

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

**UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL 540**

Respondent

and

Case 16-CB-193820

**JESUS ROMERO
Charging Party**

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S
DECISION**

Becky Mata
Counsel for the General Counsel
National Labor Relations Board, Region 16
819 Taylor Street, Room 8A24
Fort Worth, Texas 76102
Tel: (82) 703-7233
Fax: (817) 978-2928
Email: karla.mata@nlrb.gov

Date: April 10, 2018

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

**UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL 540**

Respondent

and

Case 16-CB-193820

**JESUS ROMERO
Charging Party**

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S
DECISION**

I. INTRODUCTION

On February 27, 2018, the Honorable Administrative Law Judge Keltner W. Locke issued a Decision and Order in this matter, concluding that Respondent violated Section 8(b)(1)(A) of the National Labor Relations Act (NLRA or Act) by telling an employee seeking to file a grievance that the Respondent would not file a grievance on his behalf because he was not a union member. (JD slip op. at 2, LL. 20-22). In reaching this conclusion, the Administrative Law Judge (ALJ) properly applied the Board's standard for evaluating a union's duty of fair representation and determined that Respondent's actions violated the Act.

On March 27, 2018, Respondent filed Exceptions to the ALJ's Decision and Order. In response, Counsel for the General Counsel files this Answering Brief to Respondent's Exceptions to the ALJ's Decision and Argument in Support of Exceptions (hereinafter Exceptions). As will be demonstrated below, Counsel for the General Counsel submits that each of Respondent's

Exceptions should be denied and that the ALJ's Decision and Order is supported by the credible record evidence and relevant Board law. Counsel for the General Counsel urges the Board to affirm the ALJ's Decision and Order.

II. FACTS¹

Charging Party Jesus Romero was employed by Tyson Foods, a corporation with an office in North Richland Hills, Texas, which is engaged in the processing and nonretail sale of food products. (GC Exh. 1(e); JD slip op. at 4). Romero began working for Tyson Foods in October 2002 and worked his way up to a line lead position. (JD App'x A. 5).

Romero was a member of a unit of employees represented by Respondent and for the first years of his tenure had been a dues paying member. (Tr. 19, LL. 5-10) Romero became disillusioned with Respondent's representation of the Unit and on October 17, 2015, he resigned his membership and ceased paying dues. (Tr. 20, LL. 21-23)

On February 22, 2017, the Employer terminated Romero for failing to follow the "lock out/tag out" policy. (JD App'x A. 5). After his termination, Romero initially left the premises but returned later that night. (JD App'x A. 5). Romero encountered another employee in the parking lot and asked him to call union steward Jose Segovia, who was inside the facility. (Tr. 22, LL. 3-5). Shortly thereafter, Segovia came out and spoke to Romero. (JD App'x A. 6). The

¹ References to the record are as follows: Tr. for Transcript, GC Exh. for General Counsel exhibits, R. Exh. for Respondent exhibits, and JD App'x for Judge Decision Appendix. This case was heard in Fort Worth, Texas before the Honorable ALJ Keltner W. Locke on December 19, 2017, based on an unfair labor practice charge in Case 16-CB-193820 filed by Jesus Romero, on February 24, 2017. (GC Exh. 1(a)). On August 1, 2017, the Charging Party amended his charge. On September 22, 2017, the Regional Director for Region 16 issued a Complaint and Notice of Hearing in Case 16-CB-193820. (GC Exh. 1(e)). Respondent filed its Answer to the Complaint and Notice of Hearing on September 25, 2017. (GC Exh. 1(g)).

two sat at a table where two other employees, Jamie Bonilla and Pedro Velasco², were seated and taking a break. (Ibid., Tr. 34, LL. 9-13).

Romero and Bonilla testified that at the table, Romero asked Segovia to file a grievance over his termination. (JD App'x A. 6). Bonilla and Romero testified that Bonilla was two to three feet away from Romero and Segovia as they talked. (Tr. 36, LL. 13-21; Tr. 24, LL. 7-9). Segovia acknowledged having had a discussion with Romero that night, but he testified that Bonilla stepped away from the table to smoke a cigarette and was not present during the discussion. (Tr. 77, LL.1-2). According to Romero and Bonilla, Segovia responded that he could not file a grievance for Romero because Romero was not in the union. (Ibid). Romero and Bonilla testified that Segovia also stated that he would contact business agent Juan Ventura. (JD App'x A. 7). According to Bonilla, Segovia concluded the conversation by stating that "he didn't help those that were not in the Union because he didn't want to have problems with Juan." (JD App'x A. 6). At trial, Segovia denied making these statements, but the ALJ did not credit his testimony. Ibid.

The next day, Segovia called Ventura and described his conversation with Romero. (JD App'x A. 7). Ventura investigated the circumstance of Romero's discharge and ultimately decided not to file a grievance. (JD App'x A. 8).

III. ARGUMENT

In its Exceptions, Respondent contests the ALJ's finding that "Respondent violated Section 8(b)(1)(A) of the Act by telling an employee seeking to file a grievance that the Respondent would not file a grievance on his behalf because he was not a union member."

² During the investigation of the unfair labor practice and prior to trial, the Region made several attempts to locate Pedro Velasco, but was not able to locate the witness.

Respondent does not dispute that such a statement, if made by a union representative, would be coercive. Indeed, it is well established that telling represented employees that a union will only represent them if they are members has the effect of unlawfully coercing employees into union membership and violates Section 8(b)(1)(A) of the Act. See generally *Lea Industries*, 261 NLRB 1136 (1982); *Plumbers Local 195 (Bethlehem Steel)*, 291 NLRB 571 (1988); and *Mail Handlers Local 305 (Postal Service)*, 292 NLRB 1216 (1989).

Thus, rather than defend Segovia's statement, Respondent excepts to the ALJ's credibility finding that it was made. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless there is a clear preponderance of all the relevant evidence that convinces the Board otherwise. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). In this case, Respondent provides two arguments, each of which falls well below that standard. First, Respondent argues that because Segovia also told Romero that Romero could talk to Ventura, it is implausible that he would have said that he (Segovia) would not file a grievance because of Romero's membership. Next, Respondent puts forth the logical fallacy that because it has filed grievances for non-union members in the past, it is impossible that Segovia would have told Romero otherwise. These arguments fail and critically, Respondent points to no reason why third-party witness Bonilla would testify falsely in this matter.

Respondent contends that because Segovia also told Romero that he (Romero) could talk to Ventura about filing a grievance, it is implausible that he would have said that he (Segovia) would not file a grievance because of Romero's membership. This testimony is as plausible as a clerk at a big box warehouse club telling a frustrated customer, "I can't sell you this because your membership has expired, but you can talk to the manager about it." There is nothing

implausible about a lower ranking agent of an organization explaining that he will not perform some act because it is against policy, while at the same time directing the requestor to take up the issue with a higher-ranking agent.

Next, Respondent argues that because it has filed grievances for non-union members in the past, it is impossible that Segovia would have said that he would only help members. First, this argument is flawed because it assumes that evidence of Respondent's occasional grievance filing for non-members is conclusive evidence that its union stewards consistently represent all members and non-members alike. Second, it assumes that all coercive statements are true or that statements must be true in order to be coercive, a proposition which is clearly wrong. *See e.g., City Owner-Operator Co., Inc.*, 226 NLRB 1333, 1334 (1976)(statements that employer would close plant and fire employees unlawful even if untrue), *Stevens Equipment Company Stevens Mach. Co.*, 178 NLRB 144, 146 (1969)(same). Finally, this statement assumes that Respondent's union stewards are incapable of poor judgment and making ill-advised comments. Thus, Respondent does not come close to meeting its burden of establishing error by a "clear preponderance."

Respondent points to no flaw in testimony or demeanor to contradict the ALJ's determination that Romero and Bonilla credibly testified that Segovia told Romero that he would not file a grievance for him because he was not a member. The ALJ appropriately relied on the testimony of Bonilla and he properly determined that there was no reason Bonilla, a third party witness who is not vested in the proceeding, would fabricate testimony and credited his account as well as Romero's testimony. (JD App'x A. 7). The record was devoid of any potential source of bias and Respondent provides no reason now for the Board to overturn the ALJ's decision to credit Bonilla's testimony. Indeed, such disinterested witnesses are generally considered as the

most credible. See, e.g., *G4S Secure Solutions (USA) Inc.*, 364 NLRB No. 92 (2016); *Grane Healthcare Co.*, 357 NLRB No. 123 (2011).

As noted above, the Board's established policy is not to overrule an administrative law judge's credibility resolutions unless there is a clear preponderance of all the relevant evidence that convinces the Board otherwise. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). As such, Romero and Bonilla's testimony, that Segovia told Romero that a grievance would not be filed because of his lack of membership, should be credited. Compare *Auto Workers Local 651 (General Motors Corp.)*, 331 NLRB 479, 479 (2000) (finding no evidence of union hostility towards its member based on hearsay). For these reasons, the ALJ's credibility finding should not be disturbed and his legal conclusions should be affirmed.

IV. CONCLUSION

For the forgoing reasons, the General Counsel respectfully requests that the Board deny Respondent's Exceptions and affirm the ALJ's findings of fact and conclusions of law. Counsel for the General Counsel also requests any further relief the Board deems appropriate.

DATED at Fort Worth, Texas, this 10th day of April, 2018.

Respectfully submitted,



Becky Mata
Counsel for General Counsel
National Labor Relations Board
Region 16
819 Taylor Street, Room 8A24
Fort Worth, TX 76102
Tel: (682) 703-7232
Fax: (817) 978-2928
Email: Karla.Mata@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that, on this 10th day of April 2018, a copy of the foregoing Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision was served upon each of the following:

Via E-Mail

David Watsky, Esq.
LYON, GORSKY & GILBERT, L.L.P.
12001 N. Central Expressway
Suite 650
Dallas, Texas 75243
Phone: (214) 965-0090
Fax: (214) 965-0097
Email: dwatsky@lyongorsky.com

Via Overnight Delivery

Jesus Romero
5713 Frisco Avenue
Forest Hill, Texas 76119-6833



Becky Mata
Counsel for the General Counsel
National Labor Relations Board
Region 16
819 Taylor Street, Room 8A24
Fort Worth, TX 76102-6178
Tel: (682) 703-7232
Fax: (817) 978-2928
Email: Karla.Mata@nlrb.gov