

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

U.S. COSMETICS CORPORATION,

Respondent,

and

TYLER HOAR, an individual,

and

WILLIAM ST. HILAIRE, an individual,

Charging Parties.

Case Nos. 01-CA-135282 and 01-CA-139115

Respondent's Reply in Support of Its Exceptions
to the Decision of the Administrative Law Judge

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**U.S. COSMETICS CORPORATION'S REPLY IN SUPPORT OF ITS
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Respondent U.S. Cosmetics Corporation ("USCC"),¹ by and through undersigned counsel, and pursuant to Section 102.46(h) of the Board's Rules and Regulations, respectfully submits this Reply to Counsel for the General Counsel's Answering Brief to USCC's Exceptions to the Decision of the Administrative Law Judge.

I. INTRODUCTION

Realizing that the contemporaneous documentary evidence and testimony contradict the General Counsel's arguments, the General Counsel attempts to divert attention from the facts by attacking the Respondent's witnesses (and its counsel's) credibility. The General Counsel's distraction, however, cannot change the myriad critical documentary and testimonial evidence, including testimony from the alleged discriminatees, proving that USCC did not violate the Act.

¹ The name of Respondent recently changed to Miyoshi America, Inc.

As set forth in USCC's Brief in Support of its Exceptions, acting as a "super-personnel" department, the ALJ erroneously substituted his own business judgment for that of USCC's decision-makers. Other than asking the Board simply to accept the ALJ'S judgment, the General Counsel provides no reason for the Board to affirm the ALJ's decision. Among other things, the General Counsel fails even to address the salient evidence establishing that: (1) William St. Hilaire ("St. Hilaire") and Tyler Hoar ("Hoar") engaged in the serious misconduct for which USCC terminated their employment; (2) prior to terminating St. Hilaire and Hoar, USCC had no knowledge of their protected activity and no reason even to suspect that they posted the pro-union signs; (3) USCC terminated St. Hilaire and Hoar for their serious misconduct without regard to their protected activity; (4) USCC planned its wage increase long before St. Hilaire's and Hoar's protected activity; (5) USCC's motivation for the long-planned wage increase was, in the General Counsel's own words, "to attract and retain good employees" and not to discourage union organizing activity (GC Answering Brief at n.10); and (6) USCC never interrogated its employees about organizing activity, either in connection with an internal vandalism investigation or otherwise. Critically, such key evidence does not depend on the ALJ's credibility determinations.

Thus, for the reasons set forth herein, even accepting the ALJ's credibility determinations, which themselves are contrary to the clear preponderance of the evidence, the Board should reverse the ALJ's decision in full.²

² The General Counsel advances the position that all credibility determinations made by the ALJ are beyond scrutiny. That simply is not the case where, as here, the ALJ's credibility determinations are contrary to the clear preponderance of the evidence.

II. ARGUMENT

A. **USCC Did Not Violate the National Labor Relations Act by Terminating St. Hilaire and Hoar.**

In its Answering Brief, the General Counsel accepts as a matter of faith that she met her *Wright Line* initial burdens to demonstrate that 1) USCC knew that St. Hilaire and Hoar engaged in union activity; and 2) USCC harbored animus toward that activity. Yet, the record contains no evidence of either knowledge or animus, and there is plethora testimony, including from St. Hilaire and Hoar, to the contrary. Brief in Support of Exceptions at 22-23; 29 (citing the trial transcript). The ALJ's conflicting conclusions are based improperly on nothing more than "inference on top of inference" and is therefore improper. *Id.*, at 20-23; *Alldata Corp.*, 327 NLRB 127, 128 (1998) (dissent), *enf. denied* 245 F.3d 803 (D.C. Cir. 2001).³

Furthermore, the ALJ's credibility determinations are both irrelevant and erroneous in light of contemporaneous documentary evidence that USCC terminated St. Hilaire for threats of violence and Hoar for theft, without regard to their union activity. Indeed, the General Counsel fails to acknowledge, and therefore concedes, that both St. Hilaire and Hoar engaged in the serious misconduct for which they were terminated.

As to St. Hilaire, the General Counsel's assertion that the record evidence "supports the ALJ's findings and conclusions that Respondent's stated rationale for terminating St. Hilaire was not credible" (Answering Brief at 8) widely misses the mark. To the contrary, the contemporaneous documentary evidence fully supports the testimony of USCC's witnesses that St. Hilaire was terminated solely for threatening his co-worker Jon Lasko ("Lasko"). As USCC's

³ In denying enforcement of the Board's order as it related to the discharge of employee Abbadessa in *Alldata*, the D.C. Circuit stated: "We agree with the dissenting Board member that there is simply no evidence that [the respondent] ever manifested any hostility to Abbadessa's protected concerted activity." *Id.*

Human Resources Manager Judy Jones (“Jones”) wrote at the time of St. Hilaire’s termination: “It was the consensus of the group that the Company could not forgive Bill St. Hilaire’s threatening behaviors toward Jon Lasko. The risk was too high that the behaviors would continue and employees would be put in danger of physical harm or vandalism.” GC Exh. 27. And, as USCC’s witnesses all consistently testified, St. Hilaire’s threatening behavior warranted termination. *E.g.*, Tr. 935-36; 570-71.

The ALJ’s conclusion that St. Hilaire’s termination violated the Act was based not on the evidence but on his personal judgment; and, all of the supposed “additional” evidence to which the General Counsel refers in her brief further highlights the flaws in the ALJ’s conclusion. That St. Hilaire’s admitted threats “grew out of a private dispute” between him and Lasko does not render the threats any less serious. Likewise, that Lasko did not want to go to the police and only wanted USCC to “monitor the situation” does not mean USCC should have ignored St. Hilaire’s threats, disregarded their seriousness, and/or refused to investigate. Given the nature of St. Hilaire’s threats and his history of violent behavior, USCC would have been foolish to let his threats slide and to continue his employment.⁴ It is outside of Lasko’s purview to tell USCC what to do with his complaint, and it is outside of the ALJ’s purview to disregard USCC’s well-documented, legitimate reasons for terminating St. Hilaire’s employment and impose his personal judgment instead. *Borin Packaging, Co.*, 208 NLRB 280, 281 (1974) (“[I]n the absence of a showing of antiunion motivation, an employer may discharge an employee for a good reason, a

⁴ Incredibly, the General Counsel argues that St. Hilaire’s protected activity must have been the reason for his termination because he was the sort of “good employee” that USCC “was struggling to attract and retain.” Answering Brief at 9. In effect, the General Counsel suggests that an employee 1) with a visibly aggressive personality and history of vandalism, 2) who has slashed tires and had a restraining order entered against him by a judge to stay away from his ex-wife, and 3) who threatened a co-worker with physical violence for dating his ex-wife is a “good employee” who thus should be shielded from termination solely because he secretly posted a pro-union sign.

bad reason, or no reason at all. Whether other persons would consider the reasons assigned for a discharge to be justified or fair is not the test for legality under Section 8(a)(3).”).

The ALJ’s conclusion that Hoar’s termination violated the Act, and the General Counsel’s arguments in support thereof, suffer from the same fatal flaws: the General Counsel asks the Board to accept the ALJ’s personal judgment over that of USCC’s decision-makers. The ALJ found that Hoar stole an armload (or box) of coffee from the cafeteria. Thus, USCC rightfully terminated his employment for the *universally wrong* act of theft. Tr. at 579. In that regard, the General Counsel’s numbered list of the supposed faults in “[n]umerous aspects of Respondent’s handling of the issue” (Answering Brief at 10) is a red herring. “It is not within the province of the Board to tell an employer how to investigate allegations of employee misconduct,” *Chartwells, Compass Group, USA, Inc.*, 342 NLRB 1155, 1158 (2004), and “[t]he nature of [USCC’s] investigation and other facts [to which the General Counsel refers] in no event are adequate to support an inference that [Hoar’s] unprotected act of [theft] was seized on as a pretext to get rid of [him].” *Ohio Power Co.*, 215 NLRB 165, 172 n.18 (1974).⁵

The only reasonable conclusion from the evidence presented at trial is that USCC lawfully terminated St. Hilaire and Hoar for engaging in serious, intolerable misconduct. The ALJ’s conclusions to the contrary, which fly in the face of the evidence, must be reversed.

B. USCC’s Wage Increase Did Not Violate the Act.

Regardless of the ALJ’s credibility determinations, the ALJ’s conclusion that USCC’s implementation of a wage increase violated the Act is erroneous. It is beyond dispute that USCC

⁵ Even if USCC had knowledge of Hoar’s protected activity and resented it, there is still no violation because it is undisputed that Hoar committed the theft for which he was terminated. *See P. G. Berland Paint City*, 199 NLRB 927, 927-28 (1972) (“Respondent [may have] entertained a desire to get rid of [the alleged discriminatees] whose union activities it resented, and was pleased to have an opportunity present itself for doing so. But that alone is not enough to establish that the discharge was a violation of Section 8(a)(3).”).

1) began considering and discussing the wage increase in 2013; 2) began extensively planning the wage increase as soon as Jones joined USCC in March 2014; and 3) was in the final stage of approval and implementation *before* July 8, 2014. Thus, because USCC's wage increase was planned long-before and was very near completion before any union activity, under applicable Board precedent, the wage increase did not violate the Act. *See also Ford Motor Co.*, 315 NLRB 609 n.2 (1994) (finding no violation when employer converted some supplemental employees to full-time status where the employer started the process more than a month before the organizing began); *Adams Super Markets Corp.*, 274 NLRB 1334, 1339 (1985) (affirming ALJ's finding that the employer did not violate the Act in changing its medical plans when, among other things, it had long-planned the changes); *Greenbrier Valley Hosp.*, 265 NLRB 1056, 1056 (1982) (dismissing allegation that provision of improved sick pay benefits constituted a violation of Section 8(a)(1) where it was "evident that the decision-making process was fully under way well before the onset of any organizing activity at this facility....").⁶

None of the supposed testimonial inconsistencies and credibility issues to which the General Counsel refers in her brief negates the contemporaneous documentary evidence showing that USCC's plan for the wage increase was in its final stages *before* any union activity. *See* R Exh. 3; R. Exh. 15; GC Exh. 31, at 6, 23-25; GC Exh. 39. In other words, even if not one of USCC's witnesses was credible, the ALJ's conclusion still is contrary to the weight of the evidence.⁷

⁶ The General Counsel's failure to address any of the Board decisions USCC cited in its Brief in Support of Exceptions highlights the weakness of its case.

⁷ If anything, the testimony on which the General Counsel relies in her Answering Brief further supports USCC's position. *See* Answering Brief at 5 (citing USCC President Karou Takagi's testimony that, as of July 9, 2014, "he had obtained the authority to implement the wage increase."). To be sure, even if Mr. Takagi did not obtain approval until after July 9, 2014, the plan for the wage increase still must have been near completion before then.

Moreover, the General Counsel unequivocally concedes that USCC’s implementation of the wage increase was motivated by its desire “to attract and retain employees.” GC Answering Brief at 9 n.10. Board precedent makes clear that the conferral of economic benefits is unlawful only when implemented with the “express purpose” of interfering with an ongoing campaign; it is not unlawful when implemented for a legitimate business purpose. *E.g., American Sunroof Corp.*, 248 NLRB 748, 748 (1980) (rejecting an administrative law judge’s finding that the respondent violated the Act by granting a pay raise and instituting a new pension plan within one day of an election and holding that conferral of benefits is not unlawful when done for a legitimate reason). Having conceded a legitimate business purpose for USCC’s wage increase, the General Counsel’s contention, and the ALJ’s conclusion, that the wage increase violated the Act is incongruous.

C. USCC Did Not Interrogate Employees in Violation of the Act.

In its Answering Brief, the General Counsel offers no actual evidence that USCC unlawfully interrogated its employees during its investigation of the “soaping” of Lasko’s locker or at any other time.⁸ That is because there is none.

Instead, the General Counsel asks the Board to affirm the ALJ’s findings based solely on a poorly-worded rhetorical question: “Had [Jones’] purpose been in looking at the cell phones been, as Respondent contends ... to pursue a more reasonable contention—that Jones sought to investigate whether St. Hilaire played a role in the vandalism—why would she have felt compelled to lie about it?” Answering Brief at 7. The General Counsel’s rhetorical question is representative

⁸ The General Counsel’s Answering Brief fails to address USCC’s evidence and arguments concerning allegations of unlawful interrogation during the week of July 16, 2014 (Brief in Support of Exceptions at 40-41) and on November 8, 2014 (*id.* at 45-46). For the reasons set forth in USCC’s Brief in Support of Exceptions, the ALJ’s findings of unlawful interrogations on those dates are erroneous. Because the Board’s Rules and Regulations limit USCC’s reply to the General Counsel’s Answering Brief “to matters raised in the brief” (29 C.F.R. §102.46(h)), USCC will focus solely on the General Counsel’s arguments concerning USCC’s investigation of the “soaping” incident.

of a weak argument. Leaving aside that Jones did not “lie,” there is no evidence that Jones had an “unlawful motive” in asking employees whether they have been in contact with St. Hilaire and to see their phones to confirm.⁹ To the contrary, suspecting St. Hilaire’s involvement in the “soaping” of Lasko’s locker, Jones narrowly focused her investigation on finding St. Hilaire’s co-conspirator. She did not ask *any* questions about union activity. She also did not ask questions about Hoar, who also allegedly engaged in union activity, but whom Jones did not suspect in the “soaping” of Lasko’s locker. As such, it is inconceivable to conclude that, under the circumstances, Jones’ investigation reasonably tended to restrain, coerce, or interfere with the rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176 (1984), *aff’d sub nom. Hotel Emps. Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Here, again, the ALJ improperly substituted his own judgment and credibility determinations for the evidence and common sense. The ALJ’s conclusion is clearly erroneous and must be reversed.

D. The ALJ Erred in Admitting Andrew Rucci’s Affidavit as Substantive Testimony and in Crediting the Affidavit over His Live Testimony.

The ALJ’s decision is based, in large part, on statements in Andrew Rucci’s (“Rucci”) affidavit, which Rucci denied making, but which the ALJ nonetheless erroneously admitted as substantive evidence. In doing so, the ALJ ignored uncontroverted testimony that those statements were not Rucci’s. *See* Opening Brief at 17-18. Fed. R. Evid. 801(d)(1)(A) is therefore inapplicable because Rucci’s affidavit does not contain *Rucci’s* prior inconsistent statements.

The ALJ compounded his improper admission of “Rucci’s” affidavit as substantive evidence by refusing to draw an adverse inference against the General Counsel for failing to offer Board Agent Ablavsky’s testimony to rebut Rucci’s credible testimony that: 1) the statements in

⁹ USCC denies that Jones asked to see employees’ phones. Assuming she did, however, the ALJ’s conclusion that her investigation violated the Act is still erroneous. *See* Brief in Support of Exceptions at 42-45.

the affidavit were fabricated and 2) he was not afforded an opportunity to review the affidavit before signing it. The Board long has acknowledged the “missing witness” rule, which states that, “where relevant evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and he fails to do so, without satisfactory explanation, the [trier of fact] may draw an inference that such evidence would have been unfavorable to him.” *Martin Luther King, Sr., Nursing Ctr.*, 231 NLRB 15, n.1 (1977) (citations omitted). The General Counsel cannot satisfactorily explain her failure to elicit Ablavsky’s testimony at trial because that failure is inexcusable. Ablavsky, who drafted and supposedly witnessed Rucci sign the affidavit, was present in the courtroom throughout the trial and actually made representations for the General Counsel on the record. Tr. at 1651-52. Moreover, Ablavsky was in the courtroom during Rucci’s testimony and heard his assertions regarding her behavior. Tr. at 2790-91. Though the GC had no qualms about Ablavsky injecting herself into the trial to attack USCC’s counsel’s statements, she did not interject during Rucci’s testimony, and the General Counsel did not call her as a witness to rebut Rucci’s testimony. *Id.* at 1651-52, 2790-91.

The *only* testimony in the record concerning “Rucci’s” affidavit is from Rucci. The ALJ’s complete disregard of Rucci’s testimony and acceptance of the affidavit as substantive proof of USCC’s alleged wrongdoing based only on the ALJ’s unsubstantiated “belief” that a Board agent would not engage “in such unprofessional—possibly criminal—misconduct” (ALJD 13:22-25) is specious and warrants reversal of the ALJ’s decision.

E. The ALJ’s Finding as to Unlawful Handbook Provisions Is Moot.

The General Counsel’s continued attack on USCC’s employee handbook is a ‘solution in search of a problem.’ In the spirit of cooperation, USCC eliminated all allegedly objectionable rules in its handbook nearly one year ago. R. Exh. 23. Consistent with the purposes of the Act, the

Board should encourage employers to remedy alleged unfair labor practices, including allegedly unlawful handbook rules, promptly and without lengthy and expensive litigation, as USCC did in this case. *See Boch Honda*, 362 NLRB No. 83 at *5-6 (2015) (Johnson, dissent). On the other hand, requiring USCC to post a notice regarding its handbook rules (the only possible remedy given USCC's revised handbook), which its employees already know were revised, serves no purpose other than to punish USCC further for acts which it voluntarily and fully remedied.

Finally, USCC receives confidential, proprietary, and trade secret information from its customers, which USCC must guard with the utmost of care. As such, the ALJ's one-size-fits-all application of *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004) (which should be repudiated) ignores USCC's legitimate reasons for its handbook rules, especially its rules concerning confidentiality, which is particularly important in USCC's business. *See William Beaumont Hosp.*, 363 NLRB No. 162 (2016) (Miscimarra, dissent).

III. CONCLUSION

For all the reasons set forth herein, USCC respectfully requests the Board uphold each of its exceptions and, in doing so, dismiss the Consolidated Complaint in this action in its entirety.

Respectfully submitted this 28th day of July, 2016.

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CERTIFICATE OF SERVICE

This is to certify that today I served a true and correct copy of the **U.S. COSMETICS CORPORATION'S REPLY IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** via electronic mail upon the following individuals:

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This the 28th day of July, 2016.

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