstrong] why he felt that he needed a union, if [he] had ever been a member of a union, and why none of the employees in the meeting spoke in response to Spalding's speech." *Id.*

Under the test delineated in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964), the Board will consider the following factors when determining if management directly interrogated employees during union organizing campaigns in violation of Section 8(a)(1) of the Act: the background; the nature of the information sought; the identity of the questioner; the place and method of interrogation; and the truthfulness of the reply. Respondent concedes that the evidence need not show that the employees were *actually* intimidated or coerced by an employer's conduct in order for a violation to result. Resp. Br. 32. Instead, it is sufficient, based on the facts of the specific case, that the questioning at issue would reasonably tend to interfere

with, restrain, or coerce employees in the exercise of their statutory rights. *Rossmore House*, 269 NLRB 1176, 1177 (1984). Therefore, contrary to Respondent’s assertions, the fact that the General Counsel never elicited testimony from Armstrong that he felt threatened or intimidated during his conversation with Spalding after the mandatory employee meeting on July 26 is wholly irrelevant. As the ALJ found, Stewart’s questioning must have been done “in an attempt to learn about the strength and depth of [Armstrong] and other employees’ union support.” *Id.* This action, the ALJ held, “would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their statutory rights.” *Id.* As a result, the ALJ’s decision must be affirmed.

**F. The ALJ Correctly Held that Respondent Threatened Plant Closure.**

ALJ Dibble found that Respondent violated Section 8(a)(1) of the Act by unlawfully threatening its employees with plant closure if they unionized. ALJ 30. These threats occurred at two meetings at the Warrensburg facility, one on May 8, 2012, and the second on July 25 or 26. At these meetings, Spalding read prepared remarks to the Stahl employees. Among the things he said was the following:

“I’m telling you that Ligon [Stahl’s parent company] buys plants and invests in plants that are efficient and that make a profit so that Ligon can make a return on its investment. Unions love to have work rules and other processes in place that create inefficiency and make it harder to earn a profit. That is why so many union plants close and that is why we don’t need any union here.” ALJ 7; GC Exh. 5.

These remarks clearly state that (i) Ligon only invests in plants that are “efficient,” (ii) work rules that come into place because of unions create inefficiencies, and (iii) these inefficiencies are why so many union plants close. Spalding, therefore, was very clearly saying that if a union was voted into the Warrensburg facility, the plant would have to close because of these

inefficiencies. Indeed, he gave this speech on two different occasions to the same employees “to reemphasize Respondent’s desire to keep the plant non-union.” ALJ 7.

An employer may “communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a ‘threat of reprisal or force or promise of benefit.’” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1968). However, an employer’s communication to employees that they will jeopardize their job security, wages, or other working conditions if they support the union is a violation of Section 8(a)(1). *Noah’s Bay Area Bagels, LLC*, 331 NLRB 188 (2000). While it is true that Spalding never explicitly said they would close the facility’s doors if the Union was voted in, his words very “clearly implied that the employees’ jobs were in jeopardy if they unionized by stating that all other similar casting companies were non-union and Ligon preferred not to operate a union plant....” ALJ 29.

Respondent focused this section of its Brief in Support of its Exceptions discussing how “Spalding’s speech contained true statements about Respondent’s parent company’s business preferences” (Resp. Br. 34) and how “Respondent likewise made a true and lawful statement about Respondent’s parent company’s freedom to invest its resources.” Resp. Br. 35. These points are not in contention. Importantly, however, Respondent did not mention the “thinly veiled threats” (ALJ 29) Spalding made in his speech to the Stahl employees pertaining to union work rules that supposedly cause plant closure. These threats would reasonably indicate to anyone who heard them that union “inefficiencies” lead to such closures. Indeed, as ALJ Dibble found, Spalding’s speech “reasonably would tend to restrain or coerce employees in the exercise of their Section 7 rights.” ALJ 29. As a result, the ALJ’s determination must be upheld.

**G. The ALJ Properly Held that Respondent Posted Literature Threatening Permanent Job Loss.**

ALJ Dibble found that Respondent threatened its employees with permanent job loss via a posting of literature in violation of Section 8(a)(1) of the Act. ALJ 30. The posting “clearly states that strikers will lose their jobs during a strike if the company exercises its right to hire replacement workers.” *Id.* The ALJ found that Respondent failed to make clear the distinction between employees who engage in economic strikes and “are not entitled to immediate reinstatement if replaced, as opposed to employees who engaged in unfair labor practice strikes and are protected against permanent replacement.” *Id.* (omitting citations).

Respondent argues that it should be relieved of the violation because the posting at issue makes multiple references to bargaining over “economic demands” and then proceeds “to describe the consequences of such an economic strike....” Resp. Br. 37. Respondent, however, fails to appreciate the fact that the posting did not make the very meaningful distinction between the consequences of striking over economic issues and the consequences of striking over unfair labor practices. Instead, Respondent grouped all potential strikers together, which is where the ALJ found fault. This violation must be upheld because, as the ALJ said, the posting does not show that Respondent was referring only to economic strikers (“there is absolutely nothing in the language of the posting to support Respondent’s argument” (ALJ 30)).

**II. Conclusion.**

**A. As Stated Above, the Charging Party Adopts the Answering Brief of Counsel for the General Counsel in this Case.**

The Charging Party adopts and incorporates, by reference, the arguments and authorities presented in the answering brief of Counsel for the General Counsel. As held by the

Administrative Law Judge, the alleged violations of the Act have been proven by more than a preponderance of the evidence. For the foregoing reasons, and because of the ALJ's strong credibility findings in favor of the Charging Party, the ALJ's decision must be upheld.

Respectfully submitted,

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By /s/ Thomas H. Marshall  
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**Certificate of Service**

Pursuant to Section 102.114(i) of the National Labor Relations Board's Rules and Regulations, I hereby certify that I have this date electronically filed the foregoing Answering Brief to Respondent's Exceptions with the Office of the Executive Secretary and served copies via electronic mail on all parties listed below.

Dated: November 22, 2013

/s/ John C. Andris

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