ARE THE CREDIBILITY FINDINGS OF NATIONAL LABOR RELATIONS BOARD ADMINISTRATIVE LAW JUDGES CREDIBLE?*

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The Administrative Procedure Act directs federal courts to review and to set aside final agency orders that are arbitrary, capricious, or "unsupported by substantial evidence."[1] The National Labor Relations Board has enjoyed extraordinary judicial deference to its unfair labor practice orders, partly because of how the Board defers and then invokes judicial deference to its administrative law judges' (ALJs) witness credibility findings. Often, a case disposition hinges entirely on which witnesses the ALJ chose to believe. That's more or less true of every genre of bench trial. But are NLRB judges disinterested jurists when they perform this task?[2] Or are there discernable patterns that are inconsistent with that ideal?

The National Labor Relations Act[3] makes facts found by the National Labor Relations Board in its unfair labor practice cases "conclusive" "if supported by substantial evidence on the record considered as a whole."[4] The "whole" record has been understood to include only evidence deemed

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* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the authors. To join the debate, please email us at info@fedsoc.org.

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[1] 5 U.S.C. § 706(2)(A), (E).

[2] This paper does not address whether Congress may, consistent with Article III of the U.S. Constitution, empower executive agencies or so-called independent agencies or commissions to adjudicate cases or controversies arising under the laws of the United States.

[3] 29 U.S.C. §§ 151–169.

[4] 29 U.S.C. § 160(e).

credible.[5] Since the Board ritually[6] defers to ALJ credibility determinations, ALJs have practically unreviewable discretion to indulge personal or partisan biases whenever the outcome of a case turns on conflicting testimony. Truthful but troublesome testimony may be declared unworthy of credence. As arbitrary, capricious, and unsupported as that may be in fact, it likely would pass inspection on administrative and judicial review.

That lack of effective review raises an important question: How often, if ever, do Board judges succumb to the temptation to determine whether testimony is credible in a biased manner? If this is a problem, is it a system or a personnel problem? Which judges seem to assess credibility genuinely, and which judges, if any, should we suspect of discrediting disliked parties in order to insulate the judges' preferred outcomes from review? Does any suspect class of judges or of cases merit strict scrutiny? Does Board precedent put a thumb on the credibility scale for or against the Board's General Counsel (GC) or for or against certain respondents?

Since your authors could not find any published study of this subject, we decided to conduct our own. This paper identifies problems but leaves for another day proposals for correcting the problems we found.

I. THE STUDY POOL

We examined three federal fiscal years—2021, 2022, and 2023—of final administrative law judge decisions made on the merits.[7] We excluded cases with fully stipulated facts; default judgments; and preliminary, procedural, and scheduling orders. We studied only decisions issued by judges who issued at least one decision in each study year. We further focused the study on General Counsel complaints charging unfair labor practices by employer

[5] This is the practical effect of *NLRB v. Link-Belt Co.*, 311 U.S. 584 (1941), and its progeny, which mandate acceptance of NLRB witness credibility findings by reviewing courts. *See also* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) (same effect, reading the amended statute's text to weigh heavily against meaningful review of Board credibility determinations).

[6] When a respondent objects to ALJ credibility findings, the Board habitually inserts in its affirmance opinion an early footnote refusing to reconsider them under *Standard Dry Wall Products*, 91 N.L.R.B. 544 (1950), *enforced*, 188 F.2d 362 (3d Cir. 1951), which held that such findings are immune to attack unless they are contrary to the "clear preponderance of all the relevant evidence."

[7] The NLRB does a good, timely job of posting its ALJ decisions online at https://www.nlrb.gov/cases-decisions/decisions/administrative-law-judge-decisions.

respondents[8] or by union respondents.[9] The distilled data set consists of 314 published ALJ decisions.

Allegations against employer respondents were the sole or primary focus of 289 (92%) of these decisions. Union respondents were the sole or primary targets in just 25 (8%) of these cases. When CA and CB cases were consolidated in one ALJ decision, we found that the Board's website[10] typically indexed that decision only as a CA or a CB case, and we tracked the Board's index.[11] If the Board indexed the case as CA, we studied only the CA portion of the decision. We did that to simplify the task of readers checking our work.

Twenty-seven judges issued these 314 published decisions. Their productivity varied greatly. The table below shows each judge's total number of studied cases, divides them between CA (alleging employer unfair labor practices) and CB (alleging union unfair labor practices), and displays the number of complaints dismissed in each category.

Judge	Decisions	CA cases	CA cases dismissed	CB cases	CB cases dismissed
Arthur Amchan	36	31	4	5	2
Mara-Louise Anzalone	7	6	0	1	0
Paul Bogas	13	12	2	1	0
Geoffrey Carter	14	14	1	0	0
Kenneth W. Chu	10	9	2	1	0
Donna Dawson	6	6	0	0	0
Christine Dibble	14	14	3	0	0
Gerald Etchingham	14	12	2	2	1
Lauren Esposito	6	6	0	0	0

[8] An NLRB adjudication "respondent" is the rough equivalent of a "defendant" in federal district court civil litigation. Because NLRB complaints charge employer respondents with violations of NLRA Section 8(a), Board dockets assign them "CA" case numbers. For example, Region 15 case 12345, if brought against an employer respondent, would bear Case No. 15-CA-12345. Note: a few cases in our study pool charged unions with 8(a) violations because the unions were acting as employers of their staff.

[9] If brought against a union respondent, the complaint used as an example in the preceding footnote would bear Case No. 15-CB-12345, because it would allege a violation of NLRA Section 8(b). Board judges also preside in other types of hearings, all of which we excluded from this study.

[10] *Administrative Law Judge Decisions*, Nat'l Labor Rels. Bd., nlrb.gov/cases-decisions/decisions/administrative-law-judge-decisions.

[11] See, for example, Judge Geoffrey Carter's decision in *Union Tank Car Co.*, Nos. 08-CA-240492, 08-CB-243472, 2023 WL 4997859 (N.L.R.B. Aug. 3, 2023) (consolidating a CA and a CB case).

Jeffrey P. Gardner	10	10	1	0	0
Robert A. Giannasi	10	9	7	1	1
John Giannopoulos	9	9	1	0	0
Andrew Gollin	13	12	2	1	1
Kimberly Sorg-Graves	8	7	0	1	1
Benjamin Green	14	13	0	1	1
Eleanor Laws	12	10	2	2	1
Keltner Locke	12	10	3	2	1
Charles Muhl	11	10	3	1	1
Melissa Olivero	9	8	2	1	1
Robert Ringler	16	16	2	0	0
Michael A. Rosas	24	22	1	2	0
Lisa D. Ross	10	9	1	1	0
Ira Sandron	11	11	0	0	0
Ariel Sotolongo	5	5	1	0	0
Sharon Steckler	9	8	0	1	0
Amita Tracy	6	6	2	0	0
Jeffrey Wedekind	5	4	1	1	0
Totals	314	289	38	25	11

Of the 27 judges, sixteen (59%) were NLRB attorneys before becoming NLRB ALJs; their names appear in bold face font in table above. Together, they issued 164 (52%) of the 314 studied decisions. As best we can tell from their Board-published biographies, no judge previously defended NLRB unfair labor practice respondents. Former judges (as of December 31, 2024) appear in *italic* font, showing the turnover rate among ALJs.

II. STUDY METHODOLOGY

All authors are attorneys who have defended NLRB unfair labor practice proceeding respondents. No author was compensated for his or her work on this project. To the extent that an author relied on work performed by others in his or her firm, the author supervised and reviewed that work to ensure the accuracy of resulting representations.

On a spreadsheet, we grouped the cases by ALJ and listed them in date order for each ALJ. Each case name was hyperlinked to its NLRB.gov publication. Spreadsheet instructions asked assigned authors to read each case and then enter information in columns for each row. Only binary choices were allowed:

- Complaint dismissed or violation found?[12]
- Standard credibility ruling text used?[13]
- Credibility determination material to outcome?[14]

Reviewers also noted decisions in which the judge relied upon the Board's *Flexsteel* doctrine, about which more below.[15] We compared these case attributes with the type of respondent (employer or union). We had only one author per judge. No judge's decisions were split between authors.

After the spreadsheet[16] was populated, the lead author drafted and circulated this paper. After all revisions were made, all authors approved the final draft for publication.

III. FINDINGS

We initially sought to prove or to disprove these purposefully provocative propositions:

Proposition 1

> ALJs rarely discredit union or employee testimony when finding union unfair labor practices but normally discredit employer testimony when finding employer unfair labor practices.

Proposition 2

> ALJs often use template credibility analysis text, varying little between cases.

Proposition 3

> When explaining decisions to credit union or employee witnesses opposed by employer testimony, ALJs often cite Board precedent supporting an evidentiary presumption in favor of such witness testimony, but there is no Board precedent supporting a presumption that employer testimony is

[12] Cases alleging multiple unfair labor practices were classed as "violation found" if the ALJ found any unfair labor practice. The few cases contesting only remedies were classed as "violation found" if the General Counsel substantially prevailed.

[13] We compared each judge's decisions, looking for substantially identical body text or footnote text regarding credibility determinations. We then checked whether that common text was commonly used by other Judges.

[14] A credibility determination was deemed material to the outcome if the judge indicated that it supported complaint dismissal or an unfair labor practice finding.

[15] *See infra* Section III.B.4.

[16] Appendix A reproduces as much spreadsheet information as was possible consistent with legibility. *See* https://fedsoc-cms-public.s3.amazonaws.com/ALJ%20Spreadsheet%20for%20Publication.pdf.

> more credible than opposing union or employee testimony in any circumstance.

We found some support for each proposition. We also found some apparently related things for which we were not looking.

There was substantial evidence for Proposition 1, except with respect to Judge Giannasi. The evidence for Proposition 2 varied. Most judges normally used a standard introductory sentence to trigger deference to their demeanor observations. Most judges regularly used standard opinion text to state their criteria for judging credibility. But we found no judge habitually copying and pasting the identical text of specific witness credibility findings from case to case. Notably, judges often expressed credibility findings in conclusory terms, and some used pejorative terms. Conclusory and pejorative findings almost always disfavored employer respondents. Rarely were they made against union respondents.

There was significant variance among judges on Proposition 3. Some rarely invoked Board precedent to justify credibility rulings; others regularly did so. Only one judge, in only one case, acknowledged the *Flexsteel* doctrine while ruling otherwise based on the overriding incredibility of the employee's testimony against the employer respondent.

Though the Board has its prosecution-friendly thumb[17] on the credibility scale, the writing of some judges appeared consistent with actual observations about how the testimony of individual witnesses compared with other evidence of reliability. A few judges stood out, as noted below. Their analysis was characterized by detailed explanations that could be checked against the hearing record. They rarely defaulted to conclusory shorthand such as "direct," "evasive," "cooperative," "confident," "combative," or "helpful."

A. Essential Background Information

NLRB adjudication differs markedly from civil litigation conducted in federal courts. NLRB staff acquire respondent evidence and arguments during regional office investigations of unfair labor practice charges, almost all of which are filed by unions or by employees against employers. Respondents have no right to discovery during the investigation. After the Board's

[17] The Board's prosecutor, the General Counsel, belongs to the same agency as the judges and the Board members themselves. That kind of combined structure appears in a variety of federal administrative agencies. Some commentators and courts have questioned whether the structure itself promotes institutional bias. *See* Sec. & Exch. Comm'n v. Jarkesy, 603 U.S. 109, 143 (2024) (Gorsuch, J., concurring) (observing that the SEC won 90% of cases prosecuted through its in-house administrative process, as opposed to 69% of the cases it prosecuted in an Article III court).

Regional Director issues a complaint, his or her staff attorneys prosecute the case in the name of the Board's General Counsel. An administrative law judge is assigned to make any needed preliminary rulings, to conduct the hearing, and to issue a decision which becomes a final Board order unless timely appealed to the Board in compliance with exacting rules. The respondent has no pretrial right to discover the evidence or arguments against its positions—beyond what he or she can ascertain through reading the complaint—nor does the GC have the Rule 16 disclosure duties of a federal criminal prosecutor.[18] But like a prosecutor,[19] the GC must conceal from the respondent the identity of, and the affidavit given by, an employee witness unless and until the employee has testified. After the employee's direct examination by the GC, respondent counsel may ask the judge to permit review of the witness affidavit moments before conducting cross examination.[20]

That Board effectively discourages counsel for employer respondents to interview employees when preparing to defend an unfair labor practice case. Formally, the Board requires ALJs to apply the attorney-client privilege rules applied in federal court cases arising under federal law.[21] So technically, the privilege may apply to communications between an employer's lawyer and an employee who has information related to the lawyer's defense of an unfair labor practice case. But of course, privileged circumstances will not protect an unlawful communication. The Board has determined that the employer's lawyer commits an unfair labor practice by asking an employee about communications with the union or the NLRB.[22] The employer's lawyer may ask an employee about his or her factual knowledge only if the lawyer first gives the equivalent of *Miranda* warnings, and then, after receiving employee consent, conducts the interview without the slightest hint of coercion.[23] Where an employer's lawyer's communications with an employee do not satisfy the

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[18] *See* FED. R. CRIM. P. 16(a)(1).

[19] *See* FED. R. CRIM. P. 16(a)(2); 18 U.S.C. § 3500(b).

[20] *See* 29 C.F.R. § 102.118. *See also* NATIONAL LABOR RELATIONS BOARD BENCH BOOK: AN NLRB TRIAL MANUAL § 16-613.1 (Apr. 2024); Reginald H. Alleyne, Jr., *The "Jencks Rule" in NLRB Proceedings*, 9 B.C. INDUS. & COM. L. REV. 891 (1968). The Board promulgated its *Jencks* rule without NLRA textual authorization and perhaps contrary to the Act's command to apply the Federal Rules of Civil Procedure "so far as practicable." *See* 29 U.S.C. § 160(b).

[21] *See* NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES BENCH BOOK: AN NLRB TRIAL MANUAL, §§ 8-405 and 8-475 (2024). Broader confidentiality recognized under state law is not recognized in Board proceedings.

[22] *See* Resolute Realty Mgmt., 297 N.L.R.B. 679, 685 (1990); Guess?, Inc., 339 N.L.R.B. 432, 434-35 (2003) (extending this doctrine even to discovery properly conducted in injury litigation).

[23] *See* Johnnie's Poultry Co., 146 N.L.R.B. 770 (1964).

Board's requirements, the General Counsel's complaint allegation of interview illegality will effectively bypass the attorney-client privilege. The General Counsel is permitted to question the employee about the communication and then to offer the employee's testimony in support of the alleged violation. Even if the judge later decides that the communication was lawful and privileged, the employee's testimony will have put the "confidential" communication on the record. This legal conundrum effectively discourages employers from seeking information about labor disputes from their employees, making it difficult for them to prepare adequately for trial and preventing them from knowing whom they should call as witnesses in some instances. The Board has erected no similar trial preparation obstacles for union counsel, or for its General Counsel.

Contrary to the normal practice in federal civil litigation, respondents cannot use dispositive motions to smoke out concealed evidence and arguments. If the respondent seeks summary judgment, the Board will treat the facts pled by its General Counsel as true, even if those facts are pled in conclusory terms,[24] defeating the motion. This is just one of the most notable consequences of the Board's refusal to follow the Federal Rules of Civil Procedure.[25]

The routine result for respondents is trial by ambush. Often, the respondent first learns of material adverse evidence when it hears a witness testify at trial. If the respondent did not guess well and prepare accordingly, and especially if the respondent failed to schedule an implicated manager to attend and testify, the respondent may be unable to contest the surprise evidence. Continuance requests rarely are granted. In the ensuing decision, missing documents and witnesses weigh heavily against the respondent.

When the respondent has guessed well, the trial outcome often depends on resolving testimony disputes, usually by making witness credibility findings. The Board routinely refuses to reconsider its judges' credibility findings, explaining that practice with this boilerplate footnote text:

> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law

[24] *See* Holtec Int'l, LLC, Nos. 04-CA-29171, 01-CA-292021, 02-CA-202090, 2022 WL 4547944 (Sept. 28, 2022) (denying employer summary judgment motion for this reason, relying on *Armstrong Cork Co.*, 112 N.L.R.B. 1420, 1421 (1955)).

[25] *See* 29 U.S.C. 160(b) (requiring compliance with FED. R. CIV. P. 56 "so far as practicable"). *See also* R. Pepper Crutcher, Jr, *Must the NLRB Follow Rule 56 in Its Summary Judgment Opinions?*, 92 MISS. L.J. 523 (2023); United Nat. Foods, Inc. v. Nat'l Lab. Rels. Bd., 66 F.4th 536, 549 (5th Cir. 2023) (Oldham, J., dissenting).

> judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.[26]

Over many years, the Board has developed doctrines that augment or even substitute for the General Counsel's proof of employer unfair labor practices.[27] So it's no surprise that Board precedent often influences or controls a judge's credibility findings adverse to respondents, and especially employer respondents. Judge Esposito succinctly described the main lines of this precedent:

> In addition, the Board has developed general evidentiary principles for evaluating witness testimony and documentary evidence. For example, the Board has determined that the testimony of an employer Respondent's current employee which is contrary to the Respondent's contentions may be considered particularly reliable, in that it is potentially adverse to the employee's own pecuniary interests. *Covanta Bristol, Inc.*, 356 NRLB 246, 253 (2010); *Flexsteel Industries*, 316 NLRB 745 (1995), aff'd, 83 F.3d 419 (5th Cir. 1996). It is also well-settled that an administrative law judge may draw an adverse inference from a party's failure to call a witness who would reasonably be assumed to corroborate that party's version of events, particularly where the witness is the party's agent. *Chipotle Services*, LLC, 363 NLRB 336, 336 fn. 1, 349, (2015), *enf'd* 849 F.3d 1161 (8th Cir. 2017); *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). Adverse inferences may also be drawn based on a party's failure to introduce into evidence documents containing information directly bearing

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[26] *See* Amazon.com Servs. LLC, 373 N.L.R.B. No. 136, 2024 WL 4774441, at *1 n.1 (2024).

[27] A good example is the "small plant" doctrine succinctly explained in *Strategic Technology Institute, Inc.*:

> The small-plant doctrine "applies when the facility is small and open, the work force is small, the employees make no great effort to conceal their union activities, and management personnel are located in the immediate vicinity of the protected activity, which increases likelihood of knowledge." Here, the relatively small work force of 60 employees worked on the main shop floor in an open environment. Site Supervisor Kiihnl walked through the shop floor daily to observe the work being done.

371 N.L.R.B. No. 137 at n.1 (2022) (citing Roemer Indus., 367 N.L.R.B. No. 133, at *15 (2019), *enforced*, 824 F. Appx. 396 (6th Cir. 2020)) (internal citations omitted). Where applicable, the small plant doctrine substitutes for or buttresses General Counsel proof of employer knowledge of union organizing.

on a material issue. *See Metro-West Ambulance Service, Inc.*, 360 NLRB 1029, 1030, fn.13 (2014).[28]

For all these reasons, Board judges rarely find themselves compelled to dismiss an unfair labor practice case, except where there is clear legal error in the complaint. Year-in and year-out, the General Counsel wins nearly 90% of contested unfair labor practice cases pursued to a Board decision.[29]

B. Common Patterns Observed

Here is a tabular summary of our observations about the 314 decisions that we studied:

All Judges	Total	Standard Text	Material CR	*Flexsteel* reliance
CA Sustained	246	150 (.61)	187 (.76)	31 (.13)
CA Dismissed	43	18 (.42)	31 (.72)	0
CB Sustained	14	4 (.29)	6 (.43)	0
CB Dismissed	11	4 (.36)	7 (.64)	0
Totals	314	172 (.55)	231 (.74)	31 (.10)

A similar table introduces each of our Judge-by-Judge Review comments below.[30] Here, we explain the terms that appear in these tables and their real-world significance.

[28] Apple, Inc., No. 02-CA-295979, 2023 WL 4106350, at *13-*14 (N.L.R.B. June 20, 2023). The main lines of adverse inference precedent are explained in NATIONAL LABOR RELATIONS BOARD BENCH BOOK: AN NLRB TRIAL MANUAL, § 16-611.5 (Apr. 2024), including the rare occasions when Board precedent supports drawing an adverse inference against a union respondent. *See*, *e.g.*, ILA Local 1526, No. 12-CB-295349, 2023 WL 6119413 (N.L.R.B. 2023) (the sole such decision in our study pool). A December 2, 2024, Westlaw search for Board and ALJ citations to *Flexsteel Indus.*, 316 N.L.R.B. 745 (1995), returned 403 hits, with no negative treatment. A union was the respondent in just two of those decisions; in both, the union was accused of unfair labor practices committed in its employer capacity.

[29] Until recently, the percentage win rate was disclosed in the General Counsel's annual report to the Midwinter ABA Meeting, which then was posted on the NLRB web site. The lowest GC win rate we found was the 85.7% claimed in General Counsel Memorandum 14-02 (March 26, 2014). GC Memorandum 17-02 reported an 89% win rate. These numbers exclude settlements. The EEOC, by comparison, typically wins a much smaller percentage of its contested cases resolved by district court order. *See* OFFICE OF GENERAL COUNSEL FISCAL YEAR 2014 ANNUAL REPORT, EEOC, *available at* https://www.eeoc.gov/reports/office-general-counsel-fiscal-year-2014-annual-report#IIID1 (reporting in Part III (D)(1) that the EEOC's GC had 4 wins in 12 cases). The FY 2023 Annual Report claimed favorable results in just 5 of 14 such cases.

[30] *See infra* Section III.E.

1. Deference-Triggering Template Text

The column headed "Standard Text" indicates how often cases in each category contained boilerplate text introducing or explaining the judge's credibility findings. This was most common in decisions sustaining complaints against employer respondents (61%) and least common in decisions sustaining complaints against union respondents (29%). Most judges routinely introduced their findings with some variant of this sentence: "Based upon the entire record, including my observation of witness demeanor, and after considering the briefs filed by all the parties, I make the following findings of fact and conclusions of law."[31] Variances between judges were negligible and were solely stylistic. So embedded was this sentence in the architecture of ALJ opinions that judges included it even when they made no credibility finding, and even when there was no material testimony dispute. For example, in *UPMC Western Psychiatric Hospital*, Judge Rosas retained standard *witness demeanor* credibility determination language in his published decision made on the parties' materially *stipulated* record.[32] On review, the Board deemed that an "inadvertent error."[33] That was not as much of an outlier as we would have hoped.

Most judges also regularly incorporated a paragraph stating their credibility analysis criteria. It appeared sometimes in a footnote and sometimes in the body of the opinion. Some judges used it in some cases but not others. There were style differences. Some judges truncated it; some embellished it. Here is a typical example:

> Where necessary, my credibility determinations are incorporated into the findings of fact set forth above. In assessing credibility, I primarily relied on witness demeanor. I also considered the context of the witness's testimony, the quality of their recollection, testimonial consistency, the presence or absence of corroboration, 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. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. Sub nom., 56 Fed. Appx 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common

[31] *See* Xcel Protective Servs., Inc., No. 19-CA-232786, 2020 WL 7231747 (N.L.R.B. Dec. 7, 2020) (Giannopoulos, A.L.J.).

[32] 373 N.L.R.B. No. 98, 2024 WL 413708 (2024).

[33] *Id.* at *2.

> in judicial decisions than to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, supra at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008) (citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950) rev'd on other grounds 340 U.S. 474 (1951)).[34]

It seems very likely that NLRB judges commonly draft their decisions by customizing templates that include boilerplate text invoking deference to their credibility findings. The chief tell was occasionally poor proofreading.

2. Union Respondents Fared Better than Employer Respondents[35]

Fifteen percent (43 of 289) of complaints against employer respondents were dismissed; 85% resulted in at least one unfair labor practice finding. Forty-four percent (11 of 25) of complaints against union respondents were dismissed; 56% resulted in at least one unfair labor practice finding. In other words, the union respondent dismissal rate (44%) was almost triple the employer respondent dismissal rate (15%). Only one judge departed markedly from this pattern. Judge Giannasi dismissed seven of the ten complaints that the GC took to trial—seven of nine CA cases and his only CB case.

3. Materiality of Credibility Determinations

Credibility determinations were usually material to finding employer violations, but they were less often material to finding union unfair labor practices. The rate of material credibility findings was comparable for CA cases sustained (76%) and dismissed (72%), but there was a 21-point gap between CB cases dismissed (64% based on credibility findings) and sustained (43% based on credibility findings). This disparity was more glaring because of how many CA cases alleged employer unfair labor practices that could be adjudged based on documents and undisputed facts—for example, whether the employer's written responses to the union's written information requests were consistent with the employer's good faith bargaining duty. Excluding cases with no material credibility dispute, these judges made material credibility

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[34] *See* MJB Specialty, LLC., No. 19-CA-266693, 2022 WL 3644698, at *9-*10 (N.L.R.B. Aug. 22, 2022) (Gollin, A.L.J.).

[35] At the time we finished our work, many ALJ decisions in our study pool were still under Board review. Consequently, we did not calculate and compare the Board's reversal rates for (a) ALJ decisions with material credibility findings adverse to employer CA case respondents; (b) ALJ decisions with material credibility findings adverse to union CB case respondents; (c) ALJ decisions with material credibility findings adverse to the GC in CA cases; and (d) ALJ decisions with material credibility findings adverse to the GC in CB cases. We hope to do that in a supplement.

findings adverse to respondents in 84% of CA cases (179 out of 212) but only in 36% of CB cases (5 out of 14). Put another way, employer respondents were 233% more likely than union respondents to suffer materially adverse credibility findings in credibility-dependent decisions. The judges were much more impressed by witnesses testifying against employer respondents. The most extreme example of this can be seen in the *Blue School* case, where the administrative law judge discredited the sole hearing witness, who testified for the employer respondent.[36]

4. The Role of Board Credibility Precedent

When a judge cited Board precedent on credibility, that precedent always disfavored employers.[37] There are two recurring themes in Board decisions related to credibility. First, the Board frequently presumes that, because of his or her exposure to employer retaliation, an employee's testimony against his or her current employer is probably truthful. Second, the Board sees an employer's failure to offer testimony by a supervisor witness to an alleged unfair labor practice as a reason to credit the adverse witness for the General Counsel as to that event. Each line of Board precedent is questionable.[38] Here, we analyze the credibility presumption applied to employees testifying against their employers.

Like Title VII of the 1964 Civil Rights Act,[39] the NLRA forbids employers to retaliate against employees who testify against them.[40] Before the Civil Rights Act of 1991,[41] Title VII claims, considered equitable, were tried without juries, and district court judges issued findings of fact and conclusions of law. But those district court judges never developed anything like the Board's policy of crediting an employee's disputed testimony on the ground that only

[36] Blue School, No. 02-CA-292782, at *6 (N.L.R.B. May 4, 2023).

[37] No seasoned counsel for employer respondents expects NLRB neutrality. Absurd examples abound. For a recent one, see *Lund Food Holdings, Inc.*, 373 N.L.R.B. No. 107, 2024 WL 4273639, at *1 n.1 (Sept. 20, 2024), in which Member Kaplan, concurring, expressed doubt that the Board lawfully may deem the statement of an employer agent to be lawful if pro-union but unlawful if anti-union. At issue was a supervisor's pre-election prediction of pay rises following a union victory, which were held to be unobjectionable. Under long-settled precedent, a supervisor's prediction of pay raises in the event of a union loss will support setting-aside the union's subsequent loss.

[38] The absent witness presumption is suspect because the General Counsel begins the hearing with superior knowledge of the evidence. In such circumstances, the respondent is more likely than the General Counsel to have failed to prepare to oppose surprising testimony.

[39] *See* 42 U.S.C. § 2000e-3(a).

[40] *See* 29 U.S.C. § 158(a)(4).

[41] *See* 42 U.S.C. § 1981a.

a truthfully testifying employee would run the risk of unlawful employer retaliation.[42] This presumption—developed in the 1990s—is known as the *Flexsteel* doctrine.[43] The Board explained its rationale in these terms:

> In part II.A.1.a of his decision the judge referred to a "presumption of credibility" for witnesses currently employed by the Respondent, and he stated that he would "afford this presumption to all witnesses who are current employees." We do not rely on any such "presumption." The cases cited by the judge for support do not set forth a presumption of credibility, but do recognize that the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961). Thus, a witness' status as a current employee may be a significant factor, but it is one among many which a judge utilizes in resolving credibility issues.[44]

In *Gold Standard Enterprises, Inc.*,[45] the ALJ, by crediting witnesses for the employer respondent, had implicitly discredited employee witnesses who testified for the General Counsel. The Board reversed the ALJ's credibility findings and his decision, saying:

> [E]very reason exists for finding the testimony of these employees particularly credible since both were still in Respondent's employ at the time of the hearing and both testified in direct contradiction to certain statements of their present supervisors. The Board has long recognized that the testimony of a witness in such circumstances is apt to be particularly reliable, inasmuch as the witness is testifying adversely to his or her pecuniary interest, a risk not lightly undertaken.[46]

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[42] A December 30, 2024, Westlaw search for district court citations of this NLRB doctrine in Title VII cases before 1992 returned "0" hits. This is a "shoe on wrong foot" phenomenon because of the early, strong precedent requiring broad reading of Title VII to accomplish its remedial purposes. *See* Sandra Tufari, *Title VII's Antiretaliation Provision: Are Employees Protected After the Employment Relationship Has Ended?*, 71 N.Y.U. L. REV. 797, 810 n.72 and accompanying text (June 1996).

[43] *See Flexsteel*, 316 N.L.R.B. at 745.

[44] *Id.* Most CA cases in our study pool featured employees testifying against their employers. A December 3, 2024, Westlaw search retrieved between 6 and 12 ALJ decisions per year, in recent years, involving an alleged violation of 29 U.S.C. § 158(a)(4), which protects employees who cooperate with NLRB proceedings from employer retaliation. Few of those cases alleged retaliation for testifying in an unfair labor practice hearing.

[45] 234 N.L.R.B. 618 (1978).

[46] *Id.* at 619.

That Board opinion cited and relied upon *Georgia Rug Mill*,[47] in which the Board had affirmed a credibility finding in favor of employee testimony adverse to the employer respondent: "A factor not stressed by the Trial Examiner, but which tends to support his credibility determinations, is that all the witnesses credited by him with regard to the violations of Section 8(a) (1) testified adversely to the respondent notwithstanding that they were still in its employ."[48]

This *Flexsteel* doctrine seems untethered to current reality. Often, the employee witness is a known union adherent complaining of perceived abuse by the employer respondent. The witness is protected by law from employer retaliation. Are people in that position generally known for reluctance to . . . embellish?

If that inference is reliable enough to support dispositive findings, why does the Board shy away from calling it an evidentiary presumption? It seems unlike common evidentiary presumptions such as the sanity of the testator or the receipt of a proven mailing. But perhaps the Board also worries that, were it to acknowledge that its *Flexsteel* doctrine is an evidentiary presumption, it would conflict with Federal Rule of Evidence 301:

> In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.[49]

In this study, we observed the *Flexsteel* doctrine invoked only against employer respondents. When invoked, it routinely influenced credibility findings against those respondents. We found only one exception. Often, despite what the Board might say on review, the *Flexsteel* doctrine seemed to shift the dispositive credibility burden from General Counsel to respondent.

We found *Flexsteel* cited in 13% of decisions sustaining complaints against employer respondents, and we probably undercounted. We looked for the *Flexsteel* citation as the indicator. In very long decisions, we did this by digital word search. We nevertheless ran across many instances of the ALJ citing another Board case for the same doctrine, but not citing *Flexsteel*. We may have overlooked many other similar instances. We found the *Flexsteel* doctrine so ingrained in Board adjudication culture that some judges applied

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[47] 131 N.L.R.B. 1304 (1961).

[48] *Id.* at 1305 n.2.

[49] FED. R. EVID. 301. *See also* Sundstrom v. Montana, 442 U.S. 510, 520-24 (1979) (rejecting, in criminal prosecutions, any evidentiary presumption easing the prosecution's burden of proof).

the *Flexsteel* principle, using very similar wording, without any citation.[50] We probably failed to find all such instances due to our search method.

C. A Find, Maybe, for Which We Were Not Looking

We also stumbled upon an unexpected pattern: the Board frequently dismisses respondent objections to arguably material ALJ factfinding errors, including errors related to credibility determinations. A December 2, 2024, Westlaw search returned 475 Board decisions in which the terms "inadvertent," "credib!" and "judge" appeared in the same paragraph.

In such situations, the Board has used "inadvertent" to describe and excuse a very wide range of ALJ errors. Some findings deemed inadvertent genuinely seem so—for example, Judge Rosas' finding that a material event happened a day earlier than the *stipulated* date. In context, that seemed like a typing error.[51] The "inadvertent" label stuck less well to many other findings on this long list. Here are just a few examples.

In *Paramount Trends, Inc.*, Judge Wilson credited the testimony of an employee based on a statement that the employee had attributed to a manager. In fact, a different employee gave that testimony. The Board called that error inadvertent and affirmed the credibility finding.[52]

In *Mapleview Nursing Home, Inc.*, the Board affirmed the judge's credibility findings while disregarding several record misimpressions on which the judge had based those findings. Among other things, the judge had found certain employer witness testimony patently incredible though the Board conceded that the record supported the discredited testimony. The Board called those errors inadvertent.[53]

In *United Scrap Metal, PA, LLC*, the Board affirmed a material credibility finding made by Judge Robert Ringler despite his reliance on a material misimpression about the date of an objectionable photographing incident. The Board held that Judge Ringler's witness demeanor observations independently supported the finding despite the inadvertent date error.[54]

The Board has, formulaically and consistently, conflated typing errors with substantive ALJ misstatements of the evidence, calling all those errors inadvertent rather than distinguishing clearly between harmless and prejudicial error. Many, if not most, of those errors are confessed in Board decision

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[50] Only when this was perfectly clear did we count it as an instance of *Flexsteel* reliance.

[51] *See* Am. Sec. Programs, Inc., 368 N.L.R.B. No. 151, at *1 n.2 (2019).

[52] 222 N.L.R.B. 141, 141 n.2 (1976).

[53] 302 N.L.R.B. 211, 211 n.1 (1991).

[54] 372 N.L.R.B. No. 49 (2023).

footnotes overruling respondent exceptions to ALJ credibility findings. We saw no Board explanation of why such cases were not remanded to the ALJ to determine whether the judge would have made the same credibility findings but for the error. Further exploration is beyond the scope of this study, but we hope someone will dig deeper here.

D. Significant Variance Among Judges

To the extent that such can be gleaned from the face of the page, the credibility findings of Judges Bogas, Giannasi,[55] and Sotolongo (see below) seemed the most consistent with genuine, individualized witness assessments. They explained their findings without invoking Board presumptions and without defaulting to conclusory or pejorative demeanor descriptions. Regularly, their explanations were susceptible to confirmation by reviewing the hearing record.

At the other end of the spectrum, we found conclusory descriptions of demeanor, pejorative statements about named respondent witnesses, and routine invocation of Board precedent to justify that sort of analysis. Some writing of Judges Carter,[56] Chu, Sandron, and Steckler exemplified this pattern.

The credibility writing of most judges fell between these extremes. Some were consistently middling; others vacillated between the extremes. But under *Standard Dry Wall Products*,[57] none risked reversal regardless of where they fell on this spectrum. Rulings that may be checked against the transcript routinely are affirmed, but so are rulings based on subjective witness demeanor impressions expressed in conclusory terms.[58]

E. Judge-by-Judge Review

Arthur Amchan	Total	Standard Text	Material CR	*Flexsteel* reliance
CA Sustained	27	16	25	2
CA Dismissed	4	2	3	0
CB Sustained	3	1	0	0
CB Dismissed	2	1	2	0
Totals	36	20	30	2

[55] Currently the Board's Chief Administrative Law Judge.

[56] Associate Chief Administrative Law Judge effective December 1, 2024.

[57] 91 N.L.R.B. at 544.

[58] Our research leads us to suspect that the Board's credibility ruling reversal rate may be higher for rulings that are material to complaint dismissals, but testing that hypothesis is beyond the scope of this project.

Judge Amchan sustained 27 of his 31 CA cases brought against employers. One of the four dismissed CA cases was brought against a union in its employer capacity. In that case, and in two dismissed CA cases against employers, Judge Amchan made a credibility finding favoring dismissal. In 25 of the 27 cases he sustained, Judge Amchan made credibility findings favoring that outcome.

Judge Amchan dismissed two of his five CB cases, making material credibility findings favoring the union in both CB dismissals. In no CB case sustained did Judge Amchan resolve a credibility dispute adverse to the union.

Judge Amchan's credibility writing was unusual. The ALJ's personal observation of witnesses typically is cited by the Board to support deference to ALJ credibility rulings. But in twelve of his 36 opinions, Judge Amchan expressly disclaimed reliance on witness demeanor, explaining in *Starbucks Corporation* that fraudster Bernie Madoff obviously had very persuasive demeanor, and that demeanor is therefore unreliable in determining witness credibility.[59] Sixteen other opinions omitted a demeanor reliance disclaimer, and some of those expressly cited witness demeanor as a credibility factor. Two of the cases with no anti-demeanor statement also cited *Flexsteel Industries* to support crediting the anti-employer testimony of a current employee. In some cases, Judge Amchan provided clear, testable, reasons for his credibility evaluation of each material witness. In a handful of cases, his credibility assessment grounds were unclear or unexpressed.

Mara-Louise Anzalone	Total	Standard Text	Material CR	*Flexsteel* reliance
CA Sustained	6	6	5	1
CA Dismissed	0	0	0	0
CB Sustained	1	1	1	0
CB Dismissed	0	0	0	0
Totals	7	7	6	1

Judge Anzalone sustained some or all complaint allegations in her seven opinions—six against employer respondents and one against a union respondent. In three 2021 opinions, she used identical opening sentences referencing her "observation of the credibility of witnesses" and used a standard credibility factor footnote citing four Board opinions. In one of those, she

[59] No. 03-CA-295470, 2023 WL 4363911 (N.L.R.B. July 6, 2023).

also relied on *Flexsteel Industries* to support crediting the anti-employer testimony of a current employee. Credibility determinations were material to each outcome.

In her next three opinions, starting with her 2022 CB decision, Judge Anzalone stuck with her standard introductory sentence but trimmed her standard credibility factor footnote down to citing only one of the four Board opinions cited earlier.

Judge Anzalone's final opinion was an outlier. All or almost all violations she found were based on written or website presentation communications by Starbucks. There was no significant testimony dispute requiring a credibility determination. Unsurprisingly, Judge Anzalone inserted no credibility resolution factor text, but she used a new introduction sentence referencing her "observation of witness demeanor . . . ."[60]

Paul Bogas	Total	Standard Text	Material CR	*Flexsteel* reliance
CA Sustained	10	1	7	1
CA Dismissed	2	0	2	0
CB Sustained	1	0	1	0
CB Dismissed	0	0	0	0
Totals	13	1	10	1

Judge Bogas typified judges whose credibility writing appeared to reflect genuine, varying assessments of particular witnesses. He cited similar factors—straining to support an aligned party, self-contradiction, contradiction by other reliable evidence—to find a union unfair labor practice in his only CB case and to dismiss two CA cases. He regularly found credibility problems in differing degrees with witnesses for and against the respondent. Normally, Judge Bogas appeared to do the hard work needed to find material facts without credibility determinations when possible. The one exception to this general pattern was footnote 14 in *Bardon, Inc.*, where Judge Bogas leaned on Board precedent to buttress a finding adverse to the employer respondent:

> I found Osborne to be a particularly credible witnesses [sic] based on his demeanor, apparent lack of bias, and the record as a whole, without regard to the fact that he was a current employee who was testifying against the interests of his employer. I note, however, that the Board has recognized

[60] *See* Starbucks Corp., No. 19-CA-294579, 2023 WL 6379600, at *2 (N.L.R.B. Sept. 28, 2023).

> that current employees who testify adversely to their employer's interests may be judged particularly credible since by giving such testimony they expose themselves to the possibility of retaliation . See *Murray American Energy, Inc.*, 366 NLRB No. 80, slip op. at 8 fn.6 (2018), enfd. 765 Fed. Appx. 443 (D.C. Cir. 2019), *Portola Packaging, Inc.*, 361 NLRB 1316, 1316 fn.2 (2014), and *Flexsteel Industries, Inc.*, 316 NLRB 745, 745 (1995), affd. mem. 83 F.3d 419 (5th Cir. 1996); see also *Challenge Manufacturing Company*, 368 NLRB No. 35, slip op. at 5 fn. 5 (2019) (witness' status as a current employee is among the factors that a judge may utilize in resolving credibility issues) enfd. 815 Fed. Appx. 33 (6th Cir. 2020). [61]

Geoffrey Carter	Total	Standard Text	Material CR	*Flexsteel* reliance
CA Sustained	13	13	9	0
CA Dismissed	1	1	0	0
CB Sustained	0	0	0	0
CB Dismissed	0	0	0	0
Totals	14	14	9	0

Judge Carter issued fourteen decisions, all CA cases, and dismissed only one CA complaint. He regularly made material credibility rulings adverse to employer respondents in those cases. Judge Carter used this standard paragraph, headed "Witness Credibility," in all these opinions:

> 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. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860 (2014); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an administrative law judge may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Farm Fresh Co., Target*

[61] No. 05-CA-248026, 2021 WL 2788471, at *13 n.14 (N.L.R.B. July 2, 2021).

> *One, LLC*, 361 NLRB at 860. My credibility findings are set forth above in the findings of fact for this decision.[62]

That this is pre-written, plug-in text appears evident from the fact that Judge Carter made no credibility finding in any of these decisions.[63]

Use of a standard credibility criteria paragraph is not worrisome, on its own. Sometimes, Judge Carter's credibility writing was clear and seemed even-handed.[64] But Judge Carter's writing regularly combined his standard paragraph with questionable grounds for discrediting testimony tending to exculpate employer respondents.[65] In *Starbucks Corporation*, Judge Carter discredited employer testimony for lack of detail in note 10, and then in note 11 credited anti-employer testimony despite its seemingly greater lack of detail and apparent error.[66]

Kenneth Chu	Total	Standard Text	Material CR	*Flexsteel* reliance
CA Sustained	7	6	5	0
CA Dismissed	2	1	2	0
CB Sustained	1	0	0	0
CB Dismissed	0	0	0	0
Totals	10	7	7	0

Judge Chu issued ten decisions during the study period—nine CA cases and one CB case. He dismissed two of the CA cases and found a violation in his only CB case. Judge Chu made material credibility determinations against the employer respondents in all seven of the decisions that went against them.

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[62] *See* Barons Bus, Inc., Nos. 09-CA-266622, 269462, 2021 WL 3165209, at *20-*21 (N.L.R.B. July 26, 2021). *See also* Coca-Cola Consolidated, Inc., Nos. 09-CA-250571, 251021, 2021 WL 4207496, at *23 (N.L.R.B. Sept. 15, 2021).

[63] *See* Frontier Commc'ns Corp., No. 09-CA-247015, at *16 (N.L.R.B. Oct. 14, 2020); The Painting Contractor, LLC, Nos. 09-CA-248716, 250898, 2021 WL 778879, at *17 (N.L.R.B. Feb. 26, 2021).

[64] *See* Biomedical Applications of Puerto Rico, Inc., No. 12-CA-281235, 2022 WL 1555579 (N.L.R.B. May 13, 2022).

[65] *See, e.g.*, Catsmo, LLC, Nos. 03-CA-274827, 274855, 2021 WL 6091092, at *4 n.8 (N.L.R.B. Dec. 22, 2021) (discrediting, for lack of specific dates or report forms, testimony that employee call-outs repeatedly prevented the employer from running a particular machine, despite lack of evidence that the employer normally made records of such incidents). *See also* Starbucks Corp., Nos. 07-CA-292971, 293916, 2022 WL 6435891, at *23 n.20 (N.L.R.B. Oct. 7, 2022) (discrediting manager's testimony that she had repeatedly issued similar discipline for lack of names and dates and circumstances, without indicating that cross examination disputed that testimony).

[66] No. 18-CA-293653, 2023 WL 2351350, at *7-*8 nn.10–11 (N.L.R.B. Mar. 3, 2023).

Judge Chu had three sorts of standard text explaining his credibility criteria. The longest was this paragraph, headed "Credibility Determinations":

> The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). 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. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, above; *Relco Locomotives*, 358, 298, 309 (2012). On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following . . . [sic][67]

That this was pre-written for plug-in seems certain, for what follows this paragraph in the opinion is a discussion of applicable law, rather than findings of fact. As we observed of Judge Carter's credibility writing, the same facts seemed to weigh differently depending on whether the testimony being discredited tended to inculpate or to exculpate an employer respondent. In the same case, *Michael Cetta, Inc.*, for example, an employee's inability to provide details of his search for other employment was "not indicative that he lacked credibility in searching for work."[68] Nor did Judge Chu find an employee who testified that he kept records of the forgotten details of his work search but destroyed them lacked credibility.[69] Other credibility writing in that case also seemed slanted against employer respondents, such as Judge Chu's statement that the evidence compelled him to "*reluctantly* find that the Respondent has satisfied its burden . . ."[70]

While *Michael Cetta* is concerning, it appears to be an outlier. Judge Chu more often used this truncated credibility criteria paragraph:

> In assessing credibility, I have considered factors such as: the context of the witness' testimony, the quality of the witness's recollection, testimonial

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[67] *See* Michael Cetta, Inc., Nos. 02-CA-142626, 144852, 2023 WL 1822164, at *8 (N.L.R.B. Feb. 6, 2023).

[68] *Id.* at 76 (citing Pat Izzi Trucking Co., 162 N.L.R.B. 242, 245 (1996)).

[69] *Id.* at 84.

[70] *Id.* at 38 (emphasis added).

> consistency, the presence or absence of corroboration, 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. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all or nothing propositions.[71]

In this case, Judge Chu dismissed the complaint because the employee witness contradicted his pretrial affidavit in an obvious attempt to escape a material admission. Judge Chu used the same truncated paragraph when finding unfair labor practices.[72] He also used this truncated paragraph even when the decision included no material credibility ruling.[73]

Occasionally, when credibility was barely material, Judge Chu simply dropped this footnote:

> Credibility findings need not be all of all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003).[74]

Overall, Judge Chu seemed easily persuaded to credit testimony disfavoring employer respondents, but he also discredited palpably false testimony against employer respondents. His one CB case sheds no comparative light.

Donna Dawson	Total	Standard Text	Material CR	*Flexsteel* reliance
CA Sustained	6	5	4	1
CA Dismissed	0	0	0	0
CB Sustained	0	0	0	0
CB Dismissed	0	0	0	0
Totals	6	5	4	1

[71] *See, e.g.*, Med. Diagnostic Labs., Genesis, No. 22-CA-250467, 2021 WL 1945886, at *11 (N.L.R.B. May 13, 2021).

[72] *See* Colart Americas, Inc., No. 22-CA-252829, 2021 WL 4990698, at *16 (N.L.R.B. Oct. 27, 2021).

[73] *See* Tec-Cast, Inc., No. 22-CA-277711, 2022 WL 3016148, at *7 (N.L.R.B. July 28, 2022).

[74] *See, e.g.*, Green Knoll Care, LLC, Nos. 22-CA-263661, 244307, 2021 WL 3471594, at *18 n.14 (N.L.R.B. Aug. 2, 2021).

Judge Dawson's credibility writing was regular in the result but odd in the inputs. She went 6-0 against employer respondents and made material credibility rulings in four of those opinions. Twice she used apparently borrowed text on credibility criteria and introduced five of her six opinions with this common ALJ opinion preface sentence: "On the entire record, including my observation of the demeanor of witnesses, and after considering the briefs filed by the parties, I make the following . . . ." Oddly, she inserted that sentence in two information request decisions that had no materially disputed testimony, but she omitted it in a third information request case of the same nature. In one opinion, Judge Dawson presumed the credibility of an employee witness testifying against the employer respondent, but without citing Board precedent approving that presumption. Judge Dawson several times expressed her credibility assessments in conclusory ("overall demeanor"), and even pejorative terms—such as when she accused a Postal Service management witness of "deceit."[75]

Christine Dibble	Total	Standard Text	Material CR	*Flexsteel* reliance
CA Sustained	11	11	5	0
CA Dismissed	3	3	2	0
CB Sustained	0	0	0	0
CB Dismissed	0	0	0	0
Totals	14	14	7	0

Judge Dibble sustained eleven of fourteen complaints against employer respondents, but one of her three dismissals stands out in this data set. In *Troy Grove*, Judge Dibble acknowledged Board precedent presuming the credibility of employees testifying against their employers but nevertheless discredited an employee witness for overriding reasons.[76] In other ways, Judge Dibble's credibility ruling writing was typical. Even when there was no credibility issue, and even when the facts were stipulated, she included the standard ALJ opinion preface sentence saying that she based her findings on "my observations of the credibility of the witnesses." Only four times in fourteen cases did Judge Dibble include a truncated version of the paragraph typically

[75] *See* U.S. Postal Serv., No. 15-CA-279353, 2023 WL 6157380, at *20 (N.L.R.B. Sept. 20, 2023).

[76] No. 25-CA-262611, 2021 WL 6091093 (N.L.R.B. Dec. 21, 2021).

used by others to explain credibility determination criteria, including citations to Board cases.

Gerald Etchingham	Total	Standard Text	Material CR	*Flexsteel* reliance
CA Sustained	10	10	9	0
CA Dismissed	2	2	1	0
CB Sustained	1	1	1	0
CB Dismissed	1	1	0	0
Totals	14	14	11	0

Judge Etchingham sustained ten of twelve complaints against employer respondents, including one against a union in its employer capacity. He split his two CB cases. Those are not unusual numbers, but Judge Etchingham's credibility writing had several unusual features. Introducing his opinions, Judge Etchingham always wrote that his findings were made in part based on his observation of witness demeanor, even when there was no disputed testimony and he made no credibility ruling, which often happens in information request cases. When Judge Etchingham made material credibility rulings, he normally inserted a standard paragraph—usually in body text but sometimes in a footnote—explaining credibility finding criteria. Judge Etchingham tended to give extra emphasis to witness demeanor. In several cases, he started a section of findings with, "I find witness demeanor a critical factor in resolving this case."[77] Sometimes, Judge Etchingham described determinative demeanor in ways that might be checked by transcript reference, but not often. More usually, he used conclusory and occasionally pejorative descriptions, such as calling an employer witness "disingenuous."[78] However, Judge Etchingham rarely leaned on Board credibility precedent, the one exception being an adverse inference drawn from the failure of an employer witness to testify.[79]

[77] *E.g.*, J. Ginger Masonry, LP, No. 21-CA-289777, 2023 WL 2688310, at *6 (N.L.R.B. Mar. 29, 2023).

[78] AJNC Inds. LLC, No. 28-CA-266358, 2021 WL 3879422, at *12 n.11, *26 (N.L.R.B. Aug. 30, 2021).

[79] *See* Good Samaritan Hosp., No. 31-CA-282566, 2022 WL 3910461, at *5 n.5 (N.L.R.B. Aug. 30, 2022).

Lauren Esposito	Total	Standard Text	Material CR	*Flexsteel* reliance
CA Sustained	6	3	3	3
CA Dismissed	0	0	0	0
CB Sustained	0	0	0	0
CB Dismissed	0	0	0	0
Totals	6	3	3	3

Judge Esposito went six for six against employer respondents, using standard credibility ruling criteria paragraphs and making material rulings against the employers in each of the three opinions that turned on disputed witness testimony. Judge Esposito's opinions are notable for their standard paragraphs summarizing Board credibility determination precedent that is used exclusively, or nearly so, against respondents, and especially against employer respondents. Here is an example:

> A. Credibility Resolutions
>
> Evaluating certain issues of fact in this case requires an assessment of witness credibility. Credibility determinations involve consideration of the witness' testimony in context, including factors such as witness demeanor, "the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001), enf'd. 56 Fed.Appx. 516 (D.C. Cir. 2003); see also Hill & Dales General Hospital, 360 NLRB 611, 615 (2014). Corroboration and the relative reliability of conflicting testimony are also significant. See, e.g., *Precoat Metals*, 341 NLRB 1137, 1150 (2004) (lack of specific recollection, general denials, and comparative vagueness insufficient to rebut more detailed positive testimony). It is not uncommon in making credibility resolutions to find that some but not all of a particular witness' testimony is reliable. See, e.g., *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860 (2014).
>
> In addition, the Board has developed general evidentiary principles for evaluating witness testimony and documentary evidence. For example, the Board has determined that the testimony of an employer Respondent's current employee which is contrary to the Respondent's contentions may be considered particularly reliable, in that it is potentially adverse to the employee's own pecuniary interests. *Covanta Bristol, Inc.*, 356 NRLB 246, 253 (2010); *Flexsteel Industries*, 316 NLRB 745 (1995), aff'd, 83 F.3d 419 (5th Cir. 1996). It is also well-settled that an administrative law judge may

> draw an adverse inference from a party's failure to call a witness who would reasonably be assumed to corroborate that party's version of events, particularly where the witness is the party's agent. *Chipotle Services, LLC*, 363 NLRB 336, 336 fn. 1, 349, (2015), enf'd 849 F.3d 1161 (8th Cir. 2017); *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). Adverse inferences may also be drawn based on a party's failure to introduce into evidence documents containing information directly bearing on a material issue. *See Metro-West Ambulance Service, Inc.*, 360 NLRB 1029, 1030, fn.13 (2014).[80]

Jeffrey P. Gardner	Total	Standard Text	Material CR	*Flexsteel* reliance
CA Sustained	9	2	9	0
CA Dismissed	1	1	1	0
CB Sustained	0	0	0	0
CB Dismissed	0	0	0	0
Totals	10	3	10	0

Judge Gardner used a standard preface sentence in cases that presented witness credibility disputes: "Upon consideration of the briefs, and the entire record, including the testimony of witnesses and my observation of their demeanor, I make the following . . . ."[81] Judge Gardner made material credibility rulings adverse to the employer respondents in all nine CA cases in which he found unfair labor practices, even discrediting an employer witness who was the only witness in the hearing in one case.[82] In another case, discrediting a manager's testimony, Judge Gardner described the witness as "not credible, at times to the point of farce."[83] However, Judge Gardner also made credibility findings against the GC in the case that he dismissed.[84]

Judge Gardner deemed demeanor most important, followed by internal consistency of the testimony given. Consistency may be verified by reading the transcript, but many of Judge Gardner's demeanor evaluations could not be tested by transcript reference or were expressed in conclusory terms—for

[80] Apple, Inc., No. 02-CA-295979, 2023 WL 4106350, at *13-*14 (N.L.R.B. June 20, 2023).

[81] *E.g.*, *Blue School*, No. 02-CA-292782, at *2.

[82] *See id.* at 6.

[83] *See* Elm Cmty. Charter Sch., No. 29-CA-285334, 2022 WL 16709899, at *3 (N.L.R.B. Nov. 3, 2022).

[84] *See* New Concepts for Living, Inc., No. 22-CA-187407, 2021 WL 83671 (N.L.R.B. Jan. 8, 2021).

example, crediting GC witnesses as answering GC questions "directly" and in a "forthright" manner.[85]

Robert A. Giannasi	Total	Standard Text	Material CR	*Flexsteel* reliance
CA Sustained	2	0	2	0
CA Dismissed	7	0	7	0
CB Sustained	0	0	0	0
CB Dismissed	1	0	1	0
Totals	10	0	10	0

Judge Giannasi was a statistical outlier; he dismissed his only CB case and dismissed seven of nine CA complaints, always making material credibility determinations but never expressing them in conclusory or pejorative terms.

On its face, Judge Giannasi's credibility writing looked to us like the work of a genuinely neutral fact finder, or at least one who is able and willing to set aside his priors. Judge Giannasi's credibility writing was consistent regardless of respondent identity or outcome. He didn't even use standard inserts about credibility determination factors. Judge Giannasi never relied on Board precedent to presume or to demean the credibility of a category of witness, or to demean generally the credibility of a party's evidence. When witness demeanor was not relevant, Judge Giannasi omitted his usual introductory reference to witness demeanor. When witness credibility was material, he described the grounds of his determination for each witness with great specificity. He looked for internal inconsistency, corroboration by fully reliable evidence, the extent and reliability of opposing testimony, and the interest and demeanor of the witness. As a result, his credibility writing formed a large part of his opinions compared to that of other judges.

John Giannopoulos	Total	Standard Text	Material CR	*Flexsteel* reliance
CA Sustained	8	8	6	2
CA Dismissed	1	1	1	0
CB Sustained	0	0	0	0
CB Dismissed	0	0	0	0
Totals	9	9	7	2

[85] *See* Cnty. Concrete Corp., No. 22-CA-238625, 2021 WL 4263503, at *9 (N.L.R.B. Sept. 17, 2021).

Judge Giannopoulos opened his decisions with the standard ALJ preface stating that his findings are "[b]ased upon the entire record, including my observation of witness demeanor . . . ." Judge Giannopoulos added this standard paragraph:

> Testimony contrary to my findings has been specifically considered and discredited. Unless otherwise noted, witness demeanor was considered in making all credibility resolutions. Along with observing witness demeanor, in appropriate circumstances I have also considered the context of witness testimony, the weight of the respective evidence, the established or admitted facts, the inherent probabilities of the testimony, and the reasonable inferences that may be drawn from the record as a whole.[86]

Sometimes, Judge Giannopoulos simply stated in the course of his discussion that certain testimony or evidence was "credited," without elaboration.

When discrediting testimony of witnesses for employer respondents, Judge Giannopoulos often provided detailed, particularized explanations. For example, in one case, he explained:

> I do not credit Filibeck's testimony that he did not learn that Respondent had been using unauthorized ranges, including someone's backyard, to qualify guards until April or May 2019. Generally, I did not find Filibeck to credible [sic] as he seemed conceited during his testimony, particularly while testifying about Salopek, and was flippant about Salopek's discharge. "The demeanor of a witness may satisfy the tribunal, not only that the witnesses' testimony is not true, but that the truth is the opposite of his story." *Gissel Packing Co.*, 157 NLRB 1065, 1066–1067 (1966) (internal quotation omitted). Such is the case here regarding Filibeck's knowledge of Respondent's weapons qualification practices. After he met with Rake and Burris, Filibeck discussed Rake's report with Terry and Powless, wanting to know what had happened and whether Xcel in fact had training issues he did not know about or that the Navy did not uncover. It strains credulity to think that, during his meeting with Terry and Powless, the two individuals responsible for the unauthorized ranges, they did not inform Filibeck of what had been was occurring [sic]. This is especially true since Terry believed that the Navy had, in the past, authorized these practices. I

[86] *See* 3 Corners, LLC, No. 28-CA-273948, 2023 WL 6226274, at *3 n.4 (N.L.R.B. Sept. 25, 2023). *See also Xcel Protective Servs., Inc.*, No. 19-CA-232786, at *2 n.1 ("Testimony contrary to my findings has been specifically considered and discredited. Witness demeanor was the primary consideration used in making all credibility resolutions.").

> therefore find that Filibeck learned about these practices during his meeting with Terry and Powless, before he fired Salopek.[87]

Judge Giannopoulos regularly noted the absence of corroborating documentary evidence when rejecting the testimony for employer respondents, citing *Matheson Fast Freight, Inc.*, for the proposition that "lack of documentary evidence in control of respondent supports finding that bare claims made by company witnesses were not credible."[88]

Judge Giannopoulos relied on *Flexsteel* in one case.[89] In another case, he relied on the *Flexsteel* presumption without citing *Flexsteel*.[90]

In all but one decision turning on disputed testimony, Judge Giannopoulos credited union and GC witnesses over respondent witnesses on materially disputed facts, particularly on issues relating to alleged misconduct by pro-union employees. Judge Giannopoulos discredited union witnesses' denial that they were aware of certain information based on other evidence that they had received the information.[91] In another case, Judge Giannopoulos found the testimony of an employer respondent's witness more accurate than that of the GC's witness regarding the timing of certain events, but that credibility finding was immaterial because Judge Giannopoulos found a violation by the respondent even based on the credited testimony.[92]

Andrew Gollin	Total	Standard Text	Material CR	*Flexsteel* reliance
CA Sustained	10	10	6	0
CA Dismissed	2	2	2	0
CB Sustained	0	0	0	0
CB Dismissed	1	0	0	0
Totals	13	12	8	0

[87] *See Xcel Protective Servs., Inc.*, No. 19-CA-232786, at *55. *See also 3 Corners, LLC*, No. 28-CA-273948, at *44-*47 (providing a detailed and lengthy account of his rejection of certain company witnesses' testimony).

[88] Matheson Fast Freight, Inc., 297 N.L.R.B. 63, 77 (1989).

[89] *See* CEMEX Constr. Materials Pacific LLC, No. 28-CA-230115, 2021 WL 5987176, at *22, *25, *55, *59 (N.L.R.B. Dec. 16, 2021).

[90] *See* Starbucks Corp., No. 19-CA-289275, 2022 WL 16709898, at *6-*7 (N.L.R.B. Nov. 3, 2022) (citing Advoc. South Suburban Hosp., 346 N.L.R.B. 209, 209 n.1 (2006), *enforced*, 468 F.3d 1038, 1047 (7th Cir. 2006), for the proposition that a witness's status as a current employee supported her credibility)

[91] *See* Thryv, Inc., No. 20-CA-250250, 2021 WL 1611717, at *52 n.41 (N.L.R.B. Apr. 23, 2021).

[92] *See Starbucks Corp.*, No. 19-CA-289275, at *10-*15.

During the study period, Judge Gollin issued thirteen decisions. Only one was a CB case.[93] Judge Gollin dismissed that complaint without a material credibility ruling.

In eleven of his twelve CA cases, Judge Gollin explained his credibility determinations in a standard footnote:

> The Findings of Fact are a compilation of the credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts with the findings herein, such testimony has been discredited, either as a conflict with credited evidence or because it was incredible and unworthy of belief. In assessing credibility, I primarily relied on witness demeanor. I also considered the context of the witness's testimony, the quality of their recollection, testimonial consistency, the presence or absence of corroboration, 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. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. Sub nom., 56 Fed. Appx 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, supra at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008) (citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950) rev'd on other grounds 340 U.S. 474 (1951)).[94]

When necessary, Judge Gollin addressed specific credibility determinations throughout his Findings of Fact.[95]

Unlike most other studied judges, Judge Gollin sometimes discredited employee testimony to the benefit of an employer respondent. In *MJB Specialty, LLC*, Judge Gollin discredited a security guard who testified that he was provoked by another guard into threatening violence.[96] In that case, Judge Gollin noted that the employee's testimony was self-serving, uncorroborated, and tended to exaggerate the other guard's conduct while minimizing

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[93] Laborers' Int'l Union of N. Am., Local 872, No. 28-CB-267014, 2023 WL 2826716 (N.L.R.B. Apr. 7, 2023).

[94] Phillips 66 Co., No. 15-CA-263723, 2022 WL 4299536, at *2 n.2 (N.L.R.B. Sept. 16, 2022).

[95] *See* TK, LLC, No. 10-CA-267762, 2022 WL 1555573, at *4 nn.7-8 (N.L.R.B. May 12, 2022).

[96] *MJB Specialty, LLC*, No. 19-CA-266693, at *10.

or ignoring his own.[97] Judge Gollin also discredited an employee witness in *Vision Battery*.[98] There, Judge Gollin discredited the employee witness because "it was difficult to differentiate between her emotional reaction to events and her factual recollection of them."[99] Additionally, Judge Gollin found that the employee's recall was selective and self-serving, her responses were evasive and argumentative, and her demeanor was guarded.[100]

However, other times, Judge Gollin leaned on Board precedent that always works against the respondent in an unfair labor practice case.[101] In *Amerinox Processing*, Judge Gollin cited Board precedent holding that "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge."[102] Judge Gollin held that "an adverse inference is warranted by the unexpected failure of a witness to testify regarding a factual issue upon which the witness would likely have knowledge."[103] Based on this precedent, Judge Gollin found that the employer's failure to call two witnesses with factual knowledge warranted an adverse inference, and he credited the employee witness whose testimony he found to be "clear, consistent, [and] logical."[104] Additionally, Judge Gollin cited Board precedent to draw an adverse inference where the employer failed to call a witness to testify about a significant matter which could not be attributed to mistake or omission.[105]

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[97] *Id.*

[98] No. 16-CA-271723, 2021 WL 5365990 (N.L.R.B. Nov. 11, 2021).

[99] *Id.* at 5 n.14.

[100] *Id.*

[101] This doctrine works against respondents because there is typically no pre-trial discovery in NLRB cases. The General Counsel knows the respondent's evidence because of the underlying Regional office investigation. The respondent is surprised by who takes the stand to say what at trial, at which point it's often too late to prepare and summon the needed defense witnesses.

[102] Amerinox Processing, Inc., No. 04-CA-268380, 2021 WL 2961489, at *9 (N.L.R.B. July 8, 2021) (citing Int'l Automated Machs., 285 N.L.R.B. 1122, 1123 (1987), *enforced,* 861 F.2d 720 (6th Cir. 1988)).

[103] *Id.* (citing Martin Luther King, Sr., Nursing Ctr., 231 N.L.R.B. 15, 15 n.1 (1977)).

[104] *Id.* at *1 n.14.

[105] *Id.* at *1 (citing Advanced Installations, 257 N.L.R.B. 845, 849 (1981); Colorflo Decorator Prods., 228 N.L.R.B. 408, 410 (1977)).

Kimberly Sorg-Graves	Total	Standard Text	Material CR	*Flexsteel* reliance
CA Sustained	7	3	3	1
CA Dismissed	0	0	0	0
CB Sustained	0	0	0	0
CB Dismissed	1	0	0	0
Totals	8	3	3	0

Judge Sorg-Graves published eight decisions during the study period. She dismissed no complaint made against an employer respondent. In her only CB decision, *Teamsters Local 957*,[106] Judge Sorg-Graves dismissed the complaint without making a material credibility determination for or against the interests of the Teamsters.

In three of the seven decisions finding an employer unfair labor practice, Judge Sorg-Graves made a material credibility determination, each time adverse to the employer respondent. Those three decisions shared common credibility determination text. In each decision, Judge Sorg-Graves cited the same Board precedent to outline how credibility determinations would be made. In each of the three decisions Judge Sorg-Graves held that "credibility findings are not likely to be an all or nothing determination, and I may believe a witness testified credibly about one fact but not another."[107]

In the two cases which outlined credibility determinations in the body of the opinion, Judge Sorg-Graves cited to additional Board precedent. In both *Nova Basement Systems* and *Trader Joe's*, Judge Sorg-Graves stated that:

> [M]y credibility analysis relies upon a variety of factors, including, but not limited to, the witness's demeanor, the context of the witness testimony, 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. See *Double D Construction Group,* 339 NLRB 303, 303-305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx 516 (D.C. Cir. 2003).[108]

In *Trader Joe's*, Judge Sorg-Graves cited and quoted Board precedent holding that:

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[106] No. 09-CB-255762, 2020 WL 6290160 (N.L.R.B. Oct. 27, 2020).

[107] *See* Nova Basement Systems, No. 25-CA-250547, at *7 (N.L.R.B. Mar. 10, 2021) (citing Daikichi Sushi, 335 N.L.R.B. 622, 623 (2001)).

[108] *Nova Basement Systems, Inc.*, No. 25-CA-250547, at *7; Trader Joe's, No. 16-CA-291179, 2023 WL 2327468, at *3–*4 (N.L.R.B. Mar. 1, 2023).

> Testimony from current employees tends to be particularly reliable because it goes against their pecuniary interest if they are testifying against their employer. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Division*, 197 NLRB 489, 491 (1972).[109]

In *Nova Basement Systems*, Judge Sorg-Graves applied, without citation, a reciprocal presumption that a supervisor "is not likely to testify in such a way that may harm [an employer] Respondent."[110]

Benjamin Green	Total	Standard Text	Material CR	*Flexsteel* reliance
CA Sustained	13	11	12	2
CA Dismissed	0	0	0	0
CB Sustained	0	0	0	0
CB Dismissed	1	0	1	0
Totals	14	11	12	2

During the study period, Judge Green published fourteen decisions. He dismissed his only CB complaint (a CA/CB case which the Board indexed as a CA case) without any credibility analysis, though he clearly disbelieved the testimony of the GC witness who supported the essential fact claimed—that an employee coerced by the union was a statutory supervisor. Judge Green dismissed no CA complaint; in twelve of his thirteen CA cases, Judge Green made material credibility determinations that disfavored the employer respondent.

Judge Green's credibility discourse had several common features. He used a template preface footnote to explain his credibility determination criteria. It varied little from case to case:

> The Findings of Fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent evidence of a fact is trustworthy and not contested, the fact is generally stated without reference to the underlying evidence. Testimony contrary to my findings has been discredited. In assessing credibility, I rely upon witness demeanor. I also consider the context of witness' testimony, the quality of their recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established

[109] *Trader Joe's*, No. 16-CA-291179, at *4.

[110] *Nova Basement Systems, Inc.*, No. 25-CA-250547, at *7.

> or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *See Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (*citing Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd. sub nom.*, 56 Fed. Appx. 516 (D.C. Cir. 2003).[111]

When credibility judgments drove the decision, Judge Green normally preceded his "Analysis" heading with a section headed "Credibility."[112] Usually, he grounded witness credibility assessments on some combination of witness demeanor and consistency with other evidence. Witness demeanor was the most common ground for Judge Green's credibility determinations, and he described it both generally and specifically. For example, Judge Green described credited witnesses as appearing confident or at ease, or as appearing thoughtful when answering, or as lacking any apparent desire to secure any certain outcome. Judge Green also cited specific examples of combative (and thus discredited), overly led (and thus discredited), and overly general (and thus discredited) testimony. The same was true when other evidence better matched the opposing testimony of a credited witness.

Judge Green appeared to adopt off-the-shelf credibility determinations only twice in this review period, presuming, based on Board precedent, the truth of an employee's testimony adverse to his or her employer:

> The Board "has recognize[d] that the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable . . . ." *Flexsteel Industries*, 316 NLRB 745 (1995).[113]

However, Judge Green also cited other reasons for crediting those witnesses adverse to the employer.

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[111] *See* Starbucks Corp., No. 02-CA-303077, 2023 WL 4704791, at *2 n.6 (N.L.R.B. July 24, 2023).

[112] *See*, *e.g.*, Alba Servs., Inc., No. 02-CA-271714, 2022 WL 279567, at *9-*12 (N.L.R.B. Jan. 28, 2022).

[113] *See* 11 West 51 Realty LLC, No. 02-CA-256884, 2021 WL 808560, at *8 (N.L.R.B. Feb. 25, 2021). *See also* St. Anthony Cmty. Hosp., No. 02-CA-278511, 2022 WL 2314975, at *13 (N.L.R.B. June 24, 2022) ("[E]mployee testimony to the detriment of a current employer is often particularly reliable.").

Eleanor Laws	Total	Standard Text	Material CR	*Flexsteel* reliance
CA Sustained	8	3	3	3
CA Dismissed	2	1	1	0
CB Sustained	1	0	0	0
CB Dismissed	1	0	1	0
Totals	12	4	5	3

During the study period, Judge Laws published twelve decisions, ten of them CA cases. She dismissed two of the ten CA cases and one of the two CB cases. Only twice in these twelve cases did Judge Laws discredit a witness for the General Counsel—once in a CA case and once in the dismissed CB case.[114]

Judge Laws made material credibility determinations disfavoring the employer respondent in four CA cases. The other six CA cases turned on the adequacy, or not, of employer information request responses; credibility was not material.

Judge Laws' witness credibility writing had several common features. In three decisions, she adopted Board presumptions using very similar text:

> A credibility determination may rest on various 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." *Hills & Dales General Hospital*, 360 NLRB 611, 615 (2014), citing *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 662, 623 (2001). In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness's testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950).[115]

Usually, Judge Laws grounded witness credibility assessments on some combination of witness demeanor and consistency with other evidence. For example, Judge Laws described credited witnesses as forthright, even, and not defensive when asked challenging questions. Judge Laws described discredited witnesses as unfocused, unclear, and general.

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[114] The other CA dismissal was a COVID vaccine mandate enforcement case with no credibility issue or ruling.

[115] *See* Starbucks Corp., No. 31-CA-299257, 2023 WL 3478211, at *5 (N.L.R.B. May 12, 2023).

Judge Laws appeared to adopt off-the-shelf credibility determinations three times in this review period, presuming, based on Board precedent, the truth of an employee's testimony adverse to his or her employer:

> Testimony from current employees tends to be particularly reliable because it goes against their pecuniary interests. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304, 1304 fn. 2 (1961); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Div. of Unarco Industries*, 197 NLRB 489, 491 (1972).[116]

However, Judge Laws also cited other reasons for crediting those witnesses adverse to the employer.

Keltner Locke	Total	Standard Text	Material CR	*Flexsteel* reliance
CA Sustained	7	0	6	0
CA Dismissed	3	0	3	0
CB Sustained	1	0	1	0
CB Dismissed	1	0	1	0
Totals	12	0	11	0

During the study period, Judge Locke published twelve decisions—ten CA, two CB. Judge Locke dismissed three CA cases and one CB case. Judge Locke provided an in-depth assessment of witness credibility for all but two cases (both CA), and he relied on Board credibility determination precedent.

In eight out of ten of his CA cases, Judge Locke relied materially on credibility determinations. In three of those decisions, Judge Locke relied materially on credibility determinations that favored the employer respondent.[117] He did not explicitly provide a witness credibility assessment for one dismissed CA case.[118] Judge Locke dismissed one of his two CB cases and made material credibility determinations in each.

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[116] *See* CP Anchorage Hilton, No. 19-CA-241411, 2021 WL 928417, at *13 (N.L.R.B. Mar. 11, 2021). *See also Starbucks Corp.*, No. 31-CA-299257, at *5 ("[Employee's] testimony is particularly reliable given that [employee] was testifying against her pecuniary interests."); Starbucks Corp., No. 20-CA-296184, 2023 WL 5036077, at *18 (N.L.R.B. Aug. 8, 2023) ("[A]s a current employee, she was testifying against her pecuniary interests.").

[117] *E.g.*, Starbucks Corp., No. 13-CA-300739 2023 WL 5803435, at *11, *16-*18, *31, *33 (N.L.R.B. Sept. 7, 2023); Owens Corning Insulating Sys., LLC, No. 16-CA-266880, 2021 WL 2985218, at *7-*9 (N.L.R.B. July 13, 2021).

[118] West Shore Home, LLC, No. 10-CA-260665, 2021 WL 3471601 (N.L.R.B. Aug. 4, 2021).

When credibility judgments drove his decision, Judge Locke typically created a separate "Credibility" section in his opinion.[119] Usually, he grounded witness credibility determinations on a combination of witness demeanor and consistency with other evidence. He discredited witnesses for failing to provide "straightforward" testimonies[120] and for contradicting prior testimonies and affidavits;[121] however, he credited testimonies when they did not contradict other testimonies[122] and aligned with other witness characteristics.[123]

Charles Muhl	Total	Standard Text	Material CR	*Flexsteel* reliance
CA Sustained	7	7	6	0
CA Dismissed	3	3	3	0
CB Sustained	0	0	0	0
CB Dismissed	1	1	0	0
Totals	11	10	0	0

During the study period, Judge Muhl published eleven decisions, ten of which were CA cases. He dismissed the only CB complaint and dismissed three of ten CA complaints. Judge Muhl made material credibility determinations in nine decisions. Credibility assessments were immaterial in his CB complaint dismissal and in two CA case dismissals.

Judge Muhl used a template preface footnote (numbered 2, 3, or 4) to explain his credibility determination criteria. The template did not vary much from case to case and matched with similar "copy-and-paste" blurbs used by other administrative law judges:

> In order to aid review, I have included citations to the record in my findings of fact for each of the three categories. The citations are not necessarily

[119] *See, e.g.*, U.S. Postal Serv., No. 05-CA-287181, 2023 WL 4234035, at *4 (N.L.R.B. July 7, 2022); *see also* Hosp. Metro Mayaguez, Inc., No. 12-CA-278679, 2022 WL 4467359, at *11 (N.L.R.B. Sept. 26, 2022).

[120] In *Hospital Metro Mayaguez*, Judge Locke discredited an employer's witness because she described her work "with vague generalities," and he provided examples of her testimony. No. 12-CA-278679, at *11-*12. He credited the union's witnesses for "straightforward" testimony without providing examples. *Id.* at 12. *See also U.S. Postal Serv.*, No. 05-CA-287181, at *8 (describing employer witness testimony as "theatrical," "dramatic," and a "performance").

[121] *See Owens Corning*, No. 16-CA-266880, at *8.

[122] *See* LaSalle Southwest Corr., No. 16-CA-264520, 2021 WL 3471605, at *15 n.11 (N.L.R.B. Aug. 5, 2021) (noting employee witnesses "gave reliable testimony . . . consistent with that of a management witness . . .").

[123] *See Owens Corning*, No. 16-CA-266880, at *8 (finding an employer's witness credible when she testified to not partaking with Charging Party's case due to her impeding retirement).

> exclusive or exhaustive. In assessing witnesses' credibility, I have considered their demeanors, the context of the testimony, the quality of their recollections, testimonial consistency, the presence or absence of corroboration, 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. *See Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. Sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003).[124]

Judge Muhl often grounded his witness credibility assessments on some combination of witness demeanor and consistency with other evidence. For example, he discredited witnesses for appearing to be "self-serving" or "conform[ing]" to the union or General Counsel's "[legal] theory."[125] He credited witnesses when they appeared "genuine" but did not consistently provide examples.[126]

Melissa Olivero	Total	Standard Text	Material CR	*Flexsteel* reliance
CA Sustained	6	6	6	1
CA Dismissed	2	0	1	0
CB Sustained	0	0	0	0
CB Dismissed	1	1	1	0
Totals	9	7	8	1

During the study period, Judge Olivero issued nine decisions. She dismissed her only CB case and dismissed two of eight CA cases. She made material credibility determinations in eight of her nine decisions; the only exception was in her dismissal of an information request response complaint against an employer respondent. In seven of her eight CA decisions, Judge

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[124] *See* Stephens Media Grp., No. 03-CA-290582, at *4 n.3 (N.L.R.B. Dec. 27, 2022).

[125] *See* U.S. Postal Serv., No. 09-CA-287274, 2022 WL 4597307, at *15 n.39 (N.L.R.B. Sept. 28, 2022); Bonanza Ventures, LLC, No. 16-CA-274926, 2022 WL 1617772, at *18 n.45 (N.L.R.B. May 20, 2022).

[126] *Compare* Garten Trucking, LLC, No. 10-CA-279843, 2023 WL 2070300, at *18 n.41 (N.L.R.B. Feb. 17, 2023) ("His testimony was genuine . . . he appeared somewhat nervous while testifying. He acknowledged when he could not recall something.") *with* Flow Serv. Partners OpCo, LLC, No. 25-CA-292574, 2023 WL 3002499, at *9 n.23 (N.L.R.B. Apr. 18, 2023) ("[His] demeanor was earnest and sincere when testifying about the conversation, rendering the testimony reliable.").

Olivero made material credibility determinations that disfavored the employer respondent.

Judge Olivero used a standard decision section explaining that her credibility determinations may rely on a variety of factors, including the context of the witness's testimony, the witness's 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, citing *Double D Construction Group*.[127] Judge Olivero sorted witnesses into five categories: 1) credible; 2) did not credit; 3) generally credible; 4) credited when supported by other more credible evidence; 5) fully credible.

When discussing a discredited witness, Judge Olivero always provided examples. For example, in *Warrior Met Coal, Mining, LLC*, the discredited witness was difficult on cross-examination.[128] In *Tuckahoe Recreation Club, Inc.*, Judge Olivero pointed to the discredited witness's contradiction of other evidence and inability to recall key facts without relying on a prior statement.[129] Judge Olivero's assessment of credited witnesses was more generalized. She often used terms like "testimony did not waver on cross examination," "seemed forthright," "testified in a straightforward and candid fashion," and "forthright and frank manner" when describing a witness she found credible. Judge Olivero used the phrase "did not waver on cross examination" at least ten times, and she used the phrase "testified in a straightforward and candid fashion" or "frank and sound manner" at least six times. Judge Olivero noted a credible witness had "candidly admit[ted] many things" at least nine times but did not list any of the "many things." Judge Olivero normally referenced demeanor as supporting or undercutting credibility.

Robert Ringler	Total	Standard Text	Material CR	*Flexsteel* reliance
CA Sustained	14	1	10	0
CA Dismissed	2	0	0	0
CB Sustained	0	0	0	0
CB Dismissed	0	0	0	0
Totals	16	1	10	0

[127] 339 N.L.R.B. 303, 305 (2003).

[128] No. 10-CA-274900, 2023 WL 4264887, at *43 (N.L.R.B. June 29, 2023).

[129] No. 5-CA-267420, 2022 WL 3228003, at *14 (N.L.R.B. Aug. 9, 2022).

During the study period, Judge Ringler issued sixteen published decisions—all of them CA cases. He dismissed just two complaints against those employer respondents. In ten of his fourteen cases finding employer unfair labor practices, Judge Ringler made material credibility determinations against the employer.

Judge Ringler normally explained those determinations in footnotes. Judge Ringler discussed factors that he deemed essential and necessary in determining a witness's credibility, especially witness demeanor, which always was cited when discrediting the witness but not always when crediting the witness. Consistency with other evidence was a common theme, as was cooperativeness and believability.

When crediting employee witnesses against employer respondents, Judge Ringler typically called their testimony "consistent and believable."[130] He didn't always ground such impressions in observations susceptible to transcript conformation. Oddly for a judge who leaned so heavily on demeanor impressions, Judge Ringler did not introduce his findings with the usual preface invoking deference to his demeanor-based witness credibility findings.

Michael A. Rosas	Total	Standard Text	Material CR	*Flexsteel* reliance
CA Sustained	21	1	18	0
CA Dismissed	1	0	0	0
CB Sustained	2	0	2	0
CB Dismissed	0	0	0	0
Totals	24	1	20	0

During the study period, Judge Rosas published 24 decisions—22 CA cases and two CB cases. Judge Rosas dismissed just one of the General Counsel's complaints without a material credibility finding. In three other cases, Judge Rosas made no material credibility determination. In eighteen of his 22 CA cases, Judge Rosas made material credibility determinations that disfavored an employer respondent.

Judge Rosas' credibility writing was notably devoid of apparent plug-in text. The only exception was his opinion in *Starbucks Corporation*,[131] which contained text commonly used by other judges.

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[130] *See* Starbucks Corp., No. 06-CA-294667, 2023 WL 4294732, at *7 n.16. (N.L.R.B. June 30, 2023).

[131] No. 03-CA-285671, 2023 WL 2327467, at *3 n.4 (N.L.R.B. Mar. 1, 2023).

Judge Rosas often placed credibility determinations in footnotes, citing particular testimony. Typically, Judge Rosas grounded witness credibility statements on some combination of witness demeanor and consistency with other evidence. Judge Rosas often defaulted to affirming but conclusory testimony characterizations such as "detailed" or "spontaneous" and discredited testimony as "combative," "evasive," or "nonresponsive."

Lisa D. Ross	Total	Standard Text	Material CR	*Flexsteel* reliance
CA Sustained	8	7	7	1
CA Dismissed	1	0	0	0
CB Sustained	1	0	0	0
CB Dismissed	0	0	0	0
Totals	10	7	7	1

Judge Ross had ten decisions in this study pool. Three were decided without witness credibility findings.[132]

Only four decisions included the same boilerplate language on credibility standards, as follows:

> The Findings of Fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts with the findings herein, such testimony has been discredited, either as in conflict with credited evidence or because it was incredible and unworthy of belief. In assessing credibility, I relied upon witness demeanor. I also considered the context of the witness's testimony, the quality of their recollection, testimonial consistency, the presence or absence of corroboration, 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. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001), citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, supra at 622; *Jerry Ryce Builders*, 352 NLRB

[132] *See* Kava Holdings, LLC, No. 31-CA-074675, 2021 WL 2518827 (N.L.R.B. June 17, 2021); IATSE Local 16, No. 20-CB-252132, 2021 WL 4399616 (N.L.R.B. Sept. 24, 2021); Cmty. Organized Relief Effort, No. 31-CA-272228, 2023 WL 2971492 (N.L.R.B. Apr. 17, 2023). *Kava* was decided based on the employer's documents. *IATSE Local 16* was decided on a stipulated record. *Community Organized Relief Effort* was dismissed on legal grounds with no evidence submitted.

> 1262, 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), rev'd. on other grounds 340 U.S. 474 (1951). Where necessary, specific credibility determinations are set forth below.[133]

Judge Ross cited *Flexsteel* only in *Brinderson*.[134]

Ira Sandron	Total	Standard Text	Material CR	*Flexsteel* reliance
CA Sustained	11	10	8	7
CA Dismissed	0	0	0	0
CB Sustained	0	0	0	0
CB Dismissed	0	0	0	0
Totals	11	10	0	0

Judge Sandron sustained GC complaint allegations in all eleven cases in our study, relying on the *Flexsteel* doctrine in seven of them. He used the "missing witness" rule in three cases.

Judge Sandron opened each decision with boilerplate language on credibility standards citing only NLRB cases, including *Flexsteel* and the "missing witness" rule from *Natural Life*. His opinions seem to go the extra mile to find employees credible and managers not credible, and he cited *Flexsteel* in seven of the eleven cases.

Judge Sandron issued two decisions in *Michigan Bell Telephone Co.*[135] He both used boilerplate credibility language and cited *Flexsteel*. The case alleged multiple disciplinary measures that violated the National Labor Relations Act, and the ALJ sustained most—despite finding the complainant not entirely credible and despite crediting a management employee because of respondents' failure to call another manager to testify. The boilerplate language Judge Sandron used in *Michigan Bell* is:

> In making credibility resolutions, I have considered several established precepts. The first is that a witness may be found partially credible; the mere fact that the witness is discredited on one point does not automatically

[133] Brinderson, LLC, No. 27-CA-270623, 2022 WL 2965132, at *2 n.4 (N.L.R.B. July 26, 2022). *See also* Qwest Corp., No. 19-CA-284277, 2023 WL 5425323, at *2 n.4 (N.L.R.B. Aug. 22, 2023); VHHC, LLC, No. 20-CA-272873, 2022 WL 3228231, at *2 n.4 (N.L.R.B. Aug. 10, 2022); Pro Residential Servs., No. 28-CA-239775, 2023 WL 6379678, at *2 n.4 (N.L.R.B. Sept. 29, 2023).

[134] No. 27-CA-270623, at *1 n.24.

[135] Nos. 07-CA-161545 et al., 2020 WL 7231927 (N.L.R.B. Dec. 8, 2020).

> mean that he or she must be discredited in all respects. *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 799 (1970). Rather, a witness' testimony is appropriately weighed with the evidence as a whole and evaluated for plausibility. Id. at 798–799; see also *MEMC Electronic Materials, Inc.*, 342 NLRB 1172, 1183 fn. 13 (2004), quoting *Americare Pine Lodge Nursing*, 325 NLRB 98, 98 fn. 1 (1997), enf. granted in part, denied in part 164 F.3d 867 (4th Cir. 1999); *Excel Container*, 325 NLRB 17, 17 fn. 1 (1997). As Chief Judge Learned Hand stated in *NLRB v. Universal Camera* 5 *Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), regarding witness testimony, "[N]othing is more common in all kinds of judicial decisions than to believe some and not all." Here, many witnesses were reliable on some matters but not on others.
>
> Secondly, an adverse inference is appropriate when a witness was not questioned about potentially damaging statements attributed to him or her. *L.S.F. Transportation, Inc.*, 10 330 NLRB 1054, 1063 fn. 11 (2000); *Asarco, Inc.*, 316 NLRB 636, 640 fn. 15 (1995), modified on other grounds 86 F.3d 1401 (5th Cir. 1996). More broadly, several witnesses were not questioned about certain events in which they were involved, and I have generally credited the uncontroverted testimony of opposing witnesses.
>
> Finally, when credibility resolution is not based on observations of witnesses' 15 testimonial demeanor, the choice between conflicting testimonies rests on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Taylor Motors, Inc.*, 366 NLRB No. 69 slip op. 1 at fn. 3 (2018); *Lignotock Corp.*, 298 NLRB 209, 209 fn. 1 (1990).[136]

Judge Sandron used almost identical standard text in *United States Postal Service*,[137] but he omitted the second paragraph's "missing witness" language and did not cite *Flexsteel*. In *Curaleaf Massachusetts*, Judge Sandron changed things around, but the key sentences are the same, including the "missing witness rule," for which he cited the NLRB's 2018 opinion in *Natural Life*.[138] He also cited *Flexsteel*:

> I have also considered the longstanding principle that "the testimony of current employees that contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests." *Flexsteel Industries*, 316 NLRB 745, 745 (1995),

[136] Mich. Bell Tel. Co., No. 07-CA-161545, 2018 WL 3091028, at *3-*4 (N.L.R.B. June 21, 2018).

[137] No. 12-CA-271025, 2022 WL 2063360, at *2 (N.L.R.B. June 7, 2022).

[138] No. 01-CA-262554, 2021 WL 3036484, at *3 (N.L.R.B. July 15, 2021).

> enfd. 83 F.3d 419 (5th Cir. 1996), citing *Gold Standard Enterprises, Inc.*, 234 NLRB 618, 619 (1978), enf. denied for other reasons, 607 20 F.2d 1208 (7th Cir. 1979) and *Georgia Rug Mill*, 131 NLRB 1304, 1304 fn. 2 (1961); see also *Federal Stainless Sink Division of Unarco*, 197 NLRB 489, 491 (1972).[139]

The remaining decisions follow a similar pattern.[140]

There were oddities, too. In *St. Leo University*, Judge Sandron omitted his standard text but cited *Flexsteel* and stated, without separate citation, "the testimony of former employees is considered in the context of their having no interest in the outcome of the proceedings and, in the absence of demonstrated bias either for or against the respondent, is also likely to be reliable."[141]

Ariel Sotolongo	Total	Standard Text	Material CR	*Flexsteel* reliance
CA Sustained	4	0	2	2*
CA Dismissed	1	0	1	0
CB Sustained	0	0	0	0
CB Dismissed	0	0	0	0
Totals	5	0	3	2

Judge Sotolongo had only five decisions in our study pool, which consistently avoided boilerplate, cut-and-paste credibility statements. However, Judge Sotolongo credited current employees based on that status in two decisions, *Airgas USA, LLC*,[142] and *Commercial Solar Arizona, LLC*,[143] without citing *Flexsteel* or any other Board precedent for that presumption.

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[139] *Id.* at 6.

[140] *See* VNS Fed. Servs., LLC, No. 09-CA-262035, 2021 WL 4355287 (N.L.R.B. Sept. 23, 2021) (boilerplate at 2-3, *Flexsteel* at 9); Spike Enter., No. 14-CA-281652, 2022 WL 1557096 (N.L.R.B. May 16, 2022) (boilerplate at 2-3, including citation to *Flexsteel*); Pizza Piazza, Inc., No. 06-CA-279445, 2022 WL 2191625, at *2-*3 (N.L.R.B. June 16, 2022) (citation to *Flexsteel* to credit an employee's testimony); River City Asphalt, No. 18-CA-280068, 2022 WL 2870797 (N.L.R.B. July 21, 2022) (third paragraph of boilerplate included, citation to *Flexsteel*, discredits owner's testimony for being emotional); NCRNC, No. 03-CA-252090, 2021 WL 1599292, at *3 (N.L.R.B. Apr. 21, 2021) (invoking the "missing witness" rule from the *Natural Life*).

[141] No. 12-CA-275612, 2023 WL 2212789, at *3 (N.L.R.B. Feb. 23, 2023).

[142] No. 31-CA-226568, 2022 WL 596036 (N.L.R.B. Feb. 25, 2022).

[143] No. 28-CA-288120, 2023 WL 4106355 (N.L.R.B. June 20, 2023).

Sharon Steckler	Total	Standard Text	Material CR	*Flexsteel* reliance
CA Sustained	8	4	5	2
CA Dismissed	0	0	0	0
CB Sustained	1	0	0	0
CB Dismissed	0	0	0	0
Totals	9	4	5	2

Three of Judge Steckler's eight cases were decided on materially stipulated records. Judge Steckler omitted the common demeanor preface and the credibility criteria statement when there was no material credibility dispute.[144]

Judge Steckler adopted credibility finding criteria uniformly adverse to employer respondents. She regularly introduced her findings with the customary "including my observation of the demeanor of the witnesses" sentence and also used a fairly common statement of credibility criteria:

> My findings of fact encompass the credible testimony, evidence presented, and logical inferences. The credibility analysis may rely upon a variety of factors, including, but not limited to, the context of the witness testimony, 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. *Double D Construction Group*, 339 NLRB 303, 303–305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings regarding any witness are not likely to be an all-or-nothing determination and I may believe that a witness testified credibly regarding one fact but not on another. *Daikichi Sushi*, 335 NLRB at 622.[145]

Judge Steckler departed from other judges by joining to that credibility criteria statement this recitation of Board credibility precedent:

> When a witness may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d (6th Cir. 1988).

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[144] *See* Kroger Texas, L.P., No. 16-CA-273805, 2023 WL 4682562 (N.L.R.B. July 21, 2023).

[145] Redi Carpet, Inc., No. 16-CA-292266, 2023 WL 3790393, at *2 n.3 (N.L.R.B. June 1, 2023). *See also* List Inds., No. 13-CA-278248, 2022 WL 1137173, at *4 n.3 (N.L.R.B. Apr. 18, 2022); Needham Excavating, Inc., No. 25-CA-239166, 2021 WL 6050774, at *1 n.2 (N.L.R.B. Dec. 20, 2021); H&M Int'l Transp., Inc., No. 05-CA-2341380, 2021 WL 3879421, at *2 n.2 (N.L.R.B. Aug. 27, 2021).

> This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). Testimony from current employees tend to be particularly reliable because it goes against their pecuniary interests when testifying against their employer. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Division*, 197 NLRB 489, 491 (1972). Where a witness was not questioned about potentially damaging statements attributed to him or her by an opposing witness, it is appropriate to draw an adverse inference and find the witness would not have disputed such testimony. *LSF Transportation, Inc.*, 330 NLRB 1054, 1063 n. 11 (2000); *Asarco, Inc.*, 316 NLRB 636, 640 n. 15 (1995), modified on other grounds 86 F.3d 1401 (5th Cir. 1996).[146]

Judge Steckler did not cite "missing witness" precedent but discredited employer respondents due to questions not asked by respondent counsel:

> Where a witness was not questioned about potentially damaging statements attributed to him or her by an opposing witness, it is appropriate to draw an adverse inference and find the witness would not have disputed such testimony. *LSF Transportation, Inc.*, 330 NLRB 1054, 1063 fn. 11 (2000); *Asarco, Inc.*, 316 NLRB 636, 640 fn. 15 (1995), modified on other grounds 86 F.3d 1401 (5th Cir. 1996).[147]

Amita Tracy	Total	Standard Text	Material CR	*Flexsteel* reliance
CA Sustained	4	3	3	2
CA Dismissed	2	0	0	0
CB Sustained	0	0	0	0
CB Dismissed	0	0	0	0
Totals	6	3	3	2

Judge Tracy habitually—excepting two cases that presented no material testimony dispute—used the standard ALJ introductory sentence beginning,

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[146] *Redi Carpet*, No. 16-CA-292266, at *2 n.3. *See also* Volvo Grp. N. Am., No. 15-CA-179071, 2021 WL 4305834, at *4 n.2 (N.L.R.B. Sept. 20, 2021); *Needham Excavating, Inc.*, No. 25-CA-239166, at *28 ("Testimony from current employees tend to be particularly reliable when it goes against their pecuniary interests when testifying against their employer."); *H&M Int'l Transp., Inc.*, No. 05-CA-2341380, at *2 n.2.

[147] *Needham Excavating Inc.*, No. 25-CA-239166, at *28. *See Redi Carpet*, No. 16-CA-292266, at *1 n.3 (using identical language).

"On the entire record, including my observation of the demeanor of witnesses . . . ." She also used this standard footnote text:

> To aid review, I have cited to the record in my findings of fact, but the citations are not necessarily exclusive or exhaustive. Furthermore, my findings of fact encompass the credible testimony and evidence presented at the hearing, as well as logical inferences drawn therefrom. 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. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all–or–nothing propositions—indeed nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622. I will set forth specific credibility resolutions within the findings of fact.[148]

Judge Tracy regularly expressed her credibility findings in conclusory terms; she used "credibly" or "incredibly" more often than most judges, sometimes, but not always, explaining those impressions in ways that could be checked by reviewing the hearing transcript. Some variant of the word "credible" appeared 59 times in *Valley Hospital Medical Center, Inc.*[149]

Judge Tracy also relied more heavily than many ALJs on credibility presumptions taken from Board precedent, especially the *Flexsteel* doctrine.

Jeffrey Wedekind	Total	Standard Text	Material CR	*Flexsteel* reliance
CA Sustained	3	3	3	0
CA Dismissed	1	1	1	0
CB Sustained	1	1	0	0
CB Dismissed	0	0	0	0
Totals	5	5	4	0

Judge Wedekind found unfair labor practices in three of his four CA cases and in his only CB case. When he credited or discredited a witness, he often,

[148] Freeport McMoran Bagdad Inc., No. 28-CA-257171, 2022 WL 2314964, at *2 n.5 (N.L.R.B. June 24, 2022).

[149] No. 28-CA-234647, 2021 WL 6091090 (N.L.R.B. Dec. 22, 2021).

but not always, compared other record evidence to the disputed testimony. He never relied on the *Flexsteel* presumption.

Judge Wedekind was one of very few judges who eschewed the standard preface sentence invoking deference to witness demeanor observations. Judge Wedekind instead used a standard footnote paragraph to state his credibility assessment factors:

> In making credibility findings, all relevant factors have been considered, including the interests and demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. *See*, e.g., *Daikichi Corp.*, 335 NLRB 622, 623 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997).[150]

Like some others, Judge Wedekind used this footnote even when he made no material credibility finding.[151]

IV. CONCLUSIONS

The trends discussed in this article are observable only by comparing decisions by the same ALJs across time. They are therefore unlikely to be perceived by a reviewing court, which reviews each NLRB enforcement case in isolation. We found the trends only because we looked for patterns in a large number of ALJ decisions. In our study pool:

- Former NLRB prosecutors issued the majority of decisions;
- Credibility findings tended materially to disfavor employer respondents compared with union respondents;
- CB complaints were dismissed more often than CA complaints;
- Decisions finding employer unfair labor practices were typically supported by material credibility determinations adverse to those employers;
- Decisions finding union unfair labor practices relied less heavily, and less often, on credibility findings;

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[150] *See* Columbus Elec. Coop., No. 28-CA-285046, 2022 WL 4333557, at *2 n.2 (N.L.R.B. Sept. 19, 2022).

[151] *See* Nat'l Ass'n of Broad. Emps., No. 19-CB-244528, at *2 n.2 (N.L.R.B. Dec. 30, 2020).

- When judges relied upon Board precedent to support material credibility determinations, the precedent invoked was unfailingly adverse to employer respondents; and
- The most rote of boilerplate text we found appeared in Board decisions refusing to reconsider ALJ credibility rulings and dismissing ALJ factual errors as "inadvertent"—including errors related to credibility assessments.

These results do not necessarily suggest that any ALJ has consciously slanted his or her impressions of witness credibility. The patterns we observed might be explainable by confirmation bias or halo effects.[152] As Michael McDonald put it, "No wise man has the power to reason away what seems to be."[153] It's also true that we, no less than our study judges, are prone to find what we expect to find, and we are all management advocates. For this reason, we chose to publish our simplified study pool spreadsheet, inviting readers to check our work. For the same reason, decision citation format matches the spreadsheet.[154]

We believe that our observations are accurate and that the observed problems have a systemic cause: the current administrative and judicial review standards for ALJ witness credibility findings present audit-proof opportunities for ALJs to achieve outcomes consistent with personal or partisan prejudices against employers, or for unions, or for former colleagues on the Board's enforcement staff. We can, should, and do applaud every ALJ who has resisted these temptations, but this is not a personal issue; the problem appears to be systemic, requiring system reform.

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[152] *See generally* Eyal Peer & Eyal Gamliel, *Heuristics and Biases in Judicial Decisions*, 49 CT. REV.: J AM. JJ. ASS'N 114 (2013), *available at* https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1428&context=ajacourtreview.

[153] "What A Fool Believes," written by Michael McDonald and Kenny Loggins, was released on the 1978 Warner Bros. album "Minute by Minute."

[154] *See* https://fedsoc-cms-public.s3.amazonaws.com/ALJ%20Spreadsheet%20for%20Publication.pdf.