

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

**WENDT CORPORATION**

**and**

**SHOPMEN'S LOCAL UNION NO. 576**

**Cases 03-CA-212225  
03-CA-220998  
03-CA-223594**

**ORDER<sup>1</sup>**

The Respondent's request for special permission to appeal Administrative Law Judge Ira Sandron's ruling granting the General Counsel's motion to amend the complaint during the hearing is granted. On the merits, the appeal is also granted. We find that the judge abused his discretion by permitting the General Counsel to amend the complaint to allege that the Respondent violated Section 8(a)(1) through its counsel's cross-examination of a witness at the hearing.

Only in very exceptional circumstances, not present here, has the Board found that a counsel's conduct toward a witness at a hearing warrants amending the underlying complaint during the course of the hearing. These cases typically involve threatening questions or statements by counsel that are unrelated to the unfair labor practices at issue, such as those questioning the immigration status of a witness or implying possible criminal jeopardy.<sup>2</sup> See *AM Property Holding Corp.*, 350 NLRB 998

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<sup>1</sup> The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

<sup>2</sup> The Board has long held that threats involving immigration or deportation are particularly coercive, because they place in jeopardy not only the employees' jobs, but also their ability to remain in the United States, and are likely to remain "indelibly etched in the minds of any who would be affected [ ]." *Viracon, Inc.*, 256 NLRB 245, 247 (1981) (statement to employees of Mexican descent regarding the chance that they might be

(2007) (General Counsel permitted to amend the complaint to allege counsel's statements to the judge in the presence of the witness—that counsel would have to get an investigator to find out whether the witness was in the country illegally—threatened the witness and violated Section 8(a)(1)), overruled on other grounds *Browning-Ferris Industries of California*, 362 NLRB No. 186 (2015); see also *Deep Distributors of Greater NY d/b/a The Imperial Sales, Inc.*, 365 NLRB No. 95 (2017), slip op. at 3 fns. 13-15, and 20 (citing *AM Property* in finding merit in an allegation, added by the General Counsel to the complaint during the hearing, that the respondent violated the Act based on its counsel's threats in the hearing room, which included threatening to report employees to a grand jury so they could be deported and to report them to immigration).

By contrast, here we find that the cross-examination of a witness by the Respondent's counsel at the hearing contained no such serious threats, implicit or otherwise.<sup>3</sup> Counsel's line of questioning, though inartfully expressed, was relevant to determining whether the notes taken by the witness had been recorded at the time the events at issue occurred or sometime later. Those notes, in turn, were a fundamental piece of evidence, if not the key piece of evidence, supporting the General Counsel's complaint allegation concerning the unlawful performance of unit work by supervisors. Moreover, when the General Counsel objected, stating that the question at issue was

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reported to the Immigration and Naturalization Service if the union were successful in the election found unlawful).

<sup>3</sup> Counsel for the Respondent asked the witness, "And what percentage of these notes, if you could give me a percentage, were taken during your work time?" (Tr. vol. 4 at 767.) Counsel for the General Counsel objected, and the judge sustained the objection. Counsel for the General Counsel then stated that if the Respondent disciplined the witness, it would be a violation. Counsel for the Respondent immediately responded, "I didn't mention that I was going to discipline him" and further stated that she only sought to evaluate the contemporaneity of the evidence. (Tr. vol. 4 at 768.)

threatening the employee with discipline, the Respondent's counsel immediately emphasized that she had not mentioned discipline but only sought to evaluate the contemporaneity of the evidence. This immediate disavowal of any threatening implication from the question at issue--which, again, was directly relevant to the reliability and probative value of a key piece of evidence--reduced the potentially coercive effect of the question. Under these circumstances, we find that the judge clearly erred in permitting the General Counsel to amend the complaint to include an allegation regarding the Respondent's counsel's cross-examination and that this error constituted an abuse of discretion. Accordingly, we direct the judge to reject the complaint amendment, without prejudice to the General Counsel's right to litigate this issue in a separate proceeding.

Dated, Washington, D.C., November 13, 2018.

JOHN F. RING,	CHAIRMAN
MARVIN E. KAPLAN,	MEMBER
WILLIAM J. EMANUEL,	MEMBER