

**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-26090
26-RC-8635**

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

OHL'S REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS

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ARGUMENT

OHL submits this Reply Brief in Support of its Exceptions, pursuant to NLRB Rules and Regulations, Section 102.46(h). OHL respectfully submits that the arguments advanced by the Acting General Counsel and the United Steelworkers Union either miss OHL's intended point or distort the record. Therefore, this Reply brief will attempt to succinctly set the record straight on twelve issues within the ten pages allowed for this brief.¹

I. Carolyn Jones was lawfully terminated.

As fully explained in OHL's Brief in Support of Exceptions, Carolyn Jones was terminated for two independent reasons: (1) she repeatedly called Lee Smith a "U.T.," which she explained meant Uncle Tom, and (2) she falsified witness statements in an investigation. OHL points out in its Brief in Support of Exceptions that Judge Ringler's decision omits any analysis of whether the alleged comparators that he cites are similarly situated to Carolyn Jones.

In its Answering Brief, the Acting General Counsel contends that Judge Ringler "fully analyzed whether the comparators were similarly situated." (GC Brief, p. 35). The Acting General Counsel also tries to distinguish the case law cited by OHL on the basis that Judge Ringler "fully analyzed" whether the alleged comparators were similarly situated, while the ALJ's in the cases cited by OHL did not perform this analysis.

OHL respectfully submits that the Acting General Counsel's arguments are nothing more than wishful thinking. Judge Ringler's decision is devoid of any such analysis, which is underscored by the Acting General Counsel's failure to identify where any such analysis occurs. Contrary to the assertion that Judge Ringer "fully analyzed" whether the cited comparators are

¹ OHL apologizes in advance for its brevity, which is only intended to facilitate the coverage of as many issues as possible within 10 pages.

similarly situated, he cites them *en masse*, in a table, without any discussion, other than labeling them as "comparable." (Ringler Decision, p. 12). Therefore, OHL submits that Judge Ringler's decision speaks for itself in its failure to analyze whether the comparators, upon which his analysis rests, are similarly situated to Ms. Jones. Contrary to the Acting General Counsel's argument, it appears from Judge Ringler's decision that he never even bothered to consider whether or not the alleged comparators are similarly situated to Ms. Jones.

The Acting General Counsel's brief also perpetuates the unsupported misconception that OHL deviated from its progressive discipline policy in discharging Ms. Jones. Again, as evidenced by the very comparators that Judge Ringler cites (but does not bother to analyze), the level of discipline imposed by OHL has always varied by the seriousness of the offense. Notwithstanding the Acting General Counsel's attempts to cloud the record, it is beyond dispute that the only OHL employee, other than Ms. Jones, who even arguably engaged in repeated racial epithets (Ms. Burgess) was also terminated. Even if the Acting General Counsel were correct in its argument that Ms. Burgess is an improper comparator (which it is not), then Ms. Jones' repeated racial epithets are, at best, unprecedented. Unprecedented discipline, based on unprecedented circumstances, cannot be a departure from past practice or a departure from a progressive discipline policy that expressly permits flexibility.

II. Jennifer Smith was lawfully warned.

The Acting General Counsel's argument regarding Jennifer Smith's warning rests on Jerry Smith's and Sheila Childress' speculation about what they did not hear, but what they think they "would have" heard. Since these witnesses admittedly did not hear the entire conversation between Stacey Williams and Jennifer Smith, there is no basis for them to speculate what they "would have" heard if they had been able to hear the entire conversation.

Moreover, the witness statements that Mr. Smith and Ms. Childress provided to OHL did not say what they "would have" heard. Instead, they made it clear that they did not hear the entire conversation between Mr. Williams and Ms. Smith. Therefore, at the time that OHL made the decision to discipline Ms. Smith, it had only two witness (Shirley Milan and Stacey Williams) who corroborated Ms. Smith's racial epithet, while two witnesses claimed not to hear the conversation. At the time that OHL made its disciplinary decision, it could not have possibly anticipated that the two witnesses that claimed not to hear the entire conversation would someday take the witness stand to speculate about what they think they would have heard if they had heard the full conversation.

III. *Rood Trucking* was misapplied.

OHL points out in its brief that under Judge Ringler's reading of *Rood Trucking*, the Respondent never gets to present evidence beyond the *prima facie* case. Judge Ringler's reading of *Rood Trucking* ignores the entire concept of a burden shifting framework. If a *prima facie* case is sufficient to establish an 8(a)(3) violation without further consideration, then an employer need not even show up for the hearing, since its evidence is beside the point. The Acting General Counsel points out that under Judge Ringler's interpretation of *Rood Trucking*, the General Counsel is not relieved of its obligation to prove the other *prima facie* elements, namely knowledge of union activity and animus. However, the Acting General Counsel misses the point.

Whether or not the Acting General Counsel has to prove additional *prima facie* elements, the point is that the burden never shifts to the Respondent, and therefore, Judge Ringler's interpretation of *Rood Trucking* circumvents the entire burden shifting framework. In other words, an ALJ never gets to analyze the Respondent's evidence, if all the Acting General

Counsel must do is present *prima facie* elements. OHL's argument stands, regardless of how many *prima facie* elements the Acting General Counsel must prove (contrary to the argument in its brief).

The Acting General Counsel also glosses over the factual distinctions between this case and *Rood Trucking* by claiming that factual distinctions can be drawn in any case. However, the factual distinction between this case and *Rood Trucking* go to the very core of Judge Ringler's analysis. In *Rood Trucking*, the Board found that the employer had commissioned inaccurate evidence to use in justifying the termination of its employees and not questioned the accused. There is no such allegation or evidence in this case. The allegations that resulted in discipline to Ms. Jones and Ms. Smith were brought to OHL, not manufactured by OHL. Even if it were appropriate to short circuit the burden shifting framework where there is evidence that the employer trumped up allegations against an employee, it certainly would not be appropriate to do so where there is no such allegation.

Judge Ringler and the Acting General Counsel have a fundamental misunderstanding of the concept of pretext. Pretext is where an employer manufactures a reason to terminate an employee that is not the real reason. Pretext is not where the reason for a disciplinary action arguably turns out to be false with the benefit of 20/20 hindsight and recanted witness statements.

IV. OHL was denied due process as a result of Judge Ringler's bias.

Instead of addressing the substance of OHL's argument that it was denied due process by Judge Ringler's inherent bias, the Acting General Counsel self-servingly labels the argument "beneath contempt" and "abhorrent." Apparently, in the Acting General Counsel's world, no one

dare question the sacrosanct, but clearly biased, record of ALJ Ringler.² OHL submits that it has a legal right to assert an argument where it believes that it was denied due process. That right derives from the Fifth Amendment to the United States Constitution.

Additionally, the Acting General Counsel speculates that OHL is somehow trying to disqualify Judge Ringler from future proceedings involving OHL. The Acting General Counsel ascribes motives to OHL that do not exist. OHL submits that if anyone should be "admonished" it is the Acting General Counsel, not OHL. It is the Acting General Counsel, not OHL, that attempts to deter legitimate constitutional arguments because they contain inconvenient truths.

V. OHL did not unlawfully confiscate union literature.

The Acting General Counsel repeatedly argues that OHL's actions in throwing away trash in its breakrooms are illegal because OHL does not have a policy about cleaning its breakrooms. OHL does not need a policy to allow it to do what it has a legal right to do. OHL does not have a policy that allows its managers to go to the bathroom, park in the parking lot, or turn on their computers each morning. Yet, somehow, OHL managers perform these functions on a daily basis; just like they clean up trash in their breakroom, including union literature.

The Acting General Counsel resorts to dictionary definitions to argue that what it really meant by the allegation that OHL "confiscated" literature. It claims that what it really meant was that OHL "seized" the literature. OHL respectfully submits that the Acting General Counsel's semantics do not advance its argument; and instead they prove OHL's point. According to Webster's Dictionary, a definition of "seize" is to take by force. OHL managers did not take anything by force. It is impossible to "seize" something that is not in anyone's possession. The

² As OHL made clear in its opening brief, this argument is not an attack on Judge Ringler personally. It is an attack on his biased record

point is that the union literature was not in any employee's possession; it was intentionally left in the breakroom after break was over. Therefore, there is nothing illegal about OHL disposing of it.

The Acting General Counsel makes a number of allegations that OHL "disparately" applied restrictions to union literature. This is an allegation that was neither alleged nor not tried. The allegation is that the union literature was unlawfully confiscated; not that it was disparately disposed of.

VI. OHL did not unlawfully interrogate employees.

The Acting General Counsel contends that lawful questions about whether solicitation occurred during working time on the warehouse floor are converted into unlawful interrogation, if the questions do not arise from specific complaints by employees to OHL management. Solicitation, in working areas during working times, is either protected or it is unprotected. By law, it is unprotected. The unprotected nature of the conduct does not depend on whether co-workers complain about it. There is nothing unlawful about asking employees whether other employees were engaged in unprotected activity (i.e. soliciting during working time in working areas in contravention of OHL policies).

Moreover, even if such a distinction were tenable (which it is not), Shannon Miles testified that the genesis of her question to Kedrick Smith was complaints by employees, which the Acting General Counsel has chosen to ignore by claiming that these complaints were not specific enough. There is no legal support for this position.

VII. OHL did not create the impression that employees' union activities were under surveillance.

The Acting General Counsel argues that in allegedly creating the impression of surveillance, it is irrelevant whose union activities were under surveillance. However, Judge

Ringler's conclusion is premised on his finding that "Wright commented that OHL knew that Shorter and Rayford were discussing Union affairs at the facility." Judge Ringler's finding is not supported by the record. Even under Ms. Shorter's version of events, Ms. Wright did not comment that she knew Ms. Shorter was discussing the union with Ms. Rayford. She commented that she knew the two had been talking and then allegedly asked what they were talking about. (Tr. 785). Thus, Judge Ringler's finding is premised on a factually false statement that is not supported by the witness whose version of events he credited.

VIII. OHL did not engage in unlawful surveillance.

The Acting General Counsel apparently recognizes the infirmities in Judge Ringler's analysis on the surveillance allegation. Judge Ringler's decision does not even mention that an employer has the right to observe open activity in its parking lot. Nonetheless, the Acting General Counsel argues that there is an exception to the general rule that an employer may observe open activity, where the employer's activities were "out of the ordinary."

There are two problems with the Acting General Counsel's argument. First, Judge Ringler made no finding as to why the alleged activity by Mr. Coleman and Mr. McNamee was "out of the ordinary." Second, it cannot be "out of the ordinary" to stand and look at the ground for a few minutes in a parking lot where you ordinarily park. There are a plethora of reasons why a person would stand in a parking lot where he usually parks and stare at the ground. However, regardless of motive or intent, it is not objectively coercive to stand in a parking lot and look at the ground beyond the earshot of employees who are engaged in protected activity.

As stated in OHL's brief, surveillance requires seeing or hearing. Mr. McNamee and Mr. Coleman were not in a position to see or hear the employees that were engaged in protected activity in the parking lot, according to the credited witnesses' testimony.

IX. OHL did not solicit any employee to seek other employment.

There are three problems with Judge Ringler's and the Acting General Counsel's position that Phil Smith solicited union supporters to find other employment. First, Phil Smith never actually said that any employee should seek other employment. Second, there are a number of reasonable interpretations of Phil Smith's comment that have nothing to do with adopting the content of Ms. Mitchell's question. For example, he may have meant that he was encouraged to see employees speaking up for themselves, regardless of the content. Therefore, the comment was not objectively coercive. Third, and most significantly, Phil Smith never identified any employee whom he wanted to leave OHL's employment. That is what makes this case distinguishable from the cases cited by Judge Ringler and the Acting General Counsel, which involved soliciting the resignation of identified union supporters.

X. OHL's alleged threats were unrelated to union activity.

Both Judge Ringler and the Acting General Counsel contend that Phil Smith threatened employees on three occasions. The problem with their theory is that Phil Smith's alleged threats have nothing to do to union activity. In each instance, they were made in response to unprotected insubordinate conduct.

In each case, Judge Ringler and the Acting General Counsel contend that Phil Smith was actually reacting to comments that occurred prior to the admittedly insubordinate comments that immediately preceded the alleged threats. For example, on May 26, 2011, when Phil Smith allegedly told Ms. Jones to "watch her back," numerous witnesses, including Ms. Jones, testified that this comment was made in direct response to Ms. Jones telling Mr. Smith to go back to work. Similarly, Mr. Smith's comment that he would discipline Mr. Hughes' for insubordination was in response to Mr. Hughes referring to Phil Smith taking him outside to see his "goons" (a

fact that Mr. Hughes admitted but Judge Ringler left out of his decision). In the other alleged threat, Judge Ringler indicated that Mr. Smith went and stood behind Mr. Hughes in response to Mr. Hughes refusing to remain quiet in a captive audience meeting. By Ms. Wells account (which was credited by Judge Ringler), Mr. Smith stood many feet behind Mr. Hughes. In each case, Mr. Smith's alleged threatening behavior or remarks were made in direct response to insubordinate activity that were more proximate to the alleged threats than any protected activity.

Judge Ringler and the Acting General Counsel turn Mr. Smith's efforts to maintain order into threats that were tied to union activity, even though Mr. Smith's actions and comments were in direct response to insubordination that was admitted by the employees who were allegedly threatened.

XI. Administrative Assistants were eligible to vote.

OHL disagrees with a number of the factual assertions by the union with respect to the administrative assistants. These factual disagreements can be discerned from the differences between the factual descriptions and record citations in the parties' respective briefs (which OHL does not have the space within the page limitation of this reply brief to outline here). However, beyond the factual disagreements, OHL submits that the union and Judge Ringler are missing two very important points in their analysis of the administrative assistants.

The union and Judge Ringler overlook the fact that the stipulated unit at OHL includes employees who indisputably perform clerical functions. The stipulated unit is not limited to production employees who are out on the warehouse floor picking, packing and shipping. The stipulated unit includes customer service representatives, senior customer service representatives, and inventory control clerks. These individuals work at a desk, in the same areas as the administrative assistants, using a computer and phone. Therefore, in assessing the community of

interest factors, the Board must examine whether the administrative assistants share a community of interest with any of the unit employees, including the clerical employees within the stipulated unit.³

Second, the union and Judge Ringler fail to appreciate the connection between the role of the administrative assistants and the production process. Office clericals answer phones, send faxes, schedule, and file in support of the general management of the operation. The administrative assistants at issue in this case serve a very different purpose. They enter data that is directly related to the activities that occur out on the warehouse floor. Their role is directly tied to production. If there was no activity on the floor, then there would be no data to input and no reports to generate. By contrast, if there were no activity on the floor, there would still be phones to answer, meetings to schedule, copies to make, and files to maintain. These office clerical functions are not functions of the administrative assistants at OHL, and therefore, they are “plant clericals” rather than “office clericals.”

XII. Most of the USW's objections occurred outside of the critical period.

Judge Ringler claims that the critical period runs from the first election to the second, and therefore, everything that occurs between two elections occurs in a critical period. He relies on *Star Kist Caribe, Inc.*, 325 NLRB 304 (1998) for this proposition. While the general proposition may be correct in the case of a rerun election, it ignores the facts of this case. Unlike *Star Kist*, the election at OHL was not a rerun election. The union withdrew its objections to the first election. The union cannot claim the benefit of election objections that it withdrew in establishing the critical period.

³ This is also one point that distinguishes this case from the cases cited by Judge Ringler and the union.

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 U.S. Mail on this 24th day of July 2012 to:

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