

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

**ADVANCED MASONRY ASSOCIATES, LLC
d/b/a ADVANCED MASONRY SYSTEMS**

and

**Case Nos.: 12-RC-175179
12-CA-176715**

**BRICKLAYERS AND ALLIED CRAFTWORKERS,
LOCAL 8 SOUTHEAST**

**RESPONDENT’S REPLY TO THE GENERAL COUNSEL’S RESPONSE TO
RESPONDENT’S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE
LAW JUDGE**

Respondent, ADVANCED MASONRY ASSOCIATES, LLC d/b/a ADVANCED MASONRY SYSTEMS (“Respondent”), pursuant to 29 C.F.R. § 102.46(b), hereby replies to the General Counsel’s Response to Respondent’s Exceptions to the May 10, 2017, Decision of the Administrative Law Judge. The General Counsel’s arguments are specious and wrong, and the Board should grant Respondent’s Exceptions.

LEGAL ARGUMENT

A. The ALJ Did Not Draw the Alleged “Adverse Inferences” Identified by the General Counsel (Respondent’s Exceptions ## 4-5, 15, 19-21, 24-26).

The hearing in this case lasted for five days and resulted in a substantial record. All parties had a full and fair opportunity to present evidence to the ALJ via testimony and documentary exhibits, whether on direct examination, cross-examination, or rebuttal. Respondent made numerous Exceptions pointing out that factual findings contained in the ALJ’s subsequent Order were unsupported, or contradicted, by the hearing record. In opposition to several of these Exceptions—those addressing the content, duration, and location of Respondent’s safety training presentations; the absence of disparate discipline; and Safety Director Alek Feliz’s conversation

with Respondent’s principals Ron and Richard Karp prior to terminating alleged discriminatees Luis Acevedo and Walter Stevenson—the General Counsel had no response other than to state that, the lack of evidence notwithstanding, the ALJ was entitled to draw an adverse inference. See, e.g., General Counsel’s Brief (“GC Answering Brief”) at 11, 23.

The General Counsel’s contention is unavailing, for several reasons. First, the ALJ at the hearing expressly disavowed an intention to draw inferences. See Tr.228:24-25; 229:1-4 (“I want to make sure that the record is going to be sufficient for my purposes, so I’m not leaving to infer anything. A lot of times, the parties proceed down parallel tracks, and they leave the finder of fact to leap to infer or not infer”). Second, the General Counsel at no time during the hearing—or in its post-hearing Brief—even invited the ALJ to draw an adverse inference, other than to call the ALJ’s attention to the fact that Richard Karp did not testify.¹ Third and finally, the ALJ in his Order did not identify any adverse inferences anywhere. Remarkably, on more than one occasion, the General Counsel admits that it is inviting the Board to speculate, arguing, for instance, that “[a]lthough not expressly stated in the AJLD, it appears that ALJ Rosas appropriately drew an adverse inference against Respondent” for Richard Karp’s failure to testify as to his conversation with Feliz, and “it appears the ALJ” drew an adverse inference against Respondent for failing to produce general contractor disciplinary forms with respect to employee Richard Haser.² GC Answering Brief at 8, 22 (emphasis added).

Even if the ALJ actually drew an adverse inference with respect to any of the items excepted to by Respondent—and, again, there is nothing suggesting that he did—such an inference would be error. As the Board is aware, the adverse inference rule is narrow: the judge, in his or

¹ The Union did not invite the ALJ to draw an adverse inference at any time.

² Respondent was not shown to have such forms within its control, to the extent they existed.

her discretion, may draw an adverse inference when a party fails to produce relevant evidence within its control, including but not limited to witness testimony, or documents responsive to a subpoena. The “inference” is that a party declined to produce the evidence on the ground that it would be damaging to its interests. United Brotherhood of Carpenters and Joiners of Am., Local Union No. 405, AFL-CIO, 328 N.L.R.B. 788, 788 n.2 (1999); see generally International Union, United Auto, Aerospace, and Agr. Implement Workers of Am. (UAW) v. N.L.R.B., 429 F. 2d 1329, 1335-39 (D.C. Cir. 1972). The rule does not serve to bridge a garden-variety failure of proof. And in its zeal, the General Counsel failed to mention the Board’s holding that an adverse inference is inapt when the testimony of a missing witness, for example, would duplicate other testimony. Roosevelt Mem. Med. Ctr., 348 N.L.R.B. 1020, 1022 (2006) (ALJ erred in drawing adverse inference, because “a party has no obligation to call every witness at its disposal to prove its case”).

Respondent nonetheless will address the sole adverse inference requested by the General Counsel. Richard Karp’s absence, according to the General Counsel, inferentially supported the allegations of the Amended Complaint in two ways: (i) that Feliz threatened to decrease wages during his pre-election presentation in May 2016 at the UT jobsite to Spanish-speaking masons, a presentation which Richard Karp attended; and (ii) that Respondent terminated Acevedo due to his status as a Union member and supporter, a contention purportedly bolstered by Richard Karp’s failure to supplement the testimony of Feliz and Ron Karp as to the substance of Feliz’s conversation with the Karps prior to the termination of Acevedo and Stevenson for fall protection violations. GC Answering Brief, at 3-4, 19-23. But in this case, Feliz testified as to both his UT presentation, and his conversation with the Karps (Tr.92:15-25; 93:1-20; 119:8-23). Ron Karp, too, testified as to the conversation (Tr.873:12-25; 874:1-25). The fact that Richard Karp did not

testify to add to what already was a lengthy hearing is irrelevant. Indeed, the inference to be drawn, if any, is that Richard Karp would have corroborated the testimony in the record. The Board summarily should dispose of this particular argument of the General Counsel against Respondent's Exceptions.

B. The ALJ Did Not Make Many of the Witness Credibility Determinations Alleged by the General Counsel (Respondent's Exceptions ## 4, 6, 8, 15)

The General Counsel correctly states that 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. GC Answering Brief, at 3; Hills and Dales Gen. Hosp., 360 N.L.R.B. 611, 615 (2004). But the General Counsel then goes too far in ascribing credibility determinations to the ALJ, or defending such determinations where the credited testimony does not appear in the record. In point of fact, the ALJ did not make credibility determinations wholesale, or implicitly: in his Order, the judge described and explained each one in a detailed footnote. See ALJD nn.12-14, 16, 23, 32-33, 35-36, 39-40, 44, 46, 48-49. He did not discredit the testimony of Respondent's witnesses simply because they worked for Respondent. He also credited witnesses on some points but not on others, to include a pointed comment on Acevedo's "selective memory." See, e.g., id. at nn.32, 35-36, 39-40.

Continuing, the ALJ did not "discredit Feliz's testimony with respect to the enforcement of Respondent's safety policies," GC Answering Brief at 4, and did not find Feliz to be "thoroughly unreliable" (id. at 9). He did not discredit the testimony of Ron Karp, or of Safety Coordinator Fernando Ramirez, at all, and only credited the General Counsel's witnesses over Respondent's other supervisors and agents on specific issues: Acevedo's interaction with foreman Mario Morales; Feliz's presentation to Spanish-speaking masons; whether and when other masons at UT

were tied off when working above six feet in the presence of a fall risk; whether Feliz named Acevedo and Stevenson in his conversation with the Karps; and Feliz and foreman Todd McNett's conversations with Acevedo in connection with the latter's discharge. Compare ALJD nn.32, 36, 40, 44, 46, 48-49 with GC Answering Brief at 9-11. As is true with adverse inferences, an absence of evidence cannot be overcome simply by claiming, repeatedly, that a credibility determination occurred. The Board should dispose of this argument, too, against Respondent's Exceptions.

C. The General Counsel, in Its Brief, Makes a Number of Assertions About the Hearing Record, and/or the ALJ's Interpretation of the Hearing Record, That Are Demonstrably Incorrect (Respondent's Exceptions ## 10, 14, 17, 20, 22, 24, 31).

The General Counsel supported its Response with a number of clearly incorrect assertions.

None serve as a basis upon which the Board may deny Respondent's corresponding Exceptions:

- **Exception #10.** The ALJ did not, as the General Counsel claimed, discredit Luna's corroboration of Feliz's denial that he had threatened to reduce wages (GC Answering Brief, at 6). Rather, as set forth in Respondent's exceptions, the ALJ erred by crediting Luna for something Luna did not say, on a subject the ALJ prevented Respondent's counsel from questioning Luna about (Compare ALJD 16:n.36; 17:14-15 with Tr. 847:18-25; 848:1-9).
- **Exception # 14.** Respondent never claimed that the OSHA advice letter "justifie[d] its ordering employees to tie off to scaffolding." GC Answering Brief, at 25. Respondent excepted because Acevedo, when disciplined for not tying off correctly, repeatedly argued with Respondent's supervisors that OSHA per se did not allow tying off to scaffolding (Tr.423:23-24; 428:24-25; 429:1; 622:19-21; 628:9-14). The assertion about OSHA requirements was false, and had been for two decades, and Respondent properly excepted to the ALJ's failure to make this finding of fact. Notably, when his supervisors were unmoved, Acevedo then claimed for the first time, the next day, that he was being disciplined because of his Union affiliation (id. at 429:1-10; 477:3-13; 634:5-8, 9-25; 635:1)
- **Exceptions ## 17, 20, 31.** Acevedo and Stevenson had not been working on UT interior columns for a week and a half, above six feet and without fall protection, prior to being instructed by foreman Todd McNett to use fall protection for that work (GC Answering Brief, at 20). Respondent's witnesses testified that the two masons had been working on the building's exterior, which generally did not require fall protection. Even Stevenson, to the extent credited on this point, testified that his prior work inside was below six feet (Tr.155:11-24).

- **Exceptions ## 22, 24.** The difference in treatment between witnessed and unwitnessed violations of Respondent’s fall protection rule, as the ALJ noted in his Order, was not disputed (ALJD 3:26-28 & n.6). The difference was not, as the General Counsel insists, “incredible” testimony rejected by him (GC Answering Brief, at 18).

D. Under the Act, a Union Must Prevail by a Majority of the Votes Cast (Respondent’s Exception #1).

The General Counsel opposes Respondent’s Exception #1, contending that Respondent “blithely” failed to support its statement that a tie in a union election is a victory for the employer. GC Answering Brief, at 24 n.16. But it is the General Counsel who is insouciant. Respondent declined to cite to authority because the point of law is obvious, appearing in the statute, eighty years of Board decisions, and the Board’s own internal procedures in representation cases. Indeed, one or more of such authorities likely were on the desk of the attorney(s) writing the Response. See 29 U.S.C. § 159(a) (referring to representatives designated or selected for the purposes of collective bargaining “by the majority of the employees in a unit”); R.C.A. Mfg. Co., 2 N.L.R.B. 159 (1936) (outcome of election depends upon “majority of those voting in the election”); NLRB Casehandling Manual 11340.8 (“In determining whether challenges might affect the results, it should be kept in mind that a union, to obtain a majority, must receive one vote more than 50 percent of the valid votes cast”). Respondent’s Exception #1 must be sustained.

CONCLUSION

WHEREFORE, for all the foregoing reasons, and those set forth in its Exceptions and Brief in Support, the Board should sustain Respondent’s exceptions to the May 10, 2017, Order of the Administrative Law Judge, dismissing the Amended Complaint and granting Respondent such other and further relief as the Board finds just and proper.

DATED: July 5, 2017.

Respectfully submitted,

/s/Charles J. Thomas

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed electronically with the National Labor Relations Board, and by via email to the individuals below, on this 5th day of July 2017, to the following:

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