

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

<b>PPG Industries, Inc.,</b>	)	
	)	
<b>Employer/Respondent,</b>	)	
	)	
<b>v.</b>	)	<b>No: 10-CA-36530</b>
	)	<b>No: 10-RC-15611</b>
<b>International Union, United Automobile, Aerospace, Agriculture Implement Workers of America (UAW),</b>	)	
	)	
<b>Union/Charging Party.</b>	)	

**RESPONDENT PPG INDUSTRIES, INC.'S REPLY BRIEF IN SUPPORT OF  
EXCEPTIONS TO THE SUPPLEMENTAL DECISION OF THE  
ADMINISTRATIVE LAW JUDGE**

John J. Coleman, III  
Amy K. Jordan  
BURR & FORMAN LLP  
3400 Wachovia Tower  
420 North 20th Street  
Birmingham, Alabama 35203  
Phone: (205) 251-3000  
Facsimile: (205) 458-5100

**TABLE OF CONTENTS**

Argument ..... 1

I. The Union Offers Nothing Showing The ALJ Followed Board Instructions..... 1

II. The Evidence And The Record As A Whole Do Not Support the ALJ ..... 3

    A. The ALJ's erred in his continued adherence to a status-based presumption..... 3

    B. What the ALJ ignored makes a difference..... 5

    C. The ALJ's errors warrant reversal..... 9

III. The Union's Sole Authority Does Not Support A Rerun Election Remedy ..... 10

Conclusion ..... 10

## ARGUMENT

### **I. The Union Offers Nothing Showing The ALJ Followed Board Instructions.**

The Union's nonbinding cases about either prior statements the witness did not prepare<sup>1</sup> or demeanor-based credibility decisions<sup>2</sup> cannot explain (1) why the ALJ ignored the Board's directions and reaffirmed his decision to credit Iva Mayes solely because she was an employee and (2) why the ALJ refused the Board's direction to consider Iva Mayes' own prior inconsistent statement, the Union's decision not to call a pro-union corroborating witness, and the remaining record evidence. The issue is not that the ALJ did not adopt PPG's "chosen terms" to assess credibility when demeanor was not an issue, UB at 2-3, but rather that the ALJ instead offered excuses for not following Board direction and instead continued to credit Mayes over Sue Cooper solely because Mayes is a current employee (A. 2:12, 37-9). See PPG B at 14-15.

The ALJ must follow directions. In determining whether substantial evidence supports the Board, the Supreme Court in Universal Camera v. NLRB, 340 U.S. 474 (1951), rejected the Second Circuit's special deference to the ALJ in the panel decision on which the Union relies,<sup>3</sup> and instead gave the ALJ's view no more deference than a witness's testimony. Id. at 496. In authority the Union omits, the Board made clear that the ALJ's decision to credit one witness over another for reasons besides demeanor must consider the record as a whole,<sup>4</sup> and may not

---

<sup>1</sup> UB at 5, citing Advocate-South Sub. Hosp. v. NLRB, 468 F.3d 1038, 1046-7 (7th Cir. 2006) (others' video script placing statement elsewhere and did not discredit witness's version).

<sup>2</sup> Id., citing Bloomington-Normal Seating v. NLRB, 357 F.3d 692, 695 (7th Cir. 2004)(demeanor-based decision); Wiers Int. Trucking, 353 NLRB No. 48 (Oct. 31, 2008)(demeanor-based affirmance of ALJ); Majestic Towers, 353 NLRB No. 29 (Sept. 30, 2008)(only issue board considered was impasse; rest was ALJ alone and involved inconsistencies and nonspecific denials).

<sup>3</sup> UB at 6-7, citing Universal Camera v. NLRB, 179 F.2d 749 (2d Cir. 1950).

<sup>4</sup> Humes Elec., Inc., 263 NLRB 1238 (Sept. 20, 1982).

disregard evidence contradicting the credited witness's account.<sup>5</sup>

The Union cannot avoid the ALJ's failure to follow directions by concealing it. No amount of misdirection can cover the ALJ's failure to do what even the ALJ admits the Board told him to do -- to look beyond Mayes' status as a current employee and actually consider Mayes' contradictory Union statements she prepared contemporaneously with the conversations using her own notes (A. 2:12-1). Although the ALJ acknowledges what the Board told him to do, his continued refusal to consider contradictory evidence and his rubber stamping his previous decision to credit Mayes over Cooper simply because Mayes is a current employee (A. 3:4-7) is directly at odds with the Board's explicit remand instructions.

Here, the ALJ refuses to name the factors he considered and improperly credits the Iva Mayes' testimony for reasons have nothing to do with demeanor (A. 3:1-3), but rather bases his decision solely on Mayes' status as "current employee and not a discriminatee" and "Cooper's status as a supervisor[.]" (A. 3:4-5). These are the same grounds on which the ALJ's original opinion relied (A. 2:11-12) and which the Board found to be inadequate.<sup>6</sup> The ALJ's rejection of clear Board remand directions compels the rejection of his subsequent conclusory findings. The Board cannot rubber stamp, but must evaluate independently ALJ credibility determinations in light of the "weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole."<sup>7</sup> That review compels reversal here.

---

<sup>5</sup> E.S. Sutton Realty Co., 336 NLRB 405, 406 (Bd. Sept. 28, 2001)(criticized ALJ for doing so); see also Green Valley Manor, LLC, 353 NLRB No. 92 (Bd. Feb. 17, 2009)(reversing ALJ Cullen's finding of §8(a)(1) and (a)(3) violations as against the weight of evidence).

<sup>6</sup> Unlike the ALJ in NLRB v. Jewish Hosp., 174 Fed. Appx. 631, 632 (7th Cir. 2006), this ALJ refused to rely on a "breadth of factors." It is this refusal and continued reliance on one factor after being told to consider others that warrants reversal.

<sup>7</sup> Humes Elec. Inc., 263 NLRB 1238 (Bd. Sept. 20, 1982).

## II. The Evidence And The Record As A Whole Do Not Support the ALJ.

This case is not the demeanor battle the Union claims; no demeanor is at issue. This is a case where the record's clear preponderance of evidence **contradicts** the ALJ's Supplemental Decision. The ALJ's improper status-based presumption favoring Iva Mayes simply because she is a current employee cannot substitute for ALJ's duty to evaluate the evidence. Iva Mayes' shifting accounts and contradictory Union statement she prepared using her own notes contemporaneously with the alleged conversations compel a different conclusion. The ALJ also misapplies the burden of proof in weighing the failure to call a corroborating witness.

### A. The ALJ's erred in his continued adherence to a status-based presumption.

The ALJ's continued adherence to a status based presumption in favor of Iva Mayes is error. The Union's Flexsteel argument, see UB at 3-4, fails on its own terms. First, as the Board recognized in remanding the ALJ's exclusive reliance on Mayes' employee status, Flexsteel itself does not recognize such a presumption. Second, the Flexsteel suggestion does not apply here. Third, the Union's contrary nonbinding cases (it offers no authority) do not support the ALJ's position. Finally, the Union cannot distinguish PPG's authorities.

Flexsteel itself discredits the per se approach the ALJ adopted. Flexsteel explicitly **rejects** a "presumption" of credibility for current employees testifying against supervision and states that "a witness's status as a current employee may be a significant factor, but it is **one among many** which a judge utilizes in resolving credibility issues."<sup>8</sup> For the Board to adopt the ALJ's approach through adjudication would be unlawful. As PPG noted in its initial brief, PPG B at 21, and as the Union nowhere disputes, see UB at 3, the ALJ's per se rule to credit a testifying witness based on status rather than testimony would raise serious statutory and due

---

<sup>8</sup> Flexsteel Indus. Inc., 316 NLRB 745, 745 (Bd. March 15, 1995) (emphasis added).

process issues, and at a minimum would require a §553(c) notice and comment rulemaking proceeding before the Board could apply it to the witnesses at a ULP hearing.

Flexsteel does not apply anyhow because Iva Mayes is not testifying against her own interest when, as here, additional circumstances reflect her bias. See Advocate South, 468 F.3d at 1047 (cites one example). Mayes is not simply an employee; she is a "staunch and active"<sup>9</sup> in-plant union organizer who during working time conducted up to one hour surveillance stake-outs on employees she considered pro-company,<sup>10</sup> and who reported back to the Union in writing on what she observed.<sup>11</sup> Moreover, regardless of how the Union's lawyers seek to re-characterize her concerns, UB at 3-4, Mayes herself says she is a discriminatee<sup>12</sup>-- an individual on whose uncorroborated testimony no ULP finding could rest.<sup>13</sup>

The Union's remaining cases offer no better support. These nonbinding cases are factually distinguishable from this case and offer support for PPG's argument that the ALJ erred in basing his credibility determination solely on Iva Mayes' status as a current employee. Here there were no discharge threats as in Advocate South, 468 F.2d 1038 (7th Cir. 2006), and Bloomington-Normal Seating, 357 F.3d 692 (7th Cir. 2004). There was no interrogation as in Majestic Towers, 353 NLRB No. 29 (Bd. Sept. 30, 2008) and Wiers Int'l Trucks, 353 NLRB No. 48 (Bd. Oct. 31, 2008). There was no solicitation or threats of plant closure or transfers of union

---

<sup>9</sup> Whirlpool Corp., 2002 WL 1805433 at \*14 (July 5, 2002).

<sup>10</sup> T 42:17-44:19, 46:10-14 (Mayes timed coworker when she was supposed to be working); 48:24-49:2 (Mayes wore UAW stickers and shirts).

<sup>11</sup> See RX-1 and RX-2.

<sup>12</sup> See supra note 12; T 16:3-18:14, 19:25-21:8 (Mayes testifies she is discriminatee).

<sup>13</sup> NLRB v. Container Corporation of America, 649 F.2d 1213, 1216 (6th Cir. 1981)("The uncorroborated testimony of an interested charging party does not amount to substantial evidence of an unfair labor practice.").

supporters against their will as in Wiers Int'l Trucks, 353 NLRB No. 48 (Bd. Oct. 31, 2008). There was no demeanor judgment as in each of the above cases besides Advocate South.

Finally, the Union cannot surmount PPG's authorities. Contrary to UB at 4 n.1, the Board in Whirpool Corp. did not decline to adopt the ALJ's holding (not dicta) that the General Counsel failed to meet his burden regarding an alleged comment on the futility of organizing because an "active and staunch supporter of the union," such as Iva Mayes, cannot be considered a disinterested or neutral witness; rather, the Board's decision focused on the discipline of two other employees.<sup>14</sup> The ALJ's refusal to recognize here that Mayes was a discriminatee with an interest in the proceeding, and his reliance on job position alone to determine credibility, was reversible error. See supra notes 5, 8, 13 and 14.

**B. What the ALJ ignored makes a difference.**

The ALJ's decision to ignore the record evidence makes a difference. Though directed to consider Iva Mayes' prior inconsistent statement and the failure to offer corroborating testimony, the ALJ instead offers reasons why he should not have to do so and continued to adhere to his decision to credit her based on her status alone. He misses a lot. Mayes' statements to the Union contemporaneously reporting on her surveillance differs from her subsequent hearing testimony in outcome-determinative ways. The ALJ cannot escape their impact on her testimony by faulting the employer for not exploring how they fit in with her earlier notes or the Board statement others prepared later. The Union's failure to call a known pro-union witness to corroborate Mayes' story matters under Board precedent. The ALJ cannot escape consideration of the Union's decision not to call him by blaming the employer for not doing so.

E.S. Sutton Realty Co., 336 NLRB 405 (Bd. Sept. 28, 2001), holds that the ALJ in

---

<sup>14</sup> Whirpool Corp., 2002 WL 1805433, at \*14 (ALJ Shamwell July 5, 2002).

making credibility determinations is not free to disregard documentary evidence contradicting credited witness, particularly when witness's own account tended to be "shifting." Mayes' account shifts both with respect to her first statement and with respect to her second. The Mayes report the ALJ ignored shows the shifting. This report cannot be ignored. Id. at 406.

Even a cursory review of RX-2 reveals the Union's characterization of its inconsistencies with Mayes' testimony as "minor" (UB at 7) is disingenuous. This report involves the day when Sue Cooper allegedly made the "gang up" statement and the statement about Salary Continuance being unavailable if the Union was successful--both of which the ALJ found violated §8(a)(1). Yet the report's version varies from Mayes' testimony with respect to both. With the first, it records a threat testimony omits; with the second, it omits a threat testimony records.

With regard to the first statement, Mayes' account shifted respecting time and content. As for time, she offered September 1, September 13 (when she was not even at work), and September 27 as possible dates the conversation took place.<sup>15</sup> As for content, **the report** claims Cooper told Mayes Cooper "could not have me over there out of my cell when I was openly supporting the Union"-- a clear §8(a)(1) violation.<sup>16</sup> However, Mayes **testified** Cooper **never said** "she couldn't have [Mayes] over there because [Mayes was] ultimately supporting the Union"--**testimony** diametrically opposite to the **report**.<sup>17</sup> Instead, Mayes **testified** that Cooper said she "couldn't let two union people gang up on a non-union person"<sup>18</sup>-- a statement Mayes

---

<sup>15</sup> Compare T 16:23-17:12 (September 1) with T 31:5-23 (Mayes; September 27); compare id. with T 34:19-21 (Mayes; maybe was September 13) and RX-37 (security; she not at work then).

<sup>16</sup> RX-2 (Mayes' September 1 report).

<sup>17</sup> Compare RX-2 (Mayes report; Cooper barred her for "openly supporting the union") with T 39:12-40:2 (Cooper never said she was barred for "openly supporting the union").

<sup>18</sup> T 17:10-11, 37:15-16 (Mayes).

repeated twice, one vastly **different from the report**, and one that could not reasonably be considered a §8(a)(1) violation given past instances of violence, personal complaints of people ganging up on one side or the other, and sabotage that even the ALJ recognized warranted reassigning supervisors during the campaign period to prevent such ganging up. (A 10:33-11:44)

With regard to the second statement, the contradiction is equally stark. Both testimony and the report have Sue Cooper asking if Mayes had missed a paycheck, followed by a mention of Salary Continuance (a form of paid sick leave) that Mayes testified she made and that Mayes' report said Sue Cooper made.<sup>19</sup> The report goes on to discuss a conversation fifteen minutes later among a group of employees Mayes considered pro-company. **NOTHING** about the **report** reflects Cooper said **ANYTHING** suggesting Salary Continuance would be eliminated. Yet in her **testimony**, Mayes curiously "recalls" that Cooper blurted out "we would probably lose that [i.e., Salary Continuance] with all this union stuff." T 19:2-3 (Mayes). Absent the addition, there could be no §8(a)(1) violation based on the conversation.<sup>20</sup> Her report omits what Advocate South termed the "heart" of what she testified Cooper said. 468 F.3d at 1046.

"The circumstances and relevance of the contradiction are critical...Where a contradiction goes to the heart of a witness's story, belief can be error." Advocate South, 468 F.3d 1038, 1046 (7th Cir. 2006), cited in UB at 6. This is not a case like nonbinding Advocate South, in which (1) an earlier script was prepared by someone **other than** the witness, (2) the script contradicts the witness's testimony as to location and those present though not as to content, see 468 F.3d at 1042, and (3) the supervisor did not completely deny making the statement; this is a case in which (1) **the witness prepared** the prior statement contemporaneous

---

<sup>19</sup> Compare RX-2 with T 18:23-19:3 (Mayes).

<sup>20</sup> Compare RX-2 and T 41:14-17 (Mayes report; no threat) with T 19:2-3 (Mayes; Cooper said she "would probably lose" salary continuance).

with the conversation,<sup>21</sup> (2) the prior statement contradicted **the content** of the statement recounted in witness's subsequent testimony--what Advocate South calls the "heart" of the conversation--and (3) the **supervisor denied** making the statements.<sup>22</sup> 468 F.3d at 1045-46.

The ALJ cannot sidestep his obligation under Sutton by blaming the employer for not helping Mayes. The ALJ cannot escape Mayes Union report's impact on her testimony by faulting PPG for not exploring how it squares with her earlier notes or Board statements others prepared later. Neither Sutton nor any other case declares that the ALJ is free to ignore such contradictions between a witness's prior statement and her later testimony when the employer fails also to question her on notes she used to prepare the prior statement or on a statement a Board agent created after the one she herself prepared. It is not PPG's burden to determine if another party's discredited witness can be rehabilitated, the Union's and the General Counsel's failure to try to rehabilitate Mayes using notes or a Board statement is telling, and the ALJ's mere suggestion that this function could somehow fall on PPG is itself grounds to question the extent of his effort in making reasonable findings of fact. The ALJ should have considered Mayes' prior inconsistent statement and discredited her testimony under the circumstances.

Daichi Corp., 335 NLRB 622 (Aug. 21, 2001)(cited in UB at 6), recognizes that it is settled that "“when a party [such as the GC or Union] fails to call a witness **who may reasonably be assumed to be favorably disposed to the party** [like Union supporter Brownfield], an adverse inference may be drawn regarding any factual question [like Cooper's remarks] on which the witness is likely to have knowledge.”” Id. at 622 (emphasis added). As the General Counsel and the Union never called Brownfield, the ALJ should have inferred that Brownfield would

---

<sup>21</sup> T 39:12-25, 41:1-8 (Mayes) and RX-2;T 40:23-40:25, 41:14-41:17 (Mayes) and RX-2.

<sup>22</sup> T 317:12-18, 317:19-317:25 (Cooper).

have contradicted Mayes.

The ALJ cannot sidestep his obligation under Daichi by blaming PPG for not calling him. Mayes stated that pro-Union witness Rodney Brownfield was present for Cooper's alleged statement. T 16:3-7, 17:5-12 (Mayes). If the General Counsel and the Union had the burden to prove the statement was made, and if Mayes said Cooper made it but Cooper said she did not, the General Counsel and the Union easily could have put the issue to rest by calling Mr. Brownfield. As they did not, the ALJ should have inferred that Brownfield would have testified against their position.

**C. The ALJ's errors warrant reversal.**

The ALJ's factfinding respecting Mayes' testimony warrants reversal. The Union and the General Counsel, not PPG, have the burden of proving credible ULP evidence.<sup>23</sup> Yet the ALJ gave PPG the burden, faulted PPG for not resolving contradictions between Mayes' testimony and her Union report, and criticized PPG for not calling pro-union Brownfield. See PPG B at 22-23. The ALJ (1) credits Mayes' report when it contradicted Mayes' testimony in supporting an §8(a)(1) but ignores it when it contradicted Mayes' testimony in supporting a conclusion that no violation occurred,<sup>24</sup> and (2) refuses any inference from the Union's missing witness. See PPG B at 27, 30. Though Sutton (*supra* page 5) focuses on the ALJ's mishandling Mayes' own Union report, and Daikichi (*supra* page 8) focuses on the ALJ's mishandling the presumption arising from the missing witness, both compel reversing yet another result-oriented refusal to

---

<sup>23</sup> North Hills Office Services, Inc., 345 NLRB 1262 (Bd. Nov. 30, 2005); Flintkote Co., 260 NLRB 1247, n. 2 (Bd. March 29, 1982) ("the Administrative Law Judge properly imposed upon the...objecting party... the burden of proving its objections...").

<sup>24</sup> For example, the ALJ **discredited** Mayes' Union incident report when it contradicted Mayes' testimony on Cooper's alleged statement regarding salary continuance, but **credited the same incident report** when it contradicted Mayes' testimony that Cooper could not have Mayes out of her cell "when she was openly supporting the union." See PPG B at 30.

consider the record as a whole as the law requires. See, e.g., Green Valley, *supra* note 5 (prior recent decision reversing ALJ Cullen's findings as against the weight of the evidence).

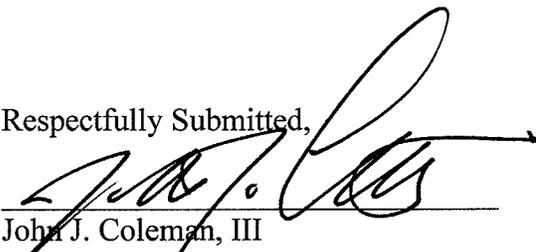
### III. The Union's Sole Authority Does Not Support A Rerun Election Remedy.

Contrary to the Union's contention, UB at 9 n.3, the Board, not the Seventh Circuit, determines remedy. Bon Appetit, 334 NLRB 1042 (Bd. Aug. 10, 2001), says there is no rerun when the evidence reveals at most **two or three** isolated comments by low-level supervisors to a handful of employees in a unit of nearly 500 voting employees. Id. at 1044. Even if found to be ULPs, the few isolated comments in a unit over 400 here, as in Bon Appetit, simply does not warrant setting aside the election the company won by a **substantial** margin because it could not have materially affected the outcome.<sup>25</sup> Id.

### CONCLUSION

The Supplemental Decision does not concern a demeanor-based credibility issue; it concerns an ALJ who will not follow directions. PPG thus asks the Board to reject the Union's invitation to be a rubber stamp, to reverse the ALJ and enter judgment in its favor or, alternatively, to set aside the rerun election order.

Respectfully Submitted,

  
\_\_\_\_\_  
John J. Coleman, III  
Amy K. Jordan  
Counsel for PPG Industries, Inc.

---

<sup>25</sup> Cases with different facts do not matter. Consolidated Biscuit, 346 NLRB 1175 (2006), does not remotely resemble this case; here, unlike there, PPG committed no § 8(a)(3) discriminatory discharges, imposed no unlawful disciplinary warnings or no position denials, issued no threats of increased discipline, never threatened to close the plant, and never called to the police to disrupt union activity.

OF COUNSEL:  
BURR & FORMAN LLP  
3400 Wachovia Tower  
420 North 20th Street  
Birmingham, AL 35203  
Phone: (205) 251-3000

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Respondent's Reply Brief was served by Electronic Filing with the National Labor Relations Board's E-Issuance Program and by Electronic Mail and Overnight Mail on this 5th day of March, 2009, upon the following:

George Davies (Via Electronic Mail and Overnight Mail)  
Nakamura, Quinn, Walls, Weaver & Davies LLP  
2700 Highway 280 East, Suite 380  
Birmingham, AL 35223

Gregory Powell (Via Electronic Mail and Overnight Mail)  
National Labor Relations Board  
Ridge Park Place, Suite 3400  
1130 South 22nd Street  
Birmingham, AL 35205-2870

  
\_\_\_\_\_  
OF COUNSEL