Double D Construction Group, Inc. *and* International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers Local 272, AFL–CIO. Case 12–CA–21951

August 31, 2004

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On July 24, 2003, Administrative Law Judge Keltner W. Locke issued the attached supplemental decision.[1] The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[2]

The Board has considered the supplemental decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order dismissing the allegation that employee Tomas Sanchez was discharged in violation of Section 8(a)(3) and (1).

ORDER

The National Labor Relations Board orders that the Respondent, Double D Construction Group, Inc., Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting or discouraging employees from placing union stickers on their vehicles.

(b) Interrogating employees about their union membership, activities, and sympathies.

(c) Prohibiting employees from discussing the Union while at work.

(d) Threatening employees with closure of the business and/or loss of jobs should they select the Union to represent them.

(e) Threatening employees with bodily harm if they selected the Union to represent them.

(f) Discharging employees because they joined and assisted the Union and engaged in concerted activities.

(g) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Dean Martindill immediate and full reinstatement to his former position or to a substantially equivalent position if his former position is no longer available.

(b) Make Dean Martindill whole for any loss of earnings and other benefits he suffered because of the unlawful discrimination against him.[4]

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Dean Martindill, and within 3 days thereafter, notify him in writing that this has been done and that this unlawful action will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amounts of backpay and future pay due under the terms of this Order.

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[1] On June 17, 2003, a panel (Members Liebman and Acosta; Member Schaumber dissenting) issued a Decision and Order remanding this case to the judge in order for him to consider more fully the credibility of alleged discriminatee Tomas Sanchez. See 339 NLRB 303. In its decision, the Board specifically held in abeyance the issuance of a final order pending receipt of the judge's supplemental decision on remand. Accordingly, the Order herein is inclusive of all unfair labor practices considered in this proceeding. Also, the judge failed to include in his recommended Order his finding that the Respondent unlawfully threatened employees with bodily harm. We therefore correct the Order to conform with the violation found.

[2] Chairman Battista did not participate in the underlying decision. The original decision reversed the judge's dismissal of an allegation that Respondent President Lock threatened employee Sanchez. Chairman Battista agrees with his colleagues on this point. As indicated above, Member Schaumber dissented from the Board's decision to remand to the judge for further analysis of credibility. Because he dissented from the remand, Member Schaumber finds it unnecessary to address or pass on the judge's discussion in response to the majority's remand.

[3] We correct certain factual errors in the judge's supplemental decision. First, in the section headed "The Issues of Recognize and Inference," the judge states that "evidence indicates that Lock was some distance away from Sanchez in a room with other people." More correctly, as the judge had earlier observed, the General Counsel's witnesses on this incident did not describe how far they were from Lock at the time, and Lock testified he did not recall having seen Sanchez then. Second, in the section headed "Further Discussion of Sanchez' Credibility," the judge refers to "Lock's veiled threat of plant closure on December 5, 2001." In fact, Lock's December 5 threat was one of discharge; the plant closure threat occurred on October 18. Finally, we wish to clarify the judge's statement that he relied upon Sanchez' testimony in finding that Lock unlawfully threatened employees with plant closure. An examination of "Appendix A" in the judge's underlying bench decision reveals that he relied upon the testimony of Canales, described as "having nothing obvious to gain by testifying as he did," as corroborated by Sanchez, who the judge characterized as "not a neutral witness, but rather one with a definite interest in the outcome of this case: He stands to get his job back." 339 NLRB at 324.. Thus, contrary to the implication in his supplemental decision, the judge did not rely upon Sanchez' testimony as the primary basis for finding the violation, but rather found it to be corroborative of Canales' testimony, on which he relied.

[4] Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(e) Within 14 days after service by the Region, post at its offices in Miami, Florida, at its jobsites in Miami-Dade and Broward Counties, and at all other places where notices customarily are posted, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn statement of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

MEMBER LIEBMAN, concurring.

I concur in the dismissal of the complaint. I do not, however, endorse all of the judge's analysis. In particular, I do not endorse his discussion of how testimony should be evaluated. See judge's supplemental decision at 916. Nor do I endorse his two-page discussion (id. at 919–920) of the "cf." citation to *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000), in the remand decision. At this point there is no reason to belabor why the majority included that citation. In any event, the judge's discussion on these issues is purely dicta.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representative to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT prohibit or discourage employees from placing union stickers on their vehicles.

WE WILL NOT interrogate employees about their own or other employees' union membership, sympathies, or activities.

WE WILL NOT instruct employees not to discuss the Union while at work.

WE WILL NOT threaten employees with closure of our business or the loss of jobs if they select a union to represent them.

WE WILL NOT threaten employees with bodily injury because they voted for or supported a union.

WE WILL NOT discharge employees because they joined or assisted a union or engaged in concerted activities or to discourage employees from engaging in these activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer immediate and full reinstatement to employee Dean Martindill.

WE WILL make him whole, with interest, for all losses he suffered because we unlawfully discharged him.

DOUBLE D CONSTRUCTION GROUP, INC.

Marcia Valenzuela, Esq. and *Jennifer Burgess-Solomon, Esq.*, for the General Counsel.
Donald G. Lock, for the Respondent.
David Gornewicz, for the Charging Party.

SUPPLEMENTAL DECISION

On September 10, 2002, I issued a bench decision and Certification in Cases 12–CA–21951 and 12–RC–8709. On June 17, 2003, the Board severed Case 12–CA–21951 and remanded part of it to me. The remanded portion concerned my decision to discredit part of the testimony of Tomas Sanchez, and my resulting conclusion that Respondent did not discharge this employee unlawfully, as the complaint had alleged.

In its decision and order (the Remand Order), the Board stated, in part, as follows:

> Our analysis of the Sanchez discharge hinges on the judge's erroneous decision to discredit Sanchez, based solely on his use of a false Social Security number to obtain employment. As we will explain, the judge's approach—which could have significant consequences in other cases, if endorsed by the Board—amounts to a disqualification of Sanchez as a sanc-

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tion for his conduct, not a proper determination of his credibility, which requires consideration of multiple factors.

The Board further stated that "we do not hold that an employee's use of a false Social Security number cannot be taken into consideration in evaluating his truthfulness," but emphasized that "a judge must take into account all of the factors that bear on the credibility of the witness *at the time of his testimony*. It is not enough to say that because the witness was untruthful in the past, and regardless of any factors that may tend to support his testimony, he cannot be credited now." (Emphasis in original.)

The importance of these points cannot be overstated. Analyzing credibility lies at the heart of an administrative law judge's duties. This crucial task requires more than a knee-jerk reflex; it entails a thoughtful and thorough consideration of all relevant facts. Anything less would manifest an unseemly disrespect for both the witnesses and the process itself.

The Board's second point is even more fundamental: A witness may not be disqualified for his conduct outside the courtroom. It would be quite inappropriate to disqualify Sanchez, or any other witness, as a sanction for any action other than certain types of misconduct during the hearing, such as refusing to answer questions while testifying. Even then, the sanction should be narrowly tailored to address and rectify the harm.

Clearly, in this case I did *not* disqualify Sanchez or impose any sanction on him and I regret that my initial decision was susceptible to such an interpretation. Far from disqualifying Sanchez as a witness, I *credited* parts of his testimony and relied on it in finding that Respondent violated Section 8(a)(1) of the Act. Specifically, I relied on Sanchez' testimony that during an employee meeting on October 18, 2001, Respondent's owner threatened to close his business if employees selected the Union.

As my initial decision discussed in some detail, a number of employee witnesses testified about what Lock said at this meeting the day before the election. The testimony of two witnesses—Martindill and Garza—did not support the complaint allegations. Garza, for example, testified that Lock told employees to "vote *for* the Union or he's [going to] close the company." (Emphasis added.)

Instead of crediting Garza and Martindill, I credited the testimony of employees Sanchez and Canales. Based on their testimony, I found that Lock had made an unlawful threat of plant closure, as alleged.

Although I did not credit certain other parts of Sanchez' testimony, the Board does not require a judge to accept a witness' testimony on an "all or nothing" basis. As the Board stated in *Daikichi Sushi*, 335 NLRB 622 (2001):

> "[N]othing is more common in all kinds of judicial decisions than to believe some and not all" of a witness' testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). Accord: *General Fabrications Corp.*, 328 NLRB No. 166, slip op. at 1 fn. 1 [1114] (1999), enfd. 222 F.3d 218 (6th Cir. 2000).

335 NLRB at 622. Nonetheless, if an administrative law judge believes certain things a witness said but doesn't believe other testimony given by the same witness, the judge certainly should explain why. The reasons for discrediting portions of Sanchez' testimony will be discussed below.

Employer Knowledge

The complaint alleged that Respondent unlawfully discharged Tomas Sanchez. To carry the Government's burden of proof, the General Counsel initially must establish four elements by a preponderance of the evidence. These four requirements are called the *Wright Line* elements because the Board adopted this analytical framework in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

In my initial decision, I found that the Government had failed to prove the second *Wright Line* element, that Respondent knew that Sanchez had engaged in union activity which the law protects. To establish such management knowledge, the General Counsel relied exclusively on testimony by Sanchez and Union President Gornewicz that on the day the Board was going to conduct a representation hearing concerning Respondent's employees, Owner Lock saw Sanchez with the union president while they were in a cafeteria.

As will be discussed further below, proof that Lock saw Sanchez on this occasion is only the first step towards establishing employer knowledge. The General Counsel must also show that Lock recognized Sanchez. More than that, the General Counsel must show that Lock reasonably would conclude from the circumstances that Sanchez was supporting the Union.

Although establishing that Lock saw Sanchez is merely the first step, it is a necessary first step. Therefore, I will begin with that issue.

Did Lock See Sanchez?

Sanchez testified that on the day of the representation hearing, he accompanied Union President David Gornewicz to the Federal Building in Miami, where the Board has a resident office. Although Sanchez intended to testify at this representation hearing, it was not necessary.

The Board's office is on the 13th floor of the Federal Building, but the record does not establish that Sanchez actually went to the Board office or to a Board hearing room. However, Sanchez testified that he and the union president visited a cafeteria on the second floor of this building. According to Sanchez, Owner Lock saw him. Sanchez testified as follows:

> Q. Okay. Were you going to participate in an NLRB hearing concerning Double D.?
>
> A. Yes.
>
> Q. Who were you going to testify for?
>
> A. For union.
>
> Q. Do you remember the date?
>
> A. Yes, in November 13th.
>
> Q. Did Don Lock see you in this federal building on that day?
>
> A. Yes, he seen me in the room.
>
> Q. When he say—
>
> A. In the room.
>
> Q. When he [saw] you were you with anyone from the union?

A. With Dave, of president of the union, union president.

Q. During—did you go to the cafeteria in this building with Dave, the president of the union?

A. Yes. I went to the cafeteria with Dave.

Sanchez testified in English, although it is not his native language. Difficulty with English may have contributed to the brevity of his answers. In any event, his testimony did not elaborate on the statement "Yes, he seen me in the room." Sanchez did not explain which room—hearing room or cafeteria—he meant.

Sanchez also did not describe how far he was from Lock, how many people were in the room, or what Lock was doing at the time. Additionally, Sanchez' testimony does not indicate that Lock waved or gave any other indication of recognition. Similarly, Sanchez did not state that he waved at Lock or otherwise tried to attract his attention.

Union President Gornewicz gave similarly brief testimony concerning this matter:

Q. [Were] you sitting with Tomas Sanchez for the hearing—waiting for the hearing?

A. We were in the cafeteria on the second floor, this building.

Q. Did Mr. Lock and his attorney, Robert Soloff, see you while you were sitting with Mr. Sanchez before the hearing?

A. I believe they did. They entered the cafeteria.

Gornewicz did not recount any details to support this belief. Additionally, he said nothing about whether Lock made eye contact with either Sanchez or himself.

Just as Gornewicz' testimony does not rule out the possibility that Lock did not see Sanchez, Lock's testimony does not rule out the opposite possibility. As the Board noted in its Remand Order, Lock did not flatly deny seeing Sanchez but only testified that he did not recall seeing him. However, I conclude that a preponderance of the credible evidence does not establish that Lock saw Sanchez on this occasion, and therefore find that he did not.

The General Counsel's own witnesses presented testimony which is both cryptic and, when considered collectively, confusing. In according this testimony little weight, I considered both the vagueness of the individual accounts and the conflict between them.

It particularly concerns me that Sanchez did not specify where Lock supposedly saw him, even though this detail obviously affects the import of such testimony. The exact location has clear significance to the government's case, but the General Counsel did not ask Sanchez if Lock saw him in the NLRB hearing room, a location where his presence reasonably might suggest some association with the Union. Instead, the General Counsel simply asked Sanchez if Lock had seen him in the federal building, which is a large structure housing many different government agencies.

Q. Did Don Lock see you in this federal building on that day?

A. Yes, he seen me in the room.

It simply cannot be assumed that Sanchez' words, "the room," refer to the Board's hearing room, particularly when Union President Gornewicz places Sanchez in the cafeteria, some 11 floors below. The General Counsel's failure to clarify Sanchez' testimony by asking more questions leads me to doubt that such a clarification would have helped the Government's case.

The General Counsel did ask Sanchez whether he went to the cafeteria with the union president, and Sanchez answered affirmatively, but the vagueness of the testimony raises more questions than it answers. Did Sanchez mean to say that Lock saw him in the hearing room and then he went to the cafeteria with Gornewicz, or did Sanchez intend to convey that Lock saw him after he and Gornewicz had gone to the cafeteria?

A judge's assessment of testimony resembles a scientist's evaluation of a new theory. A successful theory will lead to predictions which can be tested by experiment and observation. Likewise, sterling testimony will include details which provide clues to its reliability. In assaying the worth of testimony, the judge often begins by looking for the details.

Such details fall into at least two categories: Asserted facts which can be confirmed or contradicted by other witnesses, and circumstances which make the described conduct more or less plausible in light of human nature.

The basic evidentiary objection, "lack of foundation," recognizes the important contribution these details make in evaluating the reliability of testimony. Along with other evidence, an adequate foundation includes testimony concerning who else, besides the witness, was present.

Testimony that identifies who else was present falls into the first category. Such details allow the judge to compare one witness's recollection of an event with the account of other witnesses. Moreover, if someone who witnessed the event does not take the stand, the absence of that witness may have significance, as it did in the present case.

When testifying about the occasion when Lock purported saw him. Sanchez named only one other individual present, Union President Dave Gornewicz. However, the union president's own testimony identified another possible witness.

On cross-examination, Gornewicz testified that he believed union organizer Sal Gonzales also had been present. Considering that the Union is a party to this proceeding, and that the Union's interests are congruent with the General Counsel's, it presumably would be easy to arrange for organizer Gonzales to appear and testify. However, neither the General Counsel nor the Union called Gonzales to the stand. His absence is significant. I will not presume that Gonzales would have given testimony favorable to the Government's case.

The two witnesses who did testify on behalf of the General Counsel, Sanchez and Gornewicz, did not provide other supporting details. They did not describe how far they were from Lock when he assertedly saw them. Similarly, they did not estimate the size of the cafeteria, the number of other people present, or the noise level.

Likewise, neither Sanchez nor Gornewicz related what they were doing, or what Lock was doing, at the time. As noted above, they did not say whether they did anything, such as wave, to attract Lock's attention. They also failed to state

whether Lock made any gesture to signify that he recognized either of them.

Many of these missing details fall into the second category, details that make testimony more or less plausible. If the testimony of Sanchez and Gornewicz included such information, it would be possible to assess whether the events they described were likely or unlikely. However, their brief, conclusory testimony lacks such detail and is unpersuasive. Therefore, I do not credit it and find, instead, that Lock did not see Sanchez on this occasion.[1]

Before leaving this issue—did Lock see Sanchez—one additional matter needs to be addressed. What weight should be ascribed to Lock's failure to deny, clearly and unequivocally, that he saw Sanchez on this occasion?

In its Order remanding this case, the Board stated that "Lock did not unequivocally deny *that he saw Sanchez*. Rather, as the judge acknowledged, Lock testified that he did not recall seeing Sanchez." 339 NLRB at 304 (fn. omitted; emphasis in original). The Board then stated, in effect, that even crediting Lock's testimony that he did not recall seeing Sanchez, this testimony "cannot support a finding that Lock did not, in fact, see Sanchez on November 13." Id.

In considering the Board's concern, I must be careful not to shift the burden of proof improperly. Respondent has no duty to prove that Lock did not see Sanchez. To the contrary, the General Counsel must prove, by a preponderance of the evidence, that Lock did see Sanchez. Because the Government did not present credible evidence, Respondent has nothing to rebut. Therefore, the absence of an unequivocal denial does not affect my conclusion that Lock did not see Sanchez on this occasion.

Interestingly, although Lock's statement that he "did not recall" seeing Sanchez does not serve as a denial of that fact, it does carry considerable force as a denial of the other matters which the General Counsel must prove, namely, that Lock recognized Sanchez on this occasion and reasonably would have concluded, under the circumstances, that Sanchez was engaged in union activity. These issues will be discussed in the next section.

The Issues of Recognize and Inference

As stated above, to prove employer knowledge from the purported observation of Sanchez, the General Counsel must also show that Lock recognized Sanchez and that the circumstances warranted Lock inferring that Sanchez had some association with the Union. Here, strictly for the sake of analysis, I will assume that Lock did see Sanchez (which is contrary to my finding, above), and will then examine whether the evidence would also support a finding that Lock recognized Sanchez and would have reason to conclude that Sanchez was present in the federal building because of union activity. This additional analysis may be helpful to the Board should it disagree with my conclusion that Lock did not see Sanchez.

Obviously, under many circumstances, recognition can be assumed in the absence of evidence to the contrary. For example, if Lock were standing face-to-face with Sanchez at a distance of only three feet, I would not require additional evidence before concluding that Lock not only saw Sanchez but also recognized him. However, the evidence indicates that Lock was some distance away from Sanchez in a room with other people. Moreover, Lock had no reason to expect Sanchez to be present and therefore, presumably, was not looking for him.[2]

In such circumstances, evidence that Lock saw Sanchez falls short of establishing that Lock recognized him. The fact that Lock did not recall seeing Sanchez strongly suggests that even if he had laid eyes on Sanchez, Lock did not recognize him at the time. Stated another way, if Lock had seen Sanchez and recognized him, he would be much more likely to remember it. The act of recognition would have imprinted that information on Lock's memory. Therefore, Lock's credible testimony that he did not recall seeing Sanchez indicates that even if he had, in fact, seen Sanchez, Lock did not recognize him at the time.

Moreover, because of the nature of memory, if Lock had seen Sanchez on this occasion, recognized him, and concluded that Sanchez was engaged in union activity, Lock almost certainly would have remembered it. Human beings generally remember facts which have significance to them as individuals.

Indeed, people are especially likely to remember events which evoke emotion. If Lock had perceived that Sanchez was present in the federal building to align himself with his adversary at a legal proceeding, that perception most certainly would have triggered emotion and written itself, figuratively speaking, in large letters in his memory. The fact Lock did not recall seeing Sanchez clearly suggests that any glimpse of Sanchez did not prompt Lock to suspect that Sanchez was engaging in union activity.

Even assuming that Lock both saw Sanchez in the cafeteria and recognized him—facts not established by the credited evidence—the General Counsel would still bear the burden of proving that Lock reasonably would infer that Sanchez was engaged in union activities. The federal building in question is quite large and houses many different agencies. Sanchez might well have come to this building on a tax matter or, conceivably, an immigration question, to mention just two of many possibilities. His appearance in a cafeteria 11 floors below the NLRB hearing room reveals nothing of his reason for being there.

If the record established that Lock recognized not only Sanchez but also Gornewicz and saw the two of them engaging in a discussion, Lock reasonably might suspect that Sanchez was involved with the Union. However, the vague testimony of Sanchez and Gornewicz falls short of establishing such facts.

In sum, the testimony of Sanchez and Gornewicz on this particular matter is vague and unpersuasive. I do not credit it. Apart from this discredited testimony, the General Counsel

[1] Based upon my observations of witness demeanor, I find that Lock was telling the truth when he testified that he did not recall seeing Sanchez. Thus, in the initial decision I observed that "Lock appeared quite sincere when he gave this testimony."

[2] No evidence establishes that Sanchez had told Lock in advance that he, Sanchez, would be attending the hearing. It is true, as the Remand Order indicates, that the General Counsel asked Lock whether Sanchez had shown Lock a subpoena requiring Sanchez to appear at the hearing and that Lock answered, "[I]t's a possibility that he did but I can't swear to it."

Significantly, Sanchez did not testify that he showed Lock any subpoena requiring his presence at the hearing. In the absence of such testimony, I find that he did not.

offers no other evidence to establish that Lock either recognized Sanchez on this occasion or reasonably would infer that Sanchez' presence in the building manifested his support for the Union. Accordingly, the Government has not carried its burden of proving the second *Wright Line* element. Because the government has not satisfied this second *Wright Line* criterion, it has not proven that Respondent discharged Sanchez unlawfully. For this reason, I recommend that these allegations be dismissed.

Further Discussion of Sanchez' Credibility

Because the Government did not establish the four *Wright Line* elements, the burden of proceeding did not shift to Respondent. It had no duty to rebut the General Counsel's case. However, in my initial decision, I did discuss Respondent's assertion that it did not discharge Sanchez at all. According to Respondent, Sanchez simply did not report for work.

Sanchez disputed this assertion and, therefore, a conflict existed in the testimony. Crediting Lock, I found that Respondent did not discharge Sanchez. Believing that I had based this credibility determination on only one factor—Sanchez' listing a false social security number on his I-9 form—the Board remanded for a more thorough credibility analysis.

As the initial decision indicates, I accorded considerable weight to another factor unrelated to Sanchez' false statement about his social security number. Specifically, Lock testified that he considered Sanchez to be a good employee. That testimony causes me to doubt that Respondent fired Sanchez.

Sometimes, of course, antiunion animus will prompt an employer to rid itself of an exemplary employee. In the present case, however, credited evidence does not establish that Respondent knew about Sanchez' union activity.

Indeed, the record does not establish that Sanchez engaged in any union activity other than going to the Federal Building the day of the representation hearing. There is no evidence that Sanchez campaigned for the Union, served as an election observer, wore union insignia or otherwise identified himself as a union supporter. Having found that Lock did not see Sanchez in the Federal Building, I must also conclude that Lock had no reason to identify Sanchez with the Union's organizing effort.

In its Remand Order, the Board found that on December 5, 2001, Respondent's president, Lock, violated Section 8(a)(1) of the Act by pointing his finger at Sanchez and telling him "remember your bills" three times. Previously, Lock had unlawfully threatened to close his business if employees selected the Union and, the Board held, Lock's "remember your bills" comment reasonably could be interpreted as a similar threat.

The record does not indicate that Lock singled out Sanchez because he believed Sanchez to be a union supporter. Lock had made a similar threat earlier when other employees were present and no evidence suggests that he targeted those employees because he suspected they supported the Union. In these circumstances, Lock's veiled threat of plant closure on December 5, 2001, does not establish that Lock associated Sanchez with the union organizing effort.

In sum, no credited evidence demonstrates that Lock knew that Sanchez was a union adherent and I find that Lock was unaware of Sanchez' union sympathies. Thus, the record fails to establish that Respondent had an unlawful reason for discharging him. Moreover, in light of Lock's testimony that Sanchez was a good worker, Respondent did not have even a lawful reason to terminate him. If Lock did fire Sanchez, he did so for no apparent reason. But it seems quite unlikely that Respondent would discharge an employee for no reason at all.

Of course, it is a truism that, in the absence of unlawful motivation, an at-will employer may fire an employee for "a good reason, a bad reason, or no reason at all." However, as a practical matter, employers do not go around terminating workers randomly.

If the record reflected any kind of reason—either good or bad—Sanchez' claim that he was fired would be more plausible. The absence of any such reason leads me to doubt his testimony. Moreover, Sanchez had been employed by Respondent previously but had quit during a slump in the work. It appears much more plausible that Sanchez quit again for a similar reason than that Respondent discharged him for no reason at all.

The General Counsel bears the burden of proving, by a preponderance of the evidence, that Sanchez suffered an adverse employment action. The credible evidence is insufficient to satisfy that burden. Therefore, I find that Sanchez was not fired but quit.

Although I discredited Sanchez' testimony that Lock fired him, I credited another part of Sanchez' testimony and relied on it to find that on October 18, 2001, Lock made an unlawful threat to close his business. My initial decision should have articulated the reasons, discussed above, supporting such an approach.

Instead, my initial decision noted that previously, Sanchez had given a false social security number on an I-9 form and reasoned that this earlier misrepresentation cast doubt on his testimony at the hearing. The Board disagreed with my analysis, stating:

> Contrary to the dissent's apparent view of our decision, we do not hold that an employee's use of a false Social Security number cannot be taken into consideration in evaluating his truthfulness. But careful analysis is surely required in each case—and that analysis is missing here. The judge reasoned that use of the false Social Security number demonstrated that Sanchez "was willing to risk the legal penalty" to obtain work. The judge equated that situation with the proceeding before him, where "a job [was] at stake once more," essentially finding that because Sanchez had used a false Social Security number, he was testifying falsely. We are not prepared to make that inference.

339 NLRB at 305 (fn. omitted).

The Board particularly rejected the notion that a person's willingness to make a false statement on a government form reflected that individual's inclination to give false testimony in court. In both instances, deception entailed the risk of a legal penalty, but an individual might believe that he stood a much greater possibility of being punished for giving false testimony in a formal proceeding than for putting incorrect information on a routine government form. The Board continued:

> In any case, the risk that a lie will be discovered and punished, and the moral stigma attached to lying, are surely greater

> where sworn testimony, provided in the solemn atmosphere of a hearing room, is concerned. There is no possibility, for example, that the judge and the opposing litigate will be indifferent to the falsehood. In contrast, some employers who are eager to hire and retain workers may be prepared not to check social security numbers or to ignore the use of a false number (though we certainly do not suggest that this was the case here).

339 NLRB at 305–306. The Board's logic is self-evident. The Board made an even stronger point in the next paragraph:

> Our point is that in assessing whether a witness is telling the truth in a Board proceeding, a judge must take into account all of the factors that bear on the credibility of the witness *at the time of his testimony*. It is not enough to say that because the witness was untruthful in the past, and regardless of any factors that may tend to support his testimony, he cannot be credited now.

Id. (Emphasis in original.) Thus, the Board rightly and emphatically condemns any mechanical or reflexive approach to credibility resolution; it insists that every witness be given the thoughtful consideration which each of us would expect for yourself if called upon to testify.

Leaving aside Sanchez' misrepresentation on the I-9 form, I still do not credit his testimony that Respondent discharged him. Instead, for the reasons discussed above, I credit Lock's testimony and find that Respondent did not discharge Sanchez. Therefore, I further conclude that the General Counsel has not carried the Government's burden of proving the third *Wright Line* element.

Sanchez' Use of a Valid Social Security Number

In its Remand Order, the Board held that "the judge erred in discrediting Sanchez on the basis of the false Social Security number alone *and in failing to take into account Sanchez' later acquisition of a valid number*." 339 NLRB at 306 (emphasis added). It thus appears that the Board wishes me to address what effect, if any, the acquisition of a valid social security number had on Sanchez' credibility.

In my view, the fact that Sanchez later obtained a valid social security number is irrelevant, at best. This fact would become relevant only if Sanchez' credibility had been damaged by his earlier failure to have a valid social security number. It was not.

My initial decision did not state that I was discrediting Sanchez because he may have worked in this country without a valid social security number. Such a possibility would be irrelevant to his credibility and I did not even consider it.

Sanchez damaged his credibility not by failing to obtain a valid social security number but *by lying about it* on a Government form. The difference in these two acts is as stark as the contrast between malum prohibitum and malum in se. Neither the Ten Commandments nor the Code of Hammurabi nor the Confucian Analects condemns working without a valid social security number and, in any event, doing so says nothing about propensity to answer questions truthfully. On the other hand, lying is lying, and has been since the dawn of human civilization.

In sum, the fact that Sanchez worked for a while without a valid social security number does not make him any less credible and the fact he later worked with a valid social security number does not make him any more credible.

The "Moral Turpitude" Factor

In preparing this Supplemental Decision, I have tried to follow the Board's Remand Order carefully and address all concerns raised by the Board. However, the Remand Order alludes to one possible consideration which I do not know how to integrate into a credibility analysis.

The Remand Order stated that the judge essentially found "that because Sanchez had used a false social security number, he was testifying falsely. We are not prepared to make this inference." To that statement the Board appended the following footnote:

> Cf. *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000) (undocumented alien's conviction for use of false Social Security number to further otherwise legal behavior was not crime of moral turpitude within the meaning of federal alien registry statute). The dissent attacks citation of this case, arguing that Sanchez was not similarly situated to the undocumented alien in *Beltran-Tirado*. Indeed, Sanchez has not been convicted of any criminal violation, despite the dissent's repeated reference to criminal penalties assertedly implicated by Sanchez' conduct.

339 NLRB 305 at 3 fn. 17.

The Board thus cited a case involving a moral turpitude issue to support its conclusion that drawing a certain credibility inference would not be appropriate. What is the significance of this citation? Is the Board signaling its judges to use moral turpitude as a touchstone in determining credibility? Is the Board saying that judges should not base credibility decisions on witness behavior that falls short of moral turpitude? Is the Board suggesting that only a conviction of a crime of moral turpitude suffices to discredit a witness?

Regarding the last question, it appears clear that the Board is not telling its judges to believe any witness unless he was convicted of a crime involving moral turpitude. The Remand Order emphasizes that the judge should consider all factors relating to credibility and not simply seize upon one factor as a litmus test.

Still, the Board majority must have had some important reason for interjecting the concept of moral turpitude. The Board majority obviously considered the matter carefully because they pointedly insisted that the *Beltran-Tirado* case was relevant when challenged on that point by the dissent. Such insistence suggests that the Board majority does not want the *Beltran-Tirado* case, and its discussion of moral turpitude, to be ignored.

Without doubt, the administrative law judge has a duty to heed the cited case and to respect the significance which the Board majority attaches to the concept of moral turpitude. As a practical matter, I am not sure how to incorporate the moral turpitude factor into the analysis of witness credibility.

The Act requires Board judges to follow the Federal Rules of Evidence "so far as practicable." 29 U.S.C. § 160(b). However,

the Federal Rules of Evidence are silent on the issue of moral turpitude.

This silence appears to be intentional because in many states, the rules of evidence often do include references to moral turpitude. Specifically, in State courts, the words "moral turpitude" sometimes appear in a section corresponding to Rule 609 of the Federal Rules of Evidence. Such provisions concern when a court may allow evidence showing that the witness had a criminal record.

In many instances, these rules give the judge discretion to admit or reject evidence that the witness had been convicted of a crime, but for some crimes, involving dishonesty or moral turpitude, the judge had no discretion and was required to admit the evidence of a criminal conviction.

However, Federal Rule 609 doesn't refer to moral turpitude, but instead mandates the admission of evidence concerning conviction of a crime that "involved dishonesty or false statement." Additionally, that rule has no application in this case. As the Board specifically noted, Sanchez had not been convicted on any crime, let alone a crime involving dishonesty.

Because the Board was aware that Sanchez had not been convicted of any crime, it must have had some other reason for citing a case concerning moral turpitude. However, the term "moral turpitude" does not appear at all in the Federal Rules of Evidence. Further, my research found no prior case in which the Board resolved a credibility issue on the basis of moral turpitude. Therefore, the significance of the *Beltran-Tirado* case to the evidentiary issues before me is not entirely clear. Perhaps the Board simply wants me to address the absence of moral turpitude in deciding whether to credit Sanchez'.

The fact that Sanchez had not engaged in an act of moral turpitude does not make his testimony more credible. Most witnesses have not committed acts of moral turpitude and yet some of them nonetheless give false testimony. Therefore, I still conclude, for the reasons discussed above, that Sanchez' testimony about being discharged should not be credited.

Supplemental Findings of Fact

1. Respondent's Owner Donald Lock did not see employee Tomas Sanchez in the Federal Building on November 13, 2001, the day of the representation hearing in Case 12–RC–8709.

2. Respondent did not discharge employee Tomas Sanchez.

[Recommended Order omitted from publication.]