

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
WASHINGTON, D.C.

OMNISOURCE CORPORATION

and

Case 08-CA-167138

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

ALJ Paul A. Bogas

GENERAL COUNSEL'S BRIEF TO ADMINISTRATIVE LAW JUDGE

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## ISSUES PRESENTED

Whether Respondent unlawfully terminated the employment of Ricky Dean, Darrell Smith, Roy Thompson and Terry Timman on December 18, 2015, at its Mansfield, Ohio facility in violation of Section 8(a)(3) and (1) of the National Labor Relations Act.

## STATEMENT OF THE FACTS

### A. *Background*

#### 1. Respondent's Mansfield Facility

Respondent, OmniSource Corporation, is a large Indiana corporation operating at approximately 70 locations. (Complaint ¶ 3; Answer ¶ 3; Tr. 41). At its Mansfield, Ohio facility, Respondent is engaged in the processing and sale of scrap metal from which it annually sells and ships goods valued in excess of \$50,000. (Complaint ¶ 3; Answer ¶ 3).<sup>1</sup>

At the time of the four discharges on December 18, 2015, Respondent employed at its Mansfield facility approximately 34 bargaining unit employees of whom approximately 9 worked as drivers and the rest worked in the scrap yard. (Tr. 510). The employees were represented by Local 9130-03 which is an amalgamated local of the United Steelworkers of America with "03" designation standing for the bargaining unit employed at Mansfield by Respondent. (Tr. 305; stipulation).

The parties' collective bargaining agreement was effective by its terms from May 1, 2015 though April 29, 2018. (GC Exh. 6). Part of the parties' contractual obligations included a separately negotiated Letter of Understanding dated March 2, 2012, (LOU), which set forth a zero tolerance for violence and for any threats of violence. (GC Exh. 3). The LOU encompassed all individuals employed at the Mansfield facility regardless of their managerial or bargaining unit stature. (GC Exh. 3).

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<sup>1</sup> As a wholly-owned subsidiary, Respondent is part of the metals platform of its parent corporation, Steel Dynamics Incorporated (SDI). (Complaint ¶ 3; Answer ¶ 3; Tr. 37). In its answer at paragraph 5, Respondent admitted to the Section 2(11) supervisory and 2(13) agency status of *all* of the individuals pled in the complaint regardless of whether they were identified as Respondent OmniSource or its parent SDI. (Complaint ¶ 5).

Although denying it in its answer, both Andrew Ables and Chris Charlebois testified that Charlebois' correct title was "Division Manager." (Tr. 107, 711). Additionally, the parties stipulated to the Section 2(11) and 2(13) status of OmniSource Mansfield Non-Ferrous Supervisor Timothy Cline; OmniSource Mansfield Maintenance Supervisor Matt Hartzel; and OmniSource Corporate Transportation Manager Mike Moran. (Tr. 13-15).

The General Manager of the Mansfield facility was Bob Oney. On July 7 or 8, 2015, Division Manager Chris Charlebois became the new co-manager of Mansfield with Oney. (Tr. 711). Immediately preceding his arrival at the Mansfield facility, Charlebois had been the Division Manager of Omni Auto Parts, a parts dismantling company, and ran its sole facility in Macedonia, Ohio before the division closed. (Tr. 729-34). According to Division Manager Charlebois, he “was requested to come in an executive management role [at Mansfield] to work with the team in regards to safety, environmental metrics, working on team building, working with -- making sure we were operating within the collective bargaining agreement, communications, and working with -- both teams.” (Tr. 731).

Even though Charlebois denied ascribing other titles to himself like “coach” and “cheerleader,” (Tr. 735), the first e-mail that he sent to OmniSource and SDI’s upper management after his assault on employee Roy Thompson, in which he did not address the assault accusation, indicated that he is currently filling the role of “Coach, Mentor Trainer, Positive Communicator (and Cheerleader) in Mansfield.” (R. Exh. 20 - e-mail dated December 10, 2015). Notwithstanding his official and self-proclaimed mission, Charlebois maintained ineffective relationships with the bargaining unit employees beginning right on his very first day. Charlebois immediately gained the nickname among the employees of “Grumpy Grandpa” following his introduction at a safety meeting as described below. (Tr. 213, 303, 583). Charlebois was also called “Walter” after the puppet that sits on comedian-ventriloquist Jeff Dunham’s “lap with his arms crossed and a scowl on his face, and he’s very argumentative and angry and mean all the time.” (Tr. 213-14).

## 2. The July 2015 Safety Meeting

On his first day of work at the Mansfield facility in early July 2015, Division Manager Chris Charlebois attended the monthly safety meeting that was conducted by Respondent's Safety Coordinator for Mid-Ohio Eric Murray. (Tr. 207-09). At the meeting, Charlebois was introduced to the yard employees as the new co-manager with General Manager Robert Oney. The drivers were not in attendance. Towards the end of the meeting, Murray conducted a team building exercise using Jenga blocks. The purpose of the exercise was to pull out a block from within a tower of blocks, and then place the block on top without the tower falling over. (209). During the exercise, both the managers and employees were reluctant to fully participate.

According to employee Roy Thompson's testimony, at one point OmniSource Mid-Ohio Regional Manager Rob Carman asked Charlebois to participate in the Jenga game. (Tr. 209). Charlebois turned to Thompson and, specifically referring to him by name, said that he would participate if Thompson did. (Tr. 209-210). Thompson assumed that Charlebois knew his name because of comments that Thompson had made earlier in the meeting. (Tr. 210). When Charlebois eventually got up to play the game, Thompson jokingly said "[y]ea, you should do it, because it would take a member of management to fuck it up." (Tr. 210-11). Thompson testified that everyone got a little chuckle except for Charlebois who wheeled around, became red in the face, and looking straight at Thompson said "I can see you're the smart-ass in the group." (Tr. 211). For the rest of the meeting, which according to Thompson lasted another 5 to 10 minutes, Charlebois "never took his eyes off of [Thompson]." (Tr. 211). After the meeting, another employee confirmed that Thompson was now on Charlebois' "shit list." (Tr. 212).

Yard employees Terry Timman and Darrel Smith were also present at this safety meeting in July 2015 and corroborated Thompson's version. (Tr. 572-585; Tr. 297-302). According to

Timman, “Roy made a statement saying it would take a boss to screw it up or something to that effect[ ]” (Tr. 300), and Charlebois responded by calling him a “smart-ass.” (Tr. 301). Then Charlebois stared Thompson down for the rest of the meeting. (Tr. 301). Similarly Smith testified that when Murray asked for volunteers to play the Jenga game, a couple of the managers urged Charlebois to participate. (Tr. 574). At this point, Thompson made a comment like “[g]o ahead and try it and see if you can fuck it up like the rest of the bosses around here.” (Tr. 574-75, 585). At this, Charlebois turned “pretty red” and became mad. (Tr. 575). Charlebois told Thompson that he saw “who the smart-ass of the bunch is.” (Tr. 585).

Smith testified that instead of returning to his seat, Charlebois then “went over to the coffee pot and stood there with his arms crossed and stared at Roy the rest of the meeting, like just staring him down.” (Tr. 575). Smith provided a hand drawn diagram of the breakroom where the meeting was held and where everyone was located within the room including where Charlebois stood in plain view of the other employees. (Tr. 576-82; GC Exh. 31). Smith testified that the meeting lasted about another ten minutes and as soon as it was over he left because he was losing incentive pay while being there. (Tr. 575-76).

Although Respondent witnesses Carman, Oney, McKinley and Charlebois attended this initial safety meeting (Tr. 573), none of them directly testified about the meeting let alone about Charlebois’ behavior at it. On cross-examination, after Charlebois testified that employees currently give him the “stink eye” at work,<sup>2</sup> he was asked if “stink eye” or “bad eye look” was similar to the way he had looked at Thompson on his first day at the safety meeting. (Tr. 781). Becoming indignant, Charlebois testified “absolutely not” and “I didn’t give Mr. Thompson any type of stink eye look in the meeting.” (Tr. 782).

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<sup>2</sup> When describing what he meant by “stink eye” at work, Charlebois testified that it is when “somebody makes a – bad eye look at you” and added that he currently had “[j]ust a general feeling of being watched and disliked.”

In response to a question on cross-examination regarding the first time he “saw” employee Roy Thompson, Charlebois became very agitated and gave an answer filled with animus towards Thompson. He described Thompson at the meeting as being “totally dysfunctional” and testified that he was like a “caged animal” “pacing back and forth” at the meeting with “verbal diarrhea.” (Tr. 754-57). However contrary to Charlebois’s exaggerated version, Thompson testified on rebuttal that he had not been pacing during the meeting. (Tr. 1060). Thompson testified that he was seated during the entire meeting, except for getting up “once because [he] went over and pulled out one of the Jenga pieces.” (Tr. 1060). He only got up again when the meeting was over. (Tr. 1060).

### 3. The Safety and Communications Committees

According to the testimony of employee Roy Thompson, he participated on two different employee/management committees prior to his termination on December 18, 2015. (Tr. 200-07). Respondent sponsored the Safety Committee and the Communications Committee, which was also known as the Survey Committee, and solicited employees to volunteer via posted sign-up sheets. (Tr. 200-01, 204). There were approximately six employees on the Safety Committee and at least four on the Communications Committee. (Tr. 204, 201). Even though there were no union representatives on either of the committees, Respondent dealt with the employees over their grievances and would try to resolve them. (Tr. 201-02, 205-06). For example on the Safety Committee, Respondent purchased a specific type of safety gloves after it was brought up by the employees. (Tr. 202-03). Similarly, Respondent instituted pre-work meetings at the beginning of the day at the employees’ suggestion. (Tr. 205-06).<sup>3</sup>

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<sup>3</sup> While the testimony confirmed that Respondent dealt with the employees on these non-union committees over terms and conditions of employment, the Union was aware of the committees and had raised no objections.

Both General Manager Manager Bob Oney and Division Manager Chris Charlebois served on the committees for Respondent. (Tr. 201-02, 205). Charlebois started to attend the monthly meetings of both committees after he began working at the Mansfield facility in July 2015. (Tr. 202, 205). Thompson testified that he signed up for the Safety Committee in February 2015 and for the Communications Committee in approximately April 2015. (Tr. 201, 204). However, by mid-November 2015, Thompson quit both committees because he felt that Respondent's representatives did not take them seriously and "looked down" on the employees. Thompson added that Charlebois was "condescending" and an "intellectual bully." (Tr. 203, 207). The other employees on both committees also quit participating and both committees were defunct at the time the discharges occurred in mid-December. (Tr. 204, 207).

Respondent witness Division Manager Chris Charlebois did not give any testimony about the Safety or Communications Committees including his attempt at trying to get the committees reestablished at the December 2 Labor Management Committee (LMC) Meeting. Similarly, Respondent did not elicit any testimony from its other witnesses concerning the two committees. Only as a 611(c) witness did Corporate HR Manager Andrew Ables testify that the two committees had indeed become defunct just prior to the time that Thompson had filed his grievance concerning Charlebois' assault and threat. (Tr. 64-66). Notwithstanding, he could not recall being aware of why the two committees had ceased functioning just prior to the four men's discharges. (Tr. 66-69).

*B. The December 7 Grabbing and “Dinosaurs Will Be Shot” Comment*

1. The Preceding Problem with the Liebherr Crane

Around Thanksgiving 2015, employee Roy Thompson testified that he had a problem with the new Liebherr Crane that he was operating. (Tr. 215-16). Specifically, Respondent had placed a large magnet on the crane which was too heavy for the crane to handle. (Tr. 215). When Thompson reported to Yard Supervisor Brian Laughery that he could not control the stick which is attached to the boom, Laughery told him to continue running the crane and that he would send for Maintenance Supervisor Matt Hartzel. (Tr. 214-15). However before Hartzel arrived, the magnet smacked into the metal ladder attached to the crane and broke the ladder. (Tr. 216). After this happened, Laughery told Thompson to shut down the crane. (Tr. 216). Later that day, Laughery asked Thompson to fill out an accident report about what had happened with the crane. (Tr. 218). Thompson replied that he did not want to fill one out because it was not an accident and it would make it look like it was Thompson’s fault if he filled one out. (Tr. 212). Laughery responded that it was not a big deal and this it was just something that they were doing now. (Tr. 219).

2. Charlebois Grabbed Thompson in the Hall

According to Thompson, on December 7, 2015, about a week after the crane incident, General Manager Bob Oney approached him in the breakroom and asked him again to fill out an accident report. (Tr. 219; GC Exh. 7). Thompson repeated what he had said to Laughery about not having to do this before. (Tr. 219). Oney responded that it “it is what it is” and then called Unit Griever Terry Timman to the breakroom. (Tr. 219-20). After Timman arrived, the three men made their way to the conference room. (Tr. 220).

The three men walked in from the breakroom and into the office area where they preceded down a short hallway into the conference room. (Tr. 221-22). Oney led the way, then Timman, and then Thompson who was at least 5 feet behind. (Tr. 220). When Thompson passed the door of Charlebois' office, Charlebois was at his doorway and stuck out his hand to shake Thompson's hand. (Tr. 221). According to Thompson, when he ignored Charlebois' outstretched hand and kept walking, Charlebois reached out and grabbed him by the jacket. (Tr. 221-23). Charlebois pulled Thompson about a foot back towards him so that the two men were actually touching. Thompson testified that Charlebois was so close that he "felt [Charlebois'] body up against his shoulder. (Tr. 223). At the same time, Charlebois said "[w]hat's wrong with you? You don't shake a man's hand when he puts it out in front of you?" (Tr. 221). To which, Thompson responded no and pulled himself away by making a swimming-type stroke with his arm. (Tr. 221, 223-24). Thompson then went into the conference room with Charlebois following.

Thompson testified that unfortunately no one was in the hallway at the time Charlebois grabbed him. (Tr. 221). Although Oney testified that "usually" he stands in the doorway of the conference room, he conceded on cross-examination that he was already inside of the conference room when Thompson was walking past Charlebois' door. (Tr. 921). Similarly, Unit Griever Terry Timman was not aware of what had happened in the hallway as he too was already inside of the conference room. (Tr. 342).

In his testimony, Charlebois denied grabbing Thompson. (Tr. 713). But he added that "my hand may have brushed against him when I was trying to shake his hand, but no more than that." (Tr. 713). He testified that he did not shake Thompson's hand, because Thompson's hands were in his pocket (sic). (Tr. 713). Respondent placed into evidence a description of the

events of December 7 written by Charlebois which included trying to shake Thompson's hand in the hallway. (R. Exh. 21; Tr. 717). Charlebois testified that he wrote this version of events sometime between December 10 and 15, 2015. In this version (R. Exh. 21), Charlebois wrote that at 1:10 p.m., he tried to shake Thompson's hand and that Thompson had brushed right by him. Specifically, Charlebois wrote:

Bob walks by my office (I was sitting at my desk), he nods his head and says 'they are behind me'. Following in line were Bob, Terry Timman and Roy Thompson. I stood up and walked to my office door way, which takes approximately three (3) seconds. Terry had just passed my door and Roy was next; as I walked through my office doorway, I offered Roy my hand (to shake) and he brushed right by me, turned his body sideways (there is not enough room for two grown me to pass side by side, facing each other in the hallway) and Roy almost hugged the wall with his back. I then proceed to the conference room which took two (2) maybe (3) seconds. Everyone was in the room when I entered the room, I shook Terry's hand, (as I always do) greeted Terry and Roy. Roy went to the furthest chair at the opposite end of the table, slouched down and he sourly said, 'I don't want anything to do with you, everything has changed since you got here!' It was obvious to me the, that Roy appeared to be in a negative mood, sullen, hands in his pocket, and his head and eyes down.

(GC Exh. 21).

However this was actually the second version that Charlebois had written in this same time period. His earlier version, which was admitted into evidence as GC Exh. 35, neglected to mention anything at all about trying to shake Thompson's hand in the hall. (Tr. 773). Rather, Charelbois wrote that he tried to shake Thompson's hand in the conference room. (GC Exh. 35). Moreover, Charlebois wrote that he was still seated at the time the three men walked by his office door. In this earlier version, Charlebois wrote:

Bob comes by my office (I was sitting at my desk), he nods his head and says 'they are behind me'. Following in line was Bob, Terry Timmins (sic) and Roy Thompson. Terry's demeanor was consistent and Roy was in tow, he appeared to be in mood, sullen, hands in his pocket, head down, and rubbing against the wall. I instantly stood up and walked to the conference room (it took maybe three seconds). Everyone was in the room when I entered the room, I shook Terry's hand, (as I always do) greeted him and Roy. Roy went to the furthest chair at the

table, slouched down and I asked if he would like to shake hands and he sourly said, no way, I don't want anything to do with you!

Bob sat to my left, Terry sat to my right and Roy was completely at the other end of the table.

(GC Exh. 35).

### 3. Charlebois' "Dinosaurs Will be Shot" Comment

When Thompson entered the conference room, he sat down next to Terry Timman (Tr. 224) on the right side and directly across from Bob Oney. (Tr. 1059). He was not at the opposite end of the table as Charlebois contended. After the men sat down, Charlebois told Thompson that he needed to fill out an accident report for the Liebherr Crane incident. Thompson and Charlebois went back and forth. Thompson said that they never had to fill out accident reports before and that he felt like they were trying to develop a paper trail on him to fire him. Charlebois responded that he was either going to do this or that they were going to suspend him for one day for insubordination. According to both Thompson and Timman, Charlebois then said that "some people are going to conform to the way things are and some old dinosaurs will be shot." Thompson then agreed to fill out a report. Oney and Chalebois then left the room.

Unit Griever Terry Timman testified that he was unaware of the incident in the hallway between Charlebois and Thompson while he was in the conference room. He testified similarly to what was said while the four men were in the meeting. Timman attested that right after Charlebois said that Thompson would receive a 1-day suspension, in his very next breath, Charlebois said something like "some people are going to conform to the way things are and some old dinosaurs will be shot."

According to Oney's testimony, Charlebois stated that "everyone needs to conform to the way things are heading and that some old dinosaurs may not survive." (R. Exh. 20). Thompson and Timman testified that they heard Charlebois use the word "shot" instead of "survive." Even though the three men heard essentially the same dinosaur statement, Charlebois' memory was quite different. Charlebois testified that he had said "[h]ere's an example of an employee who is a dinosaur. How do we get them to buy in." (Tr. 715). Later in his testimony, he rephrased "here's an example where you've got an employee who's a dinosaur and doesn't want to buy in. How do we get them to understand the important (sic) and buy into it?" (Tr. 721).

In his two written versions of events, Charlebois was somewhat more detailed: "This was an example of an employee who refuses to buy into the new culture; they become dinosaurs and they get passed by!" (R. Exh. 21; GC Exh. 35). Notwithstanding the threat was made immediately after Thompson objected to filling out the report concerning the incident with the Liebherr Crane which happened around Thanksgiving right after Thompson had quit the two committees.

Thompson's objections to filling out the report were two-fold. First, Thompson believed that Charlebois and Oney were merely creating a "paper trail" to be used against him in the future. Thompson was not far off in his belief as testimony elicited at the hearing gives credence to his suspicions. For instance, both Charlebois and Oney repeatedly testified and "excessively" stressed the importance of the Thompson's "report" which would be shared with Respondent's other locations via its Intalex computer system. Specifically, the report was to be used to prevent similar types of crane accidents at its other locations. However Thompson's report contained no specific details, i.e., the type of crane or why it was bleeding off. The so-called report was

nothing more than a couple of sentences on a blank piece of paper, and hence had absolutely no value as Respondent repeatedly contended.<sup>4</sup>

More than likely, Respondent was trying to create a paper trail on Thompson because of his comment at the safety meeting in July and because he as well as the other employees had recently quit participating on the Safety and Communications Committees which were defunct by early December 2015. (Tr. 203, 207). Both of these committees were important to the changes that Respondent was trying to make at the Mansfield facility.

*C. The Grievance over the December 7 Assault and Threat*

1. Thompson's Decision to File a Grievance

During the meeting about the crane incident, Roy Thompson did not bring up what had just happened in the hallway with Charlebois. (Tr. 228). He testified he did not say anything because he was afraid that he would be fired. (Tr. 228). After the meeting, Thompson made his way to the breakroom where a number of employees were on break. (Tr. 228). When Thompson told them about what Charlebois had just done and said, they encouraged him to file a grievance. (Tr. 228). When Unit Griever Terry Timman came into the breakroom, Thompson also told him about Charlebois grabbing him in the hall and that he wanted to file a grievance. (Tr. 228). At this point, Timman left to speak to Unit Secretary Darrell Smith who was out by the torch shanty. (Tr. 229).

Thompson testified:

Well, Terry had left and he went back to talk to Darrell, because Darrell is the most experienced of the union representation we have. He's been doing it a long time. And the guys told me to go back there and talk to them about filing the

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<sup>4</sup> In describing the crane incident, GC Exh. 17, Thompson wrote: "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 --".

grievance. So I walked out the door, and I was heading back there and I just – kind of stopped. I stopped because I didn't think – I began to think that I don't want to open up this can of worms. I don't want to get into a battle like this with the company. I just need to let this go. And I walked back into the break room, and the fellows in there began to pressure me, and they assured me that what I was doing was the right thing. And so eventually I walked back there to let them know, as a group, that I want to file a grievance.

(Tr. 229).

After discussing the matter with Smith, Timman and Tim Philpott, who is the Local's secretary, out by the shanty, Thompson wrote the following statement concerning Charlebois' assault and threat:

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 1pm on 12-7-15. I feel unsafe and I fear for the safety of my union brothers.

I was walking through the hallway for a meeting with Bob and Chris. Chris stuck his hand out to shake my hand and I just kept walking. He reached out and grabbed me (sic) pulled me backwards. Said, "You don't shake a man's hand when he holds it out." He let go and I kept walking.

(Tr. 230-31; GC Exh. 7).

## 2. The Verbal Presentation of Thompson's Grievance

At approximately 2:30 p.m. on December 7, Unit Secretary Darrell Smith and Unit Griever Terry Timman presented Thompson's grievance verbally at Step One to General Manager Bob Oney and Division Manager Chris Charlebois. (Tr. 892). They met in the conference room and Smith handed Oney a piece of paper with the two statements written by Thompson. (Tr. 594-95; GC Exh. 7) According to Smith, after Oney read the statement, he "put his head down and shook it like in a 'no' manner, and out – and just handed it to Chris, who then read it." (Tr. 594). After Charlebois was done, Smith asked him if he had done this? (Tr. 594).

Smith attested that Charlebois said no, that he had been in this business a long time and he knew better than to grab ahold of somebody. But he admitted that he “did say that you don’t shake a man’s hand when he outstretches it[.]” (Tr. 595).

Although Timman recalled that the two had presented the verbal grievance to Charlebois and Oney while standing in the hallway (Tr. 344), Oney testified that the men later stood in the hallway after he had gone to make copies of Thompson’s statement. (Tr. 918-19). The meeting lasted about 5 minutes. Smith testified that afterwards he and Timman went back to the breakroom to talk to Thompson. Smith told Thompson that Charlebois had denied grabbing him at which Thompson became upset and said Charlebois was a liar. (Tr. 596). Thompson swore it happened and told them to look at the video from the surveillance camera in the office. (Tr. 596). The Union filed the written grievance the following day.

### 3. The Written Grievance

On December 8, the Union filed a written grievance concerning Charlebois’ behavior towards Thompson the previous day. (GC Exh. 2). Thompson’s hand-written statement concerning the grabbing incident and the “dinosaurs will be shot” threat was attached. The grievance requested that the Employer follow the protocol under the parties’ March 2, 2012, Letter of Understanding (LOU) concerning Respondent’s zero tolerance for violence and for any threats of violence covering both bargaining unit and management employees.

Specifically, the LOU states:

OmniSource Corporation together with the United Steelworkers International Union agrees that altercations between co-workers, whether verbal or physical, are unacceptable on the property of the OmniSource facility.

An altercation is defined as a physical threat or physical harm to any employee, hourly to hourly, management to management, and hourly to management or management to hourly employees.

Both parties are committed to maintaining a friendly and safe work environment for ALL employees, customers, and visitors.

For this reason, any verbal or physical altercation that occurs in the workplace will result in immediate discharge for all parties involved in that altercation. Such violations will be investigated aggressively to determine if the incident should be covered by the appeal process defined in the current or any future collective bargaining agreement.

Whatever the issue, please refrain from taking matters into your own hands. Contact your supervisor or the union grievance representative in order to resolve the issue.

*D. Respondent's Investigation of the Employees*

1. McKinley's Meetings with the Union on December 8

According to Mid-Ohio HR Manager Linda McKinley, on the following morning, December 8, she received a phone message from International Representative Donnie Blatt. (Tr. 936). She was at Respondent's Toledo facility at the time. When she returned the call, Blatt told her that Unit Chair Rick Dean had contacted him about a manager who had grabbed an employee and threatened to use a machine gun. (Tr. 937). She told him that she was aware of Thompson's written statement and that she "was really `surprised' that anything could have happened because Terry Timman, the steward, was involved in that meeting with Roy Thompson." (Tr. 937). She also told Blatt that she "could not believe" there had been any comment made about machine guns in the last Labor-Management Committee (LMC) Meeting because she was there. (Tr. 939).

Between noon and 1:00 p.m. on December 8, McKinley arrived at the Mansfield facility where she met with Terry Timman and Darrell Smith in the conference room. (Tr. 602, 941). General Manager Bob Oney was also present. (Tr. 602). Smith testified that McKinley said that

she had gotten a call from Donnie Blatt about the grabbing incident and comments about shooting dinosaurs and using machine guns. (Tr. 602). According to Smith, they talked about Thompson's grievance and then Timman told her that this was "not the first time Chris has made comments about dinosaurs." Timman told her about a conversation that he had with Charlebois just before the termination of Quentin Kiser in which Charlebois stated that "old dinosaurs will be left behind." (Tr. 603-04). They then talked about the machine gun comment that Charlebois had allegedly made at the December 2 LMC Meeting. (Tr. 604).

Timman testified similarly, but was fuzzy on the details. (Tr. 346, 356). He confirmed that both he and Smith told McKinley about Charlebois' comments at the December 2 LMC meeting. Timman also believed that he had tried to tell her about Charlebois having made a similar dinosaur statement to him previously, but he believed that McKinley got confused when he did so.

Smith also testified that he had complained about Charlebois making changes at the facility. (Tr. 606). He told her that Charlebois was more strict on the cell phone use and their break times, and that "if you're going to make strict rules, to kind of gradually do it instead of being firm all at once." (Tr. 606). In her testimony, McKinley expanded on Smith and Timman's complaints about all of the changes that were being made by Charlebois at the facility. (Tr. 959).

Later in the afternoon, both men participated in a conference call with McKinley and International Representative Blatt. During the call, the unit officers relayed the events of the previous day and what had happened at the December 2 LMC concerning Charlebois. During this time, and up until the time they were discharged, the employees believed that McKinley was investigating Charlebois' behavior and not their own.

## 2. Written Statements about the December 2 LMC Meeting

Both Smith and Timman were asked to submit written statements concerning Charlebois' comments at the December 2 LMC meeting which they did. Smith submitted the following statement on December 8:

(12-2-15) In our last Wednesday meeting Kriss made the comment "What do I have to do hold a machine gun to you to get something done around here" and Terry said who are you Stolland.

(GC Exh. 32).

Timman's statement, which he gave to Oney on December 9, read as follows:

On Dec. 2, 2015 in the bi-monthly meeting Chris stated something to the effect of having to hold a machine gun to us. I responded by calling him Stalin.

(GC Exh. 24).

Unit Chair Rick Dean was also asked to submit a statement which he did on December 9. Dean, who is a driver and on the road most of the time, wrote his statement while he had returned to the facility with a load on the 9th. He did not consult anyone concerning the spelling and left the statement in Timman's locker to give to General Manager Oney. In his statement, Dean wrote:

12-2-15 In our meeting on Wednesday, Kriss 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.

(GC Exh. 4).

### 3. McKinley Finished the Investigation

Over the next few days, HR Manager Linda McKinley collected cursory statements from the other individuals who were present at the December 2, 2015, LMC Meeting.<sup>5</sup> (Exh. 20). She also wrote her own statement. On December 14, 2015, McKinley returned to Mansfield to conduct follow-up interviews. She had a short list of questions which she asked of Thompson and the three Union officers. She typed her questions and their answers. She asked Thompson about the incidents occurring on December 7, and the three officers about the December 2 LMC Meeting. However, when she later tried to ask Timman about the December 7 events, he refused claiming that he was not the grievant. (Tr. 362). He testified that he “took the Fifth” meaning that he was not going to answer. (Tr. 362). Timman testified that he did not know what the legal significance of “taking the Fifth” was, rather he thought that it just mean to “be quiet, not talk.” (Tr. 363-64). At the time, none of the employees had an idea that McKinley was investigating them. Unit Chair Ricky Dean testified that when he spoke to McKinley on December 14, he understood that she was investigating Charlebois. (Tr. 539-540).

Although McKinley testified that she was open-minded when she returned on the 14th, it is clear from a prior e-mail chain that Respondent’s management had already determined to accuse the employees of lying about Charlebois’ statements and his assault, and to terminate

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<sup>5</sup> Mid-Ohio Regional Manager Rob Carmen also participated in the so-called investigation. (Tr. 797-809; R. Exh. 22). However, he had no direct knowledge of any of the events. He provided only hearsay testimony and a handwritten hearsay document which he forwarded to HR Manager McKinley at some point prior to the employees’ termination. (Tr. 806).

Carman testified that he had called employee Amy Allen, who he stated sits in the open area between the hall and the dispatch office, and Curt West and Amy Sanyer, who work in the dispatch office. (Tr. 801-03). While Carmen testified that the three individuals told him that they had not seen or heard anything unusual on December 7, there was absolutely no evidence that they were even in their work areas at the time the assault occurred in the hall which was around 1:00 p.m. or had seen the men pass by on their way from the breakroom to the conference room. (Tr. 801-03; R. Exh. 22; GC Exh. 35).

Carman also testified on cross-examination that West, who is also the scale master, has an office with a glass window right by the scales and that noise from the semi-trucks travels into his office along with the “hum” of the scrap yard. (Tr. 814-16). Additionally, Respondent failed to call Allen or Sanyer to the witness stand.

their employment. In the early afternoon on December 13, Ohio Division Manager Mike Herrmann wrote the following by e-mail to McKinley:

I think it is critical to get a full account of the event from Terry Timman. I would like to have Terry articulate the (sic) what Chris was doing and how the comments fit into the course of the conversation. I think we are making this too easy on the Union just asking them if it happened or if it did not happen. It is more difficult to lie if you have to put the lie in context with the events. I am confident that they will not be able to coordinate the context of their lie well enough to make it believable.

(GC Exh. 37).

In response to the judge's questions, McKinley eventually answered that she did not know at what point the investigation changed from involving a grievance to discipline. (Tr. 1043-45). However, McKinley's testimony is pretty clear that she did not believe the employees right from the start. When McKinley went to the Mansfield facility on December 8, she was already conducting an investigation into whether or not the employees were telling the truth. (Tr. 1052).

*E. The Employees' Concern about Charlebois' Behavior*

On December 8, in between McKinley's meeting with Smith and Timman, and the later conference call with International Representative Blatt, Oney called McKinley to the breakroom where a number of employees were gathered. According to McKinley's notes, which gave the most detail, she met with approximately 10 employees with a few others coming in while they talked. (R. Exh. 9, p.3). Employee Gary Sutherland asked her if the company still provided crisis counseling because he and the other employees were afraid since a supervisor was threatening them with guns. He wanted to know why Charlebois was still on the premises.

According to employee Roy Thompson's testimony, he spoke to the police on December 10 after Sutherland summoned them to the facility. "Sutherland was upset with the whole situation and he wanted something done." (Tr. 231). He was upset about the "old dinosaurs being shot" comment and Charlebois putting his hands on Thompson. (Tr. 232). "Gary was concerned that this might happen to somebody else, maybe even him." (Tr. 232). At that time, Thompson filed a police report against Charlebois. (GC Exh. 18; Tr. 232). However, Thompson testified that the police officer's report was not accurate inasmuch as he had incorrectly wrote that Charlebois had grabbed him by the arm and spun him around, rather than grabbing him by the jacket. (Tr. 234-35; GC Exh. 18).<sup>6</sup>

*F. The December 15 Grievance Meeting*

On December 15, the parties met in the conference room for a regular third-step grievance meeting as previously planned. (Tr. 407, 540). In attendance for the Union were Blatt, Dean, Smith and Timman. (Tr. 540). In attendance for Respondent were Ables, Charlebois, McKinley, and Joel Squadrito. It was unusual for Squadrito, who is SDI's Corporate Security Director, to be present. (Tr. 1033). Mid-Ohio Regional Manager HR Manager Linda McKinley testified that Squadrito had nothing to do with labor relations and has never attended a third-step grievance meeting in Mansfield. (Tr. 1033-34).

During the meeting, there was no mention about the employees being under investigation or the impending decision to terminate their employment. Although Thompson's grievance concerning Charlebois was not yet at third step, there was however some discussion about Charlebois' behavior. (Tr. 542). But when International Representative Donnie Blatt sought to

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<sup>6</sup> Thompson testified that the officer told him if he wanted to file charges against Charlebois then he would have to contact the local district attorney. Prior to his discharge, Thompson did visit the district attorney who, according to Thompson, told him since he had not suffered any bodily harm then he would no case for assault. (Tr. 236).

ask questions of Charlebois, Squadrito cut him off saying “[n]o, you can you can't ask him any questions.” (Tr. 543). Corporate HR Manager Ables had to step in telling him that “it’s okay for Donnie to ask questions.” (Tr. 1034).

Squadrito, who came to the meeting with Ables, is a large man, about 6’3” and weighs about 250 pounds. (Tr. 1034-35). A former police officer, Dean described him as a “muscular kind of guy, heavy built.” (Tr. 541). McKinley described him as a “big strong guy.” (Tr. 1036). At the hearing, Respondent provided no reason why “big strong guy” Squadrito’s presence was necessary at this third-step grievance meeting. When McKinley was asked on cross-examination why Squadrito was present, she answered “I honestly could not answer that question. He came with Andrew Ables.” (Tr. 1034).<sup>7</sup>

#### *G. The Decision to Discharge the Employees*

The four employees were terminated on December 18, 2015. (Tr. 241; 367; 551; 626). Present in the conference room for the Employer were Rob Carman, Linda McKinley, Bob Oney and Joel Squadrito. (Tr. 241; 367; 551; 626; 818). Also present both inside the conference room and in the hallway were off-duty Mansfield police officers. The termination meetings were lasted only a few minutes. Carmen read the termination notices to the employees which stated that they were being terminated due to their “false, slanderous, and defamatory statements” about management, Chris Charlebois. (GC Exhs. 8, 9, 10, 11).

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<sup>7</sup> On January 18, 2016, Respondent and the Union held another third step grievance meeting concerning the four discharges at the Union’s hall in Mansfield. (Tr. 108-10). Present for Respondent were Ables, Carman, McKinley, and Oney. (Tr. 110). Present for the Union were Local President Dave Zealor, Blatt, Dean, Smith, and Timman. Employee Roy Thompson was present for only a portion of the meeting. (Tr. 110).

Testimony concerning this grievance meeting sheds light on the credibility of Respondent’s witnesses and the draconian extent to which Respondent would accede in order to get rid of the Union’s three unit officers, i.e., Dean, Smith and Timman; and one outspoken employee, Roy Thompson. (Tr. 108-10) See GC Exhs. 5 and 16.

Respondent's Corporate Human Resource Director Andrew Ables testified that he made the decision to terminate the four employees. (Tr. 42-43). He made his decision based on the investigation conducted by Mid-Ohio Human Resource Manager Linda McKinley. (Tr. 49). According to Ables, he discussed the terminations with McKinley, Mid-Ohio Rob Carmen, General Manager Bob Oney and Scott Gible, and that they all agreed with his recommendation to terminate the employees. (Tr. 42-43).

While as a 611(c) witness Ables testified rather evasively, the reasons for the discharges were eventually pinned down. For the three union officials, the reasons were two-fold. First, when they were processing Thompson's grievance, they allegedly attributed a false comment to Charlebois made at the December 2 LMC Meeting about holding a gun to their heads to get them to do something. The second reason that Ables gave was that International Representative Donnie Blatt had offered to settle Thompson's grievance by either agreeing to Charlebois being transferred to another location, or having former employees brought back to work that had been discharged under the parties' March 12, 2012 LOU, i.e., the zero-tolerance for violence.

According to Ables, Timman had another reason for his discharge and that was because he had allegedly changed his story about the comment that Charlebois had made on December 7 at the meeting with Thompson including his taking the "Fifth." With respect to Thompson, it was clear. He allegedly lied about Charlebois grabbing him and then making the statement that dinosaurs would be shot as opposed to survive. (Tr. 61-105).

#### CREDIBILITY

In general, the testimony of the witnesses called by the General Counsel should be credited over those of Respondent. While on the witness stand, the demeanors of Dean, Smith, Thompson

and Timman were earnest and forthcoming. Their testimony was corroborative as to all of the salient facts.

However the same cannot be said of the witnesses called by Respondent. All of Respondent's witnesses at times were evasive and unwilling to admit to even the plausibility that something may have been said in a conversation that they admittedly had only overheard in part, i.e., machine gun statement made by Charlebois at the December 2 LMC Meeting; or the plausibility that something could have happened of which no one had witnessed, i.e., Charlebois grabbing Thompson in the hallway on December 7. They were prone to exaggeration particularly about their own "beliefs" that had no basis in fact.

Moreover, the testimony of Respondent's witnesses differed from one another with respect to significant events and details. Most strikingly were the differences in the testimony of Chris Charlebois who simply was not a credible witness. In addition to what at times was his obvious over exaggeration, Charlebois could neither recall events nor gave completely different versions from Respondent's other witnesses. Charlebois' written statements, which he gave to Respondent during the investigation concerning his threats and assault upon employee Roy Thompson, (GC Exh. 35 and R. Exh. 21), were also at odds and conflicted with his testimony particularly concerning his assault upon employee Roy Thompson.

Within a larger context, the overall credibility of Respondent's witnesses is dubious at best. On direct examination, Respondent's witnesses testified from documents or responded to leading questions. Moreover, Respondent simply could not present evidence to support its assertion that the employees had made "false, slanderous, and defamatory statements" against management. Indeed all of the evidence pointed to the contrary. That is, Respondent is the one who has made false, slanderous, and defamatory statements against these employees.

At times, Respondent's counsel did not even attempt to address key matters with his own witnesses. Respondent's failure to question a witness about an incident of which he has knowledge can lead to an adverse inference being drawn that the testimony would not have been favorable to respondent. *Flexsteel Industries, Inc.*, 316 NLRB 745, 757 (1995). Similarly, it is appropriate to draw an adverse inference from a respondent's failure to call a witness who has likely knowledge of a factual question. *Id.* See also *Advocate South Suburban Hospital v. NLRB*, 468 F.3d 1038, 1048 and fn. 8 (7th Cir. 2006). Consequently, the testimony of the General Counsel's witnesses should be credited.

In an attempt to bolster Charlebois' credibility, Respondent put in cursory reports of two lie detector tests that Charlebois took on February 5, 2016, (R. Exhs. 17 and 18), which were taken well after the terminations in mid-December 2015. Consequently, Respondent could not possibly have relied on the tests. Respondent also called Steven Stechschulte to the witness stand as an expert. (Tr. 425-499). However, Stechschulte provided little in the way of enlightenment concerning the two cursory reports that each had only four questions.

First, Respondent failed to turn over and Stechschulte failed to provide the underlying documents data that was created which served as the basis of his report. Rule 705 of the Federal Rules of Evidence provides that an expert may "be required to disclose the underlying facts or data on cross-examination." Second, by Stechschulte's own admission, he administers 160 or 170 to 190 to 200 polygraphs a year. He testified that the "average polygraph examiner does about 30 to 50 a year." (Tr. 442). This is roughly 4 to 5 times the number of an average polygrapher which begs one to question the reliability of his results when he is administering such an extraordinary amount of test per year.

Third, Stechschulte testify that it only takes him 20 minutes to review the underlying charts but could not testify as to how long it takes him to write up his analysis. (Tr. 471-72). When asked how long it took him to write up his analysis in this case, he answered “I have no clue.” (Tr. 472). Additionally, Stechschulte testified that any lie detector test is only as good as the pre-test information given one to be examined. He indicated that if someone is not forthcoming in the initial information or he has been provided false information then then it can throw the basis of the examination off. (Tr. 480- 86). For example, in looking at the pre-test information and questions on R. Exh. 17, the information does not correlate to the statements that were attributable to Charlebois by the discharged employees.

Finally, the reliability of polygraphs in court proceedings have been long questioned. *United States v. Scheffer*, 523 U.S. 303, 309 (1998) (noting Military Rule of Evidence 707’s prohibition, “there is simply no consensus that polygraph evidence is reliable ... [T]he scientific community remains extremely polarized about the reliability of polygraph techniques”); *United States v. Johnson*, 446 F.3d 272, 278 (2d Cir. 2006) (“polygraph results are inadmissible as evidence”); *United States v. Prince-Oyibo*, 320 F.3d 494,501 (4th Cir. 2003) (reaffirming per se ban on polygraph evidence); *United States v. Thomas*, 167 F.3d 299, 308 (6th Cir. 1999) (post-Daubert decision where court expressed its long-held opinion that the results of a polygraph are inherently unreliable); *Fixtures Manufacturing Corp.*, 251 NLRB 778 (1980) (Board unwilling to find that polygraph tests constitute sufficiently probative evidence of theft or other misconduct to rely on when determining loss of reinstatement); *Ackerman Manufacturing*, 241 NLRB 621 (1979) (polygraph admissible to evaluate respondent’s investigative efforts); *J.C. Penney Co.*, 172 NLRB 1279 (1968) (polygraph test evaluated, but not given controlling weight in determining credibility). Accordingly, the polygraph test results in this case should not be given credence.

## ARGUMENT

The discharged employees were clearly terminated for their union and other protected concerted activity. The discharges flow out of employee Roy Thompson's grievance concerning Division Manager Chris Charlebois grabbing him and Charlebois' subsequent comment that "some people are going to conform to the way things are and some old dinosaurs will be shot." The grievance had a sound basis under the parties' March 2, 2012 Letter of Understanding which requires the discharge of any employee, including managerial ones, who have engaged in and/or threatened violence against another employee.

The Board has "consistently held that employee complaints about their supervisors' treatment of them constitute protected concerted activity." *Alvin D. Johnson Nursing Home*, 261 NLRB 289 n. 2 (1982); *AvalonCarver Community Center*, 255 NLRB 1064 (1981); *Dreis & Krump Manufacturing Inc.*, 221 NLRB 309 (1975), *enfd.* 544 F.2d 320 (7th Cir. 1976). See *Ishikawa Gasket*, 337 NLRB 175 (2001), *enfd.* 354 F.3d 534 (6th Cir. 2004).

The discharges of union representatives Rick Dean, Terry Timman, Darrell Smith are directly related to the processing of Thompson's grievance. But for their attempts to bolster Thompson's accusations by relaying similar comments that Charlebois had made to them, they would not have been discharged. Respondent freely admits that the reason for the employees' discharges was the accusations that the employees made against Charlebois.

Aside from the legitimacy of the employees making their allegations via the parties' grievance process, counsel for the General Counsel anticipates that Respondent will argue that the employees lost the protection of the Act by the nature of their allegations against Charlebois, i.e., that their accusations were "false, slanderous and defamatory." However, this contention is simply not supported by any direct evidence. Rather, Respondent's contention is based on its

own managerial employees' beliefs and their assessment of plausibility. Moreover, the animus exhibited towards Thompson and in general for the Union and the employees' unwillingness to easily concede to changes in their working conditions underlies the inadequate bases for the Employer's decision to terminate these employees.

Asserting the contractual right to file a grievance is considered protected activity under Section 7. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 422, 436 (1984). Moreover, an employee is protected by the Act when fulfilling his role as a steward by processing grievances. *Union Fork & Hoe Co.*, 241 NLRB 907, 908 (1979). While a steward may lose the protection of the Act, he must engage in misconduct that "is so violent or of such character as to render the employee unfit for further service." *Id.* Moreover, employees engaged in collection action do not lose the protection of the Act even if they make false or inaccurate allegations against their employer unless the allegations are deliberately or maliciously false. *Walls Mfg. Co.*, 137 NLRB 1317 (1962). See *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).

In the instant case, there is simply no justification to support the Employer's contention that the employees have lost the protection of the Act. To find otherwise would render the parties' grievance procedure to be meaningless.

#### REMEDY

##### *The ALJ Should Award Search-for-Work and Interim-Employment Expenses*

As requested in the complaint, the General Counsel is seeking that the discriminatees be reimbursed for all expenses incurred while seeking and/or retaining interim employment, where such expenses would not have been necessary had the employee been able to continue working for the respondent under the same terms and conditions in place before their unlawful discharges.

Discriminatees are entitled to the reimbursement of such expenses as part of a make whole remedy. *See Deena Artware, Inc.*, 112 NLRB 371, 374 (1955), *enfd.* 228 F.2d 871 (6th Cir. 1955); *Crossett Lumber Co.*, 8 NLRB 440, 498 (1938), *enfd.* 102 F.2d 1003 (8th Cir. 1938).

Such expenses might include increased travel costs associated in seeking or commuting to interim employments, *see D.L. Baker, Inc.*, 351 NLRB 515, 537 (2007); costs of tools or uniforms required by an interim employer, *see Cibao Meat Products*, 348 NLRB 47, 50 (2006); or contractually required union dues and/or initiation fees, *see Rainbow Coaches*, 280 NLRB 166, 190 (1986), *aff'd mem.*, 835 F.2d 1436 (9th Cir. 1987), *cert. denied* 487 U.S. 1235 (1988).

Until now, however, the Board has only awarded search-for-work expenses in cases involving a total loss of employment, in which the discriminatee has a duty to mitigate his or her damages. *See F.W. Woolworth Co.*, 90 NLRB 289 (1950). Thus, in those cases, search-for-work and interim employment expenses are offset against the discriminatee's interim earnings. *See West Texas Utilities Co.*, 109 NLRB 936, 939 n.3 (1954) ("We find it unnecessary to consider the deductibility of [the discriminatee's] expenses over and above the amount of his gross interim earnings in any quarter, as such expenses are in no event charged to the Respondent."); *see also North Slope Mechanical*, 286 NLRB 633, 641 n.19 (1987), *enforced mem.*, 760 F.2d 276 (9th Cir. 1985). In cases that do not involve a total loss of employment, but where employment continues at a lower rate of pay or at reduced hours, there is no duty to mitigate damages. *Ogle Protection Service, Inc.*, 183 NLRB 682 (1970), *enforced*, 444 F.2d 502 (6th Cir. 1971); *see also Remington Lodging & Hospitality*, 363 NLRB No. 140, slip op. at 1 (Mar. 31, 2016). The Board has not yet addressed the propriety of awarding search-for-work and interim employment expenses to *Ogle* discriminatees.

The General Counsel is currently attempting to change this standard for *Woolworth* discriminatees in a case pending before the Board. See Responsive Brief of the General Counsel in *King Soopers, Inc.*, Case 27-CA-129598. Under the General Counsel’s proposed standard, search-for-work and interim employment expenses would be calculated separately and would not be offset against a discriminatee’s interim earnings. Notwithstanding that cases arising under *Ogle* do not require discriminatees to mitigate their damages, discriminatees who seek additional work due to a reduction in hours or other unlawful discriminatory conduct short of a complete cessation of employment should nevertheless receive make-whole relief for their search-for-work and secondary interim employment expenses.

The Board has “‘broad discretionary’ authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act.” *Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 2 (2014) (citing *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969)). The basic purpose and primary focus of the Board’s remedial structure is to “make whole” employees who are the victims of discrimination for exercising their Section 7 rights. See, e.g., *Radio Officers’ Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 54-55 (1954); *Kentucky River Medical Center*, 356 NLRB 6, 8 (2010), *enforcement denied*, 647 F.3d 1137 (D.C. Cir. 2011). In other words, a Board order should be calculated to restore “the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); see also *J.H. Rutter-Rex Mfg.*, 396 U.S. at 263 (recognizing the Act’s “general purpose of making the employees whole, and [] restoring the economic status quo that would have obtained but for the company’s” unlawful act). Indeed, employees would be reluctant to exercise their Section 7 rights knowing that the Board could not provide them with make-whole relief in the event of an employer’s discriminatory response. In

the case of *Ogle* discriminatees, any expense incurred while searching for extra work or retaining secondary interim employment due to a reduction in wages or hours would not have occurred absent the Employer's unlawful conduct. *See Deena Artware, Inc.*, 112 NLRB at 374; *Crossett Lumber Co.*, 8 NLRB at 498. Therefore, a Board order that does not take account of these additional expenses will not adequately make employees "whole" within the meaning of well-established Board remedial principles. *See Kentucky River Medical Center*, 356 NLRB 6, 8 (2010) (primary focus in calculating monetary remedy must be on making employees whole), *enforcement denied on other grounds*, 647 F.3d 1137 (D.C. Cir. 2011).

#### CONCLUSION

For all of the above-mentioned reasons, the General Counsel respectfully requests that the ALJ find that Respondent violated Section 8(a)(3) and (1) when it discharged employees Ricky Dean, Darrell Smith, Roy Thompson, and Terry Timman.

The General Counsel further requests that the ALJ order all appropriate remedies including that Respondent reimburse the discriminatees for all search-for-work and work-related expenses regardless of whether the discriminatees received interim earnings in excess of these expenses overall or in any given quarter. Additionally, the General Counsel requests that the ALJ order Respondent to pay for all consequential damages incurred by the discriminatees as a result of Respondent's unlawful conduct.

Respectfully submitted,  
/s/ Karen N. Neilsen

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing General Counsel's Brief to Administrative Law Judge was served by e-mail on the following counsel on this 21st day of November, 2016:

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