

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.**

PACIFIC COACH SIGHTSEEING TOURS & CHARTERS, INC.
A WHOLLY OWNED SUBSIDIARY OF COACH USA, INC.,
AND MEGABUS WEST, LLC AN INDIRECTLY OWNED
SUBSIDIARY OF COACH USA, INC.

and

Cases 21-CA-168811
21-RC-167379

INTERNATIONAL ASSOCIATION OF SHEET METAL,
AIR, RAIL AND TRANSPORTATION WORKERS -
TRANSPORTATION DIVISION

**COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

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I. INTRODUCTION

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Counsel for the General Counsel (CGC) files this answering brief to Respondent's exceptions to the decision of Administrative Law Judge Ariel Sotolongo (ALJ), which issued on March 17, 2017.¹ In his decision, the ALJ correctly found that Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA or Act) by: (1) making threats of discipline to employees if they supported the Union in an upcoming representation election; and (2) making threats of job loss to employees by telling them they could quit or go work elsewhere if they did not like their working conditions. (ALJD 15:23-24; 16:26-27).

The ALJ properly applied Board precedent in the instant case and his decision should be affirmed in its entirety. See *Pathmark Stores*, 342 NLRB 378, fn. 1 (2004). The bulk of Respondent's exceptions aim solely to second guess the ALJ's credibility determinations even though those determinations were fully supported by a preponderance of the relevant evidence. See *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950). Respondent's remaining exceptions are also groundless. Therefore, the CGC urges the Board to adopt and affirm the ALJ's decision in this matter.

II. RESPONDENT'S OBJECTIONS

Respondent's voluminous objections can be placed, broadly, into three categories: those alleging the ALJ made improper credibility determinations; those alleging the ALJ improperly considered evidence outside the scope of the complaint; and those disputing the ALJ's findings that Respondent's conduct violated the Act.

¹ References to the ALJ's Decision are cited herein as "ALJD" followed by the page and line number. All citations to the hearing transcript will be referred to as "Tr." followed by the appropriate page number(s). Citations to CGC's exhibits will be referred to as "GC" followed by the appropriate number(s). Joint Exhibits will be referred to "JX" followed by the appropriate number(s).

III. FACTS

Respondent transports passengers by bus to and from various destinations throughout California. It operates its fleet of buses from hubs or yards in several Southern California cities, including Anaheim, where it employs bus drivers and other employees. (ALJD 2:31-33; Tr. 1048, 1050, 1185).

On November 25, 2015, the International Association of Sheet Metal, Air, Rail and Transportation Workers – Transportation Division (Union) filed a petition in case 21–RC–164957 seeking to represent certain of Respondent’s employees at the Anaheim facility. That petition was later withdrawn. (ALJD 2:39-41; JX 4-5). On January 7, 2016, the Union filed a representation petition in case 21–RC–167379, this time seeking to represent certain of Respondent’s employees at several of its facilities, including its Anaheim location. A representation election was held on February 4, 2016 and February 5, 2016. (ALJD 3:1-5; GC1(a); JX 6). During the months of December 2015 and January 2016, Respondent held as many as 100 or more meetings with employees, many of which were held specifically to discuss the Union. (ALJD 8:7-8, fn.17; Tr. 1185-86, 1199). Based on the evidence presented, which included the testimony of several bus drivers employed by the Respondent, the ALJ found that Respondent violated the Act by (1) making threats of discipline to employees at a meeting on about January 18, 2016; and (2) making threats of job loss to employees at a meeting on about January 25, 2017. (ALJD 15:23-24; 16:26-27).

IV. ARGUMENT

- A. The ALJ's credibility findings should not be disturbed (Respondent's Exceptions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 42, 43, 44, 45, 46, 49, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 79, 81, 86, 87)

The bulk of Respondent's exceptions either directly or by inference take exception to the ALJ's credibility determinations. The Board has long held that a judge's credibility determinations will not be overturned "except where the clear preponderance of all the relevant evidence convinces [the Board] that the Trial Examiner's resolution was incorrect." *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950). This standard of reviewing credibility has been routinely applied by the Board when upholding an ALJ's credibility findings. Contrary to Respondent's assertions, the ALJ's credibility determinations are fully supported by a preponderance of relevant evidence.

The CGC's case in chief consisted of documentary evidence and the testimony of five bus drivers employed by Respondent – Juventino Santos, Fernando Torres, Silvia Lopez, Demetris Washington, and Daniel Romero. They testified about statements made by Respondent supervisors Kristen Martinez and Haney Hana during meetings Respondent held with employees in its Anaheim, CA facility. Respondent, during its case in chief, called Martinez and Hana to testify, as well as several employees.

In his decision, the ALJ summarized all of the evidence presented in support of – as well as in opposition to – each of the allegations made in the Complaint. The ALJ also provided detailed analyses of what evidence and testimony he credited in making his rulings. Ultimately, he credited the testimony of the CGC's witnesses concerning some allegations and credited the testimony of Respondent's witnesses concerning other allegations. Several times in his decision, the ALJ stressed that although he chose not to credit the CGC's witnesses concerning particular allegations, he did not

find them inherently unreliable and found their testimony credible concerning other allegations (ALJD 8:4-6, 13:1-3).

Respondent attempts to attack the ALJ's credibility determinations in the CGC's favor by restating its own witnesses' testimony, by pointing to instances in which the ALJ did not credit the CGC's witnesses, and by accusing the ALJ of making improper inferences based on the balance of the evidence presented. Tellingly, however, Respondent fails to cite to any authority supporting its contentions that the ALJ made erroneous or improper credibility determinations. Respondent fails to do so because controlling authority gives the ALJ wide latitude in making such determinations:

A credibility determination may rely 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. Credibility findings need not be all or nothing propositions--indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Hills & Dales General Hospital*, 360 NLRB 611, 615 (2014) (internal citations and parentheticals omitted).

Board authority clearly empowers the ALJ to do exactly what he did throughout his decision: weigh multiple factors in evaluating trial testimony, make reasonable inferences based on the record as a whole, and credit some, but not all, of a witness's testimony. The ALJ's credibility determinations in the CGC's favor are further bolstered because the CGC's witnesses, all current employees of Respondent, testified against their own pecuniary interests, *Advocate South Suburban Hospital*, 345 NLRB 209 fn. 1 (2006), citing *Flexsteel Industries*, 316 NLRB 745 (1995), affd. mem. 83 F.3d 419 (5th Cir. 1996), as noted by the ALJ. (ALJD 11:34-35). Respondent's exceptions to the ALJ's credibility determinations are groundless.

Respondent also argues the ALJ erred in crediting witness testimony elicited through improper use of leading questions. In his decision, the ALJ noted that portions of the hearing testimony were punctuated by objections and arguments concerning the use of leading questions by

all parties during their direct examinations. (ALJ 7:fn. 13). As evidenced by his note, the ALJ clearly took this issue into account and based his credibility determinations on the record as a whole, as is squarely within his authority under Board law. As such, Respondent's exceptions are groundless and the ALJ's credibility determinations should not be disturbed.

B. The ALJ did not improperly consider evidence outside the scope of the Complaint
(Respondent's Exceptions 40, 41, 73)

Respondent contends that, in finding Respondent violated the Act, the ALJ improperly considered evidence outside the scope of the Complaint. Like its attacks on the ALJ's credibility findings, these exceptions are meritless.

The ALJ found Respondent violated the Act on two occasions: (1) on about January 18, 2016, Respondent threatened to discipline employees if they supported the Union; and (2) on about January 25, 2016, Respondent threatened employees with job loss by telling them they could quit if they did not like their working conditions.² In his decision, the ALJ clearly explained the evidence he relied upon in finding the Respondent violated the Act.

Concerning the January 18, 2016 allegation, the ALJ relied on Santos' and Washington's testimony that, on January 18, 2016,

[Respondent Manager] Hana stated that if the Union was selected, he would discipline employees for coming in 30 seconds late, and by stating that he would enforce rules more strictly than Respondent was currently doing. (ALJD 15:13-17; Tr. 143, 513, 522, 536).

The ALJ further explained that he concluded Santos' and Washington's testimony was "also supported by the testimony of Torres, also a current employee, who had testified that Hana had made

² The Complaint alleged that additional violations occurred on December 19, 2015, December 21, 2015, and January 18, 2016.

eerily similar statements during a December 2015 meeting” which was also alleged in the Complaint.³ (ALJD 12:1-3, Tr. 204-205, 251, 258).

Concerning the January 25, 2017 allegation, the ALJ

credited the testimony of three employee witnesses [Lopez, Washington, and Romero] who testified that on or about January 25, during the course of meetings attended by groups of employees, Hana had stated that employees who did not like the conditions or wages could quit and go work for other employers. (ALJD 13:12-34, 16:5-8; Tr. 451, 452, 540-41, 543-45, 710).

He also credited the testimony of a fourth employee [Santos] who testified that Hana said the same thing, albeit on January 18, 2016, which corroborated Lopez, Washington, and Romero. (ALJD 13:36-40, 16:8-10; Tr. 144).

Contrary to Respondent’s assertions, the ALJ’s findings are supported by the record and, consistent with Board law, the ALJ may draw reasonable inferences from that record. *Hills & Dales General Hospital*, 360 NLRB at 615. As discussed above, several employee witnesses offered direct testimony supporting the allegations made in the Complaint and additional witnesses offered similar, corroborating testimony. None of the evidence the ALJ relied on and cited in his decision was outside the scope of the allegations in the Complaint. As such, Respondent’s exceptions should be denied.

Respondent also attempts to seize upon dicta in a footnote included in the ALJ’s decision to attack the substance of the decision. In the footnote in question, the ALJ noted that although the Complaint alleged a violation occurred on “about December 21, 2015,” the record as a whole indicated that if a violation had occurred around that date, it likely occurred on December 17, 2015 and not December 21, 2015. The ALJ went on to note that, in spite of this, the CGC failed to amend the Complaint allegation, a failure which the ALJ believed to “raise due process issues.” (ALJD

³ While the ALJ ultimately was not persuaded Hana made those statements in December 2015, he did find Hana made such statements in January 2016 based on Santos’, Washington’s, and Torres’ testimony. (ALJD 12:3-12).

4:fn. 6). While Respondent cites to this footnote, Respondent fails to explain how it is relevant to the ALJ's findings concerning *other* allegations. The ALJ did not state that any of the allegations which *he found meritorious* raised due process concerns.⁴ Contrary to Respondent's spurious due process argument, and as previously noted above, the ALJ did not consider allegations outside of the Complaint and did not fail to consider Respondent's evidence. His decision clearly outlines the evidence presented by the CGC and Respondent for each allegation and explains why he credited one side's evidence over the other. Further, his decision explains that the CGC called several witnesses who offered direct evidence of the violations as alleged, as well as witnesses whose testimony corroborated that direct evidence. Respondent's claims are therefore unconvincing.

Strangely, while arguing the ALJ acted improperly by considering evidence outside of the Complaint, Respondent also argues the ALJ should have drawn an adverse inference against the CGC for his failure to produce evidence concerning statements made in meetings *not* alleged in the Complaint. In its brief, Respondent speculates that the CGC possessed evidence concerning violations which were not alleged in the Complaint and therefore the ALJ should have found that any other meetings held by the Respondent were therefore lawful. Respondent fails to cite any evidence in the record to support this argument and fails to explain why events which may have occurred outside of the allegations made in the Complaint are relevant to those allegations.

Respondent's exceptions should, therefore, be denied.

C. The ALJ correctly found the Employer's conduct violated the Act (Respondent's Exceptions 35, 42, 43, 44, 78, 85, 88, 89, 90)

Respondent cites to several cases in support of its argument that, even if the conduct alleged in the Complaint occurred, it did not violate the Act. Respondent's argument and citations are misguided.

⁴ Presumably, the ALJ would not have found merit to the allegations had they raised such concerns.

Respondent attempts to analogize the present case to *Danzansky-Goldberg Memorial Chapels, Inc.*, 264 NLRB 840, 854 (1982). There, the Board did not find a violation of the Act where a funeral home manager remarked to employees that they should find work elsewhere if they were frustrated with their jobs. However, *Danzansky* is easily distinguishable from the present case. There, the manager's statement was made during an informal meeting about various topics, including the fact that there had been an "uncomfortable degree of tension" and infighting between employees at the workplace. *Id.* at 853-54. In a finding adopted by the Board, the ALJ found that the manager's statement was not threatening and was genuinely "an expression of his opinion about how the employees might best advance their own well-being" in light of on-going workplace conflicts. *Id.* at 854. In the present case, manager Hana made the violative statements during formal meetings specifically about the Union and Hana was speaking directly about working conditions and the effects unionization would have on those conditions. (ALJD 8:36-41, 9:1-11, 13:12-40). As such, *Danzansky* is not analogous to the present case and the ALJ properly found Hana's statements to violate the Act.

Respondent argues that the ALJ's reliance on *Jupiter Medical Center*, 346 NLRB 650 (2006) is misplaced because the facts in that case are distinguishable from the present case. Respondent's argument is misleading in that the ALJ solely quoted a general statement of the law from *Jupiter*. The ALJ did not touch on or rely on the facts underlying *Jupiter*. Tellingly, Respondent quotes Board Member Schaumber's dissent in *Jupiter* because the Board majority found the statement alleged there to be a violation of the Act. *Id.* at 651. Contrary to Respondent's assertions, the ALJ properly found it violated the Act as alleged in the present case and Respondent's exceptions should be denied.

D. Additional Exceptions (Respondent's Exceptions 80, 93, 94, 95, 96, 97, 98, 99, 100, 101)⁵

Respondent excepts to the ALJ's granting of the CGC's motion, made at the hearing, to amend the Complaint to request a notice reading as a remedy (ALJD 28:fn. 56). Respondent offers no authority in support of this exception. Because the authority to hear and grant motions to amend complaints at hearing is specifically granted to the ALJ under the Board's Rules and Regulations § 102.35, Respondent's exception should be denied.⁶

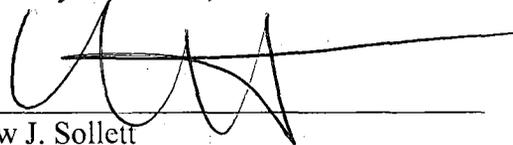
Respondent's remaining exceptions concern the ALJ's remedy findings and recommended order. Respondent fails to offer any argument or citation to controlling law to support these exceptions. Further, the ALJ's remedy and recommended order (ALJD 27-28) are squarely in line with Board practice in similar cases. *See for example, DHL Express, Inc.*, 355 NLRB 1399, (2010) and *Stoody Co.*, 312 NLRB 1175 (1993).

V. CONCLUSION

In light of the above and the record as a whole, the CGC requests that the Board affirm the ALJ's decision and find that Respondent violated the National Labor Relations Act as alleged in the Complaint and issue an appropriate remedial order along with a notice to employees.

Dated: May 11, 2017

Respectfully submitted,



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⁵ The CGC does not dispute the substance of Respondent's Exception 82, however, he believes the correct citation is ALJD 13:45. The CGC does not dispute Respondent's Exception 83. Several remaining objections solely concern the ALJ's finding that Respondent's unfair labor practices justify a re-run election in case 21-RC-167379 and are not discussed here.

⁶ Further, Respondent's exception is moot in that the ALJ denied the request for a notice reading remedy (ALJD 28:fn. 56) and the CGC does not except to that denial.

STATEMENT OF SERVICE

I hereby certify that a copy of Counsel for the General Counsel's Answering Brief to Respondent's Exceptions was submitted by E-filing to the Executive Secretary of the NLRB on May 11, 2017. The following parties were served with a copy of the same document on May 11, 2017 by electronic mail.

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Dated at Los Angeles, California, this 11th day of May 2017

/s/
Aide Carretero
National Labor Relations Board
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