

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

REGION 8

IN THE MATTER OF:
UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION,
AFL-CIO/CLC, LOCAL 9130-03

Charging Party

Case No. 08-CA-167138

and

OMNISOURCE CORPORATION,
Respondent.

POST-HEARING BRIEF OF RESPONDENT,
OMNISOURCE CORPORATION

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I. INTRODUCTION

OmniSource Corporation (“OmniSource” or “Company”) is accused of interfering with rights protected by the National Labor Relations Act (the “Act”) and for terminating four employees in violation of their rights under the Act and in retaliation for their engaging in protected, concerted union activities. As discussed herein, there is no evidence of interference with those rights, of union animus, or that that the motivating factor – or *any* factor – in OmniSource’s decision to terminate the four individuals was their union status or activity. Rather, the evidence shows that four employees repeatedly lied about threats of violence and an alleged physical assault in order to remove a respected, senior manager. Those lies (and the reason behind them) were exposed during the Company’s investigation.

The investigation revealed inconsistencies in the employees’ stories, including one vividly remembering the allegation after repeatedly denying hearing it. To bolster their claims that the manager had committed criminal activity, three employees (all holding positions in the Union) came forward to make a claim that the manager had threatened to shoot employees at a meeting *five days earlier*. But none reported the threat of violence and none of the five management employees in the room heard any such exchange at the congenial meeting. It was not until the grievance was filed with respect to December 7 that any of the employees decided to tell the Company they believed one of its managers was threatening to shoot employees.¹

Following a thorough investigation into their claims against a respected manager, an investigation that included one employee deciding to “take the Fifth” rather than answer any

¹ Off the record, the ALJ noted during the hearing his opinion that the Company’s response was extreme. *See also* Tr. at 1044-45 (“I don’t understand – I just see an investigation of a complaint against management that was – that you found was unsubstantiated at some level. . . . ‘It was unsubstantiated. Grievance denied.’ That’s the way I usually see these things go.”) But what the ALJ failed to note during the hearing was that the conduct of these terminated employees was itself extreme – and illegal under the Act.

more of the Company's questions, and following the Union's request that the violent manager simply be *moved* to another Union facility, the Company concluded the employees conspired to lie, slandered a manager in an effort to illegally remove him, and lied to the Company about it.

The Regional Director eventually concluded that the evidence constituted a sufficient basis upon which to issue a formal Complaint against the Union for its attempts to illegally deprive OmniSource of its choice of representatives. Despite this admission by the Board, the General Counsel and the Union take the position that the reason the four employees were terminated was their affiliation with the Union. The evidence amply demonstrates that the same discipline would have been meted out to non-union employees given the extreme conduct the investigation uncovered: concerted deception to rid their workplace of a manager that the employees disliked and wanted out. As a result, the Complaint against OmniSource should fail.

II. PROCEDURAL HISTORY

The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL-CIO, Local 9130-036 ("Union") filed a charge against OmniSource on January 6, 2016, GC Ex. 1(a), and an amended charge on May 25, 2016, GC Ex. 1(c). The Regional Director for Region 8 issued a Complaint that was consolidated with a Complaint the Regional Director issued against the Union based on a charge filed by OmniSource against the Union on February 3, 2016, GC Ex. 13, amended on February 5, 2016, GC Ex. 14, and again on May 27, 2016. *See* GC Ex. 1(e); *id.* ¶ 2(C). The Consolidated Complaint was amended on June 2, 2016. GC Ex. 1(h).

Through the Amended Consolidated Complaint, the Regional Director alleged that, OmniSource violated Sections 8(a)(1) and (3) of the Act by terminating employees Rick Dean, Darrell Smith, Roy Thompson, and Terry Timman, because they supported and assisted the

Union and engaged in concerted activities and because OmniSource wanted to discourage those activities, charges OmniSource denied in its Answer. GC Ex. 1(j) ¶¶ 7, 9.

The Regional Director also alleged that, in violation of Section 8(b)(1)(B) of the Act, the Union made maliciously false statements and filed and processed a grievance for the purpose of obtaining the termination of Chris Charlebois, a manager OmniSource chose to represent it for the purposes of collective bargaining or the adjustment of grievances. GC Ex. 1(e) ¶¶ 8, 10.

On September 7, 2016, the Union executed an Informal Settlement Agreement resolving the Board's Complaint against the Union for its conduct, and, on September 9, 2016, the Regional Director issued an Order severing the two cases. GC Ex. 1(m). From September 12, 2016 through September 15, 2016, a hearing was held on the remaining charges against OmniSource.

III. OPERATIVE FACTS

III.A OmniSource's Managers and Representatives

OmniSource is in the business of scrap recycling. Tr. at 37, 197. OmniSource has about 70 locations, about seven or eight of which are unionized facilities with five different bargaining units. Tr. at 173. The following individuals are supervisors within the meaning of Section 2(11) of the Act and agents of OmniSource within the meaning of Section 2(13) of the Act:

Andrew Ables has been OmniSource's Corporate Human Resources Manager since 2008 and, other than for a few months in 2004, has been employed by OmniSource since June of 2001. GC Ex. 1(j) ¶ 5, at 3-4; Tr. at 36, 171-72. Ables ultimately made the termination decision that is the subject of the instant grievance. Tr. at 42-43, 45.

Chris Charlebois is an OmniSource manager, currently working as a co-manager of the Mansfield facility. Tr. at 711; GC Ex. 1(j) ¶ 5, at 3-4. He was assigned to Mansfield in early July, 2015. Tr. at 711. Charlebois previously worked with companies operating with collective

bargaining agreements at three other facilities, including one for OmniSource. Tr. at 731-32. Charlebois had previously been employed by OmniSource as the division manager for Omni Auto Parts in Macedonia, Ohio. Tr. at 729.

Bob Oney is the other co-manager of OmniSource's Mansfield facility and has been employed at Mansfield since 2004. Tr. at 862; GC Ex. 1(j) ¶ 5, at 3-4. Oney has held the position of Plant Manager for the last three years. Tr. at 862. Oney first joined OmniSource as a union employee in 1998 and then was laid off in 2001. He later returned to OmniSource in 2004, starting as a second shift supervisor. Tr. at 863.

Linda McKinley is the Mid-Ohio Human Resources Manager for OmniSource and is responsible for OmniSource's Lima, St. Mary's, and Mansfield, Ohio locations. Tr. at 46, 924; GC Ex. 1(j) ¶ 5, at 3-4. As part of her role, she conducts human resources investigations. Tr. at 925. Over her career, she has conducted hundreds of HR investigations. Tr. at 925. Consistent with her responsibilities, she also attended the Labor Management Committee meetings at Mansfield. Tr. at 926.

Patrick Harte is the Northern Ohio Division Transportation Manager for OmniSource, which includes Mansfield. Tr. at 653; GC Ex. 1(j) ¶ 5, at 3-4. He attended the Labor Management Committee meetings at Mansfield. Tr. at 656.

Curtis West is the Scale Master/Dispatcher at Mansfield. Tr. at 691; GC Ex. 1(j) ¶ 5, at 3-4. He attended the Labor Management Committee meetings there. Tr. at 693.

Robert Carman is the Mid-Ohio Regional Manager for OmniSource and handles operational and marketing capacities for the facilities in Lima, St. Mary's, and Mansfield, Ohio. Tr. at 794; GC Ex. 1(j) ¶ 5, at 3-4.

III.B. The Union and Terminated Employees

OmniSource's Mansfield, Ohio facility is unionized. United Steelworkers Local 9130 is an amalgamated unit that has multiple locations. Tr. at 304-05. Local 9130-03 is the unit of employees represented at OmniSource ("Union"). Tr. at 305-06. Approximately 34 bargaining unit employees worked at Mansfield. Tr. at 509-10.

Roy Thompson worked at Mansfield as a crane operator loading both trucks and railcars with scrap metal from October 4, 2004, until his termination on December 18, 2015. Tr. at 197-98. Thompson's direct supervisor was Brian Laughery, a Yard Supervisor, who reported to co-managers Oney and Charlebois. Tr. at 199; GC Ex. 1(j) ¶ 5, at 3-4. Thompson was a member of the Union, but held no positions in the Union. Tr. at 199-200.

Terry Timman was employed at Mansfield as a "pre-loader" from June 16, 2003, to December 18, 2015. Tr. at 290-91. As a pre-loader, he operated a dump truck to move materials around the yard. Tr. at 291. Timman is a member of United Steelworkers Local 9130 and replaced Darrell Smith as the Unit Griever in September of 2015. Tr. at 293-94; GC Ex. 1(g) ¶ 6, at 2. As Unit Griever, Timman's responsibilities included filing grievances and representing the grievant, as well as participating in biweekly labor/management meetings. Tr. at 303-04.

Darrell Smith was employed at Mansfield as a torcher from June 23, 1993, to December 18, 2015. Tr. at 569-70. Smith was a member of Local 9130 and was the Unit Griever from 2003 until 2015. Tr. at 571. In September or October of 2015 he became the Unit Recording Secretary. Tr. at 572; GC Ex. 1(g) ¶ 6, at 2.

Rick Dean was employed at Mansfield as a truck driver from September 2002 to December 18, 2015. Tr. at 509. Curt West was his supervisor. Tr. at 510. Dean was a member of Local 9130, was elected trucking steward in 2012, and was elected Unit Chair in 2015. Tr. at 511-12;

GC Ex. 1(g) ¶ 6, at 2. As Unit Chair, Dean oversaw the Unit Griever and Unit Recording Secretary. Tr. at 512.

Tim Philpott is the Local Executive Secretary of the Union, was formerly its Secretary and Chair, and is currently employed at the Mansfield facility as a torcher. Tr. at 230, 306-07, 631; GC Ex. 1(g) ¶ 6, at 2.

Donnie Blatt is the International Representative of the Union. He was apprised of the events detailed below through discussions with Linda McKinley and other OmniSource managers. Tr. at 936-46; GC Ex. 1(g) ¶ 6, at 2. Blatt also represented the Union members in questioning Charlebois in a December 15, 2015 meeting. Tr. at 997. Blatt attended the hearing on this matter but did not testify or refute any portion of the Company's testimony.

III.C. The Events Leading to the Alleged Unlawful Activity

III.C.1. OmniSource Division Manager Chris Charlebois is assigned to Mansfield to effect change at the facility (July 2015)

In July 2015, OmniSource assigned a Division Manager, Chris Charlebois, to its Mansfield facility to assume an executive management role (as co-manager) in order to mentor existing management, bring the facility in line with the Company's change in culture, specifically in helping move that facility forward in its standards regarding safety, environmental metrics, team building and communications, and making sure the local managers were working within the collective bargaining agreement. Tr. at 53-54, 107-08, 731, 933, 951-52. Charlebois was a long-time, respected employee. *E.g.*, 1000; 1010 (accusations Charlebois grabbed someone were inconsistent with his "normal demeanor"); *id.* at 53-54 (Charlebois entrusted to address culture and safety issues at Mansfield). Before Charlebois' arrival, Mansfield had a single plant manager, Bob Oney, who started working for OmniSource as a union employee, started working

in Mansfield in 2004, and had been Plant Manager for three years. Tr. at 862-63. Oney had a good personal relationship with many of the employees. *E.g.*, Tr. at 267, 891, 1030-32.

The employees in question, Thompson, Timman, Smith, and Dean, first encountered the new Mansfield co-manager Chris Charlebois at a mandatory monthly safety meeting held in July of 2015 in the Mansfield breakroom. Tr. at 207-08, 298, 573, 753. The meeting was run by OmniSource's Mid-Ohio Safety Coordinator, Eric Murray. Tr. at 208, 298-99, 372; GC Ex. 1(j) ¶ 5, at 3-4. To illustrate a point about teamwork, Murray brought a Jenga game (wooden blocks forming a tower). Tr. at 208-09, 299-300, 372, 574. According to Thompson, Charlebois was asked to participate and, in response, Thompson, who had never met Charlebois before, stated, "Yeah. You should do it, because it would take a member of management to fuck it up." Tr. at 209-10, 253-55, 300, 372, 575. Charlebois said, "I can see you're the smart-ass in the group," and told Thompson to sit down and pay attention. Tr. at 211, 300-01, 373, 585, 757. Thereafter, Charlebois judged Thompson to be someone who was rude, sarcastic, disengaged, distracting the other employees, on his cell phone, and agitated. Tr. at 754-55. Notwithstanding Thompson's antics, some of the employees did participate in the teambuilding exercise. Tr. at 376.

Despite being told by some co-workers that he had "pissed off" the new boss, as Thompson was leaving the meeting he intentionally knocked the Jenga blocks over. Tr. at 212-13, 254-56, 301, 375. Notwithstanding his conduct at the meeting, Thompson was never disciplined and the Union did not counsel Thompson about his conduct in the meeting. Tr. at 375-76, 381, 383. Following that meeting, Thompson would sometimes refer to Charlebois amongst themselves as "grumpy grandpa" or as "Walter," a reference to scowling, argumentative, and angry puppet made famous by comedian/ventriloquist Jeff Dunham. Tr. at 214, 256, 303, 583.

III.C.2. Union representatives and employees resist Charlebois' attempt to implement change in Mansfield

In connection with his duties as co-manager, Charlebois joined two management/employee committees. Tr. at 202. Roy Thompson served on the Mansfield Safety Committee and Survey Committee. Tr. at 200-01, 204, 245-46. Through the Safety Committee, safety issues affecting the facility could be raised, such as ensuring the employees had the right kind of gloves they needed, a safety issue the Company, in fact, addressed as a result of the Committee's work. Tr. at 202-03. The Mansfield Safety Committee was also responsible for installing handrails on the scales, putting ice stops on the roof, and switching the swing operation of a door. Tr. at 405-06. The Survey Committee was designed to improve communication and trust between the employees and management. Tr. at 206, 246-47. For instance, one employee suggested pre-work meetings, and, in response, management started having such meetings. Tr. at 206-07.

Despite these accomplishments, Thompson quit the committees, claiming that because not every suggestion was adopted by management, the Company did not take the employees' suggestions seriously, and he encouraged others to quit. Tr. at 203-04, 207, 247-49. Thompson personally laid the blame with Charlebois. Tr. at 203. Other employees also blamed Charlebois for tightening up on policies and behavior that had been permitted under Bob Oney. *E.g.*, Tr. at 959-60. For example, Oney did not require the employees to adhere to the time limits for breaks. Tr. at 959, 1029-32. Oney also was more permissive of the use of cell phones on the job and smoking at the facility. Tr. at 959. Following Charlebois' arrival, employee Gary Sutherland was disciplined for using his cell phone. Tr. at 959, 1031-32. Simply put, "[the employees] didn't like [Charlebois'] being there." Tr. at 960.

III.C.3. An uneventful LMC meeting where no one complained (December 2, 2015).

Regular Labor Management Committee (LMC) meetings are held in the conference room at Mansfield. Tr. at 309. The LMC is a cooperative between the Union and management designed

to work together on issues, find common ground, and attempt to avoid the grievance process. Tr. at 711, 926-27. One such regular meeting of the LMC was held on December 2, 2015.

In attendance for the Company were co-Managers Oney and Charlebois, Human Resources Manager Linda McKinley, co-Transportation Manager Pat Harte, and Scale Master/Dispatcher Curt West. Tr. at 46, 48 52, 308, 315-17, 514, 587, 657, 693, 711, 865, 926. In attendance for the Union were unit representatives Timman, Dean, and Smith. Tr. at 308, 514, 586. In order to fit everyone around one table, the chairs are typically very close to each other and a person could physically touch someone on either side of them. Tr. at 523, 559. Given the size of the room, one can generally hear what is being said at the table. Tr. at 660-61.

The meeting was congenial and it concluded with the group scheduling their next meeting. Tr. at 939. McKinley personally was pleased with the overall tone of the meeting and the examples of engagement she saw between labor and management. She thought to herself, “Gosh, this is good. This is – we’re achieving what the company would like us to achieve.” Tr. at 933.

III.C.4. Thompson refuses the request of three supervisors to fill out a routine safety report, agrees to fill out the report after a meeting with management and the union, and only later claims to have been physically assaulted before and verbally threatened in the meeting (December 7, 2015).

Around Thanksgiving 2015, Thompson experienced a safety problem while operating a crane with a 72” magnet to load railcars. Tr. at 215. Thompson believed the magnet was too heavy for the crane and it created a safety issue which eventually resulted in the magnet damaging a ladder on the front of the crane’s base. Tr. at 216. At no time did anyone blame Thompson for the damage or the incident. Tr. at 256-57.

That same day, Thompson’s supervisor asked him to fill out a safety report about the crane malfunction. Tr. at 218. The system of reporting incidents – Intalex – is designed to allow all Company facilities to learn about safety issues, such as near misses, and see if such incidents can

be avoided in the future. Tr. at 54, 875-76, 907-08. It was a relatively new system, having been implemented only three or four months before Thompson's incident. Tr. at 886.

Thompson refused his supervisor's request, claiming the Company would use the statement to blame him for the damage. Tr. at 218-19. Thompson's supervisor told him that it was not a big deal but the Company was requiring such safety reports to be completed. Tr. at 219.

Thompson flatly refused his supervisor's request – twice. Tr. at 219, 257, 876. About a week later, Mansfield co-manager Bob Oney asked Thompson to fill out the safety report. Tr. at 219, 257, 877. Thompson again refused to fill out the report and accused OmniSource of trying to start a paper trail on him. Tr. at 257, 877.

During a conference call involving Oney, Charlebois, McKinley, and Regional Manager Carman, Oney reported that Thompson had refused his supervisor's request to fill out a report about the incident with the crane. Tr. at 719. Carman and McKinley pointed out the importance of the reports in following the safety culture of OmniSource's parent company and they asked Oney and Charlebois to explain to Thompson the importance of the report, to get the report completed, and to report back to them. Tr. at 716.

Oney met with Thompson and he again absolutely refused to make the report. Tr. at 719. After Thompson refused both his direct supervisor and the facility's co-manager, Oney contacted Unit Griever Timman to meet with Thompson respecting the refusal. Tr. at 219-20. Oney wanted Charlebois to explain to Thompson the importance of the safety report and the Company's safety culture and why the Company was requiring the reports. Tr. at 719. Oney shared with Charlebois that he was having a hard time getting Thompson to buy into the safety program, despite Oney's numerous attempts to assure Thompson the information on the form would not be held against him. Tr. at 879. For his part, Charlebois was unaware of any

employee ever refusing to fill out an incident report. Tr. at 787. Although there were compliance issues in the past, it was generally because the supervisors were not having the employees fill out the reports; not that the employees were refusing to fill out the reports. Tr. at 787-88, 789.

On December 7, 2015, Thompson was called in to meet with Timman, Oney, and Charlebois to discuss the uncompleted report. Thompson was entering the Mansfield conference room about five feet behind Timman. Tr. at 220, 221. All four men entered the conference room and at no time before they entered the room, during the conference, or immediately after were any allegations made that an assault (or grabbing, or spinning around and holding) had occurred in the hallway as the men were walking through the door. Tr. at 389, 883-84, 891-92, 896.

Despite only moments having elapsed since the alleged assault, and despite being right next to his Unit Griever, Thompson said nothing to Timman about any alleged assault in the corridor. Tr. at 224, 275, 388, 389. Nor did Thompson ever claim he suffered any injury or where, exactly, he had been allegedly grabbed. Tr. at 388.

Charlebois told Thompson that Thompson had to fill out an incident report and that he did not do anything wrong, but was correct in letting his supervisor know about the incident. Tr. at 224. The Company repeatedly reassured Thompson that the report would not be used against him, but Thompson was agitated and concerned. Tr. at 260, 339, 720. According to Oney, Thompson was very confrontational at the meeting and constantly interrupted Charlebois claiming this was all designed to create a reason to justify firing Thompson. Tr. at 885.

Charlebois spent most of his time talking about the importance of safety. Tr. at 720. When Thompson again refused to fill out an incident report, noting he had wrecked equipment before without having to fill out a report, Thompson asked what would happen if he didn't fill out a

report. Tr. at 720. Charlebois responded that Oney would have to write Thompson up for insubordination and Thompson could be suspended for a day. Tr. at 720, 889. 268, 339, 720, 889. Timman encouraged Thompson to fill out the report. Tr. at 721. At the time of the meeting, Timman knew that at least two other persons at Mansfield had been asked to fill out similar incident reports. Tr. at 386. Even though Timman told Thompson that others had filled out such reports, Thompson still refused to sign. Tr. at 387.

At this point, Thompson had been told by three supervisors and one Union official that he should fill out the report, but the only discipline discussed was a possible one-day suspension if he refused. Tr. at 387. Thompson still refused to fill out an incident report, even though – incredibly – Thompson later claimed he was afraid he would lose his job if he spoke up about Charlebois' alleged grabbing of him. Tr. at 257-58.

According to Oney, in discussing the safety program and Intalex, Charlebois said that everyone needed to conform to the new programs and that some old dinosaurs would not survive (in the context of buying into the new safety programs). Tr. at 916-17. At no time did Charlebois ever mention shooting anyone or anything. Tr. at 715, 935; Co. Exs. 5-6. According to Charlebois, "Near the end of the meeting, which only lasted maybe seven minutes, I made reference to a dinosaur to Timman. 'Here's an example of an employee who is a dinosaur. How do we get them to buy in?'" Tr. at 715, 721. Charlebois recalled saying such dinosaurs would be left behind (not that they would not "survive" – and certainly not that they would be "shot"). Tr. at 790-91. Thompson still refused to fill out a report, fearing it was a ruse designed to "develop some kind of paper trial on [him]." Tr. at 225. The meeting then ended and Oney and Charlebois left Thompson and Timman alone to discuss matters. Tr. at 721.

About a minute or so later, Timman came into Charlebois' office and said Thompson would fill out the report so long as Bob Oney wrote across the top of it "Will not be used as discipline." GC Ex. 17, Tr. at 340-41, 721. This compromise was suggested by Union officer Timman and the Company honored his request. Tr. at 390. (Tellingly, even when left alone with his Union representative, Thompson said nothing about the alleged grabbing.) Thompson's "report" stated, "Travelling the crane and the stick began to bleed off rapidly. I could not stop the crane to prevent it from hitting the ladder on the base of the crane. Immediately informed the supervisor – I was forced to write this statement." GC Ex. 17. Charlebois walked back into the room and thanked Thompson for filling out the report. Tr. at 721.

III.D. The Grievance and Ensuing Investigation

III.D.1. The Union Presents the Handwritten Grievance (December 7, 2015).

According to Timman, following the December 7 meeting he walked to the break room and found Thompson "telling the guys in the break room what was going on or what happened to him." Tr. at 341. This included Thompsons telling his fellow employees that Charlebois "grabbed" him. Tr. at 341. Unit Recording Secretary Darrell Smith first learned of the alleged incident when Thompson came back to the torching shanty and said he wanted to file a grievance because Charlebois grabbed him and commented about shooting old dinosaurs. Tr. at 593.

According to Thompson, just before the meeting, Charlebois came out of his office put his hand out like he wanted to shake Thompson's hand. Because Thompson didn't want to shake Charlebois' hand, Thompson proceeded to walk by. Thompson claims that Charlebois reached out and grabbed Thompson and pulled Thompson to him, saying, "What's wrong with you? You don't shake a man's hand when he puts it out in front of you?" Tr. at 221; *see also* Tr. at 264-65. Thompson reportedly said "no" and went into the conference room. Tr. at 221. Thompson

conceded that Charlebois did not appear to be upset and spoke to him in a normal tone of voice. Tr. at 275-76. As to the nature of the alleged grabbing, Thompson claimed Charlebois grabbed him by his jacket and pulled Thompson approximately one foot toward him, against Thompson's shoulder. Tr. at 223. Thompson also claimed that "*throughout* the [December 7 meeting, Charlebois] has said something to the effect of, you know, "People are going to conform to my way, or all the old dinosaurs will be shot." Tr. at 225 (emphasis added). Charlebois spoke in a normal tone of voice and did not whisper it. Tr. at 275.²

Timman and Smith had Thompson write up his allegations and later on December 7, 2015, they presented the write up as a "verbal" first step to Charlebois and Oney. Tr. at 342, 594.

Thompson's signed statement said:

Chris told me that some people are going to conform to the way things are and some old dinosaurs will be shot. I felt threatened by this and I am fearful for my safety. This happened in the conference room at approximately 1 pm on 12-7-15. I feel unsafe and I fear for the safety of my union brothers. /s/ Roy Thompson
12-7-15

I was walking through the hallway for a meeting with Bob [Oney] and Chris [Charlebois]. Chris stuck his hand out to shake my hand and I just kept walking. He reached out and grabbed me pulled me backwards. Said, "You don't shake a man's hand when he holds it out." He let go and I kept walking. 12-7-15 /s/ Roy Thompson

GC Ex. 7.

When Charlebois read Thompson's statement, he turned to Oney and Timman and asked whether either had heard or seen anything in connection with the alleged comment or the alleged grabbing and both denied hearing or seeing any such thing. Tr. at 724, 897. Since he had heard

² Although Timman admitted hearing Thompson relate his story to his co-workers, Timman initially claimed shortly thereafter that he did not remember hearing Charlebois say anything about shooting anyone or anything. Tr. at 341, 949. If Thompson's claim that Charlebois stated *throughout* the meeting that old dinosaurs would be shot were true – and the evidence demonstrates it's not – Timman's claim to forgetting a repeated theme of violence is even more unbelievable.

and seen nothing and nothing had been said to anyone about the alleged grabbing at the time it occurred, Oney, who knew these men well, concluded immediately that Thompson's statement wasn't true. Tr. at 891, 895, 896.

Smith and Timman both concede that Charlebois denied ever grabbing Thompson. Tr. at 407, 594-95. Smith recalled Charlebois denying Thompson's allegations, but Timman – who incredibly also claimed not to remember hearing the comment himself initially – asserted Charlebois did not deny making the alleged December 7 dinosaur comment. Tr. at 345, 949. Importantly, at no time did the Union bring up any other alleged comments made by Charlebois about dinosaurs when presenting the verbal grievance. Tr. at 636.

After receiving Thompson's statement, Bob Oney made a copy of it and called Human Resources Manager Linda McKinley as well as Oney's boss, Rob Carman. Tr. at 899. McKinley was about to leave for an appointment when she received Thompson's handwritten two part statement. Tr. at 935. She called Oney and Charlebois and asked what was going on. Tr. at 935. Both denied that Charlebois had said anything about shooting anyone or anything and Charlebois said he never grabbed Thompson. Tr. at 935. Charlebois stated he had never done any such thing in his life. Tr. at 936.

On the evening of December 7, 2015, Charlebois contacted Carman and personally informed him of Thompson's grievance. Tr. at 795. Charlebois was emotional about the false accusations that had been made against him, and he again denied ever grabbing Thompson or asserting anything to the effect of shooting dinosaurs. Tr. at 795-96. Carman then contacted his boss, Mike Herrmann, the Division Manager of the Northern and Mid-Ohio facilities and an investigation started. Tr. at 796, 797; GC Ex. 1(j) ¶ 5, at 3-4.

III.D.2. Mansfield Union employees demand Charlebois' suspension and the written grievance report is prepared citing a workplace policy requiring the termination of anyone engaging in workplace violence or making threats (December 8, 2015).

On the next day, December 8, 2015, the yard employees were in the break room talking about the alleged incident and asking Oney why Charlebois was still at Mansfield. Tr. at 598-99. At the least, the employees wanted Charlebois suspended. Tr. at 599. That day, Timman drafted a written grievance about the alleged incidents with the input of Unit Chair Dean. Tr. at 345, 525. Despite the fact that he saw and heard nothing, Timman repeated Thompson's claims and told Dean Charlebois grabbed Thompson, turned him around, and later said "you will comply and the old dinosaurs will be shot." Tr. at 527. Timman asked Dean under what section to file the grievance and Dean told Timman to file it under the Letter of Understanding. Tr. at 525.

The Grievance Report filed on December 8, 2015 stated, "Roy Thompson on or about the time stated above [December 7, 2015 at 1:00 p.m.]. His concern for his and other union members safety. See written statement provide dated 12-7-15. Both verbal and physical threat's apply." GC Ex. 2. The Grievance specifically cited the March 2, 2012, Letter of Understanding that provides "any verbal or physical altercation ["altercation is defined as a physical threat or physical harm"] that occurs in the workplace *will result in immediate discharge* for all parties involved in that altercation. GC Ex. 3 (emphasis added). The attachments were the two handwritten statements Thompson had made on December 7. GC Ex. 7.

III.D.3. The Company begins its formal investigation and the employees now claim Charlebois threatened to shoot them six days earlier (December 8, 2015).

OmniSource's Corporate Human Resources Manager, Andrew Ables, tasked Mid-Ohio Human Resources Manager McKinley, with investigating Thompson's allegations against Charlebois. Tr. at 925. On December 8, McKinley was scheduled to be in Toledo for her annual performance review with Ables and Herrmann. Tr. at 936. Carman met with McKinley in

Toledo and McKinley told him she had been tasked with investigating the grievance. Tr. at 797-98. Carman assisted McKinley in the investigation. Tr. at 798.

While in Toledo, McKinley received a call from Union representative Donnie Blatt who told her Dean claimed a “supervisor in Mansfield [was]threatening to shoot people, had been grabbing people, and also threatening to hold machine guns to their head to get them to do something.”³ Tr. at 937. McKinley said she was aware of Thompson’s statement but told Blatt she knew nothing of anyone claiming Charlebois threatened to hold a machine gun to someone’s head. Tr. at 937. McKinley also commented that she was surprised any such thing could have happened since Timman was present at the December 7 meeting. Tr. at 937, 938. When Blatt raised the LMC meeting, McKinley told Blatt she could not believe there was any inappropriate comment made at the LMC meeting because she was there and the meeting was good and congenial. Tr. at 939. McKinley then headed to Mansfield. Tr. at 940.

Carman contacted the people at Mansfield closet to the hallway. Tr. at 798. Carman made notes of his conversations and forwarded them to McKinley. Tr. at 799-800, 806; Co. Ex. 22. Amy Allen, whose desk was no more than 10 feet from the hallway where the grabbing allegedly occurred, stated she did not see or hear anything in relation to the alleged hallway assault. Tr. at 801-02. The next closest people, Curt West and Amy Saunier, were about fifteen feet away they too did not hear or see anything to corroborate Thompson’s claim that he was assaulted in the hallway. Tr. at 803. Carman then called Oney to get his version of events. Tr. at 804. Oney said Thompson was agitated during the December 7 meeting and was concerned the Company was trying to get rid of him. Tr. at 805. Oney told Carman he did not hear Charlebois make any statements about shooting dinosaurs. Tr. at 805.

³ It was not unusual for McKinley to receive calls from Blatt about a grievance. She believed they had a good working relationship. Tr. at 948.

When McKinley arrived in Mansfield later on December 8 she asked to meet with Oney and Timman to discuss the allegations. Tr. at 941. Timman asked for Smith to be present, and McKinley agreed; the meeting started at 12:50 p.m. Tr. at 941; Co. Ex. 9. They then discussed the additional allegations as to what Charlebois allegedly stated at the December 2 LMC meeting.⁴ Tr. at 941-42. McKinley asked each how, if the alleged statement about putting a machine gun to the employees' heads was made, did no one say anything about it. Tr. at 942. Timman responded, "'Well, I just thought [the alleged statement] was a figure of speech.' And [Smith stated] 'I didn't think much of it at the time.'" Tr. at 942-43.

McKinley asked Smith whether they were taking the alleged December 2 comments out of context, but Smith refused to comment on the context and just claimed to report what Charlebois said. Tr. at 605-06. Although they were also present, McKinley and Oney never heard the alleged statement. Tr. at 874, 943. McKinley reminded Timman that she was sitting right across from him and Charlebois when the alleged threat was supposedly made. Tr. at 943.

⁴ At the hearing, Timman and Smith both said they heard Charlebois say something to the effect of "What do I got to do, hold a machine gun to you guys to get something done here." Tr. at 312-13; *id.* at 590 (testimony of Smith). Timman claimed that, in response, Timman called the co-manager "Stalin" sarcastically (or arrogantly), to which Charlebois allegedly asked "where he could buy a union job." Tr. at 313, 590. Timman allegedly responded (again, allegedly sarcastically) "Tammany Hall." Tr. at 313, 412.

After indicating at the hearing that he could recall no more about the conversation, when the General Counsel asked whether Charlebois made a response to Timman's "Okay Stalin" comment, Timman then recalled Charlebois said Stalin was "worse than Hitler." Tr. at 313-14. Timman denied that when he compared Charlebois to a dictator responsible for the deaths of millions of people that he was trying to challenge, intimidate, or upset Charlebois. Tr. at 413. Timman testified that they were both being sarcastic and neither was threatening the other. Tr. at 413-14. Smith said Timman and Charlebois "kind of went on with their conversation, so I didn't think that much of it, so I went back to talking to [McKinley]." Tr. at 590.

Dean testified that while engaged in a conversation with Pat Harte about trucking issues, he "heard Mr. Charlebois say, 'What do I have to do to get you to comply,' or 'listen.' . . . Hold a machine gun to your head?'" Tr. at 519. Despite hearing comments about a gun, Dean never looked up to see anyone's reaction to the comments. Tr. at 558. Dean then allegedly heard Timman say, "Who do you think you are, Stalin?" and either Charlebois or Timman said, "Worser than Hitler." Tr. at 519. But Dean never mentions "Tammany Hall." Nor do any OmniSource witnesses, even those asked about it specifically at the hearing. Tr. at 672.

Following the meeting, Dean never discussed the statement. Tr. at 519. Similarly, Smith never discussed the alleged comment after the meeting and never filed a grievance over it. Tr. at 634.

Smith then changed the subject to their dissatisfaction with the changes Charlebois ushered into the plant (such as enforcing the policies about cell phone usage and break times), how they didn't like the changes, and arguing the Company should make changes gradually instead of being firm on the policies all at once. Tr. at 606, 959, 1029-32. When McKinley pointed out that the employees should not hold the person implementing the changes personally responsible for the making the changes, they said they knew he was the one behind the changes and that's why the changes were happening. Tr. at 960. "They didn't like [Charlebois] being there." Tr. at 960.

When McKinley asked about the allegation that on December 7 Charlebois said something about shooting dinosaurs, Timman stated that he might have heard something about dinosaurs, but did not recall anything about dinosaurs being shot. Tr. at 945; Co. Exs. 6, 9 (Oney's and McKinley's contemporaneous notes on this meeting). McKinley also asked Timman in that first meeting whether he heard anything in the hallway or whether Thompson acted funny when he came into the room for the December 7 meeting. Timman replied that he saw nothing out of the ordinary. Tr. at 945-46.

Later that day (December 8), McKinley had another conversation with Blatt in which she shared with him the conflicting stories she gathered. Tr. at 946-47. Blatt asked McKinley to bring Timman and Smith, as Union stewards, into the conference room so they could discuss the issues together and she did. Tr. at 612, 948-49. When McKinley asked Timman to bring Blatt up to speed on what had happened, Timman then stated (contrary to his prior statements) that he had, in fact, heard Charlebois state that dinosaurs would be shot and that the statement made the hair on his head stand up. Tr. at 949. McKinley could not believe what she was hearing. Tr. at 949. When McKinley pointed out that was contrary to what Timman had previously told her, he replied, "I just remembered." Tr. at 949; Co. Ex. 9. McKinley again noted to Blatt that the

Union was saying one thing and management was saying another. Tr. at 950. Discussing the LMC meeting, McKinley pointed out that neither she nor Oney heard any such statement respecting machine guns. Tr. at 968. Blatt said that he didn't care if the accounts conflicted: "We need to follow the agreement. If our guys are being threatened, then we need to follow the letter of understanding or we need to be bringing back others that may have been terminated."⁵ Tr. at 613, 950. 968. The others Blatt wanted the Company to rehire were an employee who the Union acknowledges called his coworker a fucking faggot and threatened to bash his head in and another who said he was going to take a coworker up on the roof and beat him up. Tr. at 968-69.

Also that day, Oney approached McKinley to report employees wanted to talk to them about crisis counseling. Tr. at 962-63. They claimed to be afraid because Charlebois was still at Mansfield. Tr. at 963. McKinley offered the free company assistance program, but no one used it, a fact unrebutted by the Union. Tr. at 966-67. Employee Gary Sutherland (who had been suspended for using his cell phone after Charlebois arrived, Tr. at 959) told McKinley that if Charlebois was still there on December 10 he would call the police. Tr. at 965. About ten employees were present for this conversation, but none appeared fearful or distraught. Tr. at 963-64 ("They might have been asking if they could have pizza rather than the hamburger we brought in . . . [T]here was nothing in their physical demeanor to indicate they were distraught."). Oney eventually told them to go back to work. Tr. at 964.

As part of her investigation, McKinley also asked all of the OmniSource management who attended the December 2, meeting whether they heard Charlebois say anything related to guns at the meeting, and none heard any such thing. Tr. at 968, 1018-19; Co. Ex. 10-12; *see also* Tr. at

⁵ Importantly, Blatt did not testify to refute *any* of this evidence.

661, 664, 699-701, 703, 712, 867, 874, 904, 906. Later, McKinley spoke with Charlebois and he was distraught over the false allegations made by the employees against him. Tr. at 969.

III.D.4. Timman claims to remember yet another “dinosaur” comment.

At the hearing, Timman also testified respecting another comment Charlebois supposedly made about dinosaurs, but Timman never asserted he informed the Company about it. Linda McKinley specifically testified that she did not recall Timman making such an allegation, and, importantly, none of the contemporaneously created, detailed statements documenting the investigation reference this alleged additional allegation against Charlebois, including those statements Timman wrote himself. Tr. at 1028. Accordingly, there is no credible evidence to show Timman provided the information to the Company,⁶ and Timman’s changing his story is well documented as his standard mode of operation.

III.D.5. Because OmniSource did not remove Charlebois from Mansfield, an employee, who was suspended after Charlebois became co-manager, calls the police to report Charlebois (December 10).

As he threatened to do if Charlebois remained at Mansfield, on December 10, 2015, Gary Sutherland called the police and reported the allegations against Charlebois. Tr. at 231-32, 282. Sutherland claimed to be concerned that Charlebois would attack him or someone else. Tr. at 232. The police came to the site and investigated what they deemed in their report to be an allegation of aggravated menacing with a personal weapon, in violation of Ohio Rev. Code 2903.21. *See* G.C. Ex. 19.

⁶ At the hearing, *Smith* testified that on December 8 Timman told McKinley that December 7 was not the first time Charlebois made comments about dinosaurs. Tr. at 602-03. The alleged statement was supposedly made on December 3 before a meeting where Charlebois stated, apparently in reference to Bethlehem Steel, that “the old dinosaurs will comply or will be left behind . . .” Tr. at 325. Interestingly, this additional remembered comment more closely tracks Charlebois’ memory of the December 7 meeting – that he said something along the lines of “here’s an example of an employee who’s a dinosaur who will be left behind.” Tr. at 790. There is no explanation in the record as to why Timman did not disclose this alleged exchange at the time the Company was investigating.

As the identified victim, Thompson spoke to the police about the alleged grabbing incident. Tr. at 231, 282. As detailed in the report, Thompson's version was that when he walked past Charlebois in the hallway, Charlebois "grabbed ahold of [Thompson's] arms and spun him around holding [Thompson's] arms and stated, 'What's wrong? You're not going to shake a man's hand?'" G.C. Ex. 19. The report further detailed that Thompson said Charlebois told him in the meeting "Everybody is going to conform to my ways or all you old dinosaurs are going to get shot," a statement Timman *corroborated to the police*. G.C. Ex. 19. Thompson also told the police that Charlebois had threatened to use guns against employees before and that he felt threatened by the statement and by the fact that Charlebois had access to the employee files. Tr. at 260; G.C. Ex. 19. Following the interview, the police told Thompson that he would have to convince the district attorney to file charges against Charlebois. Tr. at 232; GC Ex. 7, 18, 19.

Thompson claims that the officer making the police report got everything right except the *key details* about the alleged hallway assault and, this time, the remark had Charlebois threatening "all *you* old dinosaurs." Tr. at 234-35, 262-63; GC Ex. 19. Thompson also claims that he spoke with the District Attorney but he refused to prosecute Charlebois due to the lack of any bodily harm and the fact that the alleged statements by Charlebois were nothing more than hyperbole. Tr. at 236-37. Though the District Attorney apparently did not give much credence to Thompson's story, the Company did hire security on site for a few weeks to address the employees' stated concerns. Tr. at 965-66.

III.D.6. The investigation continues (December 9-11, 2015).

On December 9, McKinley compiled the notes from her various meetings and investigation from December 8 and waited for additional statements to come in that she had requested respecting the alleged incidents. Tr. at 349, 530, 609, 951, 954, 971, 1036-37; Co. Ex. 9.

McKinley compiled the statements she obtained on December 10 and provided them to Ables. Tr. at 952-54, 972, 975; GC Ex. 4, 7, 32; Co. Ex. 4-11. Additional documents were sent to Ables on Friday December 11, including McKinley's own statement, Timman's statement, and Charlebois' statement. Tr. at 717, 725, 977; GC Ex. 27, 35, Co. Ex. 12, 21.

III.D.7. The Company seeks more detailed information from the employees, the Union continues to demand Charlebois' removal, and Timman "takes the Fifth." (December 14, 2015).

On December 14, McKinley returned to Mansfield, as instructed by Herrman and Ables, to again meet with the employees and ask more specific questions, since their statements lacked detail and the evidence was conflicting. Tr. at 981; GC Ex. 37. She asked Smith, Dean, and Timman the same set of questions about the December 2, LMC meeting, typed their answers, allowed the employees to read their answers to ensure they were correct, and then had them sign their typed answers. Tr. at 981-82; GC Exs. 25, 28, 33. None of the individuals claimed to have been scared by the statements Charlebois allegedly made at the LMC meeting. Tr. at 986.

In Timman's and Smith's signed written statements, they were specifically asked what was being discussed before the comment was made. *Neither* claimed Charlebois was repeatedly requesting that they rejoin the Safety and Survey Committees. *See* Co. Exs 25, 33. Nine months later at the hearing, they both testified in detail that Charlebois repeatedly pressured them to rejoin the committees and then, only after Timman and Smith finally relented, Charlebois stated, "What do I got to do, hold a machine gun to you guys to get something done here?" Tr. at 312-13 (testimony of Timman); *id.* at 590 (testimony of Smith). This detail on the specific context of Charlebois' alleged statement is even more striking in Smith's case since in his signed, written statement made within two weeks of the meeting Smith told OmniSource, "*I don't even remember; before or after the statement to tell you the truth.*" Co. Ex. 33 (emphasis added). By

the time he testified before this tribunal nine months later, Smith's "memory" as to what was said had changed dramatically. *See* Tr. at 587-91 (providing substantial details in response to the General Counsel's question about his recollection of the December 2 LMC meeting). How Smith managed to remember so vividly what he had forgotten so quickly is never explained.

Following Unit Chair Dean's interview, Dean told McKinley he had a couple questions for her and asked the uniformed police officer who was at the facility providing security to come into the room to witness his questions to McKinley. Tr. at 538. Dean asked her why Charlebois was still at the facility and stated "that the employees were in a state of panic because someone was on site and had threatened to shoot them, and that the individual that had made the threat was still there, and they wanted him gone." Tr. at 988, 538.

When McKinley stated the Company was still investigating the charges, Dean said it should be honoring the agreement, Charlebois should not be at work, and Dean threatened to file more charges against the Company. Tr. at 539, 989. Dean looked at the police officer and told him that "there's people out in the yard that are disturbed about this. You hear of workplace violence like this all the time on the news." Tr. at 539. At that time, the Company had provided uniformed officers on site, Tr. at 965-66, and McKinley reminded Dean that she had also offered to bring someone on site on December 8 for counseling and that information on the employee assistance program was posted. Tr. at 990. McKinley documented the meeting, erroneously noting in her document that the meeting occurred on December 15. Tr. at 991; Co. Ex. 23.

McKinley also attempted to have Thompson and Timman answer additional questions about the events of December 7. Tr. at 993-94; GC 18, 33. Thompson met with McKinley in the presence of Oney and Timman. Tr. at 228. Thompson signed the written statement with the caveat that it was only "to the best of [his] recollection" since it had been "over a week since

[his] original statement.” GC. Ex. 18. In his December 14 interview, Thompson claimed Charlebois “grab[bed] a hold of me and pulled me backwards towards him. He said what’s wrong with you don’t shake a man’s hand when he puts it out to you. *And that basically scared the shit out of me because I have never had anyone put their hands on me in the time I’ve worked here. I felt very intimidated.*” *Id.* (emphasis added). Thompson claims he said nothing to Charlebois because he didn’t want to lose his job. *Id.* Thompson reported that he took Charlebois’ alleged statement – that “people were going to conform to his new way or the old dinosaurs were going to be shot” – “as a threat.” *Id.* When asked why he didn’t say anything during the December 7 meeting – where he repeatedly defied management’s requests to fill out an Intellex report – Thompson stated “I’m not suppose [*sic*] to say something to management. I’m suppose [*sic*] to go to the union and they will handle it.” *Id.* (emphasis added).

McKinley asked to meet with Timman again, and Timman asked Smith be present. Tr. at 518. When McKinley asked Timman questions about the December 7 meeting, Timman refused to comment and “plead[ed] the fifth.” GC Ex. 26; Tr. at 357. When asked why he would not give any further statements on the matter, Timman claims that he “just felt that [he] had given enough statements already.” Tr. at 362. Despite the fact that he pleaded “the Fifth” and refused to give any more statements, when asked about whether he knew his own actions could be the subject of discipline, Timman claimed he had no idea that could be the case. Tr. at 365-66.

On December 14, 2015, McKinley forwarded all statements she collected that day to Ables. Tr. at 994-96; GC Ex. 18, 25, 26, 28, 33, Co. 15, 16; Tr. at 998 (stipulation that Ables received documents referenced during investigation). At the conclusion of her part of the investigation, McKinley was convinced that the employees were lying to get rid of Charlebois. Tr. at 1001-03. She expected that an employee might say during the investigation that they had exaggerated

about Charlebois' statements at the LMC meeting (since she was there and saw what happened), but that never happened. Tr. at 1003. As to the alleged grabbing incident, McKinley found Thompson's statement implausible because he never said anything initially, his behavior was not different in the meeting immediately following the alleged assault, and no one heard or saw the alleged incident, even though there were people very close by. Tr. at 1005-07. The allegations were also contrary to her own knowledge and experience with Charlebois. Tr. at 1000.

III.D.8. The Union questions Charlebois and the Company tells the Union there will be consequences for lying (December 15, 2015).

On December 15, 2015, a regularly scheduled step-three grievance meeting was held at Mansfield. Tr. at 996. Present for the Union were Dean, Timman, Smith, Tim Philpott (who is currently the Local Executive Secretary), and International Representative Blatt, and for the Company were Charlebois, Ables, McKinley, Oney, Carman, and parent company SDI's Corporate Security Director, Joel Squadrito. Tr. at 540, 620, 996; GC Ex. 1(j) ¶ 5, at 3-4; GC Ex. 1(g) ¶ 6, at 2. At that point, no decision had been made respecting the investigation and the Company wanted to hear any other information that potentially could be relevant to the investigation. Tr. at 100.

At the end of the meeting, the attendees discussed the allegations against Charlebois. Tr. at 620-21, 996. According to Smith, Blatt pointed to the Letter of Understanding and said that other employees were fired for violating the policy and that the Letter also applies to management. Tr. at 621. Ables stated that the Company was not through with its investigation. Tr. at 621. In the spirit of cooperation, Ables allowed Blatt to question Charlebois about the allegations and Charlebois again denied making any threats or grabbing Thompson. Tr. at 409-10, 998. Charlebois pointed out that he owned no guns. Tr. at 410. Smith testified that at the meeting Timman called Charlebois a "fucking liar." Tr. at 622.

In discussing the investigation, Dean specifically denied to Ables any wrongdoing on the employees' part: "We ain't got nothing to hide. We didn't do nothing wrong." Tr. at 312-13; *see also id.* at 622 (testimony of Smith). According to Dean, Ables said to him in a stern, strong voice "If I find that you are – you guys are lying, there will be consequences." Tr. at 543-44, 567. In response, Dean told Ables he took that as a threat.⁷ Tr. at 544. Dean felt that Ables was threatening his livelihood. Tr. at 567. Smith testified that Ables stated that the investigation was still ongoing "and the guilty parties will be held accountable," a statement at which Dean took offense to the statement. Tr. at 623. As to whom the phrase "guilty parties" referred, Smith said Ables looked at Smith, Dean, and Timman when he said the words and indicated that they (Smith, Dean, and Timman) would be held accountable. Tr. at 624. When asked whether he knew management was going to issue discipline to anyone, Smith stated that, based on those comments, he knew that "it was on us now." Tr. at 624. Thus, the employees and the Union were on notice that the Company was investigating them.

III.D.9. The Union proposes a solution: move Charlebois to another OmniSource facility.

On the day before the employees were terminated and before Ables had made a decision, the Union verbally proposed to resolve Thompson's grievance. Tr. at 75-76, 78-80; GC Ex. 12. As part of the proposal, OmniSource would be required to rehire two employees: one who both called his coworker a "fucking faggot" and threatened to bash in his coworker's head,⁸ and another who said he was going to take a coworker to the roof and beat him up. *See* GC Ex. 12; Tr. at 968-69. As for Charlebois, the dangerous supervisor assaulting and threatening to shoot employees? The Union demanded he be *moved* to the Toledo facility, also a Union facility. *See*

⁷ It is clear now that Dean, in front of the others, verbalized his understanding that they could be terminated.

⁸ Timman acknowledged this termination was valid. Tr. at 384.

GC Ex. 12; Tr. at 79-80, 173. For Ables, this showed the motivation behind the multiple fabrications and lies: to remove Charlebois from Mansfield. Tr. at 75-76, 79-80.

III.D.10. Based on the results of the investigation and input from his team (who were unanimous as to the outcome), Ables decides to terminate the employees who lied in an illegal attempt to remove Charlebois, and they are terminated on December 18.

Ables eventually made the decision to discharge the employees after gathering the input of numerous people and discussed the decision with McKinley, Carman, Oney, Herrmann, Midwest Executive Vice President Scott Gible, and OmniSource President Russ Rinn. Tr. at 42-43, 811. Among the input he received was Carman's conclusion that, based on the evidence gathered, the employees were not telling the truth and were just trying to remove Charlebois from Mansfield. Tr. at 811. Ables agreed. *E.g.*, Tr. at 63. All who participated in the investigation and discussed the matter with Ables agreed with Ables' conclusion regarding the employees' dishonesty and the decision to terminate them on seriousness of their conduct. Tr. at 43.

The four employees, Thompson, Dean, Smith, and Timman were terminated effective December 18, 2015. GC Ex. 8-11; Tr. at 101, 551-52, 625-28. At a meeting, which was also attended by Philpott as a Union representative, Carman read each of them a statement setting forth the reasons why they were being terminated. Tr. at 242, 367, 627, 631, 819-20.

In making the decision to terminate, Ables relied on numerous pieces of information, including the following:

- Oney's written statement about the December 7 meeting where there was no mention of any grabbing incident or of anyone being shot. Tr. at 141-42; Co. Ex. 5.
- Oney's written statement respecting a December 8 meeting with Timman, Smith, and McKinley where Timman first stated he heard something about a dinosaur, but did not recall the word being "shot," and, an hour later, on a call with the Blatt, Timman not only

stated he did hear a statement about dinosaurs being shot, but also stated that upon hearing such words it made the hair on his head stand up. Tr. at 145-46; Co. Ex. 6.

- Notes from McKinley's investigation. Co. Ex. 9; Tr. at 61, 151-52. Among other things, the detailed where Timman changed his story multiple times. Tr. at 153, 157-58, 160. They set out Thompson's statement that Charlebois stated dinosaurs would be shot and that Charlebois grabbed Thompson (statements Ables did not believe). Tr. at 155. They also set out McKinley's own statement respecting the LMC meeting that she was not aware of any machine gun reference and could not understand why none of the Union stewards brought up such a comment at the time if they believed it was threatening or inappropriate. Tr. at 155-56, 161. The notes also referenced the fact that no Company representatives at the December 2 LMC meeting heard Charlebois make any comment about a machine gun or shooting. Tr. 158-59, 161. McKinley's notes also recorded that Charlebois denied making any such statements or manhandling anyone ever. Tr. at 161.
- A December 9, 2015, email from OmniSource Transportation Manager Harte respecting the December 2 LMC meeting for which Harte was present and did not remember any statement made by Charlebois respecting guns or any statement by anyone that could be perceived as threatening. Co. Ex. 10; Tr. at 162, 165.
- A December 9, 2015, email from OmniSource's West respecting the December 2 LMC meeting that West did not remember any threatening comments or any talk about guns at the meeting. Co. Ex. 11; Tr. at 165-66.
- A December 11, 2015, written statement from McKinley respecting the LMC meeting that she participated in, describing it as "very amicable" and stating she "did not hear any threatening comments or any reference to the use of guns. Co. Ex. 12; Tr. at 166-67.

Ables found the statement very persuasive since he had worked with McKinley for years and trusted her unreservedly. Tr. at 167.

- McKinley's interview notes from a December 14, 2015, interview with Timman in which McKinley recorded that Timman said "I have already given an oral and written statement, I'm not the griever. At this time I will plead the fifth," and thereafter refused to answer any more questions about the incidents. Co. Ex. 16; Tr. at 167-69.
- A written statement from Smith respecting the December 2 LMC meeting and stating that "Kriss [*sic*] made the comment 'What so I have to do hold a machine gun to you to get something done around here' and Terry said who are you Stolland [*sic*]." Co. Ex. 4.
- A remarkably similar written statement from Dean respecting the December 2 LMC meeting and stating that "Kriss [*sic*] made a coment [*sic*] what do I have to do hold a Machine gun to you to get something done. Terry said who are you Stolland [*sic*]." Co. Ex. 7. Ables believed this statement and Smith's statement "were made up and false because they are so clearly written, similar misspelling words on things like the name Chris. Both spelled K-r-i-s-s. And a more uncommon name . . . "Stolland," and they virtually read the same, so it appeared to me and I believe that they did write these together or certainly in some way talked about these." Tr. at 147.
- A written statement from Timman respecting the December 2 meeting and stating "Chris stated something to the effect of having to hold a machine gun to us. I responded by calling him Stalin." Co. Ex. 7; Tr. at 150.
- Ables' conversations with Charlebois and his statement. Tr. at 44, 56-58, 193-94.
- Ables' conversations with employees at the December 15 grievance meeting. Tr. at 195.

As to how Ables reached the conclusion that the employees had lied about the grabbing incident and the allegations about guns or shooting people, Ables pointed to the following:

- Ables' own familiarity with the hallway in question. Tr. at 71; Co. Ex. 1.
- Ables' own knowledge and familiarity with Charlebois. Tr. at 44, 74, 178.
- Ables unreserved trust for McKinley who was directly across from Charlebois at the LMC meeting and heard nothing about a gun. Tr. at 167.
- The fact that Thompson (who was being brought into the meeting for his blatant defiance of Company policies and who has a history of speaking up in meetings) never said anything to his Union rep or anyone else in the December 7 meeting that he had just been grabbed and felt threatened. Tr. at 71-73.
- The fact that the entire December 7 incident, as Thompson related it, did not make sense to Ables. Tr. at 73.
- The fact that during the investigation into the December 7 incident Dean, Smith, and Timman, made false, defamatory, and slanderous statements that on December 2 Charlebois threatened to hold a gun (or a machine gun) to the employees' heads, an actual threat of harm as opposed to a metaphor of some sort. Tr. at 81, 83, 86, 89, 90-91, 103-04, 136.
- The fact that Timman was in the December 7 meeting with Thompson and lied about hearing a comment that Charlebois was going to "shoot" dinosaurs. Tr. at 92-93.
- The fact that Timman repeatedly changed his story about what he did or did not hear on December 7 from denying hearing anything to, eventually, claiming he heard exactly what Thompson claimed Charlebois said and that Charlebois' utterance was so shocking

“it made the hair on his head stand up.” *See* Tr. at 95-98, 146. There is no evidence to challenge this sequence of events.

- Timman’s “taking the Fifth” and refusing to answer further questions or sign a statement about what he saw or heard, indicating to Ables that Timman was lying and did not want to implicate himself any further. Tr. at 98.
- The fact that Oney contradicted the employees’ accounts of what was allegedly said at the meetings on both December 2 and December 7. Tr. at 142, 145-46.
- The fact that Charlebois denied that the physical assault and any of the verbal threats ever happened. Tr. at 57.
- The fact that, in making an offer to settle the grievance, the Union demanded that OmniSource *move* Charlebois – a person they claimed to fear as someone who would *murder* his co-workers – to another location, a demand that belied any true belief on their part that Charlebois was a danger to OmniSource employees. Tr. at 75, 79-80, 88, 90.
- And the fact that the Union’s demand to remove a manager was inappropriate and demonstrated that their lies were a ruse to orchestrate the removal of a manager they didn’t like. Tr. at 79-80.

III.D.11. Post-termination events: Charlebois sues for defamation, passes a polygraph, the Board investigates and finds sufficient evidence to charge the Union with interfering with OmniSource’s rights under the Act, and the evidence at the hearing is consistent with the OmniSource’s decision to terminate.

In February of 2016, Charlebois commenced a civil action against the four individuals for defamation. Tr. at 114-15, 127-28, 277, 781; GC Ex. 36. Thompson has not filed a counterclaim against Charlebois. Tr. at 277-78.

Though he was not required to do so, Charlebois willingly took a polygraph examination in order to protect his good name, his career, and his reputation. Tr. at 727. Charlebois heard from

Blatt and Dean that the Union guys were taking polygraph examinations and they wondered why Charlebois wasn't taking one. Tr. at 728. On February 5, 2016, Charlebois took a polygraph examination on the issue of whether he had threatened to shoot people at work and whether he physically assaulted Thompson. Tr. at 432-33, 441. The result of the examination was that "no deception" was indicated when Charlebois denied threatening to shoot people and denied grabbing Thompson. Tr. at 440; Co. Ex. 17-18.

After conducting its own investigation into OmniSource's charge against the Union, the Regional Director decided to issue a formal Complaint alleging the Union violated Section 8(b)(1)(B) of the Act by making maliciously false statements and by filing and processing a grievance for the purpose of obtaining the termination of Chris Charlebois, the manager OmniSource chose to represent it for the purposes of collective bargaining or the adjustment of grievances, charges. GC Ex. 1(g) ¶¶ 8, 10, at 3. Had the Board's "investigation reveal[ed] that there [was] not violation of the [NLRA] or the evidence [was] insufficient to substantiate the charge," under Board Rule § 101.5, the Regional Director would have recommended the Company withdraw the charge. Here, the Board issued a Complaint, an action fully consistent with OmniSource's own investigation and its decision to terminate the four employees.

The testimony elicited at the hearing is also consistent with OmniSource's conclusion that that the employees were lying about Charlebois' grabbing Thompson and threatening to shoot anyone and that they were lying to management in the course of the investigation. Unlike Timman's, Oney and Charlebois' statements about the December 7 meeting have never changed and are consistent that Charlebois never threatened to shoot anyone or anything. None of the persons who were close to the hallway heard any altercation. Tr. at 389, 713-14, 769-70, 883-84. And it was only well after the meeting occurred that Thompson claimed he was assaulted, even

though he had been left alone with his Union steward before he agreed to fill out the safety report and said nothing.⁹ Tr. at 341. Moreover, the fact that Charlebois is an experienced senior manager is flatly inconsistent with his, on numerous occasions, threatening to shoot his employees and manhandling one.

None of the five managers in attendance at the LMC meeting recalled any statements by Charlebois concerning guns or anything that could be perceived as threatening, and Charlebois personally denied making any statement about holding a machine gun to anyone's head to get them to do something. Co. Ex. 10-12; Tr. at 661, 699-701, 703, 712, 867, 874, 904, 906, 968, 1018-19. For his part, Charlebois did not recall having a conversation about Hitler and Stalin on that particular day, although he recalled such a conversation occurring at one time. Tr. at 738.

Bob Oney testified that he heard nothing about a gun or about Stalin or Hitler during the LMC. Tr. at 867, 874, 904, 906. Oney believes he absolutely would have heard a comment about a gun. Tr. at 904-05. Harte heard nothing unusual said by Charlebois at the meeting. Tr. at 661. West recalled that Timman and Charlebois had a conversation about history and did recall the names Hitler and Stalin being mentioned, but West did not hear any comments about guns. Tr. at 699-701, 703. West said Timman and Charlebois were speaking in a normal tone of voice and were not whispering. Tr. at 701. West believes that a mention of shooting or guns would have grabbed his attention, since that's not a normal thing one hears in those meetings – it would be “an instant red flag.” Tr. at 704, 705. West was adamant that there was no comment made

⁹ Thompson also claimed that he said nothing about the grabbing at the meeting because he “was afraid [he] would get fired.” Tr. at 228, 342. This testimony lacks credibility given Thompson's other actions that indicated he had no such fear of management, such as claiming management would “fuck [things] up,” and repeatedly refusing the direct instructions of his supervisor and both plant managers, even when he was told he could be suspended from work for insubordination. Tr. at 257-58, 720, 889. It is also inconsistent with the statement he made to McKinley that he said nothing because he was “not suppose[d] to say something to management. I'm suppose[d] to go to the union and they will handle it.” GC Ex. 18.

about a machine gun. Tr. at 707-08. At no time during the meeting did anyone claim that anything that could be perceived as a threat had been said. Tr. at 874.

McKinley, who sat directly across from Timman and Charlebois, heard Charlebois say to Timman, “You know I’m a history buff. Especially World War II.” Tr. at 932. Timman responded, “Well, so am I.” Tr. at 932. “Then Terry said, ‘Stalin,’ and Chris said, ‘Better than Hitler.’” Tr. at 932, 1020. Accordingly to McKinley, the exchange was a casual conversation in a normal tone of voice among two men, but it struck her as nice since two persons from very different walks of life were “just engaging in this nice conversation. And of course we’d been working on engagement.” Tr. at 933, 1021. In fact, McKinley thought, “Gosh, this is good. This is – we’re achieving what the company would like us to achieve.” Tr. at 933.

IV. LEGAL ANALYSIS

IV.A. The evidence supports a determination that OmniSource did not violate Section 8(a)(1) of the Act.

Section 8(a)(1) of the National Labor Relations Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in” Section 7 of the Act. 29 U.S.C. § 158(a)(1). While OmniSource disputes that its actions could have so interfered, even if they had, “it is only when the interference with § 7 rights outweighs the business justification for the employer’s action that § 8(a)(1) is violated.” *Textile Workers Union of America v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965). As set forth below, the business justification for OmniSource’s actions was to remove employees it believed were deliberately lying about and slandering a supervisor in order to obtain the supervisor’s removal from his job at Mansfield.

In *HCA/Portsmouth Reg’l Hosp.*, 316 NLRB 919 (1995), the ALJ considered whether a hospital violated Section 8(a)(1) when it discharged a nurse accused of maliciously spreading

false rumors about her supervisor in an effort to have the supervisor removed from her position or fired. The ALJ recognized that while complaining about management is activity protected under the Act, “such activity may lose its protection under circumstances when such conduct includes defamatory statements, bad-faith conduct, or deliberate and malicious falsehoods.” *Id.* at 930 (citing *Puerto Rico Sheraton Hotel*, 248 NLRB 867, 874 (1980); *American Hospital Assn.*, 230 NLRB 54 (1977)). The ALJ looked at the comments the employee made, including that the supervisor (also a nurse) had abandoned a patient, and found there was no question that the statements were “malicious and defamatory” and that “such a charge left unchallenged would have destroyed [the supervisor’s] ability to lead the OR.” *Id.*

As to the nature of the allegations lodged against Charlebois, there can be no doubt that charging a manager with assaulting an employee and threatening to shoot those who do not comply with the changes being made were both malicious and defamatory actions which, if left unchallenged, would have, as it did in the initial aftermath of the allegations being made, severely compromised or destroyed Charlebois’ ability to manage.

In *HCA/Portsmouth*, the ALJ concluded that the employee’s statements about her supervisor were untrue, based on the fact that the employee did nothing to verify the rumors she heard, the fact that the supervisor denied the statements, called them lies, and threatened the employee with a civil action for defamation, the fact that the supervisor’s story was plausible, and the lack of corroborating evidence for the employee. *Id.* Finally, the ALJ pointed out that even if the rumors the employee spread about her supervisor were true, the motivation for doing so “had nothing to do with her fellow employees’ working conditions and everything to do with her own survival at the Hospital and her personal relationship, or lack thereof, with [the supervisor].” *Id.*

Here, the evidence is undisputed that Thompson believed he was being targeted by

Charlebois since their first meeting and was concerned the Intalex incident reporting, which was being implemented company-wide, was simply designed to result in his being terminated.

The ALJ concluded in *HCA/Portsmouth* that there was no violation of the Act: “I do not believe that it would effectuate the policies of the Act to reward an employee for trying to destroy the reputation and end the employment of another employee simply to serve her own ends.” *Id.* at 931. Similarly here, engaging in a concerted plan to oust a disliked supervisor seen as an undesirable agent of unwanted change is not protected activity, and the discharge of those employees – the consequences of which Andrew Ables warned – does not violate the Act.

Similarly, in *Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am. (UAW), AFL-CIO v. N.L.R.B.*, 514 F.3d 574 (6th Cir. 2008), the Sixth Circuit affirmed the Board’s reversal of an ALJ’s decision that an employee’s termination based on his falsifying certain information violated the Act. In that case, three employees became especially dissatisfied with their supervisor, who was an outspoken union opponent and who complained about the three employees’ work, despite his own poor work. *Id.* at 578. The three resolved to get the supervisor demoted and put together a letter and packet of information about the supervisor to send anonymously to the company. *Id.* at 578-79. To mask their identity, one of the employees falsely identified the package as being sent by another employee, Pierson, who was also known to oppose union affiliation. *Id.* at 778.

When the package was received, the company started an investigation into the allegations supposedly made by Pierson. When it discovered the stated sender’s address did not match Pierson’s, the company obtained security footage from where the package was mailed and identified the real sender. The company’s representative then met with the employee/sender, who denied sending the package. *Id.* at 580. The representative then told the employee that they

had evidence of his deceptive acts and that those acts warranted termination, which termination was confirmed in writing by a letter sent the next day.¹⁰ *Id.*

Based on the evidence, the Court found the Board's conclusion that the employee's action in falsifying information removed from him the protections of the Act was neither illogical nor arbitrary. *Id.* at 584. Accordingly, there could be no violation of Section 8(a)(1) of the Act. The same reasoning should apply here. The substantial evidence in this case supports the Company's conclusion that the employees' falsehoods were made to target another individual where it could "provoke employer reprisals." *Id.* The Act is not intended to protect such collusive, fraudulent, and illegal activity.

IV.B. The evidence supports a determination that OmniSource did not violate Section 8(a)(3) of the Act.

OmniSource also asserts it discharged the employees for reasons unrelated to any protected activity and thus not in violation of Section 8(a)(3). Under Section 8(a)(3), it is an unfair labor practice for an employer to discharge an employee for engaging in protected union activities. 29 U.S.C. § 158(a)(3). "The threshold test for determining whether an employee's discharge constitutes an unfair labor practice is whether the discharge was motivated by 'anti-union animus.' The Board holds that the General Counsel has the burden of showing, by a preponderance of the evidence, that the employee's exercise of rights protected by § 7 of the Act 'was a substantial or a motivating factor in the discharge.'" *N.L.R.B. v. Cook Family Foods, Ltd.*, 47 F.3d 809, 816 (6th Cir. 1995) (quoting *N.L.R.B. v. Consolidated Freightways Corp. of Del.*,

¹⁰ There was no claim in that case that the lying employee's immediate termination violated any rights he had. Were such a claim to be made here, even putting aside the incredible testimony of the employees here that they didn't know that lying to get a manager removed could subject them to discipline, the employees here had *actual knowledge* three days prior to their termination that there would be consequences for those lying and the "guilty parties." See Tr. at 543-44, 567, 623-24. Yet they chose to do nothing in response to that information.

651 F.2d 436 (6th Cir. 1981), and *N.L.R.B. v. Transportation Management Corp.*, 462 U.S. 393, 400 (1983)); *see also ITT Auto. v. N.L.R.B.*, 188 F.3d 375, 387 (6th Cir. 1999).

In *Cook*, the Sixth Circuit reversed the Board's adoption of the ALJ's determination that the termination of employees from a ham processing plant was motivated by anti-union animus. Although the ALJ pointed to the fact that the employees were poor performers from the outset and were not fired until two days after circulating a union petition and one day after complaining about the temperature in the plant, 47 F.3d at 817, the Court found the reasoning unpersuasive since companies usually give employees time to train and improve and there was overwhelming evidence of the employees' poor performance. *Id.* ("Being a union activist does not immunize anyone from the natural consequences of sub-standard performance, and the record of this case shows very clearly that the women would have been fired for sub-standard performance regardless of their union activities.").¹¹

As was the case in *Cook*, in this case there is no evidence that anti-union animus played any part in the termination decision, but there is overwhelming evidence of employee wrongdoing. The reasons why the employees were terminated have nothing to do with union activity, and no one contends that lying and making false accusations of *criminal* behavior because one does not like a person or his management style or activities is protected behavior under the Act. Indeed, it was this action that prompted OmniSource to file its own ULP claim. GC Ex 13.

¹¹ An examination of cases where anti-union animus is found demonstrates the *lack* of any such evidence here. This was not a time of organizing or bargaining, the employer has not made anti-union statements, there were no departures from usual practices, there was no election going on, salary increases or freezes were not an issue, the employer's justification for termination has never wavered, and there is no background of any hostility on the part of OmniSource against the Union. *See, e.g., Property Resources Corp. v. N.L.R.B.*, 863 F.2d 964, 967 (D.C. Cir. 1988) (collecting cases discussing such evidence); *Acme Die Casting, a Div. of Lovejoy Industries, Inc. v. N.L.R.B.*, 26 F.3d 162, 167 (D.C. Cir. 1994) (discussing the various factors that demonstrated anti-union animus).

In addition, given the fact that the Regional Director concluded there was a *sufficient legal basis* upon which to issue a Complaint charging the Union with making false and malicious statements designed to remove Charlebois from Mansfield, GC Ex 1(e), it is difficult to see how this tribunal could take the position that OmniSource’s very same conclusion was not justified or could not have been reached without being motivated by anti-union animus.¹² Indeed, the testimony is totally to the contrary. *See, e.g.*, Tr. at 830, 831 (noting management did discuss various levels of discipline for the four employees involved, but none advocated for a lesser level of discipline than termination based on the level of integrity the employees’ actions violated – “to lie in order to remove a supervisor who was trying to promote a cultural change”); *see also* Tr. at 70 (Ables correcting the General Counsel’s attempts to characterize the termination as prompted by the filing of a grievance: “He wasn’t fired for filing the grievance. He was . . . fired . . . for lying about these statements. He’s allowed to file a grievance, but he’s not allowed to make false statements”); Tr. at 75, 79-80 (Ables correcting the General Counsel’s attempts to characterize as union animus the Company’s reaction to the Union’s demand to merely transfer Charlebois – a demand the Company saw as not only motivation for the defamation, but evidence the Union did not believe its own story that Charlebois was a danger).

Here, other than the mere fact that three of the four employees discharged held positions within the union and the fourth was a union member, there is simply no connection whatsoever between the Union and the activities that prompted the Company to fire them. Mansfield was, and remains, a union facility. At the termination, Tim Philpott, who is now the Unit Secretary,

¹² The Union settled the Complaint against it. Tr. at 10-12. The Union consented to posting its agreement that it “WILL NOT restrain or coerce OmniSource Corporation, an employer, in the selection of representatives for the purposes of collective bargaining or adjustment of grievances” and that it “WILL NOT, in any like or related matter, restrain or coerce OmniSource Corporation.” This tribunal can take judicial notice of this settlement. *See, e.g., N.L.R.B. v. Teamsters, Chauffeurs, Helpers & Taxicab Drivers, Local Union 327*, 419 F.2d 1282, 1284 (6th Cir. 1970) (citation omitted) (Board can take judicial notice of its own case against the same local union).

appeared with the employees. Tr. at 230, 306-07, 367, 627-28, 631. There is no evidence that the termination of the three Union officers or Thompson was intended to – or did – quell the Union or Union activity and neither Blatt nor Philpott testified. Further, there is no evidence that the employees’ status as Union members played any part in the Company’s decision.

Moreover, there was ample evidence that the Company works with the Union and takes seriously its responsibilities. *See, e.g.*, Tr. at 173 (noting OmniSource has had Union facilities since the 1970s); Tr. at 1018 (noting conversations between management and the union are not adversarial); *id.* at 636, 639-40 (Company allowed multiple individuals to leave the Mansfield location to attend to Union business such as negotiations or grievance handling); *id.* at 375-76, 381, 383 (Company did not discipline Thompson for disrupting a safety meeting and denigrating management with profane language); *id.* at 202-03, 205-06 (admission by Thompson that the Company adopted many employee recommendations made to management); *id.* at 206 (admission by Thompson that through the Survey Committee OmniSource was “trying to improve communication, as well as building trust between management and the employees and we were looking for ways to improve communication and trust between us”); *id.* at 390 (OmniSource honored Union’s request to include on safety incident report the Company’s agreement that the report could not be used for disciplinary purposes); *id.* at Tr. at 409-10, 998 (OmniSource permitted the Union’s international representative to question Charlebois about the allegations against him at the end of an unrelated meeting); *id.* at 933, 1021 (testimony that OmniSource was working diligently on engagement and good relations with the Union). This uncontradicted evidence supports the conclusion that the General Counsel cannot make the required evidentiary showing that union animus was a substantial or motivating purpose behind the decision to terminate, as is its burden to show. *See, e.g., N.L.R.B. v. Brown*, 380 U.S. 278,

290 (1965) (pointing to evidence of the company working with and engaging with the Union and concluding that “not only is there absent in the record any independent evidence of improper motive, but the record contains positive evidence of the employers’ good faith”).

As the ALJ observed in *HCA/Portsmouth*, “[t]his is not a case where an employer is shown to reject employee input on issues of working conditions or to instill fear in its employees that raising issues or rocking the boat will result in adverse consequences. On the contrary, this Hospital seemed to genuinely invite its employees to raise issues with any level of management. They were encouraged to do so in staff meetings and in one on one meetings with supervisors.” 316 NLRB at 930. The same could be said of OmniSource and Mansfield through the LMC and Safety and Survey Committees. Although Thompson conceded the Committees effected beneficial changes and did respond to many employee concerns, he personally believed there were a waste of time. Tr. 202-03, 205-06. But the fact that some employees may be dissatisfied is not indicative that management harbors any anti-union animus. *See, e.g., HCA/Portsmouth*, 316 NLRB at 930 (Employee’s “concerns were addressed fully and without any sense of rancor or upset at their being raised. Clearly she did not like the answers, but the willingness of this management to address issues and be open to the staff is demonstrated.”) *Id.*

Even if the tribunal were to find evidence of a mixed motive, OmniSource can demonstrate that it is more likely than not it would have discharged the employees for lying and conspiring to lie about a supervisor in order to remove him from the facility, even had they not been involved with the Union. *See, e.g., N.L.R.B. v. Fluor Daniel, Inc.*, 161 F.3d 953, 966 (6th Cir. 1998) (citing *N.L.R.B. v. Transportation Mgmt. Corp.*, 462 U.S. 393, 395 (1983), and discussing *Wright Line*, 251 N.L.R.B. 1083, 1089 (1980), *enforced*, 662 F.2d 899, 904 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982)). “*Wright Line* is designed to preserve what has long been

recognized as the employer's general freedom to discharge an employee "for a good reason, a poor reason, or no reason at all, so long as the terms of the [Act] are not violated." *MCPC Inc. v. N.L.R.B.*, 813 F.3d 475, 488 (3d Cir. 2016) (citing *Meyers Indus. (Meyers I)*, 268 N.L.R.B. 493, 497 n.23 (1984) (quoting *N.L.R.B. v. Condenser Corp. of Am.*, 128 F.2d 67, 75 (3d Cir. 1942))).

Here, OmniSource had a compelling reason to terminate these employees wholly unrelated to any union activity or any (entirely unidentified in evidence) anti-union animus: those employees conspired to lie about and to slander a manager by accusing him of criminal activity in order to facilitate his being removed from Mansfield. The fact that the Union proposed moving Charlebois to a different OmniSource facility in Toledo supports this conclusion. Why would the Union think it a reasonable solution to send a legitimately dangerous manager to another Union workplace within the same Company? Thus, the fact that OmniSource reached its conclusion respecting the employees' dishonesty in good faith is difficult to challenge. For Ables to conclude that the four employees were *not* lying, it is factually inescapable that Ables would also have had to reach the following fourteen conclusions based on the evidence gathered:

1. That long time employee and manager Chris Charlebois *repeatedly lied* about his conduct and his statements and repeatedly threatened the safety of his employees;
2. That long time employee and manager Bob Oney *repeatedly lied* about what he heard or did not hear in the December 7 meeting;
3. That *not one of the five* members of management crowded around a table in a small conference room heard Charlebois' comment about holding a machine gun to people or people's heads at the December 2 LMC meeting (*including* those members of management who heard the conversation but not the alleged threat), but the three Union representatives all heard the same threatening comment *and then did nothing about it*;

4. Alternatively, that while closely gathered around the same table, every member of management at the December 2 LMC meeting was too distracted by other conversations in the room to hear a manager say something about holding a machine gun to someone's head, but *not one* of the Union members was similarly distracted, including those engaged in other conversations at the time;
5. That Terry Timman who was asked within hours about whether he heard the alleged December 7 comment that dinosaurs would be shot *actually did forget* he heard it and only later "remembered" not only hearing the statement, but colorfully recalled that the statement was so disturbing it made the hair stand up on his head;
6. That Timman and Smith's detailed testimony at the hearing in which they conveniently provided a context for Charlebois' alleged statement about having to hold a machine gun to your head (Charlebois' repeatedly asking Timman and Smith to join the Safety and Survey Committees) was truthful, notwithstanding their signed, dated statements to the Company in which, in response to being asked what was being said at the time Charlebois made the alleged statement, neither reported any such conversation, and Smith claimed to have *no recollection whatsoever* of what was said.
7. That when the Company wanted to question him further about what he saw and heard on December 7, Terry Timman actually had a legitimate reason for refusing to answer any more questions and pleading "the Fifth";
8. That the December 7 altercation (grabbing) could occur in a narrow hallway close to a door where others were standing and near where other were working, but *nobody – not management, Union, or any other employee – heard or saw anything*;

9. That Thompson was not trying to exaggerate his story about the alleged grabbing (by claiming he was spun around and his arms held) or to exaggerate the alleged threat (by claiming the threat was “to shoot *you* old dinosaurs”), but that a trained police officer would get everything correct in his report *except for the operative facts charging a crime*;
10. That Thompson, a man who rejected Company authority so much that he openly denigrated management, knocked over a prop at a safety meeting, and repeatedly refused multiple requests to fill out a routine safety report even after those requests came from his own supervisor, from the Plant Manager, from the co-Manager, and from his Union representative (even under penalty of suspension from work), was too scared to accuse a disliked manager of assaulting him in the hallway – the same manager Thompson said would “fuck [something] up” upon meeting him for the first time – so Thompson initially said nothing, and showed no change in emotion or affect following a supposedly disturbing event, *even when left alone with his Union representative*;
11. That two Union members giving written statements *supposedly independently and without coordinated action* misspelled the names “Kriss” and “Stolland” for “Chris” and “Stalin” in their statements accusing Charlebois of making threats;
12. That the employees’ negative opinion of Charlebois’ management style, derisive nicknames, and their desire that he leave Mansfield played no part in their actions;
13. That the Mansfield employees were truly terrified and in need of crisis counseling (as opposed to attempting to bolster the case for Charlebois’ removal), but inexplicably failed to use the free counseling provided by the Company, a fact also unrebutted by the Board or the Union; and

14. That Union members, who supposedly believed a manager had physically assaulted an employee and had repeatedly threatened to shoot employees, requested only that the manager be *transferred to another Ohio facility* (where maybe he could shoot someone else?), and not simply terminated.

In short, evidence of OmniSource's good faith business justification for the terminations is overwhelming, as is the evidence that, in fact, the employees who were terminated did make slanderous statements about Charlebois in order to remove him from the facility.

As the decision maker, this tribunal is required to make determination as to the credibility of the witnesses, just as Ables was called upon to make a determination as to who was being truthful in the investigation and who was lying. *See, e.g., Property Resources Corp. v. N.L.R.B.*, 863 F.2d 964, 967 (D.C. Cir. 1988) (crediting union's testimony where it was not "intrinsically implausible" and where manager's testimony was uncorroborated). Accordingly, to rule in favor of the Union and the discharged employees this tribunal will have to be able to find *each one of the fourteen points set out above*, otherwise, it must conclude the witnesses for the Union lacked credibility and it must rule in OmniSource's favor.

It should be noted that the Company's good faith justification – a decision it reached at the conclusion of a thorough investigation – is bolstered by not only the contemporaneously gathered evidence and common sense, but also the polygraphic examination of Chris Charlebois. The polygraph reports in question were procured approximately six weeks after the decision to terminate, found no specific reactions of deception on Charlebois' part, and concluded that Charlebois told the substantial truth when he denied the following: (1) ever threatening to shoot anyone; (2) ever saying he would shoot anyone; (3) ever saying he would point a gun at anyone; (4) ever saying he would line up people and shoot them; (5) ever grabbing Thompson in the

hallway; (6) ever spinning Thompson around in the hallway; (7) ever trying to grab Thompson; and (8) ever assaulting Thompson in any way. Co. Exs. 17-18;¹³ Tr. at 440-41.

In *International Union*, the Sixth Circuit affirmed the Board's conclusion that the company met its burden by establishing it had a legitimate reason for terminating the employee who falsified the sender information on the packet of information sent to management in an effort to remove a manager and that this rationale was the consistently given reason for the termination. 514 F.3d at 585. The deceptive act – writing another person's name on the package – was the motivating act behind the termination, not any Union activity. The same reasoning applies here.

Where there is evidence of a legitimate business motive, the Board must show that “union antipathy did actually play a part in the decision to discharge employees.” *Pirelli Cable Corp. v. N.L.R.B.*, 141 F.3d 503, 523 (4th Cir. 1998) (quoting *N.L.R.B. v. Instrument Corp.*, 714 F.2d 324, 327 (4th Cir. 1983)). “[T]he Board may not simply declare that the stated reasons for the discharge are pretextual, rather the General Counsel must put forth substantial evidence that anti-union animus motivated the decision to terminate. *Id.* (citing *Instrument Corp.*, 714 F.2d at 327-28) (finding no violation of the Act where employer fired employee for engaging in clearly inappropriate behavior (sleeping) and there was no substantial evidence the reason for the discharge for union activity).

¹³ Respecting the admissibility and weight of the polygrapher's testimony and reports, as the NLRB Bench Book sets out, some courts have accepted polygraph evidence for impeachment or corroboration. Bench Book § 16-702.1 (citing *U.S. v. Picciononna*, 885 F.2d 1529, 1536 (11th Cir. 1989)). Though there is no universal rule, *see, e.g.*, Kenneth W. Graham, Jr., 22 Fed. Prac. & Proc. *Evid.* § 5169.3 (summarizing treatment of polygraph evidence across federal and state jurisdictions and noting that in the Sixth Circuit it is “admissible at the discretion of the trial judge”), a polygraph was admitted by the judge and given some, but not controlling, weight in assessing credibility in *J.C. Penney, Co., Inc.*, 172 NLRB 1279, 1283 (1968), *enforced in relevant part*, 416 F.2d 702, 705 (7th Cir. 1969), *cited in* Bench Book § 16-702.1. In this proceeding, a finding that the employees were telling the truth requires the tribunal to affirmatively find that Chris Charlebois was repeatedly lying. The polygraph examination is therefore consistent with and corroborative of his prior statements. Accordingly, admission of the evidence and reports is proper and within this tribunal's discretion. In addition, given the breadth of the polygrapher's training and experience, there is no credible claim that the test itself was performed in such a way as to compromise the results. *See* Co. Ex. 19; Tr. at 426-29, 432-35, 439-43.

OmniSource has articulated a legitimate business purpose. In *6 W. Corp. v. N.L.R.B.*, 237 F.3d 767 (7th Cir. 2001), the Seventh Circuit addressed the Board's assertion of pretext and its reliance on the fact that the employer had no written policy requiring honesty when it determined the employer violated the Act in discharging an employee for theft: "No company needs to have a set procedure for what action it will take when adjudicating every single employee problem. It is also obvious that, at a bare minimum, *companies must be able to trust their employees* and be assured that no one is stealing documents from offices or private files. *It is also obvious that companies must be able to discharge a thief or an untruthful employee.*" *Id.* at 778 (emphasis added). Quoting the Eleventh Circuit, the court went on to note, "[f]alse statements impair the employer's ability to make sound judgments that may be important to the employer's legal, ethical and economic well-being. So, an employer is entitled to expect and to require truthfulness and accuracy from its employees in an internal investigation that is exploring possibly improper conduct in the business's own workplace. . . . Therefore, an employer, in these situations, is entitled to rely on its good faith belief about falsity, concealment, and so forth." *Id.* (quoting *EEOC v. Total System Servs., Inc.*, 221 F.3d 1171, 1176 (11th Cir. 2000)).

In discussing the termination, the court found that terminated employee "Gibson gave his employer cryptic and false answers in response to inquiries about the materials stolen from the manager's log. Whether Gibson actually stole the materials in question is irrelevant. What is relevant is that Tucci had a logical and legitimate reason to suspect that Gibson was involved in the removal of the documents. When Gibson was less than forthright with his answers, Tucci was justified in terminating his employment. Tucci would have terminated Gibson for giving misleading answers in the course of an investigation into stolen property regardless of Gibson's union involvement." *Id.* (footnote omitted) (citing *Vulcan Basement Waterproofing of Ill., Inc. v.*

N.L.R.B., 219 F.3d 677, 684 (7th Cir. 2000) (“[T]he employer can . . . avoid a finding of an unfair labor practice if it can show that it would have taken the action [Gibson’s termination] regardless of the employee’s union activities.”)).

Similarly here, there is simply no evidence that the employees’ union status played any part in Ables’ decision or that the Company would have continued to employ workers the evidence compellingly demonstrated were untruthful. This is not a case of an exemplary employee being terminated for a random unexcused absence or the violation of non-critical workplace rule. OmniSource concluded that these employees acted in concert to knowingly and wrongfully accuse a supervisor of criminal activity to remove him. In such a case, “simply declar[ing] that the stated reasons for the discharge are pretextual” is plainly insufficient to show a violation of the Act. *Pirelli Cable*, 141 F.3d. at 523. Because there is no evidence of union animus, or, even if some could be shown, the overwhelming evidence demonstrates that the employees here were discharged for reasons wholly unrelated to their union status, OmniSource did not violate the Act when it discharged them.

V. CONCLUSION

For the reasons set forth above, this tribunal should find and conclude that Respondent OmniSource did not engage in any unfair labor practices within the meaning of Section 8(a)(1) or (3) of the Act and should recommend to the Board that the Complaint against OmniSource be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 21st day of November, 2016, filed the foregoing document electronically with the National Labor Relations Board in Washington, D.C. and copies were served via email on the following:

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