

**[ORAL ARGUMENT NOT YET SCHEDULED]
Nos. 14-1163, 14-1175**

**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MIKE-SELL'S POTATO CHIP COMPANY,

Petitioner and Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent and Cross-Petitioner.

**ON PETITION FOR REVIEW FROM A DECISION OF THE NATIONAL
LABOR RELATIONS BOARD**

REPLY BRIEF FOR PETITIONER AND CROSS-RESPONDENT

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GLOSSARY

ALJ Administrative Law Judge

Decision Decision and Order of
Administrative Law
Judge Paul Bogas

SUMMARY OF THE ARGUMENT

Petitioner and Cross-Respondent Mike-sell's Potato Chip Company ("Mike-sells" or "Company") hereby replies to the Principal Brief ("Brief") filed by Respondent and Cross-Petitioner National Labor Relations Board ("Board").¹ In this case, the ALJ's credibility determinations are not entitled to deference because they are based on a subjective evaluation of the relative likelihood of witnesses' substantive testimony rather than an objective evaluation of witnesses' demeanor and conduct at the hearing. Even if the ALJ's findings were based in part on the witnesses' demeanor and conduct at the hearing, the record as a whole does not support his credibility determinations. For the reasons stated herein as well as in the Company's Principal Brief, the Company's Petition for Review should be granted, the General Counsel's Petition for Enforcement should be denied, and the Board's Order should be reversed because: (I) the ALJ erred in failing to consider several important aspects of the parties' bargaining history and practices; and (II) the ALJ abused his discretion in making credibility determinations. As a result, the record as a whole does not contain substantial evidence to support the ALJ's credibility assessments, factual findings, conclusions of law, remedy, and order.

¹ References to the Board's Brief will be cited parenthetically as "Board Br.". References to the Company's Brief will be cited parenthetically as "Company Br.". References to the Corrected Joint Appendix will be cited parenthetically as "JA.".

I. ARGUMENT

A. **Contrary to the assertions in the Board's Brief, the ALJ's credibility determinations are not entitled to deference because they are based on a subjective evaluation of the relative likelihood of witnesses' substantive testimony rather than an objective evaluation of witnesses' demeanor and conduct at the hearing.**

An ALJ is in no better position than a court to assess inherent probabilities of substantive testimony, and courts are not bound by credibility determinations based on such assessments. *Betances Health Unit*, 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, Inc. and Local Union 135, United Union of Roofers, Waterproofers and Allied Workers, AFL-CIO*, 268 NLRB 456, 456 (1983).

In *Kelco*, the ALJ’s credibility determinations were reversed 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 The only difference between the improper credibility findings in this case versus *Kelco* is that, here—as the Board emphasizes in its 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. (Board Br. 30; JA012.) The ALJ “cannot simply ignore relevant evidence bearing on credibility and expect [courts] to rubber stamp his resolutions by uttering the magic word ‘demeanor.’” *See, e.g., Permaneer Corporation*, 214 NLRB 367, 369 (1974); *see also S&G Concrete Co.*,

² For example, the ALJ could not possibly have actually witnessed Sharon Wille (“Wille”) being “extremely impatient” to implement the healthcare changes, as he was not there to observe her demeanor in the weeks preceding the changes. (JA012.)

274 NLRB at 897 (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 "[o]utward appearance or behavior, such as facial expressions, tone of voice, gestures, and the hesitation or readiness to answer questions." *See* Black's Law Dictionary, p. 442 (7th Ed. 1999). Proper assessments of "demeanor" are based on "observing the witnesses while they testified." *Standard Drywall Products, Inc.*, 91 NLRB 544, 545 (1950); *see also El Rancho Market*, 235 NLRB 468, 470 (1978) (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 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***." *In re Dist. Council 711*, 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. and*

Bakery, Confectionary Tobacco Workers Int'l Union, et al., 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 Inc.*, 229 NLRB 1241 (1977) (emphasis added).

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, gestures, 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 note at the outset that I find Wille’s account *implausible in the extreme*. *Why would Newsome and Campbell be, as Wille claims, “happy and smiling” during a meeting at which the Respondent was forcing substantial reductions on the Union without providing any*

counterbalancing concessions? Campbell, as a unit employee, would see his own benefits sharply reduced. Moreover, Wille immediately rejected the alternatives that Newsome proposed even though Campbell and Newsome discussed how painful the proposed reductions would be for unit employees. *And yet, Wille wants us to believe that Campbell and Newsome were “happy and smiling.” Really?*

Moreover, *it is not credible that the Union would surrender on this important issue only 10 to 20 minutes into the first negotiating session on the subject.* All the evidence indicates that the Union had been gearing up for a battle regarding the reductions. . . . *Why then, would the Union officials simply agree to the unwanted reductions within 20 minutes of the start of negotiations? . . . On this record, I believe that, as Newsome and Campbell indicated, they told Wille that the Respondent would have to take the matter to arbitration if it wished to pursue the reduction in unit member’s benefits.*

(JA011 (emphasis added).)

...

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.*

(JA012 (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. *Betances Health Unit*, 283 NLRB at 370; *S&G Concrete Co.*, 274 NLRB at 897; *Kelco Roofing*, 268 NLRB at 456; *Permaneer Corporation*, 214 NLRB at 369.

³ A proper demeanor assessment would have inevitably resulted in an acknowledgement that Wille was forthright and steadfast in her testimony, and she gave a consistent and detailed explanation of events. (JA237-JA313.) The General Counsel elicited nothing on cross-examination that would suggest Wille had changed her story or was not telling the truth about what occurred before, during, or after the December 14th bargaining session. Furthermore, 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 Board's Brief.

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. (JA193, JA209-JA210.)

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

Contrary to the assertions in the Board's Brief, the ALJ indeed took testimony out of context, ignored certain evidence, and failed to recognize inconsistencies in the Union's testimony. The ALJ failed to consider the following inconsistencies in making his credibility assessment:

- 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. (*Compare* JA204, JA208-JA210 *with* JA163-JA164.)
- 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* JA192 *with* JA220, JA222.)
- 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. (*Compare* JA195-JA199 *with* JA224-JA226.)

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. (JA245-JA246, JA274; Company Br. 25.)
- 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.⁵ (Company Br. 27.)

- 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. (Company Br. 28-32.)
- 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.⁶ (Company Br. 29-30.)
- Accounts of the December 12th information meeting exposed significant inconsistencies in the Union's testimony and overall version of events. (Company Br. 32-33.)

⁵ 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.

⁶ Beyond referencing the first communication from each side, the ALJ pays little heed to the “flurry of correspondence” between the parties. However, the substance and tenor of these communications are critical in determining each party's intentions before, during, and after the reopener.

- 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. (Company Br. 33-34.)

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 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.

CONCLUSION

For the reasons stated above as well as in the Company's Principal Brief, the Company's Petition for Review should be granted, the General Counsel's Petition for Enforcement should be denied, and the Board's Order should be reversed because: (I) the ALJ erred in failing to consider several important aspects of the parties' bargaining history and practices; and (II) the ALJ abused his discretion in making credibility determinations. As a result, the record as a whole does not contain substantial evidence to support the ALJ's credibility assessments, factual findings, conclusions of law, remedy, and order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Reply Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32 because this brief contains 3,111 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1). The undersigned used Microsoft Word 2007 to compute the count.

This brief also complies with the typeface requirement of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced font using Microsoft Word 2007 in 14-point Times New Roman font.

Dated: March 11, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2015, I electronically filed the foregoing Reply Brief for Petitioner and Cross-Respondent by using its CM/ECF system, which constitutes service upon the following registered CM/ECF user(s):

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I also served one (1) paper copy of the foregoing Brief, via UPS, upon each of the above-referenced parties. I further certify that, pursuant to D.C. Circuit

Rules 25 and 31, eight (8) paper copies of the foregoing Brief will be delivered to the Clerk of the Court.

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