

UNITE HERE (Boyd Tunica, Inc. d/b/a Sam's Town Hotel and Gambling Hall Tunica) and Cynthia Stephens. Case 26–CB–005146

July 13, 2011

DECISION AND ORDER

BY MEMBERS BECKER, PEARCE, AND HAYES

On December 28, 2010, Administrative Law Judge Keltner W. Locke issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief. The Respondent Union filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings,² findings,³ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and the complaint is dismissed.

Susan Greenberg, Esq., for the General Counsel.
Kristin L. Martin, Esq. (Davis, Cowell & Bowe, LLP), for the Respondent.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on November 8, 2010, in Memphis, Tennessee. After the parties rested, I heard oral argument, and on November 12,

¹ The Respondent Union moves to strike the Acting General Counsel's assertion that the complaint was amended because of a "clerical error." In light of our decision here, we deny the motion as moot.

² The Acting General Counsel excepts to the judge's evidentiary rulings excluding the testimony of employees Bonnie Ruth Moore, Pamela May Sidden, and Donna Jean Aven, and the Respondent Union's position statement. We find that, even if admitted, the testimony and the position statement would not affect our decision to adopt the judge's demeanor-based credibility findings. Therefore, we find it unnecessary to pass on the correctness of the judge's rulings.

³ The Acting General Counsel excepts to the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Further, in adopting the judge's credibility findings, we rely solely on his demeanor-based findings.

In the judge's demeanor-based discrediting of Charging Party Cynthia Stephens, he referred to Stephens' reliance on notes. The Acting General Counsel asserts that the judge created the erroneous impression that Stephens actually used notes while testifying. However, we find that the judge's observation reflected Stephens' admission at hearing that she had prepared and attempted to memorize three pages of notes the prior night.

2010, issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.¹ The conclusions of law and recommended Order are set forth below.

General Counsel's Offers of Proof

Testimony of Betty Ferguson

As part of the government's case-in-chief, the Acting General Counsel called the Charging Party, Cynthia Stephens, who testified that Respondent's agents had made certain statements described in the complaint. Immediately after Stephens' testimony, the Acting General Counsel called the Employer's labor relations manager, Betty Ferguson.

Ferguson testified that on May 20, 2010, Stephens came to her and reported that a union agent had made comments which made Stephens feel threatened. The Respondent's counsel raised a timely hearsay objection to this testimony, which I sustained. However, I did receive into evidence an email which Ferguson had sent to her superior, summarizing what Stephens had said to her. I also allowed the Acting General Counsel to make an offer of proof in question-and-answer form. After careful consideration of the offer of proof and Stephens' testimony, I have decided to reverse my ruling sustaining the objection, and to admit the proffered testimony into evidence.

Among other things, Section 10(b) of the Act provides that unfair labor practice proceedings "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States." 29 U.S.C. Section 160(b).

The statute does not spell out when following the Federal Rules of Evidence would not be "practicable." However, the Board has articulated a standard for the admission of hearsay which does not depend on how the word "practicable" is defined. As stated in *Dauman Pallet, Inc.*, 314 NLRB 105, 106 (1994), the "Board has long held that it will admit hearsay evidence 'if rationally probative in force and if corroborated by something more than the slightest amount of other evidence.' *RJR Communications*, 248 NLRB 920, 921 (1980); *Livermore Joe's, Inc.*, 285 NLRB 169 fn. 3 (1987)."

However, in this instance I conclude that it is not necessary to apply the Board's test because Ferguson's testimony is, in fact, admissible under the Federal Rules of Evidence. In discussing this conclusion, I begin with the testimony Ferguson gave during the offer of proof:

Q. BY MS. GREENBERG: How did the conversation begin with Cynthia Stephens the first time in your first conversation with her on May 20th?

A. She came and told me that she felt very uneasy. That she felt that she had been threatened and that she didn't think that we as company were taking care of her basically by allowing this to happen.

¹ The bench decision appears in uncorrected form at pp. 309 through 319 of vol. 3 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as appendix A to this certification.

Q. And when she said she felt threatened, did she say why she felt threatened?

A. She then went into—Gigi was the lady who she named, had basically made the remarks that I put in this e-mail about kicking their a-s-s and that the Union would not represent those who didn't sign up.

Q. And did you discuss the language that she said was used?

A. I told her that we have a very strict rule about language or threats being made to our employees and that we would not tolerate any, whether it be a vendor, a guest, or a fellow employee making threats of any kind to another employee.

Q. Did she show you any gestures of any kind that Gigi or Pam had done?

A. I don't recall.

Q. Okay. And then after you talked to Ms. Stephens for about 20 minutes, what happened at that point?

A. I sent her back to her area to go back to work or go on to lunch. I don't know which it was. And I told her that I would have to report up.

Presumably, the Acting General Counsel offered this testimony to bolster Stephens' credibility by showing that she had made a prior consistent statement. However, a careful examination of Stephens' testimony indicates that what she told Ferguson was *not* entirely consistent with what she said on the witness stand.

At the hearing, Stephens testified about the conversation she had with union agents Gigi Phelps and Pamela Stitts in late April 2010. Stephens testified that she said to them, "I want to find out if you all were funded to pay us if we go on strike." According to Stephens, one of the union agents answered, "Yes, we are." Stephens further testified:

I said, "What if I have to go back in to work?" And then that's when Pam said, "We'll kick your ass." And then that's when I said, "Okay." And I got up and walked off with Rose and told her I wasn't paying nobody \$30 a month to kick my ass.

Although Stephens testified that Pam (Stitts) made the "kick your ass" statement, she told Ferguson that Gigi Phelps made this statement. Thus, the words attributed to Stephens by Ferguson constitute a prior *inconsistent* statement.

Rule 613(b) of the Federal Rules of Evidence states as follows:

Extrinsic evidence of prior inconsistent statement of witness.—Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

Although Charging Party Stephens already had testified before Ferguson took the witness stand, Stephens remained at the hearing throughout the day, and thus was present when I asked the Acting General Counsel whether there would be rebuttal

testimony. Even though the Acting General Counsel did not present rebuttal evidence, Stephens, as the Charging Party, also had the right to call and examine witnesses. Similarly, Respondent could have called Stephens to testify. Therefore, Respondent was afforded the opportunity to interrogate her.

In these circumstances, I conclude that Ferguson's testimony satisfied the requirements of Rule 613(b) and was admissible on that basis. More fundamentally, in view of the fact that Stephens had filed the unfair labor practice charge against Respondent and was a party to this proceeding, her comments to Ferguson constituted the statement of a party opponent within the meaning of Rule 801(d)(2) of the Federal Rules of Evidence, and therefore, these statements were not hearsay. Accordingly, I reverse the ruling I made during the hearing and receive the offer of proof into evidence.

Stephens' inconsistent statement to Ferguson takes on further significance when considered together with the government's amendment of the complaint. As discussed more fully in the bench decision, the original complaint had alleged that Union Agent *Stitts* had told an employee (Stephens) not to call the National Labor Relations Board. The complaint amendment deleted that allegation and substituted an allegation that *Phelps* had made such a statement. The difference between Stephens' testimony about the "kick your ass" statement and what she told Ferguson shows confusion related to a separate complaint allegation. Although I relied on demeanor observations in rejecting Stephens' testimony, the muddle over who said what reinforces my conclusion that it is unreliable.

It also appears significant that Stephens waited more than 3 weeks before reporting the "kick your ass" statement to the Employer's human resources manager. Stephens' comments to Ferguson, that she "felt very uneasy," that she felt she had been threatened, and that she didn't think the Company was taking care of her, should be considered in the context of that 3-week delay. If Stephens really had felt threatened, would she have waited so long before bringing her concerns to the attention of management.

The delay might be explained away if Stephens had displayed some shyness or hesitancy about contacting the human resources department. However, the record shows that Stephens had not been reluctant about approaching the human resources staff when she had a question about the Union. Therefore, it is appropriate to consider the delay in assessing Stephens' credibility.

In sum, based on my demeanor observations and the other factors discussed above and in the bench decision, I conclude that Stephens' testimony is not reliable enough to have significant probative value. Therefore, I reject it.

Testimony of Bonnie Ruth Moore

The Acting General Counsel called Bonnie Ruth Moore, who is one of Charging Party Stephens' fellow employees. When Respondent objected to certain parts of Moore's testimony, the Acting General Counsel made an offer of proof in question-and-answer form.

In this offer of proof, Moore recounted what Stephens had told her about Stephens' contacts with Respondent's agents. According to Moore, Stephens quoted the Respondent's agents

as saying that if Stephens crossed a picket line she would “get her butt beat” or something to that effect. However, Moore was not present when the union agent supposedly made this statement, so Moore’s testimony clearly is hearsay and properly excluded under the Federal Rules of Evidence.

To determine whether this testimony would be admissible in Board proceedings, I will apply the Board’s two-part test: Is the testimony (1) rationally probative in force and (2) corroborated by something more than the slightest amount of other evidence. See *Dauman Pallet, Inc.*, above.

To determine whether Moore’s excluded testimony is rationally probative in force, I will begin by examining that testimony without regard to its hearsay nature. Moore did not know the names of the union agents to whom Stephens had attributed the “butt beat” statement. Additionally, she did not recall the exact words but only “something to that effect.” Therefore, even apart from the hearsay nature of the testimony, it has little probative effect. It certainly would be of quite limited usefulness in establishing a violation.

Moreover, the information which Moore recounted came from Charging Party Stephens. Therefore, Moore is not an independent source of information about what happened. Further, for the reasons discussed above and in the bench decision, I have concluded that Stephens is not a reliable witness. Filtering what Stephens said through the ears and memory of a third party is not likely to make it any more reliable. I conclude that the offer of proof does not pass the first part of the Board’s test.

Moore’s testimony in the offer of proof also does not pass the second part of this test. The information which Stephens provided to Moore is not corroborated by anyone except Stephens, and I have rejected her testimony as unreliable.

For these reasons, I conclude that the offer of proof does not meet the Board’s criteria. Therefore, I adhere to my ruling excluding that testimony from the record.

Testimony of Pamela May Sidden

The government also called Pamela May Sidden, another employee of the Employer. Sidden also testified that Stephens told her about statements which Stephens attributed to union agents. Sidden was not present when the union agents supposedly made such comments. Therefore, Sidden’s testimony clearly is hearsay and properly excluded under the Federal Rules of Evidence. Respondent objected to the receipt of this testimony and I sustained the objection. The General Counsel then made an offer of proof in question-and-answer form.

However, the following part of Sidden’s testimony is part of the record because made before Respondent objected:

Q. And so after you asked Cynthia [Stephens] what was going on, what happened?

A. She just told me what they said and everything.

Q. What did she say they said?

A. She was asking them questions about how they was going to represent us and everything in the Union when they come in.

Q. And what did they say?

A. Well, see now, I’m not going to—if I don’t join the Union, she was asking them how they was going to represent us and everything because some of us, if we don’t pay

our dues we just going to join because they in Sam’s Town. And I hadn’t joined yet. And she was telling me what they said that they wouldn’t represent us if they—if we had a problem.

At this point, Respondent objected, I sustained the objection, and the General Counsel made the offer of proof. Solely to analyze whether this offer satisfies the Board’s standards for the receipt of hearsay, I will consider the testimony given by Sidden during the offer of proof, set forth below. However, it should be stressed that the testimony below is not part of the record and I have not relied upon it for any purpose.

Q. BY MS. GREENBERG: What did Cynthia Stephens say that the union rep said about non-members?

A. They said they wouldn’t represent us. That if we had to go in front of the Board and they had to represent us, they would turn their back on us and they wouldn’t represent us.

Q. Did Cynthia Stephens say that they told her to tell you that?

A. Well, I asked her what they were saying because she went up there and talked. Yes, ma’am, they did say to tell the people that wouldn’t joining to—that’s what they was going to do.

Q. Did you hear anything that was said by Gigi and Pam?

A. No, ma’am, I was going out of the EDR.

Q. Could you determine whether Gigi or Pam was talking loudly?

A. I don’t remember them talking loudly. I could just tell they was upset.

MS. GREENBERG: That concludes my offer of proof.

The first prong of the Board’s test asks whether the hearsay statement is rationally probative in force. I must conclude that the offer of proof was not. It did not identify any particular union representative. Moreover, Sidden’s testimony derives solely from information provided to her by Charging Party Stephens, and I have concluded that Stephens is not a reliable witness.

The offer of proof also fails the second part of the Board’s test. It is uncorroborated. (In this regard, I do not consider Stephens’ testimony to be corroboration because she also is the source of the information provided by Sidden in the offer of proof. Similarly, to the extent that another witness offered hearsay based on what Stephens said, that information also comes from Stephens and does not constitute independent corroboration.)

In sum, the offer of proof is not admissible either under the Board’s test or the Federal Rules of Evidence. Therefore, I adhere to my ruling which sustained the objection to this testimony.

Testimony of Donna Jean Aven

Another employee, Donna Jean Aven, also offered testimony concerning statements made to her by Charging Party Stephens. After Respondent raised a hearsay objection, which I sustained, the General Counsel made an offer of proof in question-and-answer form.

This offer of proof also did not pass the Board's two-part test for the admissibility of hearsay. Aven did not identify the union representative who supposedly made the statement attributed to her by Stephens. Further, the information came to Aven from Stephens who was not, I concluded, a reliable witness. Moreover, this information is not corroborated by any witness other than Stephens, and Stephens, of course, may not corroborate her own testimony.

Because the offer of proof constitutes inadmissible hearsay under the Federal Rules of Evidence, and because it fails the Board's test for the admissibility of hearsay, I adhere to my ruling which excluded this testimony from the record.

Respondent's Position Statement

During the hearing, the Acting General Counsel sought to introduce a June 18, 2010 letter which Respondent's lawyer sent to the Board investigator during the precomplaint investigation. In the letter's own words, it provided Respondent's "opening position statement" concerning the allegations raised by the unfair labor practice charge.

Respondent objected to the receipt of the letter into evidence. The Acting General Counsel, arguing for receipt of the document, cited *Steve Aloï Ford*, 179 NLRB 229 fn. 1 (1969) ("It is well settled that the admissions of an attorney in the management of litigation are admissible against the client.") However, based on the Board's more recent decision in *Kaiser Aluminum & Chemical Corp.*, 339 NLRB 829 (2003), I sustained the objection.

In *Kaiser Aluminum & Chemical Corp.* the Board held that a position statement submitted by the union's lawyer during the investigation of an unfair labor practice charge constituted attorney work product within the meaning of Rule 26(b)(3) of the Federal Rules of Civil Procedure. The Board also held that this attorney work product doctrine applied to unfair labor practice proceedings and that the position statement fell within that privilege.

In the present case, the Union is the Respondent rather than the Charging Party, but I discern no logical reason why a position statement submitted by the lawyer for one party should be accorded the privilege but the position statement submitted by the lawyer for another party should not. Indeed, it would seem not merely asymmetrical but unfair for the position statement of one party's lawyer to be accorded the privilege but a similar statement from the other party's lawyer to be denied the privilege.

Another case, in the same volume as the *Kaiser Aluminum & Chemical Corp.*, may have some relevance here. In *Commercial Workers Local 342 (Pathmark Stores)*, 339 NLRB 148, 148 fn. 1 (2003), the Board stated, "we find it unnecessary to pass on the judge's additional statement that position papers submitted by an attorney for a party also are admissible as admissions." This language is somewhat unexpected, considering that 24 years earlier, in *Steve Aloï Ford*, the Board had considered it "well settled" that the admissions of an attorney were admissible against the client. However, I am reluctant to infer from footnotes in two cases that the Board is reconsidering how position statements should be treated.

My research did not find a case in which the Board construed the *Kaiser Aluminum & Chemical Corp.* holding to be inapplicable to position statements submitted by a respondent. Therefore, I adhere to my ruling sustaining the objection to receipt of this document into evidence. However, the position statement is preserved in the rejected exhibit file, and thus is accessible to be placed in the record, should the Board reverse my ruling.

CONCLUSIONS OF LAW

1. The Respondent, UNITE HERE, is a labor organization within the meaning of Section 2(5) of the Act.

2. The Employer, Boyd Tunica, Inc., d/b/a Sam's Town Hotel and Gambling Hall Tunica, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Charging Party is an individual and an employee of the Employer.

4. The Respondent did not violate the Act in any manner alleged in the Complaint.

On the findings of fact and conclusions of law, and on the entire record in this case, I issue the following recommended²

ORDER

The complaint is dismissed.

APPENDIX A

Bench Decision

In this case, the government alleges that Union agents made certain coercive statements to employees in the bargaining unit which the Union represented. Because I do not credit the testimony of the government's primary witness, I find that a preponderance of the evidence does not prove any of the alleged violations. Therefore, I recommend that the Board dismiss the Complaint in its entirety.

Procedural History

This case began on May 21, 2010, when the Charging Party filed an unfair labor practice charge against the Respondent, UNITE HERE, a labor organization. The Charging Party amended this charge on July 14, 2010.

On August 27, 2010, after investigation of the charge, the Regional Director for Region 26 of the National Labor Relations Board issued a Complaint and Notice of Hearing, which I will call the "Complaint." In issuing this complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "government."

Respondent filed a timely Answer.

On November 8, 2010, a hearing opened before me in Memphis, Tennessee. At the beginning of the hearing, the General Counsel amended the Complaint. Respondent denied the new allegations.

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

On November 8, both the General Counsel and Respondent called witnesses and offered documentary evidence. On November 9, counsel presented oral argument. Today, November 12, 2010, I am issuing this bench decision pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations.

Admitted Allegations

In its Answer, Respondent admitted the allegations raised in Complaint paragraphs 1(a), 1(b), 2, 3(a), 3(b) 3(c), and 4, and portions of Complaint paragraph 5. Based on those admissions, I conclude that the General Counsel has proven these allegations. More specifically, I find that the Charging Party filed and served the charge as alleged.

Moreover, I find that the government has proven that the Employer, Boyd Tunica, Inc. doing business as Sam's Town Hotel and Gambling Hall, Tunica, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Further, I find that at all material times, the Respondent, Unite Here, has been a labor organization within the meaning of Section 2(5) of the Act. Respondent's Answer also admits, and I find, that on the dates of the alleged unfair labor practices, April 23, 2010 and April 27, 2010, the following individuals were its representatives or organizers: Scott Cooper, Gigi Phillips and Pamela Stitts. Respondent's Answer does not specifically admit that these individuals were its agents within the meaning of Section 2(13) of the Act. However, based on the entire record, I so find.

Facts

Early in 2010, Respondent engaged in a campaign to organize the employees of Boyd Tunica, Inc., doing business as Sam's Town Hotel and Gambling Hall, Tunica, in Tunica, Mississippi. On April 12, 2010, an arbitrator checked the signatures on authorization cards submitted by Respondent and determined that a majority of bargaining unit employees had designated the Respondent to represent them. The Employer then granted the Union recognition as the exclusive bargaining representative of the following unit:

All regular full-time and part-time bell department, hotel housekeeping, food and beverage, banquet, conference services, janitorial, cleaning and laundry employees (including guest room cleaners, house persons, bell persons, baggage handlers, door persons, change persons/slot attendants, booth cashiers, cooks, kitchen employees, kitchen utility employees, servers, bussers, bartenders, dining room cashiers, restaurant hosts and hostesses, non-hotel public space cleaners, specialty floor cleaners, laundry workers), but excluding all secretarial, office clerical, sales and all managers, supervisors, and guards as defined in the National Labor Relations Act.

The Charging Party, Cynthia Stephens, works for the Employer as a food server and is a member of this bargaining unit.

At some point—from the record it is not clear whether this was before or just after the April 12 recognition—Charging Party Stephens embarked on an effort to obtain employee signatures on a petition opposing the Respondent. In other words, she sought to reverse the decision which bestowed recognition

on the Union. To various employees, she voiced concerns that there might be a strike and that the Employer's practice of providing free meals to workers would end. It is not clear how those concerns arose.

Then on May 21, 2010, Ms. Stephens filed the unfair labor practice charge which began this proceeding. In that charge, Ms. Stephens alleged that the Union made certain statements which restrained and coerced employees in the exercise of their Section 7 rights, in violation of Section 8(b)(1)(A) of the Act.

The Complaint alleges that Respondent's agents made a number of such statements on April 23 and April 27, 2010. Although the General Counsel called a number of witnesses during the hearing, the government depends on Ms. Stephens' testimony to prove each of the unfair labor practice allegations and without that testimony, each of the allegations cannot be established. Therefore, this case turns on Ms. Stephens' credibility.

Before examining that matter, it may be helpful to summarize the alleged violations. In some respects they have changed because the General Counsel amended the Complaint at hearing.

Complaint paragraph 6(a) alleges that Respondent, by Gigi Phillips, at the Employer's facility, on or about April 23, 2010, told an employee that the employee could not resign from the Union.

Complaint paragraph 6(b) alleges that Respondent, by Gigi Phillips, at the Employer's facility, on or about April 27, 2010, told an employee that Respondent would not represent employees who did not pay union dues and instructed the employee to tell employees who did not want to be dues paying members that they would not be represented.

The original Complaint did not include a paragraph 6(c), which was added by the amendment during the hearing. This amendment bears examination because it suggests that the Charging Party may have provided incorrect or at least confusing information during the pre-Complaint investigation.

The original Complaint included, in its paragraph 8, an allegation that on or about April 27, 2010, Respondent's agent Pamela Stitts told an employee not to call the National Labor Relations Board and threatened the employee with bodily harm when the employee asked what would happen if the employee returned to work during a strike.

The amendment left untouched the allegation that Respondent, by Pamela Stitts, had threatened an employee with bodily harm. However, it deleted the allegation that Stitts had told an employee not to call the National Labor Relations Board.

However, the amendment placed, in a new paragraph 6(c), an allegation that on or about April 27, 2010, Respondent, *by Gigi Phillips*, told an employee not to call the National Labor Relations Board. Ms. Stephens gave testimony to that effect during the hearing. Deletion of the allegation that Respondent's agent Stitts had made the statement, and substitution of an allegation that Respondent's agent Phillips had made the statement, suggests that the Charging Party had been confused. Other evidence pertaining to confusion will be discussed below. Complaint paragraph 7(a) alleges that Respondent, by Scott Cooper, on or about April 23, 2010, at the Employer's facility, failed to provide an employee with correct information

concerning resignation of union membership. Complaint paragraph 7(b) alleges that Respondent, by Scott Cooper, on or about April 27, 2010, during a telephone conversation with an employee failed to provide the employee with correct information regarding dues revocation.

These allegations, about resignation of union membership and revocation of a dues checkoff authorization, are similar enough to cause confusion. For reasons discussed below, I am concerned that the Charging Party did confuse or conflate the resignation of union membership and the revocation of dues checkoff.

Complaint paragraph 8, as amended at hearing, includes subparagraphs (a) and (b). Subparagraph (a) alleges that on or about April 27, 2010, Respondent, by its agent Pam Stitts, threatened an employee with bodily harm when the employee asked what would happen if the employee returned to work during a strike. Subparagraph (b) alleges that on or about April 27, 2010, Respondent, by Stitts, told an employee that Respondent would not represent employees who did not pay union dues and instructed the employee to tell employees who did not want to be dues-paying members that they would not be represented.

The allegations just described are the only unlawful acts alleged in the Complaint. The General Counsel relies on the testimony of Charging Party Stephens to establish each of these allegations. However, based on my observations of the witnesses, I conclude that Ms. Stephens' testimony is not reliable and do not credit it, even when it is uncontradicted.

In general, the Charging Party's testimony tended to ramble and to be confusing, but that alone would not be enough to persuade me that it was too unreliable to have any probative value. However, there are more specific reasons to doubt its reliability.

Some of my concerns about the Charging Party's testimony arose in connection with her description of a conversation she had with two of Respondent's agents, Gigi Phillips and Pamela Stitts, on April 27, 2010. She testified that she had been smoking a cigarette in the smoking room at work when another employee, Rose Williams, entered.

Stephens told Williams that there was a chance that the employees would have to begin paying for their food and a chance that they might go on strike. Williams replied, "I don't believe that." The two decided to speak with two Union representatives who were on the Employer's premises.

The two Union representatives, Phillips and Stitts, were in the employee dining room, which adjoined the smoking room. Up to this point in her testimony, Charging Party Stephens had appeared confident and assured. However, when she began to describe her questioning of the Union representatives, she gave the impression of being unable to recall her question without referring to notes which, she admitted on cross-examination, she had prepared the night before the hearing. For two reasons, her reliance on those notes raised questions about her memory and credibility.

Obviously, any witness's recourse to notes may call into question the accuracy of her independent memory. Moreover,

in Ms. Stephens' case, there seemed to be an unexplained lack of consistency between how much she recalled of her conversation with the other employee, Rose Williams, and how much she remembered about her contact with the Union representatives. The difference between her confident demeanor while testifying about her conversation with Williams, and her reliance on notes when testifying about what the Union representatives said, seems hard to explain.

After all, the statements attributed to the Union representatives bothered Ms. Stephens enough that she later filed unfair labor practice charges. It would be reasonable to assume that a witness would be more likely to recall a comment that caused her distress than an innocuous remark to a friend.

Stephens testified that, in response to a question, one of the two Union representatives, Stitts, said that she legally would have to represent an employee who was not a Union member but that, during grievance meetings, she would "turn my back on their asses."

Stephens also said that she told the Union representatives she had called the Labor Board with some questions. According to Stephens, Union representative Phillips replied, "First of all, don't call the Labor Board" that instead, she should come to the Union.

Stephens' hesitant demeanor while giving this testimony raises doubts in my mind. Moreover, although another employee, Williams, accompanied Stephens, Williams did not testify. Although Gigi Phillips also did not take the stand, she no longer was employed by the Union at the time of hearing and I draw no adverse inference from her failure to appear.

On cross-examination, Stephens not only admitted that she had written her notes the night before the hearing—they were not contemporaneous with the events—but also admitted that she had tried to memorize other parts of her testimony.

Although I do not believe she consciously lied, she certainly had taken a position opposite the Union even before filing the charge. At some subconscious level, this may have affected her memory.

Even if it did not, the potential for confusion and conflation is so great, and my doubts about the reliability of Williams' testimony are so great, that I cannot credit that testimony even when uncontradicted. The preponderance of the evidence standard requires proof that an alleged action or statement more likely happened than not. Stephens' testimony does not meet this standard.

Therefore, I recommend that the Board dismiss the Complaint in its entirety.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, and Order. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

Throughout the hearing, counsel displayed professionalism and courtesy which truly are appreciated. The hearing is closed.