

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

ACE HEATING & AIR CONDITIONING CO., INC.		
and	CASES	08-CA-133965 08-CA-133967 08-CA-133968
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 33		

ACE HEATING & AIR CONDITIONING CO., INC.		
	Employer	
and	CASE	08-RC-127213
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 33		
	Petitioner	

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

Counsel for the General Counsel respectfully responds to arguments raised by the Respondent in its Brief in Opposition to the General Counsel’s Exceptions and Brief in Support of Exceptions to the Decision of Administrative Law Judge Arthur J. Amchan in JD-03-15.

At the outset, Counsel for the General Counsel notes that in its Brief in Support of Exceptions, it thoroughly addressed arguments raised in Respondent’s Opposition Brief concerning the ALJ’s unsupported credibility resolutions, the ALJ’s failure to find and conclude that Respondent violated Section 8(a)(1) with regard to Respondent telling an employee that scheduled wage increases were withheld because the Union filed a post-election challenge and objections, and the ALJ’s failure to find and conclude that Respondent’s granting of wage

increases to employees while the Union's objections to the election were pending violates Section 8(a)(1).

Counsel for the General Counsel now addresses arguments raised by the Respondent's Opposition Brief which were not previously addressed.

I. ARGUMENT

A. RESPONDENT IS LIABLE FOR THE 8(A)(1) MISCONDUCT OF ITS STATUTORY SUPERVISOR

Ed Dudek is an admitted statutory supervisor, and the ALJ properly found that Dudek was a supervisor within the meaning of Section 2(11). (ALJD, p. 5, Lines 9-10) Contrary to the ALJ's analysis and the Respondent's asserted argument, no further inquiry into Dudek's agency status is necessary for the purposes of attributing liability to the Respondent. Board precedent is clear: coercive acts and statements by a statutory supervisor are imputed to their employer without inquiry into the supervisor's agency status. *See e.g., Storer Communication*, 294 NLRB 1056, 1077 (1989). In this case, Respondent is liable for Dudek's unlawful threats of plant closure and job loss, interrogation, and other coercive statements.

In its Opposition Brief, the Respondent relies on agency principles to contend that Dudek was not an agent of the Respondent for the purposes of his 8(a)(1) coercive conduct. Respondent asserts, "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." (Resp. Opposition Brief, p. 7)

Board precedent is clear that a Section 2(13) agency analysis is applicable only when the employee at issue is not a statutory supervisor. An agency analysis is a secondary analysis for attributing liability to an employer and has no effect on established Board precedent that an

employer is liable for the conduct of statutory supervisors. Woodman's Food Mkt., Inc., 359 NLRB No. 114 (Apr. 30, 2013).

The Respondent cites Pan-Oston Co., 336 NLRB 305 (2001) in support of its argument that an employee may be an agent of the employer for one purpose and not another. (Resp. Opposition Brief p. 7) Pan-Oston, however, is distinguishable and Respondent's reliance on it is misplaced. In Pan-Oston, the Board found that the employee at-issue was not a Section 2(11) supervisor. Thereafter, it applied a Section 2(13) agency analysis to determine whether the employer was liable for the alleged misconduct. *Id.* at 305. Here, Dudek is an uncontraverted statutory supervisor. Thus, any further agency analysis is unnecessary to impute liability to the Respondent for Dudek's misconduct.

The Respondent further mischaracterizes Pan-Oston to support its contention that the Board "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.'" (Resp. Opposition Brief, pp. 7-8) In Pan-Oston, the Board addressed whether an employee's conduct fell outside the scope of his or her duties to bind the employer under a Section 2(13) analysis. It did not address the conduct of a statutory supervisor as the Respondent contends. Pan-Oston, *supra.* at 305-307. Therefore, whether Dudek was acting outside the scope of his duties under an agency analysis is also unnecessary since he was a statutory supervisor.

Respondent's reliance on Cooper Indus., 328 NLRB 145 (1999) is also misplaced. In Cooper Indus., the Board affirmed the ALJ's findings that the three individuals at-issue were Section 2(11) supervisors to impute liability to the employer. The Board also affirmed the ALJ's alternative findings that the supervisors' 8(a)(1) conduct was also attributable to the Respondent under apparent authority agency principles. *Id.* at 145. Again, the Board in Cooper Indus.

makes it clear that an agency analysis is an alternate analysis and does not disturb the Board's long-standing precedent that 8(a)(1) conduct of admitted statutory supervisors is imputed to their employers.

Finally, the Respondent claims that it is not liable for Dudek's conduct because it never held Dudek out as speaking on its behalf. (Resp. Opposition Brief, p. 8) Respondent cites Waterbed World, 286 NLRB 425, 426-27 (1987) to support its argument that under an agency analysis, an employee is not an agent of the employer in the context of interrogations and threats of discharge when the employer never held out the employee as speaking on its behalf. (Resp. Opposition Brief, p. 8) Again, Respondent's reliance on Pan-Oston, Cooper Indus., and Waterbed World is misplaced. In all of these cases, the Board undertook an agency analysis only after it determined that the employees at issue were not Section 2(11) supervisors.

The Respondent's argument that a supervisor's coercive remarks cannot be imputed to an employer unless the supervisor's status is also analyzed under agency principles would require the Board to analyze agency principles in every case to determine whether an employer is liable for a supervisor's misconduct. Respondent's theory is contrary to established Board precedent. In attributing liability to an employer for an individual's misconduct, the General Counsel must prove that the individual is *either* a statutory supervisor or an agent of the employer –not both. SKC Electric, Inc., 350 NLRB 857, 877 (2007). Employers are liable for their supervisors' misconduct regardless of agency status, and Respondent should be held liable for Dudek's statements.

B. RESPONDENT MISCHARACTERIZES FACTS WHICH ARE NOT IN EVIDENCE

In its Opposition Brief, Respondent's counsel makes unsubstantiated assertions of fact not contained in the record.¹ While the record demonstrates that Dudek signed an authorization card on April 21, 2014, the record is devoid of any evidence to demonstrate that Dudek was "the main point of contact for the Union and he was actively engaged in recruiting Ace's employees before and after they signed the petition."² (Resp. Opposition Brief, p. 3) To that extent, there is no evidence which demonstrates that Dudek directed or solicited employees to sign authorization cards. (Tr. 86) Further, contrary to the Respondent's contention that "Dudek attended and organized union meetings, and regularly communicated and texted with the Union's organizer," there is no evidence to substantiate these claims. (Resp. Opposition Brief, p. 8) The only evidence of any communications between Dudek and the Union are two text messages between Dudek and Union's organizer David Coleman dated April 30 and May 7, 2014, which occurred at the beginning of the organizing campaign. (Resp. Ex. 1) This limited communication occurred prior to the time that Stephen directed Dudek to threaten employees with plant closure and job loss. (Resp. Ex. 1) The record contains no evidence that Dudek, attended or organized union meetings during the critical period of the election. Further, contrary to Respondent's contention, the record contains no evidence that Dudek acted as "the Union's conduit for contact

¹ In its brief, Respondent's counsel makes factual references to the record without citing to the hearing transcript. Despite its claim of limited financial resources, Counsel for the Respondent's failure to cite to the record to support his factual claims is curious, given that on January 7, 2015, Counsel for the General Counsel served Respondent with the full administrative record in coextensive litigation which is no longer pending.

² While Respondent does not make reference to Montgomery Ward and Co., 115 NLRB 645 (1956), it alludes to the same proposition from this case that the ALJ relied upon that a supervisor's involvement on behalf of a union warrants further inquiry to determine whether he was acting for and on behalf of management when making statements that would otherwise violate Section 8(a)(1). (ALJD, p. 5, Lines 5-16). The ALJ and Respondent's reliance on this case is misplaced. In Montgomery Ward, the Board stated that when a supervisor is included within a bargaining unit by agreement of the parties and is permitted to vote in a representation election, the supervisor may be viewed by employees as not speaking on behalf of management. *Id.* at 647. In the instant case, the threshold requirements that the parties included Dudek in the stipulated bargaining unit and permitted Dudek to vote in the election without challenge were not met. Accordingly, Respondent lacks a basis to show that Dudek's union involvement somehow demonstrates that he lacked apparent authority to speak on its behalf.

with Ace employees.” (Resp. Opposition Brief, p. 8) There is no evidence that Dudek served as a liaison or a go-between for any communication between employees and the Union during the critical period of the election.

Even assuming that Dudek had some union involvement, the evidence clearly demonstrates that the employees viewed Dudek to be their supervisor with the authority to discipline, approve overtime, assign and direct work, in addition to relaying directives from owner Stephan. The record demonstrates that seven of the eight unit employees considered Dudek to be their immediate supervisor, Dudek was the only supervisor on the Shoreway Lofts jobsite, and Dudek exercised broad supervisory authority over installation employees. (Tr. 150, 165-66, 235, 267, 296, 349, 496, GC. Ex. 2(i), p. 2) The ALJ correctly found that employees, “reasonably believed that [Dudek] was speaking for management.” (ALJD, p. 5, Lines 20-21) Furthermore, the record is replete with testimony that Stephen directed Dudek to threaten employees with plant closure and job loss, and make offers to bribe employees for their vote . Dudek explicitly told employees that the threats threats and bribes came directly from Stephen. (Tr. 154, 172-174, 241-242, 276, 304) Finally, the record lacks any evidence to demonstrate that Supervisor Dudek’s statements to employees could not be relied on, that employees had any notice that Dudek was not authorized to speak on behalf of the Respondent or that employees reasonably should have known that Dudek did not possess such authority. Dudek’s coercive remarks were made to employees as Respondent’s statutory supervisor and there is no evidence to find otherwise.

II. CONCLUSION

For the reasons contained in this Reply Brief, as well as its Brief in Support of Exceptions, Counsel for the General Counsel respectfully requests the Board to find that

Respondent violated Section 8(a)(1) of the Act by threatening employees with job loss and plant closure if they selected the Union as its collective-bargaining representative, by offering bribes to employees for their votes against the Union, by interrogating an employee on election day about his union sympathies, by coercively telling employees that they would not receive scheduled pay raises because of the Union, and by issuing wage increases to employees while the Union's post-election objections were pending to dissuade employees' union activities. Counsel for the General Counsel urges the Board to find that with regard to those violations that occurred during the critical period, that the Respondent engaged in objectionable conduct warranting that the election results in Case 08-RC-127213 be set aside. The General Counsel further requests that the Board issue a *Gissel* bargaining order as a measure necessary to remedy the egregious unfair labor practices committed by the Respondent.

Dated at Cleveland, Ohio this 12th day of March 2015.

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PROOF OF SERVICE

A copy of Counsel for the General Counsel's Reply Brief to Respondents Brief in Opposition to the General Counsel's Exceptions to the Decision of the Administrative Law Judge (JD-03-15) was sent on March 12, 2015, to the following individual by electronic mail and where electronic mail is unknown, by regular mail:

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