

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

**ACE HEATING & AIR CONDITIONING
CO., INC.**

**CASES o8-CA-133965
 o8-CA-133967
 o8-CA-133968**

and

**SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL UNION NO. 33**

**ACE HEATING & AIR CONDITIONING
CO., INC.**

CASE o8-RC-127213

Employer

and

**SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL UNION NO. 33**

Petitioner

**EMPLOYER’S BRIEF IN OPPOSITION TO
THE GENERAL COUNSEL’S EXCEPTIONS TO THE DECISION OF
THE ADMINISTRATIVE LAW JUDGE (JD-03-15)**

I. Introduction.

It is striking that it has taken the Counsel for the General Counsel 34 pages to state its exceptions to the clearly written and succinct seven-page opinion of Administrative Law Judge Amchan (the “ALJ” or “Judge Amchan”), which concluded, after evaluating all of the evidence, and most importantly, the credibility of the witnesses who testified during the

two-day hearing, that Ace Heating and Air Conditioning Company (“Ace” or the “Company”) did not commit any unfair labor practices before or after the May 21, 2014 representation election.

Specifically, the ALJ concluded that:

1. The Company did not threaten employees it would close if they voted for union representation.
2. The Company did not tell employees that it would pay them in exchange for voting against union representation.
3. The Company did not interrogate employees about their union sympathies and how they would vote.
4. The Company did not deny employees a scheduled pay increase about a week after the representation election.

Each of the General Counsel’s nine exceptions to the ALJ’s decision improperly takes issue with Judge Amchan’s evaluation of the evidence and, more importantly, his evaluation of the credibility of the testifying witnesses. Because the NLRB must afford considerable deference to the ALJ’s credibility assessment of witnesses, in addition to his balancing of all of the many factors at work in deciding whether to believe or disbelieve witnesses, the Board should affirm Judge Amchan’s well-reasoned decision.

II. Factual Background.¹

Ace is an Ohio corporation with a history that dates back more than 20 years, when the owner, Mitchell Stephen, started the company as a solo HVAC operator. Located in

¹ Because Ace is a small business with limited resources, counsel will not be citing herein to the hearing transcript. Notably, because of the same financial restrictions, at the conclusion of the hearing Ace’s counsel was only able to present a closing argument, and did not file a post-hearing brief. Despite the General Counsel’s 23-page post-hearing brief, Judge Amchan still ruled for the Company on every alleged violation.

Cleveland, Ohio, Ace has steadily added employees over the years and has been involved in increasingly visible and complex projects across Cuyahoga County. During the relevant time, there were two statutory supervisors (Mr. Stephen and Ed Dudek), two office clerical employees (Laura and Laurie Stephen) and approximately eight (8) hourly employees working for the Company, including field installers and service technicians.

An election was conducted on May 21, 2014, with all eight employees voting plus Mr. Dudek (an unexpected participant), who voted pursuant to the Board Agent's challenge. The tally of ballots resulted in a 4-4 tie, plus Mr. Dudek's challenged ballot. Following a hearing to determine whether Mr. Dudek's challenged ballot should be excluded due to his supervisory status, and over the Union's objection, the Hearing Officer reviewed all the evidence and found that he was a supervisor under Section 2(11) of the Act and was ineligible to vote in the election. Notably, Mr. Dudek served as the Union's primary witness at the hearing, and in several instances, the Hearing Officer did not credit his testimony. It also became abundantly clear at the hearing that Mr. Dudek was *the* main point of contact for the Union and he was actively engaged in recruiting Ace's employees both before and after they signed the petition. The Board subsequently adopted the Hearing Officer's findings and recommendations on August 14, 2014.

The Union simultaneously filed multiple election objections, including several objections directed at the Board Agent who conducted the election. Although the Union withdrew some of its objections and eventually dismissed all of them in favor of filing multiple, somewhat similar unfair labor practice charges, which Judge Amchan determined all as meritless, he correctly determined that the alleged perpetrator of all of the alleged

improper behavior, Mr. Dudek, at all relevant times was acting as an agent of the Union, and not of the Company, when he, for purposes of intentionally undermining the legitimacy of an election the Union knew it could not win, engaged in conduct that is alleged to have violated the Act.

The ALJ held a factual hearing regarding the alleged unfair labor practices on December 8 and 9, 2014. At the hearing, the General Counsel supported its entire case on the uncorroborated, and as Judge Amchan concluded, non-believable and non-credible testimony of Mr. Dudek. For example, Judge Amchan concluded that it was not believable that the pro-union employees felt threatened or coerced by Mr. Dudek's alleged statement that Ace would close its door if the union won the election, as no employees engaged in discussion about the alleged threats among themselves, and no one asked Ace's owner, Mitchell Stephen, about it. Indeed, there was testimony from one employees, James Mazzeo, who confirmed that Mr. Dudek was making such outrageous, self-serving comments, that he openly laughed at them during a conversation between the two.

Instead, it is undisputed that Mr. Stephen, in response to the union organizing campaign, expressly told Mr. Dudek not to say anything improper to any Ace employees about the union or the election. Lori Stephen witnessed and corroborated this phone conversation at the hearing. In the face of this corroborated, credited testimony, the General Counsel simply cannot legitimately challenge Judge Amchan's determination dismissing "all of the complaint items predicated on statements [Mr. Dudek] made to the unit employees." Thus, there is no basis to overturn Judge Amchan's fact-and-credibility

based determination that Mr. Stephen never authorized Mr. Dudek to threaten employees if they voted for union representation.

After evaluating all of the evidence presented by the parties, and the credibility of all testifying witnesses, Judge Amchan concluded that Mr. Dudek was an agent of the Union and not of the Company, and that the Company had not committed any unfair labor practices. Indeed, Judge Amchan concluded that the Company's argument that Dudek made certain statements to pro-union employees as a "back-up plan for filing objections if the Union lost the election is not farfetched."

III. Argument.

A. The NLRB Must Give Substantial Deference to Factual Findings and Credibility Determinations of the Administrative Law Judge Who Presided Over the Hearing.

The NLRB, located in Washington, D.C., cannot (literally or figuratively) seat itself next to an administrative law judge at a hearing held in Cleveland, Ohio. The Board cannot watch and listen to witnesses testify. It must rely on a judge's assessment of the witnesses' credibility, and the judge's balancing of all of the many factors at work in deciding whether to believe or disbelieve witnesses.

Indeed, the United States Supreme Court has firmly established the deference due to an administrative law judge's findings, particularly with respect to credibility. In *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951), the Court stated:

The "substantial evidence" standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he had reached the same conclusion. The findings of the examiner are to be considered along

with the consistency and inherent probability of testimony. The significance of his report of course, depends largely on the importance of credibility in the particular case.

Further, in *Ewing v. NLRB*, 732 F.2d 1117 (2d Cir. 1984), in language applicable to the Board in reviewing an administrative law judge's credibility resolutions, the court said:

It is the task of trial judges to separate factual wheat from evidentiary chaff, and appellate courts must accord great deference to these determinations. The temptation to displace the trial court's judgments with our own is often strong, but the integrity of the decision-making process requires that we do so only in cases of clear error. Fed.R.Civ.P. 52(a). The same policies apply in the administrative context when decisions of the finder of fact are brought under review.

This Board's job is not to re-try the case. It not only should and cannot, resift through the facts that the judge has already thoroughly considered, and, as the General Counsel improperly urges, on the basis of that re-sifting, reverse the judge's credibility resolutions. Such second-guessing does not give proper deference to the Board's administrative law judges. Even if the Board suspects that a decision may not be exactly right, it must affirm that decision if the ALJ based it on thoroughly considered credibility resolutions. *California Saw & Knife Works*, 320 NLRB 224, 224 n.2 (1995).

In this case, the ALJ reached his decision based on thoroughly considered credibility resolutions that the Board cannot disturb. The ALJ correctly concluded, based on the evidence presented, that Mr. Dudek was a union supporter acting solely on its behalf, and therefore not an agent of the employer, when he allegedly made pre-election statements that the union alleged violated section 8(a)(1). Specifically, the ALJ concluded:

- Mr. Dudek signed a union authorization card in front of six employees, and a seventh was also aware of his support for the Union.

- Mr. Dudek communicated and exchanged text messages with a union organizer throughout the election process and as late as two weeks prior to the election.
- None of the four employees whom Mr. Dudek allegedly threatened complained to the union about the threat, leading Judge Amchan reasonably to conclude that they did not believe Mr. Dudek was acting on behalf of the employer or had the authority to carry out the threat.
- Mr. Dudek acted out of suspicious motives, as there is no logical explanation as to why a union supporter (which he was) would engage in pre-election anti-union threats, unless he wanted to manufacture disingenuous and false unfair labor practices.
- Even the Union considered Mr. Dudek to be operating on its behalf and not on behalf of the employer, by filing objections in which it argued that he was an “employee” whose vote should be counted.

Each of these facts is based on the ALJ’s evaluation of the evidence and testimony presented at the hearing. Indeed, this entire case rises and falls based solely on the credibility (or, more accurately, the lack thereof), of the Union’s primary witness, Mr. Dudek. Thus, even if the Board has doubts as to the correctness of the decision below (although a common-sense reading of the record dictates that it should have no such doubts), it must affirm the decision because the ALJ based it on thoroughly considered credibility resolutions.

B. Judge Amchan Correctly Concluded that Mr. Dudek was not Acting as the Company’s Agent When Making All Statements Alleged to have Violated Section 8(a)(1).

The mere fact that Mr. Dudek was a “supervisor” within the meaning of Section 2(11) of the Act does not foreclose further inquiry as to whether his agency status as a supervisor imputes his alleged anti-union statements to the Company. Indeed, as Judge Amchan correctly held, an individual may be an agent of the employer for one purpose and not another. *Pan-Oston Co.*, 336 NLRB 305, 306 (2001). In *Pan-Oston Co.*, the Board held that

it can decline to find a supervisor is an agent of the employer “where an employee acts outside the scope of his or her usual duties.” *Id.*; see *Cooper Indus.*, 328 NLRB 145 (1999) (finding that even though certain facilitators were agents of their employer for certain purposes, they were not acting as agents of the employer when they attended a union meeting because no one would reasonably believe they were there on behalf of the employer); *Waterbed World*, 286 NLRB 425, 426-27 (1987) (finding that an employee who interrogated other employees and threatened them with discharge did not act as an agent of the employer because the employer had never held out the employee as speaking on its behalf).

In this case, Judge Amchan correctly concluded that Mr. Dudek was not an agent of Ace when making any alleged anti-union statements, and the record is replete with examples of his union support:

- Mr. Dudek signed a union authorization card.
- Seven of the eight bargaining unit members were aware of Mr. Dudek’s support of the union, including the six who were present when he signed his card.
- Mr. Dudek acted as the Union’s conduit for contact with Ace’s employees.
- Mr. Dudek attended and organized union meetings, and regularly communicated and texted with the Union’s organizer as late as two weeks before the election.
- None of the employees to whom Mr. Dudek allegedly communicated anti-union threats complained about it to management.
- Mr. Dudek’s motives are highly suspicious, as the only logical explanation for a Union supporter to make anti-union threats one week before an election is to create fraudulent unfair labor practices as a strategic back-up plan in the event the Union lost the election.

Therefore, Judge Amchan correctly held that Mr. Dudek was not an agent of Ace when he made any statements alleged to have violated Section 8(a)(1).

C. Judge Amchan Appropriately Disposed of All Issues Relating to Wage Increases at the Company.

The General Counsel makes two contradictory arguments regarding wage increases (or the lack thereof) at Ace while the Union's objections to the election were pending. On the one hand, the General Counsel argues that Judge Amchan erred by failing to conclude that Ace violated 8(a)(1) by unlawfully withholding wage increases. Yet, on the other hand, the General Counsel also argues that Judge Amchan erred by failing to conclude that Ace violated 8(a)(1) by granting wage increases to certain of its employees. Simply, the General Counsel can't have it both ways.

Regardless, Judge Amchan addressed these issues and properly disposed of them. Regarding the allegedly withheld increases, the delay of pay raises does not violate the Act unless the employer was required to provide raises prior to the filing of the representation petition. *See DMI Distrib. of Del.*, 334 NLRB 409 (2001). In this case, Judge Amchan correctly determined that Ace historically doled out raises in a "haphazard fashion," and therefore any decision to delay pay raises did not violate the Act. Regarding the alleged pay raises given to certain employees, the undisputed evidence at the hearing was that Ace provided these raises to two specific employees—Fred Corbin and Steve Sarosy—only after they threatened to leave for better paying jobs. Thus, Judge Amchan correctly disposed of all issues surrounding pay increases.

IV. Conclusion.

For all of the reasons stated herein, Ace Heating and Air Conditioning Company respectfully requests that the Board affirm January 15, 2015, decision of the Administrative Law Judge dismissing the complaint.

Respectfully submitted,

/s/ Seth P. Briskin

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically. Notice of this filing will be sent to all parties by electronic mail on February 27, 2015, as follows:

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