

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

**OZBURN-HESSEY LOGISTICS, LLC**

**and**

**Case Nos. 26-CA-24057  
26-CA-24065  
26-CA-24090  
26-RC-08635**

**UNITED STEEL, PAPER AND  
FORESTRY, RUBBER  
MANUFACTURING, ENERGY, ALLIED  
INDUSTRIAL and SERVICE WORKERS  
INTERNATIONAL UNION, AFL-CIO,  
CLC**

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**BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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## I. INTRODUCTION

The United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (“USW” or “Petitioner”) has been unsuccessfully trying to organize OHL’s Memphis employees since the summer of 2009. This proceeding is the USW’s latest attempt to litigate its way to electoral success.

In order to obscure the will of OHL’s employees, the USW and its supporters have resorted to challenging legitimate ballots, threatening employees with violence, and hurling racial epithets at employees. Despite its dubious tactics, the USW was only able to achieve a one-vote preliminary margin of victory, before all of the eligible votes are counted. OHL believes that its employees do not wish to be represented by the USW, and once the eligible votes are counted, the intent of OHL’s employees to reject the USW’s representation will be evident.

In the meantime, the USW continues its sustained campaign of spurious unfair labor practice allegations. This latest round includes a challenge to the legitimate discipline of two employees that hurled racial epithets at their co-workers. Jennifer Smith called Stacey Williams a “house nigger.”<sup>1</sup> Carolyn Jones repeatedly called Lee Smith a “U.T,” which she explained meant “Uncle Tom.” Even though Ms. Smith and Ms. Jones both acknowledged that they would expect to be disciplined for using these words at OHL, the USW and Acting General Counsel resort to apologist arguments for why racial epithets are really not that bad in OHL’s primarily African American workforce.

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<sup>1</sup> OHL and its counsel deplore this word in its spoken or written form and are reluctant to even include it in this Brief. However, OHL will use the word in this Brief only for the purpose of accurately quoting Jennifer Smith.

In addition to challenging OHL's discipline, the USW adds a number of legally questionable 8(a)(1) allegations that are only corroborated by avowed USW supporters.

Finally, OHL submits that it was denied due process by trying this case in a forum with only one potential outcome.

## II. STATEMENT OF THE CASE

### A. OHL

OHL is a third party logistics service provider. (R. 1123). Its Memphis operations provide warehousing and fulfillment services for companies that outsource those functions. *Id.* OHL's Memphis operations include five warehouses that are referred to as a "campus." (R. 1367 and 1465). The Memphis campus has over 300 employees.

OHL's operations are divided into "accounts," which are a group of employees who perform services for a particular customer. The accounts include nonsupervisory employees who have the job titles Operator I, Operator II, Inventory Control Specialist, Auditor, Administrative Assistants, and Customer Service Representative ("CSR"). There are also Maintenance Technicians and Custodians who are assigned to particular accounts. Each account has an Operations Supervisor who, in turn, reports to either an Account Manager or an Operations Manager. (Union Ex. 20). The Account Managers and Operations Managers report to Director of Operations, Phil Smith, who, in turn, reports to Karen White, OHL's Regional Vice President for Memphis Operations. *Id.* Ms. White reports to Randall Coleman, OHL's Senior Vice President for the South Region. (R. 1123).

The Human Resources Department at OHL's Memphis operations consists of a Human Resources Coordinator, two Human Resources Generalists, and a Human Resources Manager. (R. 1360). After June 10, 2011, only two of the four human resources positions in Memphis were filled. (R. 1359). Sara Wright was a Human Resources Generalist, and Evangelia ("Van") Young was the Human Resources Manager. Rather than reporting directly to the head of Memphis operations, Ms. White, the Memphis Human Resources Manager, reports to OHL's

Human Resources Department at its corporate headquarters in Brentwood, Tennessee. (R. 1210). Shannon Miles, Senior Employee Relations Manager at OHL's corporate headquarters, was on-site assisting the short-staffed Human Resources Department in Memphis during June, July, and August of 2011. (R. 1356).

## **B. Procedural History**

On March 16, 2010, OHL employees voted overwhelmingly to reject representation by the USW, 180 to 119. The USW objected to the election but subsequently withdrew its objections on June 11, 2011. On July 27, 2011, a second election was conducted. The preliminary vote count was 165 in favor of the USW and 164 in favor of OHL, with 14 determinative challenged ballots.

Since the beginning of the campaign, the USW and its supporters have filed over 150 unfair labor practice allegations against OHL. Only a small percentage of the USW's allegations have been sustained, and the ones that have been sustained are the subject of ongoing litigation.

## **C. The Alleged Section 8(a)(3) Violations.**

### **(i.) Termination of Carolyn Jones.**

#### **(a.) UT Comments**

In the spring of 2011, Lee Smith made his opposition to the USW known in a department-wide meeting. (R. 950). Shortly thereafter, Carolyn Jones began calling Lee Smith a "UT" on a daily basis. (R. 952). Carolyn Jones walked by Lee Smith's work area multiple times per day to get to and from her work area. *Id.* At the time that she was calling him "UT," Lee Smith did not know what Carolyn Jones meant by it. (R. 953). He even asked some of his coworkers what "UT" meant. Finally, after more than two weeks of daily name-calling, Lee Smith asked Carolyn Jones what she meant by "UT." (R. 954). She responded, "Uncle Tom."

By clarifying what “UT” meant, Carolyn Jones gave meaning to all of the previous times that she had called Lee Smith a “UT.” (R. 956).

Mr. Smith immediately called his co-worker, Jennifer Sims, and reported what Ms. Jones had just explained to him. After returning from lunch, he reported this interaction to his manager Lisa Taylor, and to Senior Area Manager, LeRoy Heath. Mr. Heath called Human Resources Manager, Van Young, and relayed what he had been told by Mr. Smith. An investigation commenced. OHL concluded that Ms. Jones had, in fact, called Lee Smith UT on multiple occasions, and then explained that it meant Uncle Tom, thereby giving meaning to each of her prior epithets.

**(b.) Falsification of Witness Statement**

All parties agree that there was a heated verbal interaction in the 5510 breakroom between Phil Smith and Carolyn Jones on May 26, 2011. Ms. Jones claims that she prepared a witness statement and asked her co-workers to sign it. (R. 86-90; GC Ex. 10). She then presented that witness statement to Van Young on the afternoon of May 26. Her description of her interaction with Van Young regarding the witness statement is significant:

Q: When you approached her what did you tell her?

A: Well, I told her that I was threatened by Phil Smith and that I had prepared a statement. Witnesses had signed it.

Q. Well, she said, “were there witnesses and did they sign it?”

A: I said “They did sign it.” I think the signatures were on the second page.”

(R. 91). As reflected in her testimony, Carolyn Jones specifically represented to Ms. Young twice that the witnesses had signed her statement. She did not say that the witnesses had signed the statement before she filled in the details. She did not say that the witnesses did not read her

statement. She said twice that the witnesses had signed her statement, clearly representing that the witnesses had adopted her statement.

OHL's Conduct Guidelines prohibit "failure to cooperate with an internal investigation, including, failure to be forthright, open or truthful; withholding information or evidence concerning matters under review or investigation; fabricating information or evidence or conspiring with another to do so." (GC Ex. 35, p. 30). However, once OHL began investigating Ms. Jones' allegations against Mr. Smith, it became apparent that the witnesses had been asked to sign the paper before Ms. Jones wrote in the statement. Each of the four witnesses who signed the statement gave signed statements to OHL stating that the paper they signed did not have Ms. Jones' statement on it when they signed it. (GC Exs. 5, 18, 21, 23). After obtaining the statements from each of the four witnesses indicating that Ms. Jones' statement was not on the paper when she signed it, Ms. Miles interviewed Ms. Jones, and she had an opportunity to come clean. Instead, she doubled down on her deception and lied to Shannon Miles.

In her June 13, 2011 statement to Ms. Miles, Ms. Jones claims that Troy Hughlett read her statement before he signed it and that she thought Kedric Smith had read it also. Both Kedric Smith and Troy Hughlett denied in their statements to OHL, as well as in their testimony under oath in this proceeding that they had read Ms. Jones statement. They both testified that all that they saw on the paper was a list of names. (GC Exs. 5 and 18; R. 1053-54; R. 239).

By filling in her statement after the witnesses signed the paper, Ms. Jones essentially put words in the witnesses' mouth without their knowledge. The General Counsel would understandably prefer to focus on what Phil Smith allegedly said to Carolyn Jones in the breakroom on May 26, 2011, which is wholly irrelevant to the reason for her discharge.

However, OHL had ample evidence<sup>2</sup> that Ms. Jones had obtained witness signatures, filled-in a statement above them, presented it to OHL as witnesses who had signed her statement, and then lied about it to OHL when asked to clarify.

General Counsel did not offer evidence of any alleged comparators who falsified a witness statement and kept their job. OHL offered one indirect comparator, James Griffin, who was terminated for falsifying a bill of lading. (Resp. Ex. 22).

**(ii.) Warning of Jennifer Smith.**

Jennifer Smith received a final written warning for calling Stacey Williams a "house nigger." On June 8, 2011, an employee approached Stacey Williams, a lead in the Brown-Halco account, to ask him where a box of red pens was located. (R. 995). Mr. Williams began looking for the red pens that had arrived in a recent shipment. (R. 996). When he could not find the pens in the cabinet, he began asking employees if they knew where the pens were located. *Id.* He asked Jennifer Smith, Shirley Milan, and Sheila Childress, "has anybody seen the pens?" *Id.* Shirley and Sheila responded that they had not seen them. *Id.* Jennifer did not respond at all. *Id.* Mr. Williams began looking around in boxes for the pens. *Id.* When he could not find them, he called Brad Spellman, the supervisor of Brown Halco. (R. 997). Mr. Spellman arrived on the scene and asked "does anybody have the red pens?" *Id.* At that point, Jennifer Smith turned around and retrieved the pens out of a box that she keeps near the line. *Id.* She handed the pens to Brad Spellman, and he walked away. After he walked away, Jennifer Smith said to Stacey Williams, "you always starting shit... you are nothing but a house nigger." (R. 999).

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<sup>2</sup> General Counsel repeatedly beat up OHL's witnesses about the quantum of proof (four witness statements) that allegedly corroborated Phil Smith's threat to Carolyn Jones. General Counsel repeatedly implied that this was sufficient evidence to conclude that the threat occurred. OHL notes that it had the same amount of evidence (four witness statements) when it made its decision to terminate Ms. Jones.

Ms. Smith denies that she called Mr. Williams a "house nigger." She admits that the term "house nigger" is intolerable, and she admits that using that phrase would violate OHL's anti-harassment policy. (R. 515-516). Jennifer Smith turns the tables. She testified Stacey Williams commented to her, after Brad Spellman walked away, "I guess I had to call the white people for you to give me those pens back." (R. 489). The statement that Ms. Smith provided to OHL, GC Ex. 37, indicated that Mr. Williams said "It's sad that I've got to get the white people to get the pens back." The phrase that she attributes to Mr. Williams is notably different in her testimony than it is in her statement. In any event, Ms. Smith does admit that she called Mr. Williams a "mess starter," which is not that far from what Mr. Williams claims she said right before hurling the racial epithet.

Ms. Smith claims that she heard Ms. Milan and Mr. Williams conspiring against her after this incident, but she admits that she never mentioned their alleged conspiracy to Ms. Wright who investigated the incident.

All parties agree that there were three potential witnesses to this interaction between Jennifer Smith and Stacey Williams: (1) Jerry Smith, (2) Sheila Childress, and (3) Shirley Milan. Ms. Milan corroborated Jennifer Smith use of the phrase "house nigger," both in her statement to OHL and in her testimony. (R. 928; Resp. Ex. 11). Sheila Childress provided a statement that said that she "didn't hear anything far as race words between Jen and Stacey." (GC Ex. 40). This statement conflicted with Jennifer Smith statements that Stacey asked her about getting white people involved. Jerry Smith provided a statement to OHL indicated that he came in "at the tail end" and "don't know what was said." (GC Ex. 39). However, he did recognize the situation as a verbal altercation because he told Jennifer and Stacey "let's get along...it's too hot for that." *Id.* Ms. Milan testified that Mr. Smith testified that Mr. Smith reacted to

Jennifer's comment by shaking his head and saying "no, no, no don't do that." Similarly Mr. Williams testified that Mr. Smith testified that Mr. Smith reacted by saying "don't, don't, don't say that." (R. 1001).

So, at the time OHL was making its decision to discipline Ms. Smith, it had one corroborating witness (Ms. Milan), the similarity between "shit starter" and "mess starter," one witness (Ms. Childress) who said she heard no race words in contradiction of Jennifer Smith's statement that Mr. Williams referred to white people, and another witness who claims not to have heard the altercation but knew enough about it to say "let's get along." OHL reasonably reached the conclusion that Ms. Smith made the comment based on the evidence at its disposal.

OHL chose to give Ms. Smith a final written warning rather than terminating her because her violation involved a single epithet in the course of a heated discussion, unlike Ms. Jones who repeatedly sought out a target over a two week period to call him a racially derogatory name.

**D. The Alleged Section 8(a)(1) Violations.**

**(i) Interrogation Allegations.**

**(a.) Sara Wright did not Interrogate Sharon Shorter.**

Sharon Shorter and Sara Wright testified about two very different versions of the same conversation. Both acknowledge that they spoke in Ms. Wright's office about Ms. Shorter's blood pressure. Ms. Shorter testified that Ms. Wright asked her whether anyone was pressuring her on the floor about the union. (R. 785). Ms. Wright acknowledged that she had a conversation with Ms. Shorter about her blood pressure, but she testified that there was no reference to the union during that conversation. (R. 1302).

**(b.) Shannon Miles did not Interrogate Kedrick Smith.**

During the course of an investigatory interview, Shannon Miles admittedly asked Kedrick Smith, “Has C.J. [Carolyn Jones] tried to solicit you for the Union while you working on the floor (on the clock)?” (GC Ex. 5; R. 35-38). Ms. Miles’ question does not amount to unlawful interrogation, since union solicitation on the work floor during work time is not protected activity..

**(ii.) Surveillance Allegation.**

It is alleged that John McNamee and Randall Coleman “surveilled” employees handbilling in the OHL parking lot. Both Mr. Coleman and Mr. McNamee allegedly stood near the entrance to a building while looking at the ground, as employees handbilled in the parking lot. Both Mr. McNamee and Mr. Coleman denied this allegation.

**(iii.) Impression of Surveillance Allegation.**

During the previously described conversation between Sara Wright and Sharon Shorter, Ms. Wright allegedly said that she knew Glenora Rayford had been pressuring Ms. Shorter to talk about the union. (R. 785). Ms. Wright denied this allegation. According to Ms. Wright, the only reference to Glenora Rayford during the conversation was raised by Ms. Shorter. Ms. Shorter complained that Ms. Rayford was constantly bothering her about why she had not received a pay raise that she deserved. (R. 1302).

**(iv.) Confiscation Allegation.**

Several Waterpik employees testified that they observed Phil Smith removing union literature from the Waterpik breakroom after break was over, on April 11, 2011. The union literature at issue was a copy of the 10(j) injunction issued against OHL. It is alleged that Mr. Smith removed copies of the decision in the late morning, after the initial break. Mr. Smith

explained that it is his personal practice to clean up all items left in the break room during nonwork times. (R. 1529). While Mr. Smith does not recall the particular day in question, he candidly does not dispute that he could have been in the Waterpik account that day.

Employees also claimed that supervisor, Alfreda Owens, and manager, Eric Nelson removed union literature from the Waterpik breakroom at times when employees were not on break.

**(v.) Alleged Solicitation of Resignation of Union Supporter.**

The General Counsel alleges that Phil Smith improperly responded to a question in a group meeting by nonsupervisory employee Tondra Mitchell, when she asked why the union supporters do not find other jobs if they are unhappy at OHL. Specifically, the General Counsel claims that Mr. Smith responded “exactly, that’s what I’m talking about,” at which point Ms. Young allegedly fell on the floor laughing. Ms. Mitchell is not alleged to be a supervisor or agent of OHL, and there is no evidence in the record that Mr. Smith knew that Ms. Mitchell would be asking this question or otherwise instigated it. Mr. Smith acknowledges receiving the question and says that he responded by saying, “I can’t answer that question. You’d have to ask those employees.” (R. 1497). Ms. Mitchell, Mr. Coleman, and Ms. White all corroborate Mr. Smith’s response. (R. 909, 1135, 1208).

**(vi.) Alleged Threats.**

**(a.) Phil Smith did not Threaten Carolyn Jones.**

Carolyn Jones claims that Phil Smith threatened her life by telling her to “watch her back” twice.<sup>3</sup> Mr. Smith testified that he told Ms. Jones that “she would not tell him when to go back to work; he would tell her when to go back to work.” (R. 1490). Regardless of which

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<sup>3</sup> Not even the Memphis Police took the alleged threat seriously.

version is credited, it is clear that this episode is not a threat based on Ms. Jones union activities. Ms. Jones own testimony establishes that Mr. Smith was responding to her telling him to go back to work. (R. 146). Mr. Smith testified that when he returned and verbally engaged with Ms. Jones, he was referring to her telling him to go back to work. (R. 1490).

**(b.) Phil Smith did not Threaten Keith Hughes.**

Mr. Smith asked Keith Hughes to stop interrupting a group meeting, and Mr. Hughes sarcastically responded by asking Mr. Smith if he intended to take him to the parking lot so his “goons” could get him. (R. 1482). Mr. Smith responded to the obvious sarcasm. Mr. Smith said that he was not going to take him to the parking lot, he would write him up for insubordination because he was still interrupting the meeting after he had been instructed to stop. (R. 1482). Keith Hughes acknowledges that Mr. Smith’s threat to write him up for insubordination was in direct response to the “goons in the parking lot” comment. (R. 473).

**E. The USW’s Sustained Challenges.**

**(i.) Administrative Assistants.**

**(a.) Tia Harris.**

The bottom line is that Ms. Harris is a production clerical employee. She works in the Red Prairie software system, generates productivity reports, and does billing for the HP account. Ms. Harris does not set productivity goals (R. 1636). She lines up the employee’s time with the data fed into the Red Prairie system, so that productivity is accurately tracked. (R. 1637). She posts productivity reports on the bulletin board in the warehouse. (R. 1638). She does not determine staffing levels with the Red Prairie reports. (R. 1635). Her role for billing is data entry. (R. 1635). The Inventory Control Employees (unit employees) and Leads work in the same area where she does. (R. 1639). They use the same break room that she does (R. 1640).

She punches a timeclock on the warehouse floor. (R. 1641). She works out on the floor doing blasting once or twice a month. (R. 1641). The reports that she generates are available to all employees. (R. 1642). If the HP employees were not out on the floor picking and blasting, her job would not exist. (R. 1649).

**(b.) Rachel Maxey Chaisson.**

Ms. Maxie-Chaisson was also a plant clerical employee. Sh testified that her job was to boost productivity numbers from Red Prairie and explain them to employees. (R. 1791). She met with individual employees only when instructed to do so by a supervisor. (R. 1791). The reports that she generated were available to all employees. (R. 1794). Ms. Maxie-Chaisson specifically denies telling Ms. McNeil that she was a supervisor. (R. 1797). Ms. Maxie-Chaisson did not use Red Prairie to "manage labor." (R. 1799). She never had access to change anyone's time in Unitime (the timeclock system). (R. 1799). The function that she performed in Red Prairie was to simply reconcile the data in the system and then print reports. (R. 1801). She filled in for customer service representatives (unit employees) in the Waterpik and Roland departments. (R. 1802). She punched a timeclock on the warehouse floor. (R. 1802). She took breaks either the breakroom or in her truck. If employees were not generating data in the Red Prairie system, then her job would not exist. (R. 1803). She never decided what productivity levels were acceptable for employees. (R. 1804). The only conversations that she had with employees regarding discipline occurred if they did not improve their productivity. She was instructed to have these conversations by her supervisor. (R. 1804).

**(ii.) Part-Time Maintenance Employees.**

Richard James and James Brewer are part-time maintenance technicians. Other than the number of hours they work and their benefits eligibility, they are identical to OHL/Memphis'

full-time maintenance workers. They report to the same supervisor, Billy Smith, as the full-time maintenance techs. They use the same tools and equipment, same computer, and same truck as the full time maintenance techs. They perform the same functions as they did when they were full-time maintenance techs at OHL. Their work is tied directly to the production of other unit employees because they repair equipment. Their only distinction is the amount of hours that they work and the benefits that they receive. Therefore, they should be included in the unit.

**F. OHL’s Overruled Challenges.**

OHL challenged the ballots of Renal Dotson, Jerry Smith, Glorina Kurtycz, and Carolyn Jones. Each of these individuals are former OHL employees with pending unfair labor practice charges against the company. However, the status of each of these unfair labor practice allegations is unresolved. Renal Dotson and Jerry Smith’s allegations are pending before the United States Court of Appeals for the District of Columbia in Case No. 11-1481. Glorina Kurtycz’ allegation is pending before the same court in Case No. 11-1482. Carolyn Jones allegation is pending before the NLRB in the instant case.

**G. OHL’s Overruled Objections.**

**(i.) Keith Hughes Threatened Dawn Barnhill**

Keith Hughes, a self-avowed union spokesperson, approached Dawn Barnhill a few weeks before the election while she was working in the HP account. (R. 476, 1726). She was wearing a “No means no” t-shirt opposing the union. Keith Hughes told Ms. Barnhill, “I’ll rip that shirt off of you.” (R. 1726). She took him seriously and felt threatened. *Id.*

**(ii.) Inappropriate Union Literature**

“Gun packing, Tire Slashing, Scab Killing, Bullhorn Yelling, Drive By Shooting, Violent Gangbanging, Beastlike Savages.” This is what was being distributed in large print all caps

shortly before the election. (Resp. Ex. 20). Ms. White and Ms. Young testified that they both saw this flyer in the HP breakroom. Ms. White recalled a second-shift HP employee telling her that it was being passed out in the parking lot as the employees (approximately 50) on HP second shift came into work. (R. 1202-1204).

**(iii.) Electioneering by Union Observer.**

Bobby Hill testified that the union's election observer was electioneering in the course of his duties as an observer. (R. 1731-1735). Mr. Hill was the company's observer. (R. 1732). As he and the union observer were coming down the steps outside of the polling location, the union's observer said "yeah you did the right thing" and gave the employee who just voted a high five. (R. 1735). Mr. Hill and the union's observer had been instructed by the Board Agent conducting the election not to talk to employees other than to tell them it was time to vote (their release observer duties).

**(iv.) Keith Hughes Comments**

Keith Hughes, the self-avowed union spokesperson, told another employee in the HP account that Randall Coleman had called employees robbers, thugs, and killers, which was false. (R. 1741). Mr. Hughes was also calling out in the HP account, in a manner loud enough for Jim Cousino to hear him 15 yards away, that Randall Coleman had called employees thugs, gangbangers, and killers. (R. 1746-1747).

**H. The USW's Sustained Election Objections.**

**(i.) OHL Did Not Threaten to Bargain From Scratch (Objection 5)**

The only employee who offered passing testimony regarding an alleged threat to bargain from scratch was Jerry Smith. (R. 631). Randall Coleman. Karen, White, and Phil Smith all

specifically denied his allegation and explained how they did lawfully explain bargaining. (R. 1141, 1212 and 1512).

**(ii.) OHL Did Not Threaten Loss of Benefits (Objection 12)**

This presumably refers to the testimony concerning the 401(k) meetings. However, Dani Bowers participated in those meetings. Her last day at OHL was June 10. (R. 1350). Therefore, these alleged meetings took place outside of the critical period.

**(iii.) Catchall Objections (Objections 18 and 20).**

### III. QUESTIONS PRESENTED

- (a.) Whether the Administrative Law Judge erred in concluding that Respondent violated Sections 8(a)(1) and 8(a)(3) of the Act by terminating Carolyn Jones' employment. (Exception No. 1).
- (b.) Whether the Administrative Law Judge erred in concluding that Respondent violated Sections 8(a)(1) and 8(a)(3) of the Act by warning Jennifer Smith. (Exception No. 2).
- (c.) Whether the Administrative Law Judge erred in concluding that Respondent violated Section 8(a)(1) of the Act by interrogating employees. (Exception No. 3).
- (d.) Whether the Administrative Law Judge erred in concluding that Respondent violated Section 8(a)(1) of the Act by surveilling employees. (Exception No. 4).
- (e.) Whether the Administrative Law Judge erred in concluding that Respondent violated Section 8(a)(1) of the Act by creating the impression of surveillance. (Exception No. 5).
- (f.) Whether the Administrative Law Judge erred in concluding that Respondent violated Section 8(a)(1) of the Act by confiscating union materials. (Exception No. 6).
- (g.) Whether the Administrative Law Judge erred in concluding that Respondent violated Section 8(a)(1) of the Act by threatening employees. (Exception No. 7).
- (h.) Whether the Administrative Law Judge erred in concluding that Respondent violated Section 8(a)(1) of the Act by soliciting the resignation of union supporters. (Exception No. 8).
- (i.) Whether the Administrative Law Judge erred in sustaining the USW's challenges to the ballots of administrative assistants Tia Harris and Rachel Maxie Chaisson. (Exception No. 9).
- (j.) Whether the Administrative Law Judge erred in sustaining the USW's challenges to the ballots of part-time maintenance employees Richard James and James Brewer. (Exception No. 10).

- (k.) Whether the Administrative Law Judge erred in overruling OHL's challenges to the ballots of Jerry Smith, Renal Dotson, Glorina Kurtycz and Carolyn Jones. (Exception No. 11).**
- (l.) Whether the Administrative Law Judge erred in overruling OHL's election objections. (Exception No. 12).**
- (m.) Whether the Administrative Law Judge erred in sustaining the USW's election objections 1, 2, 3, 5, 6, 8, 12, 13, 14, 18 and 20. (Exception No. 13).**
- (n.) Whether the Administrative Law Judge erred in concluding that the USW's sustained objections would warrant setting aside the election results, if OHL wins the election. (Exception No. 14).**
- (o.) Whether the Administrative Law Judge's biased decision-making denied OHL due process. (Exception No. 15).**
- (p.) Whether the Administrative Law Judge erred in his credibility determinations. (Exception No. 16 and subparts).**

## IV. LEGAL ARGUMENT

### A. OHL did not violate Section 8(a)(3) of the Act.

#### (i.) Carolyn Jones termination was lawful. [Exception No. 1]

Carolyn Jones was terminated for two independent reasons: (1) she repeatedly called a co-worker a “U.T.” (which she explained meant “Uncle Tom”) in violation of OHL’s Anti-Harassment Policy, and (2) she presented OHL with a witness statement that the purported witnesses never reviewed in violation of OHL’s conduct guidelines.

#### (a.) Carolyn Jones’ Violation of OHL’s Anti-Harassment Policy.

Judge Ringler found that Carolyn Jones repeatedly called Lee Smith a “U.T.,” a phrase that she explained to Lee Smith met “Uncle Tom.” Judge Ringler offered three explanations as to why Carolyn Jones repeated racial epithets to Lee Smith did not justify her termination, all of which are interrelated. First, Judge Ringler found that OHL disciplined Ms. Jones more harshly than it disciplined other employees. Next, Judge Ringler claims that OHL overlooked comparable conduct by Phil Smith. Finally, Judge Ringler claims that OHL “deviated from its progressive disciplinary system.” All three of these rationales are unsupported by the record.

Judge Ringler claims that Carolyn Jones discipline is inconsistent with "10 prior disciplinary actions involving profanity and racial epithets." However, Judge Ringler's decision is devoid of any analysis of these "10 prior disciplinary actions." Judge Ringler does not engage in any analysis of whether these alleged comparators are similarly situated. They are not.<sup>4</sup>

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<sup>4</sup> Interestingly, Judge Ringler seems to recognize the concept that comparators must be similarly situated in Footnote 22 of his decision where he summarily dismisses OHL’s evidence of other terminations. However, he fails to apply the same concept to the alleged comparators that he relies on.

Judge Ringler's failure to analyze whether the alleged comparators are similarly situated is inconsistent with Board precedent. The Board has held that disparate treatment sufficient to support a finding of a violation of the Act must be “blatant,” and must involve “a plain failure by the employer or its supervisors or managerial agents to treat equally-situated employees equally.” *New Otani Hotel & Garden*, 325 NLRB 928, 942 (1998).

In *Engineered Comfort Systems*, 346 NLRB 661 (2006), the Board held that an administrative law judge erred when she relied on an employer's treatment of dissimilarly situated employees. The Board reversed the ALJ, finding that evidence regarding employees who had not undertaken similar misconduct “is of limited probative value.” *Id.* at 662. The Board noted that “[t]he General Counsel failed to present significant countervailing evidence of disparate treatment of similarly situated employees...” In OHL’s case, Judge Ringler performed no analysis whatsoever, as to whether the alleged comparators are similarly situated to Ms. Jones.

Additionally, the Board has found that where “[a] particular form of discipline is not necessarily unlawful solely because an employer has imposed it for the first time.” *St. George Warehouse, Inc.*, 349 NLRB 870, 879 (citing *National Steel Supply*, 344 NLRB 973, 975 (2005)). Where an employee’s conduct is “unprecedented, there are no similarly-situated employees with whom to compare him.” *Id.* In *St. George Warehouse, Inc.*, the Board reversed the ALJ and found that the record did not support a finding of disparate treatment, where the alleged comparators relied on by the ALJ were not similarly situated.

Finally, in *Jos. Schlitz Brewing Co.*, 240 NLRB 710, 713 (1978), the ALJ refused to even permit the introduction of employee records, stating “they were totally irrelevant because the factual similarities between [complainant’s] case and those cases were completely dissimilar.”

The ALJ noted that the records could not establish disparate treatment because the employees were not similarly situated and the records could not “establish[] any norm with reference to appropriate discipline.” The ALJ’s opinion was adopted in its entirety.

Based on the foregoing caselaw, it is clear that the Board requires a baseline showing that any alleged comparators are similarly situated. The comparators cited by Judge Ringler are not similarly situated to Ms. Jones. First of all, there is no testimony in the record regarding at least four of the cited comparator incidents (Burgess Verbal Discussion, Newberry Final Warning, Quarles Final Warning, and Williams Counseling). Second, it is undisputed that OHL’s Human Resources regime changed with Ms. Young’s resignation, and the Carolyn Jones investigation as the first investigation conducted by Shannon Miles at OHI’s Memphis campus. (R. 1213, 1220). Therefore, the decision-makers on the cited discipline are different than the decisionmaker for Ms. Jones’ termination. Third, only two of the ten alleged comparator incidents involved racially derogatory language, Ashley Burgess and Jennifer Smith.

Ashley Burgess was terminated, not coincidentally, because she is the only other potential comparator who used more than one racial epithet, like Ms. Jones did. She called K.C. Foster a “pussy ass nigger” and “monkey face” and had referred to Mr. Foster as a monkey on prior occasions. (R. Ex. 21). Jennifer Smith received a final written warning, because her epithet was a single epithet that occurred in the heat of a verbal altercation with Stacey Williams. The Acting General counsel cannot claim that Ms. Smith was treated more favorably than Ms. Jones on the basis of union support, as Ms. Smith is a self-described union supporter and alleged discriminatee in this case. Therefore, the only true comparator to Ms. Jones, Ashley Burgess, received the exact same level of discipline; termination.

Judge Ringler also relies on two instances of alleged comments by Phil Smith where he did not receive discipline. It is alleged that many years before Carolyn Jones termination, Phil Smith called an employee a “faggot ass” and another employee a “monkey on a stick.” Mr. Smith denies both of these comments, and Jim Steel corroborates Mr. Smith’s denial of the “monkey on a stick” comment. However, Judge Ringer’s reliance on these alleged comments by Mr. Smith is misplaced. First, the General Counsel could have subpoenaed James Griffin, to testify about the alleged “faggot ass” comment but chose not to do so. Second, both of these comments allegedly occurred years ago and were never raised until the hearing in this case. (R. 708, 362). Third, there is no evidence that these alleged comments were ever reported to OHL management, and the employees who testified about the comments confirm that they did not report the comments to OHL management. Obviously, OHL management could not have disciplined Mr. Smith for comments that it never knew about, until they are raised, years later, on the witness stand by interested witnesses. Finally, the alleged “faggot ass” comment (while certainly would be inappropriate) is not a violation of OHL’s Anti-Harassment Policy.<sup>5</sup>

Judge Ringler’s third, and final, rationale is that OHL allegedly failed to follow its progressive disciplinary process in terminating Ms. Jones. This rationale is easily de-bunked. First, OHL’s policy specifically provides for “disciplinary action up to and including termination, as OHL believes appropriate under the circumstances.” (GC Ex. 35, p. 27). Moreover, even the 10 incongruous comparators that Judge Ringler relies upon demonstrate that the level of discipline imposed by OHL depends on the circumstances. Those alleged comparators range in severity from counseling to discharge. Obviously, the level of discipline

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<sup>5</sup> When OHL’s counsel pointed this out at the hearing, the General Counsel claimed that OHL’s policy “tolerates discrimination against homosexuals.” (R. 118). OHL respectfully submits that the charge of “tolerating discrimination” is patently ironic coming from the party that is advocating for Carolyn Jones and Jennifer Smith.

imposed depends on the circumstances, as OHL's policy expressly states. Ms. Jones received the same level of discipline as the only other employee (Ashley Burgess) who repeatedly called another employee a racially derogatory name.

All three of Judge Ringler's rationales for second guessing OHL's decision to terminate Carolyn Jones are incorrect. The General Counsel has failed to show that there is any causal nexus between Ms. Jones' union activities and her termination, and OHL has shown that it treated Ms. Jones in the same manner as the only true comparator. Therefore, pursuant to *Wright Line*, the allegation that OHL illegally terminated Ms. Jones should be dismissed.

**(b.) Carolyn Jones' Fabricated Witness Statement.**

Another independent reason for Carolyn Jones' termination is the false witness statement that she presented to OHL. Essentially, she induced employees to sign a piece of paper and then wrote a purported witness statement above the signatures that she collected. Ms. Jones admitted that if she had written the statement after obtaining the employees signatures, then the statement would have been misleading. (R. 165-166). The Judge Ringler claims that this reason is pretextual. However, it is undisputed that at the time of Ms. Jones termination OHL had statements from all four employees who signed Carolyn Jones' statement that there was no statement on the paper at the time that they signed it. Carolyn Jones was the only witness who testifies that there was a statement on the paper before it was signed. Moreover, none of the four employees could confirm at trial that anything that was written on Ms. Jones statement (other than signatures). Therefore, Carolyn Jones clearly obtained the signatures before presenting the statement.

Judge Ringler claims that OHL "coerced" employees into signing statements that incriminated Ms. Jones. However, the record is devoid of any such evidence. K.C. Foster

claims that he signed a statement at Ms. Young's request because he was "stressed," not because he was coerced. Ms. Ingram, the other employee who offered strikingly incredible testimony that Ms. Young had her sign a blank piece of paper in the middle of the page (R. 188), even though she admitted to reporting to Van Young almost everything that was in the statement that she allegedly never saw before she signed it. (R. 210-211). There was no testimony that Mr. Smith or Mr. Hughlett were "coerced." Not a single witness testified about anything that was said by OHL management to allegedly "coerce" them in to giving statements against Ms. Jones. Judge Ringler's finding that employees were "coerced" is unsupported by the record.

Judge Ringler also reasons that "the statement does not appear to be created after the fact, given that the signatures are located after the text and about a third of the way down the page." First of all, this observation is inconsistent with Judge Ringler's finding that Ms. Ingram supposedly signed a blank statement in the very center of the page. More significantly, there was no substance to the portion of Ms. Jones statement on the second page of her statement where the signatures appeared. (G.C. 10). The portion inserted by Ms. Jones on the page signed by the witnesses is less than half of the statement. None of the four employees who signed Ms. Jones statement testified that they reviewed the first page of her statement. Therefore, even if a small portion of the statement was contained on the second page of G.C. Ex. 10, none of the signatories adopted the majority of the statement, which is on the first page, which they never saw.

Finally, Judge Ringler implies that, somehow, Carolyn Jones termination is undermined because OHL did not discipline Phil Smith for an alleged threat to Carolyn Jones. It is unclear what one has to do with the other, as they are not comparable offenses. Nonetheless, it is clear from the context of Mr. Smith's alleged statement to Carolyn Jones that he was responding to her

telling him to go back to work. There is nothing remotely similar between responding to an employee's insubordinate comment with an arguably inappropriate response, as compared to fabricating a witness statement that was signed by four employees who had had never seen the statement.<sup>6</sup>

Yet again, the Acting General Counsel has failed to show that there is any causal nexus between Ms. Jones' union activities and her termination, and OHL has shown that it has legitimate reasons for Ms. Jones termination, irrespective of her union support. Therefore, pursuant to *Wright Line*, OHL again requests that the Board dismiss the allegation that it illegally terminated Ms. Jones.

**(ii.) Jennifer Smith's warning was lawful. [Exception No. 2]**

Jennifer Smith received a final warning for calling a co-worker a "house nigger." Judge Ringler's decision with respect to Jennifer Smith's final warning is based on a false premise. He incorrectly found that that two of the three witnesses to Ms. Smith's conversation corroborated her version. They did not, and Judge Ringler's finding is not supported by the record.

There were three witnesses to the interaction between Jennifer Smith and Stacey Williams: Jerry Smith, Sheila Childress, and Shirley Milan. Judge Ringler specifically found that "Childress and Jerry Smith denied that Jennifer Smith called Williams a 'house nigger.'" (ALJD, p. 8). To the contrary, both Sheila Childress and Jerry Smith testified consistent with their statements to OHL that they did not hear the entire conversation between Smith and Williams. (G.C. 39 and 40). They did not deny that the phrase "house nigger" was used (because they were not in a position to know one way or the other). Instead, they testified that

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<sup>6</sup> Judge Ringler also makes the absurd argument that "if OHL were motivated to address concerns about false statements, it would have also disciplined Phil Smith, who falsely denied threatening Carolyn Jones." For Judge Ringer, to equate a credibility determination by OHL with evidence that Carolyn Jones had manufactured evidence is nonsensical.

they could not hear. The only witness who did hear the conversation, Shirley Milan, corroborated Mr. Williams.<sup>7</sup>

The General Counsel has produced no evidence of employees who used similar racial epithets and did not receive comparable discipline. In fact, the only other two individuals who used racially derogatory language (Ashley Burgess and Carolyn Jones) were discharged.<sup>8</sup> Therefore, the Acting General Counsel has offered no causal connection between Ms. Smith's union support and her discipline, and OHL has met its *Wright Line* burden by showing that it disciplined other employees for comparable racial epithets.

**(iii.) Judge Ringler Misapplied *Rood Trucking*. [Exception No. \_\_\_]**

Judge Ringler repeatedly invokes *Rood Trucking Co.*, 342 NLRB 385, 398 (2004) (a two to one decision with a strong dissent) to circumvent a full *Wright Line* analysis in each of the 8(a)(3) allegations in this case. However, the principal relied upon by Judge Ringler from *Rood Trucking* is a classic case of circular logic. Specifically, he claims that once the General Counsel establishes pretext, the employer does not even get to present evidence in support of its *Wright Line* defense. This cannot be the case. The entire purpose of the *Wright Line* defense is for the employer to prove its legitimate reasons for disciplining the employee. In other words, the entire point of the *Wright Line* defense is to show that the employer's decision was not pretextual, once a *prima facie* case has been shown. Under Judge Ringler's reading of *Rood Trucking*, OHL never gets to present evidence that its decision was not pretextual. His theory ignores the entire concept of a burden shifting framework. If a *prima facie* case is sufficient to establish an 8(a)(3)

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<sup>7</sup> Judge Ringler adopts the General Counsel's argument that Ms. Milan did not like Jennifer Smith. Even if that were the case, that does not mean that OHL should never believe anything that Ms. Milan says. OHL could not foresee at the time that it disciplined Ms. Smith that an Administrative Law Judge would someday misconstrue witness testimony and statements to find that the only other witnesses corroborated Ms. Smith's version of events.

<sup>8</sup> Ms. Smith was not discharged because her offense involved a single comment in a heated conversation.

violation without further consideration, then an employer need not even show up for the hearing, since its evidence is beside the point.

Additionally, *Rood Trucking* is factually distinguishable from this case. In *Rood Trucking*, the Board found that the employer had commissioned inaccurate evidence to use in justifying the termination of its employees. There is no such allegation in this case. Lee Smith brought the UT comments to OHL management, and Stacey Williams reported Jennifer Smith's epithet to OHL. These allegations were brought to OHL. OHL did not trump them up or instigate them, as the employer allegedly did in *Rood Trucking*. Moreover, the Board specifically noted in *Rood Trucking* that the employer never asked the disciplined employee for their side of the story. *Id at 899*. The employer failure to get the accused's side of the story was "strong evidence of pretext" in *Rood Trucking*. There is no such strong evidence of pretext in this case, and OHL obtained statements from both Jennifer Smith and Carolyn Jones. Judge Ringler identifies no specific evidence of pretext.

In sum, Judge Ringler legally and factually misapplied *Rood Trucking* and did not even afford OHL an opportunity to meet its *Wright Line* rebuttal burden.

**B. OHL did not violate section 8(a)(1) of the Act.**

**(i) OHL did not violate section 8(a)(1) of the Act by interrogating employees. [Exception No. 3]**

Judge Ringler incorrectly found that Shannon Miles and Sara Wright interrogated employees about their union activities. The General Counsel triumphantly paraded Ms. Miles onto the stand as their first witness as if they were actually going to ask her something important. Instead, they asked her about a three line portion of the dozens of pages of her notes that were entered into the record in this case. Specifically, General Counsel claimed, and Judge Ringler found, that the following question violates Section 8(a)(1) of the Act: "Has C.J. tried to solicit

you for the Union while you working on the floor (on the clock)?" (GC Ex. 5; R. 35-38). There is nothing illegal about Ms. Miles' question. The Board has held, almost since the Act's inception, that an employer may, in normal situations, make and enforce a rule prohibiting employees from engaging in solicitation during "worktime." *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 617-618 (1962). The Supreme Court long ago affirmed the Board's approach. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-804 (1945), citing *Peyton Packing Co.*, 49 NLRB 828, 843 (1943). Ms. Miles was asking whether Ms. Jones was engaged in unprotected activity, prohibited by OHL's policies, on OHL's work floor, during working time. There was nothing illegal about her question.<sup>9</sup>

Sharon Shorter and Sara Wright testified about two very different versions of the same conversation. Both acknowledge that they spoke in Ms. Wright's office about Ms. Shorter's blood pressure. Ms. Shorter testified that Ms. Wright asked her whether anyone was pressuring her on the floor about the union, and according to Ms. Shorter, Ms. Wright specifically said that she knew Glenora Rayford had been pressuring her to talk about the union. (R. 785). Ms. Wright acknowledged that she had a conversation with Ms. Shorter about her blood pressure, but she testified that there was no reference to the union, and the only reference to Glenora Rayford was by Ms. Shorter, who complained that Ms. Rayford was constantly bothering her about why she had not received a pay raise that she deserved. (R. 1302).

Judge Ringler erred in crediting Ms. Shorter over Ms. Wright. Ms. Shorter was not credible because she is obviously still angry with OHL that she is not being paid as an auditor. This was the main thrust of her testimony, and she even broke down crying on the witness stand. She did not break down crying when she discussed the alleged interrogation by Ms. Wright.

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<sup>9</sup> Judge Ringler did not even address this argument which was asserted in OHL's post-trial brief.

Rather, she broke down crying when she discussed how unfair it was that she was not receiving auditor pay. Furthermore, Ms. Wright was eminently credible. She subjected herself to harsh cross examination relating to notes that she misplaced when she candidly admitted that she misplaced them. She also did not deny that the conversation with Ms. Shorter took place, which would have been easy for her to do if she was trying to bend her testimony to avoid liability.

In reaching his finding of unlawful interrogation, Judge Ringler cites “an extensive history of union hostility, as demonstrated by the instant case, *Ozburn I* and *Ozburn II*.” However, Ms. Wright and Ms. Miles are relatively new employees at OHL Memphis and they were not involved in either *Ozburn I* or *Ozburn II*.<sup>10</sup> Moreover, Judge Ringler does not identify any evidence that supports the alleged “hostility” by Ms. Miles and Ms. Wright in this case.

**(ii.) OHL did not violate section 8(a)(1) of the Act by surveilling employees. [Exception No. 4]**

It does not violate the NLRA for an employer to openly observe open union activity on its premises. Therefore, Mr. Coleman and Mr. McNamee did nothing illegal. In *Roadway Package System*, 302 NLRB 961 fn. 1 (1991), the Board held that “[i]t is well settled that where, as here, employees are conducting their activities openly on or near company premises, open observation of such activities by an employer is not unlawful.” In *Roadway Package Systems*, the employer's plant manager visibly stationed himself in a guardhouse and, for 30 minutes, observed the handbilling of the company's employees as they entered and left the plant. Mr. Coleman and Mr. McNamee are alleged to have engaged in surveillance for much less than 30 minutes.

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<sup>10</sup> Neither of their names are mentioned in the previous NLRB decisions.

Similarly, the Board, in *F. W. Woolworth Co.*, 310 NLRB 1197 (1993), reaffirmed the principle that an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. In *Hoschton Garment Co.*, 279 NLRB 565, (1986), the Board held that "... union representatives and employees who choose to engage in their union activities at an employer's premises should have no cause to complain that management observes them." *Id.* at 567. Thus, nothing that Mr. McNamee or Mr. Coleman is alleged to have done qualifies as unlawful surveillance.

Mr. McNamee and Mr. Coleman were standing across a parking lot staring at the ground; not staring at the hand billers. It stands to reason that it is impossible to engage in surveillance without being able to see or hear the employees.<sup>11</sup> The allegations against Mr. McNamee and Mr. Coleman place them staring at the ground outside of earshot of the employees, so it is unclear how they could have been engaged in surveillance if they could not see or hear the alleged targets of their surveillance.

Judge Ringler finds that the alleged surveillance was "out of the ordinary," and therefore, coercive. However, he does not explain how standing outside of a building (where one works in the case of Mr. Coleman) is "out of the ordinary." The very case that Judge Ringler cites for this proposition, *Alladin Gaming, LLC*, 345 NLRB 585 (2005), found that a manager's observation of employees in a breakroom was not "out of the ordinary," and therefore not unlawful surveillance. Mr. McNamee and Mr. Coleman, at most, stood in an open parking lot while not looking at union activity. This cannot be characterized as unlawful surveillance.

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<sup>11</sup> There is no allegation in the Consolidated Complaint that Mr. McNamee or Mr. Coleman created the *impression of* surveillance.

**(iii.) OHL did not violate Section 8(a)(1) of the act by creating the impression of surveillance. [Exception No. 5]**

Ms. Wright allegedly told Ms. Shorter that she was “aware” of Glenora Rayford talking to her about the union on the floor. First of all, Ms. Shorter, by her own testimony, claims that Ms. Wright commented on Ms. Rayford approaching Ms. Shorter, not visa versa. (R. 785). So, if Ms. Wright was giving the impression that anyone’s activities were under surveillance, it was Ms. Rayford’s not Ms. Shorters.

Moreover, this allegation is inconsistent with the interrogation allegation against Ms. Wright. According to Ms. Shorter’s testimony, Ms. Wright did not say that she knew that Ms. Rayford had approached her about the union on the floor. (R. 785). Instead, Ms. Shorter testified that Ms. Wright told her that she knew Glenora Rayford had approached her on the floor. Ms. Wright then allegedly asked her what they were talking about (giving rise to the separate interrogation allegation). Ms. Wright would have no need to ask Ms. Shorter what they were talking about, if she already knew what they were talking about and was giving the impression of omniscience to Ms. Shorter.

**(iv.) OHL did not violate section 8(a)(1) of the Act by confiscating union materials. [Exception No. 6]**

This is a frustrating recurring allegation with which OHL simply disagrees with the Region’s (and Judge Ringler’s) legal position. There is nothing in the National Labor Relations Act that prohibits an employer from removing abandoned union literature from its breakroom at non-break times. Several Waterpik employees testified that they observed Phil Smith removing union literature from the Waterpik breakroom after break was over, on April 11, 2011. The union literature at issue was a copy of the 10(j) injunction issued against OHL. It is alleged that Mr. Smith removed copies of the decision in the late morning, after the initial break. Mr. Smith

explained that it is his personal practice to clean up all items left in the break room during nonwork times. (R. 1529). While Mr. Smith does not recall the particular day in question, he candidly does not dispute that he could have been in the Waterpik account that day. Similarly, it is alleged that Eric Nelson and Alfreda Owens also removed union literature from breakrooms during non-break times. Even if this were true it is not illegal.

It does not violate the NLRA to dispose of union literature in a break room after a break is over. *North American Refractories, Co.*, 331 NLRB 1640, 1643 (2000); *Page Avjet, Inc.*, 278 NLRB 444, 450 (1986)(“the union literature in the break area assumes the same character as any other material once the break has ended and employees have returned to work.”). The testimony regarding this allegation clearly establishes that Mr. Smith allegedly removed the literature after break was over.<sup>12</sup> Moreover, there is no evidence that any literature was “confiscated.” It may have been removed but it was not “confiscated.” Confiscation implies that Mr. Smith took the union literature directly from its owners. He did not. Even under the alleged theory of violation, he removed items that were not in anybody’s possession.

Even if the allegation were valid legally, the credibility of Mr. Smith’s accusers is suspect. Sandra Hays testified that she was standing at Blast Station 1 when she saw Mr. Smith remove the literature. However, photographic evidence Respondent’s Exhibit 28, clearly shows that Ms. Hays, Ms. Rayford, and Ms. Herron would have been unable to see what was going on inside the break room from Blast Station 1. Moreover, it is not credible that Ms. Herron, Ms.

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<sup>12</sup> The General Counsel’s questions implied that Respondent was required to leave the materials because there would be breaks later in the day. However, there is no legal support for the proposition that an employer must wait to the end of the day to clear its breakrooms. The caselaw cited speaks to the end of breaks; not the end of the day. Moreover, the implication by General Counsel has no logical or legal bounds, since any break can be said to come before the next break, whether at the beginning of the day or the end of the day.

Hayes, and Ms. Rayford were all independently sitting around and watching the breakroom when they should have been working.

Judge Ringler misses the mark, yet again, in citing a case that says that employees are entitled to “possess” union literature on an employer’s premises. The issue is not whether employees are entitled to “posses” union literature. Nobody was in possession of the literature when it was removed from the breakroom. The issue is whether an employer has a property right to dispose of abandoned literature in its breakroom.

OHL submits that Phil Smith did not violate section 8(a)(1) of the Act by removing literature from unoccupied break rooms during non-break times.

**(v.) OHL did not violate section 8(a)(1) of the Act by threatening employees. [Exception No. 7]**

Judge Ringler finds a series of three threats made by Phil Smith against Carolyn Jones and Keith Hughes. Mr. Smith allegedly told Jones to “watch your back,” and he allegedly told Hughes “I’ve got something for him.” And “I’m going to get you on insubordination and get you out of here.”<sup>13</sup> However, even according to the employees making these allegations, Smith was responding to their insubordinate comments. He allegedly told Jones to watch her back, only after she admittedly told him to go back to work as he was walking away from her, causing employees in the room to snicker. He only “threatened” Keith Hughes in response to Hughes’ admitted smart-alec (for lack of a better work) reference to Smith’s “goon squad.” First of all, Judge Ringler erred in crediting Jones and Hughes over Smith. However, even if the comments were made, they were made in response to unprotected insubordinate comments, acknowledged by Hughes and Jones.

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<sup>13</sup> Unbelievably, Judge Ringler found that Phil Smith “hovered over” Hughes for 15 minutes, even though the General Counsel’s own witness said that Smith was standing a number of feet behind Hughes.

**(vi) OHL did not violate section 8(a)(1) of the Act by soliciting the resignation of union supporters. [Exception No. 8]**

In finding that Mr. Smith violated Section 8(a)(1) by soliciting the resignation of union employees, Judge Ringler takes a recognized legal principle and extends it beyond recognized bounds. Even though it is an unfair labor practice to solicit an employees resignation based on their union support, that is not what Mr. Smith allegedly did. Instead, it is alleged that Smith responded to an unprompted question from a unit employee to the effect of “if the union members are so disgruntled about working at OHL, why don’t they just leave.” Smith allegedly responded “that’s what I’m talking about.” It is not alleged that Smith directly suggested to ay employee that they resign, or that what Smith actually said, is in and of itself illegal. Instead the General Counsel and Judge Ringler attempt to manufacture a new allegation. It is now illegal to agree with an employee. What if Phil smith had nodded his head in response? What if he had smiled? There is no logical place to draw the line.

This case is distinguishable from the case cited by Judge Ringler, as well as other precedent. In this case, unlike previous cases, Phil Smith did not directly ask anyone to quit. He did not trget any particular OHL employee. If the touchstone of 8(a)(1) is coercion, then this allegation hardly meet the test. There is a qualitative difference in the level of a coercion when a manager approaches a specific individual and solicit their resignation because of their union support, than there is when a manager makes a non-specific response to nobody in particular. Therefore, this allegation should be dismissed.

**C. The Administrative Law Judge erred in sustaining the USW’s challenges to the ballots of administrative assistants Tia Harris and Rachel Maxie Chaisson. [Exception No. 9]**

Judge Ringler improperly sustained the USW’s challenges to the ballots of Administrative Assistants, Tia Harris and Rachel Maxey Chaisson. In so doing, he makes

factual findings that are belied by the record and relies on inapposite case law. First, he finds that the administrative assistants “work in a separate office area and spend an extremely small percentage of their time on the warehouse floor.” He is simply incorrect. While they work in an office, it is an office area where other unit employees (customer service representatives and inventory control clerks) work. Therefore it is not “separate.” While he finds that they spend “a small percentage of their time on the warehouse floor,” he does not compare that percentage to the percentage of time spent on the floor by other unit employees (customer service representatives and inventory control clerks) who share the same office area. He correctly notes that they are “data clerks,” but then stretches their responsibility by saying that they “prepare productivity reports and do accounts receivable work.” Neither Ms. Harris, nor Ms. Maxie-Chaisson “prepare the reports.” Rather, it is the software that they use that prepares the reports. The administrative assistants simply enter the data and print the reports. They do not “prepare” them. Similarly, the administrative assistant do not “do accounts receivable work.” They enter data into an invoice template.

Next, Judge Ringler relies on cases that are clearly distinguishable to support his conclusion that the challenges to the administrative assistants’ ballots should be sustained.<sup>14</sup> He cites *Mitchellace, Inc.* 314 NLRB 536 (1994), a case where the employees at issue were in a separate office department, with a separate pay scale, in a separate office area, who attended separate office events. OHL’s administrative assistants work in the same accounts as other unit employees, with the same pay scale, in the same office areas with other unit employees, and there is no evidence that they attended separate events for office employees. Most significantly,

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<sup>14</sup> Notably, Judge Ringler makes no specific finding as to whether the administrative assistants share a community of interest with other unit employees. He simply says that the “challenges are valid.”

*Mitchellace* analyzes whether the administrative assistants share a community of interest with production employees. The employees in the unit at OHL are not limited to production employees. Therefore, there were not customer service representatives and inventory control clerks with whom the community of interest analysis was performed in *Mitchellace*.

Similarly, the employee at issue in the other case Judge Ringler cites is also distinguishable. In *Virginia Manufacturing Co., Inc.*, 311 NLRB 992 (1993), the “production control clerk” “monitored” employees, tracked inventory and finished goods, and reported directly to the plant superintendent. The production control clerk would decide when production number “looked off” and question employees about irregularities. In contrast, OHL’s administrative assistants enter data into a software system that generates reports. They do this in the same area as other unit employees, with the same pay scale, reporting to the same managers that other unit employees report to. Again, a glaring difference is the scope of the unit. There is no evidence that the employee at issue performed his tasks in the same area with the same equipment as other unit employees. OHL’s administrative assistants perform similar tasks in the same areas as customer service representatives and inventory control clerks.

In OHL’s case, unlike the cases cited by Judge Ringler, there is evidence of overlapping duties with unit employees and interchangeability. Rachel Maxie-Chaisson testified about how she filled-in for customer service representative Tondra Mitchell when Mitchell was on leave. (R. 917-918). Kaycee Harden a CSR, or Customer Service Representative, testified about how she also enters data that is used to generate productivity reports and invoices, and she is also trained on the same software system as the administrative assistants. (R. 1765-1768). There was no such evidence discussed in the cases relied upon by Judge Ringler.

**D. The Administrative Law Judge erred in sustaining the USW’s challenges to the**

**ballots of part-time maintenance employees Richard James and James Brewer.  
[Exception No. 10]**

Richard James and James Brewer are part-time maintenance technicians, but other than the number of hours they work and the benefits that they do not receive, they are identical to OHL/Memphis' full-time maintenance workers. They report to the same supervisor, Billy Smith, as the full-time maintenance techs. They use the same tools and equipment, same computer, and same truck as the full time maintenance techs. They perform the same functions as they did when they were full-time maintenance techs at OHL. Their work is tied directly to the production of other unit employees because they repair equipment. Their only distinction is the amount of hours that they work and the benefits that they receive. Therefore, they should be included in the unit.

Mr. James has a full-time job at the Memphis airport. However, the fact that an employee has a full-time job with another employer does not prevent him from being in the unit. *Tri-State Transportation Co.*, 289 NLRB 356 (1988); *Leaders-Nameoki, Inc.*, 237 NLRB 1269 (1978).

**E. The Administrative Law Judge erred in overruling OHL's challenges to the ballots of Jerry Smith, Renal Dotson, Glorina Kurtycz and Carolyn Jones. [Exception No. 11]**

The employees whose ballots were challenged by OHL are the subject of pending litigation, and therefore, it is premature to rule on OHL's challenges. The unfair labor practice allegations relating to Jerry Smith and Renal Dotson are pending in Case No. 11-1481 at the U.S. Court of Appeals for the D.C. Circuit. The unfair labor practice allegation relating to Glorina Kurtycz is pending in Case No. 11-1482 at the U.S. Court of Appeals for the D.C. Circuit. Carolyn Jones termination is being litigated in this appeal to the NLRB.

**F. The Administrative Law Judge erred in overruling OHL's election objections.**

**[Exception No. 12]**

Given the razor thin margin of the vote count, if the USW ends up with more ballots than OHL, then the election should be set aside. In evaluating whether a party's misconduct has "the tendency to interfere with employees' freedom of choice," the Board considers: (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. *Taylor Wharton Division*, 336 NLRB 157, 158 (2001).

**(i) Keith Hughes' Threat to Dawn Barnhill (Objection 7, 10, 11, and 13)**

Keith Hughes, a self-avowed union spokesperson, approached Dawn Barnhill a few weeks before the election while she was working in the HP account. (R. 476, 1726). She was wearing a "No means no" t-shirt opposing the union. Keith Hughes told Ms. Barnhill, "I'll rip that shirt off of you." (R. 1726). She took him seriously and felt threatened. *Id.* Clearly a threat of violence by a union spokesperson against an employee who opposed the union interfered with the laboratory conditions prior to the election.

Mr. Hughes' threat was an action likely to instill fear in a unit employee shortly before the election.

**(ii.) Campaign Literature (Objections 1, 2, and 13)**

“Gun packing, Tire Slashing, Scab Killing, Bullhorn Yelling, Drive By Shooting, Violent Gangbanging, Beastlike Savages.” This is what was being distributed in large print all caps shortly before the election. (Resp. Ex. 20). Ms. White and Ms. Young testified that they both saw this flyer in the HP breakroom. Ms. White recalled a second-shift HP employee telling her that it was being passed out in the parking lot as the employees (approximately 50) on HP second shift came into work. (R. 1202-1204). This is an inappropriate appeal to violence and racial prejudice, and it interfered with the election.

**(iii.) Electioneering Observer (Objections 3, 9, and 13)**

Bobby Hill testified that the union’s election observer was electioneering in the course of his duties as an observer. (R. 1731-1735). Mr. Hill was the company’s observer. (R. 1732). As he and the union observer were coming down the steps outside of the polling location, the union’s observer said “yeah you did the right thing” and gave the employee who just voted a high five. (R. 1735). Mr. Hill and the union’s observer had been instructed by the Board Agent conducting the election not to talk to employees other than to tell them it was time to vote (their release observer duties). This conduct put the imprimatur of an official election observer, wearing an election observer badge, on campaign activity on the day of the election. Therefore, it is objectionable conduct.

**(iv.) Keith Hughes’ Comments (Objections 1, 2, and 13)**

Keith Hughes, the self-avowed union spokesperson, told another employee in the HP account that Randall Coleman had called employees robbers, thugs, and killers, which was false. (R. 1741). Mr. Hughes was also calling out in the HP account, in a manner loud enough for Jim

Cousino to hear him 15 yards away, that Randall Coleman had called employees thugs, gangbangers, and killers. (R. 1746-1747).

**G. The Administrative Law Judge erred in in sustaining the USW’s election objections 1, 2, 3, 5, 6, 8, 12, 13, 14, 18 and 20. [Exception No. 13]**

As pointed out in OHL’s post trial brief (but ignored by Judge Ringler), objections 1, 2, 3, 6, 12, and 13 all occurred on or before the election petition was filed on June 14, 2011.<sup>15</sup> Therefore, they occurred outside of the critical period and cannot form the basis for valid election objections. The Board recently summarized this principle in *Stericycle, Inc.*, 357 NLRB No. 61 (NLRB August 23, 2011):

The Board frequently is faced, in both the representation and unfair labor practice context, with determining whether conduct is permissible that occurs during an organizing campaign, but prior to the filing of a representation petition and the onset of the critical period. The Board's long-settled rule is that, with rare exception, only conduct occurring during the critical period between the filing of the petition and the date of the election may serve as a basis for the setting aside of an election. *See Wyandanch Day Care Center*, 323 NLRB 339 fn. 2 (1997); *Ideal Electric & Mfg. Co.*, 134 NLRB 1275, 1278 (1961). In *Ideal Electric*, the Board stated, “when the Board's processes have been invoked [by the filing of a petition] and a prompt election may be anticipated pursuant to present procedures, we believe that conduct thereafter which tends to prevent a free election should appropriately be considered as a postelection objection.” *Id.* at 1278.

*Id.* at \*6.

OHL submits that sustained objection 14 fails for the reasons discussed in Section IV.B.6.

OHL submits that there is no evidence in the record to support objection 8. There is no testimony that any OHL manager or supervisor offered t-shirts to employees. This objection is based on assumptions unsupported by the record, that the employees receiving the t-shirts did not request them.

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<sup>15</sup> Carolyn Jones was terminated in the morning prior to OHL’s receipt of the election petition.

**H. The Administrative Law Judge erred in concluding that the USW's sustained objections would warrant setting aside the election results, if OHL wins the election. [Exception No. 14]**

It is well settled that "[r]epresentation elections are not lightly set aside." *Safeway, Inc.* 338 NLRB 525 (2002) (quotation marks and citations omitted). The Board's longstanding rule in assessing election objections is that the objecting party must show not only that the prohibited conduct occurred, but also that it interfered with voters' exercise of free choice. *See, e.g., Frito Lay, Inc.*, 341 NLRB 515, 515 (2004); *Picome Industries*, 296 NLRB 498, 499 (1989).

In assessing whether misconduct has a tendency to interfere with an election, the Board examines the following factors: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. *Taylor Wharton Harsco Corp.*, 336 NLRB 157, 158 (2001) *enfd.* 818 F.2d 1108 (4th Cir. 1987), citing *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

The party seeking to set aside an election also bears a heavier burden where, as here, the vote margin is wide. *See, e.g., Avis Rent-a-Car, supra; Longs Drug stores California Inc.*, 347 NLRB 500, n. 12 (2006); *Trump Plaza Hotel & Casino*, 352 NLRB No. 76 (2008); *Amveco Magnetics, Inc.*, 338 NLRB 905 (2003).

In the instant case, ALJ Ringler did not analyze any of these factors in summarily setting aside the election, if OHL succeeds on the ballot count.

**I. The Administrative Law Judge's biased decision-making process denied OHL due process. [Exception No. 15]**

OHL submits that a trial with only one potential outcome is no trial at all. OHL does not believe that it received due process from Judge Ringler because he is biased, in that he can only reach one result. OHL was unable to locate a single 8(a)(3) disciplinary case where he has ruled in favor of an employer. By OHL's count, of the 49 unfair labor practice allegations against companies that Judge Ringler has decided, 45 have been found in favor of a union.<sup>16</sup> This clearly lopsided track record leads to the conclusion that litigation before Judge Ringler is a forgone conclusion. A trial with only one potential outcome is a denial of due process and no trial at all.<sup>17</sup>

**J. The Administrative Law Judge erred in his credibility determinations. [Exception No. 16 with subparts]**

In several places in this Brief, OHL challenges the ALJ's credibility determinations. Most of the exceptions can be resolved without even reaching the credibility determinations. However, in several places, ALJ Ringler's credibility determinations are so erroneous that they are subject to challenge.

OHL is familiar with Board's typical deference to an administrative law judge's credibility resolutions. See *Standard Drywall Products*, 91 NLRB 544 (1950), enfd., 188 F.2d 362 (3<sup>rd</sup> Cir. 1951). However, the Board has identified several exceptions to this rule, all of which are applicable to the credibility determinations that have been challenged in this Brief:

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<sup>16</sup> These statistics rely on the following cases of which the Board can take judicial notice:

<sup>17</sup> This is not intended as a personal attack on Judge Ringler. OHL appreciates his courtesy and professionalism demonstrated throughout the trial. Rather this argument addresses his record.

- (a.) **The Board will overrule an administrative law judge's credibility resolutions when the clear preponderance of all the relevant evidence demonstrates that they are incorrect. See *Standard Drywall Products*, supra.**
- (b.) **The Board's reluctance to displace the credibility resolutions of the administrative law judge is diminished where the administrative law judge's resolutions are not based on his observation of the demeanor of the witness. See *Humes Electric, Inc.*, 263 NLRB No. 159 (1982).**
- (c.) **The ultimate choice between conflicting testimony rests not only on the witness's demeanor, but also on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. See *Humes Electric*, supra.**
- (d.) **The Board's usual deference to the credibility determinations of the ALJ do not apply where the ALJ has misstated or confused certain parts of the relevant record evidence and testimony in the case.**
- (e.) **The Board's usual deference to the findings of the ALJ do not apply when the judge does not fully address all of the inconsistencies in the record, or relies on witness testimony which is contradicted by documentary evidence, or inaccurate and incomplete. See *E.S. Sutton Realty Company*, 336 NLRB No. 33 (2001).**
- (f.) **At times it is necessary for the Board to examine the record "de novo" and to make credibility findings, when appropriate, that comport with the record evidence as a whole and with the inferences fairly drawn therefrom. See *Humes Electric*, supra. This is one of those cases.**

**K. The ALJ's recommended reading remedy is unwarranted. [Exceptions No. 17].**

In order to obtain the reading remedy requested in the Consolidated Complaint, the General Counsel must show that the unfair labor practices at issue are serious, persistent, and widespread, as well as repetition of the same type of misconduct previously found unlawful. *Homer D. Bronson Co.*, 349 NLRB 512, 515-516 (2007), *enfd. mem.* 273 Fed. Appx. 32 (2d Cir. 2008). OHL submits that it has not committed any unfair labor practices. However, to the extent that any unfair labor practices are found, OHL submits that they do not rise to the level required to impose such an onerous remedy.

Moreover, even if a reading remedy is imposed, Judge Ringler ordered a remedy different than the remedy requested by the Acting General Counsel. The Complaint asked that Mr. Coleman read the notice in the presence of a Board Agent. Judge Ringler ordered that the Board

agent read the notice. Thus, the reading remedy imposed by Judge Ringler is relief that the General Counsel did not as for and is not entitled to obtain.

## **V. CONCLUSION**

For all of the foregoing reasons, the findings and conclusions by the ALJ that OHL violated Sections 8(a)(1) and 8(a)(3) of the Act should be reversed, and any proposed remedy and order vacated. Further, the USW's ballot challenges should be overruled, and OHL's ballot challenges should be sustained. Finally, OHL's election objections should be sustained, and the USW's election objections should be overruled. In sum, OHL should be declared the winner of the last election and its disciplinary decisions should be vindicated.

Respectfully submitted,  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been sent by e-mail and FedEx to:

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