UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

OMNISOURCE CORPORATION,

Respondent,

Case No. 08-CA-167138

AND

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

Charging Party.

UNION'S RESPONSE IN OPPOSITION TO RESPONDENT'S EXCEPTIONS

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Introduction

There are two words which doom the Respondent Employer's Exceptions in this case: Standard Drywall. And this, of course, is because the vast majority of Respondent's exceptions are over the ALJ's credibility determinations. This is understandable given that this case does revolve around the credibility of the Employer versus the Union witnesses over what amount to subtle differences in perception over events. However, given that the ALJ simply did not believe the testimony of the Employer witnesses about these events and about their true motivations behind the discharge of these employees based on these events, the Employer's case before the Board simply cannot succeed.

The Employer's credibility in this case, moreover, is greatly impacted by the objective fact that it discharged ***all three members of the Local union leadership***, along with one other bargaining unit employee. The rank 'n file bargaining unit employee, moreover, was discharged for the offense of filing a grievance, specifically over a manager's conduct which the employee, as well as the Local, viewed as violative of the parties' letter of understanding forbidding workplace threats and violence. And, the Local leadership was discharged specifically for processing this grievance and providing evidence in support of it.

In short, as the ALJ found, all four employees were unlawfully discharged for protected, concerted activity in violation of Sections 8(a)(1) and (3) of the Act. Even if the ALJ had believed the Employer's claimed, subtle interpretations of the facts underlying the aforesaid grievance, this would not take away from the protected nature of the employees' conduct in filing and processing a grievance under an enforceable labor agreement. And, in the end, the ALJ simply did not believe the Employer's claims in this respect. Given all of this, the Employer has an impossible task before the Board in attempting to achieve a different result.

Statement of Facts

The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC ("USW" or "International") is the exclusive collective bargaining representative for bargaining unit employees at the Mansfield, Ohio facility of the OmniSource Corporation ("Company," or "Employer" or "OmniSource") (GC Ex 6 at p. 1). The bargaining unit at this facility is relatively small, consisting of around 34 employees (Tr. 509-510).

The USW, on behalf of the Local, is a party to a collective bargaining agreement with the Company ("CBA"), effective May 1, 2015, through April 30, 2018, which embodies terms and conditions of employment, as well as a grievance procedure. (GC Ex. 6). The parties' CBA also includes a Letter of Understanding which addresses the handling of verbal and physical altercations that may occur at the facility. (GC Ex. 3).

On December 7, 2015, bargaining unit employee Roy Thompson was approached in the breakroom by General Manager Bob Oney regarding an incident that Thompson recently had in which damage occurred to a crane ladder (Tr. 215-217, 219). Oney requested that Thompson fill out an accident report about the incident (Tr. 219). Thompson initially declined to fill out such a report, explaining that "we've never had to do this before, and I didn't understand why I had to do it now." (Tr. 219). In response, Oney called for the Unit Griever/Steward Terry Timman to join him and Thompson in the breakroom (Tr. 219-220). Upon Timman's arrival, he and Thompson followed Oney to the conference room (*Id.*).

As Oney led the way down the hallway to the conference room, OmniSource Division Manager Chris Charlebois exited his office and reached out his hand to shake Thompson's hand (Tr. 221). This is how Thompson describes what happened at this point:

> Mr. Charlebois . . . came out of his office and was standing in his doorway, and he put his hand out like he wanted to shake my hand. I didn't want to shake his hand, so I tried to walk by. He reached out and grabbed me and pulled me to him and says, 'What's wrong with you? You don't want to shake a man's hand when he puts it in front of you'
>
> I said, 'No.' I pulled away, and I went on into the conference room.

(Tr. 221). There were no witnesses to this incident (*Id.*).

For his part, Charlebois gives a slightly different account of what transpired on this occasion. Thus, while Charlebois admits that he tried to shake Thompson's hand, but that he was unsuccessful in doing so because Thompson had his hands in his pockets and didn't want to shake his hand, Charlebois claims, "[m]y hand may have brushed against him when I was trying to shake his hand, but no more than that." (Tr. 713-714). Charlebois denies actually grabbing Thompson (Tr. 713).

Meanwhile, Charlebois followed Oney, Thompson and Timman into the conference room where they all met to discuss the issue of filling out the accident report (Tr. 224). During this meeting, Charlebois threatened Thompson with a one-day suspension if he did not fill out the accident report as instructed (Tr. 224-225). According to Thompson, Charlebois stated "throughout the conversation . . . 'People are going to conform to my way, or the old dinosaurs will be shot.'" (Tr. 225). Terry Timman corroborates this, stating that he heard Charlebois tell Thompson during this meeting, "'The old dinosaurs will comply or will be shot'" . . . . (Tr. 339).

Again, Charlebois claims to have a bit of a different take as to what he said in this respect. Thus, Charlebois claimed at hearing that, during this meeting, he "made reference to a dinosaur to Terry Timman. 'Here's an example of an employee who is a dinosaur. How do we get them to buy in?'" (Tr. 715). He admits that he then stated something to the effect of,

"'Some old dinosaurs may not survive'" or "here's an example of a dinosaur who will be left behind." (Tr. 790).

For his part, OmniSource Mansfield General Manager Bob Oney also heard Charlebois "make a comment about dinosaurs not surviving." (Tr. 813, 916-917). Indeed, in a written statement he made in regards to this statement, Oney related that "Chris made a statement that everyone needs to conform to the way things are heading and that some old dinosaurs may not survive." (GC Ex. 5).

OmniSource Human Resources Manager Andrew Ables, who made the ultimate decision to discharge the four employees at issue in this case (Tr. 45), states that it was reported to him from Charlebois himself that Charlebois made comments to the effect that "if people don't comply, then old dinosaurs, they don't survive." (Tr. 55-58). And, Ables admitted that he ultimately decided to fire Thompson in part because "he alleged the dinosaur statement . . . and didn't say it in the exact way that Mr. Charlebois or Mr. Oney had reported it" to him (Tr. 74). Similarly, Ables admits that he fired Timman because Timman "made a statement similar to Mr. Thompson that a dinosaur would be shot instead of a dinosaur would not survive . . . ." (Tr. 93). OmniSource Mid-Ohio Regional Manager Robert S. Carman, who recommended that the four employees at issue in this case be fired, also testified that his decision to recommend discharge revolved around the difference between Charlebois saying that dinosaurs won't survive versus saying that they will be shot (Tr. 821-826).

In the end, while the ALJ could not determine which version of the "dinosaur" comment was the most correct one, he concluded that "it is unnecessary to resolve the factual question of which of these very similar versions of the statement is accurate since the difference between them is not legally consequential under the Act." (ALJD at p. 14).

Meanwhile, right after the December 7 meeting in which Charlebois made the "dinosaur" comment, Thompson returned to the torching shanty and discussed Charlebois' actions with the employees who were present there at the time, including with Unit Secretary Darrell Smith and Local Unit Griever/Steward Terry Timman (Tr. 593). Specifically, Thompson said "he wanted to file a grievance because Chris [Charlebois] grabbed him and made a comment about shooting old dinosaurs." (*Id.*). As Smith explains, he told Thompson that the first step of the grievance procedure required the Local to talk to OmniSource management about the situation before actually submitting a written grievance (Tr. 593-594).

And so, Timman and Smith took a statement from Thompson about the events he was concerned about and then initiated the first-step of the grievance procedure by presenting Thompson's concerns to OmniSource Mansfield General Manager Bob Oney and to Charlebois himself (Tr. 594-595). First of all, according to Timman, Charlebois did not deny making the "dinosaur comment" at this meeting (Tr. 345). In addition, according to Timman, although Charlebois denied grabbing Thompson, he did admit that he tried to shake Thompson's hand, and that he did remonstrate Thompson for not shaking his hand when offered. (Tr. 344-345).

When Smith soon thereafter told Thompson that Charlebois denied actually grabbing him, Thompson was adamant that this happened, telling Smith, "'He grabbed me. I'm telling you, he grabbed me.'" (Tr. 595). Thompson then told Smith, "'Check the cameras, Darrell. That will show you him grabbing me.'" (Tr. 596). Thompson's response in this regard convinced Smith that he was telling the truth, and Smith therefore told Thompson, "'Okay, Roy. We'll write the grievance up and we'll go through the process of it and we'll do it.'" (Tr. 596-597).

While the ALJ could not ultimately determine which version of the hallway encounter – Thompson's or Charlebois's – was the correct one, the ALJ did determine affirmatively that neither Thompson nor any of the other Union witnesses "made false statements regarding the hallway encounter." (ALJD at ps. 9-10). And, at the same time, the ALJ determined that the Company "has not shown that it had a good faith basis for believing that such misconduct occurred." (*Id.* at p. 11).

On December 8, 2015, the Local proceeded to file a written grievance on Roy Thompson's behalf over the events of December 7 – specifically, over what Thompson perceived to be the threat made by Charlebois as well as Charlebois' grabbing him in the hall (Tr. 526-527). Thompson provided a written statement about these events along with this grievance (Tr. 63; GC Ex. 7).

The grievance specifically challenged "Both Verbal and Physical Threats," and, as a remedy, requested Ominisource to "Follow Protocol, 'A System of Rules That Explain The Correct Conduct and Procedures' set forth in the letter of understanding negotiated on March 2, 2012 By USW 9130-3 and OmniSource Corp. Mansfied Yard." (GC Ex. 2). The letter of understanding cited states, in pertinent part:

> [A]ltercations 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 agreements.
>
> 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.

(GC Ex. 3) (emphasis added).

In the afternoon of December 8, OmniSource Human Resource Manager Linda McKinley, who the ALJ found to be "an unusually biased" and unbelievable witness (ALJD at 6, 11), initiated a meeting with the Local ostensibly about the Thompson grievance (Tr. 601-602). This meeting included Terry Timman, Bob Oney and Darrell Smith (*Id*.). Unbeknownst to these employees and the Union, Ms. McKinley, reflecting the Company's intentions, was beginning to "re-cast the investigation as one into whether the employees had engaged in misconduct while pursuing the grievance." (ALJD at p. 4, 12).

As OmniSource Human Resources Manager Andrew Ables explained at hearing, a separate event involving Charlebois came up in the course of the discussions and investigation into the Thompson grievance (Tr. 83-84). Thus, during the course of the December 8 meeting, Timman told McKinley, "'Well, Linda, the only thing I can tell you is that he [Charlebois] said that machine gun comment in the December 2 meeting'" (Tr. 604-605). Smith chimed in, "'Well, he said the machine gun part of it.'" (Tr. 605). Timman and Smith were referring here to a comment which Charlebois allegedly made at a December 2, 2015, labor/management meeting (Tr. 604). To wit, according to Timman, Charlebois, sensing hesitation on the part of the union to accept the company's suggestion to put the then-defunct safety committee back together, stated, "'What do I got to do, hold a machine gun to you guys to get something done here?'" (Tr. 313). In response, Timman said, "'Okay, Stalin,' in a sarcastic way." (Tr. 313). According to Timman, Charlebois then asked "where he could buy a union job. And I told him Tammany

Hall, being sarcastic again, of course." (*Id.*). Rick Dean claims to have overheard this conversation and to have heard one of the parties to the discussion say that Stalin was "'[w]orser than Hitler.'" (Tr. 519). Darrell Smith, who was also present at this meeting, also corroborates Timman's recounting of the discussion with Charlebois (Tr. 590).[1]

Charlebois himself has a vague recollection that he had some conversation with Timman in which Stalin and possibly a comparison to Hitler came up, but his recollection of that discussion is foggy (Tr. 740-741). In addition, McKinley herself was present at the December 2 labor-management meeting to which Timman was referring, and she herself overheard the part of the discussion in which Timman mentioned Stalin and in which Charlebois mentioned that Stalin was better than Hitler (Tr. 607, 932, 1020-1021). For his part, Oney stated that he had heard someone make a reference to Stalin at this same meeting (Tr. 607).

In the end, based upon his "review of the record in this case, including the demeanor of the witnesses, and the substance of the testimonies," the ALJ credited "the testimony of Dean, Smith, and Timman" and found that "at the December 2, 2015, LMC meeting Charlebois did ask whether it was necessary to 'hold a machine gun' to employees in order to get something done." (ALJD at p. 6). In addition, the ALJ also found that these employees' reports to the Company about this statement "were not only honest, but substantially accurate." (ALJD at p. 7).

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[1]OmniSource Dispatcher, Curtis West, was also present at this December 2 meeting and heard Timman and Charlebois having a conversation about Stalin and Hitler, but he did not hear what preceded that (Tr. 699-702). For his part, OmniSource Transportation Manager Patrick J. Harte, who was also at this meeting, remembers hearing some type of "back-and-forth" between Timman and Chris Charlebois (Tr. 678). As he explains, "Timman made reference to something about history and Chris acknowledged that (*Id.*). And, while Harte had claimed in a statement to the Company that he had not heard anything at this meeting which could be perceived as a threat, he admitted at the hearing that a threat could have been made in a side conversation that he simply was unable to hear (Tr. 670-671, 688).

Meanwhile, during the course of the December 8 meeting about the newly-filed Thompson grievance, Linda McKinley telephoned USW Staff Representative Donnie Blatt to conference him in to the discussion with everyone present. At the request of the Company, Timman and Smith once again retold the incidents involving Charlebois (Tr. 612-613). Upon hearing Timman and Smith's recounting of events, Blatt stated, "'Well, Linda, we've got a letter of understanding and I would hope you guys do the right thing' . . . ." (Tr. 613). Ultimately, as a possible settlement of the Thompson grievance, Blatt proposed that OmniSource transfer Charlebois to another facility (Tr. 75-76; 87-88). And, indeed, OmniSource Human Resources Manager Andrew Ables testified that this proposed settlement was a motivating factor in firing the four employees in this case (*Id.*).

After the meeting was over on December 8, Linda McKinley and Bob Oney asked Timman, Smith and Local Unit Chairman Rick Dean as well to write down statements about what they knew about the December 7 as well as the December 2 incidents relating to Charlebois (Tr. 529-530). As indicated in the record, neither Smith nor Dean ever completed any formal education past eighth grade (Tr. 532, 611). As requested, these three employees did indeed write down such statements (GC Exs. 4, 27, 32).

The Company continued to investigate the Charlebois incidents over the next several days by repeatedly questioning Thompson, Timman, Dean, and Smith about the events that occurred (*See*, Tr. 533; GC Ex. 37; Company interview notes at GC Exs. 18, 25, 26, 28, 33).

On December 18, 2015, after the conclusion of the Company's investigation, the Company discharged all four employees, who otherwise had very good work records (ALJD at p. 3 & p. 14, fn. 8), for allegedly making "false, slanderous, and defamatory statements [] about management, Chris Charlebois." (GC Exs. 8-11). At the time of this discharge, Timman, Dean

and Smith were the only Local officers (Tr. 630-631; ALJD at p. 2). Indeed, the dischargees had to call in former Local Unit Secretary Tim Philpott to sit in on the discharge meeting as their union representative because there were no other Local representatives to be called upon (*Id.*).

In response, the Union filed grievances on behalf of all the employees, challenging the discharges for lack of just cause. Additionally, the Union filed ULP charge 08-CA-167138 with the Board on January 6, 2016, alleging that,

> the Employer has violated the Act by discriminating and retaliating against union officials in regards to their tenure of employment when it unlawfully terminated Unit Chairman Rick Dean, Unit Secretary Darrel Smith, Unit Griever Terry Timman, and former safety committeeman Roy Thompson for discussing and reporting a violation in the terms and conditions of employment. The Employer terminated these union members for complaining about and reporting a supervisor's threatening actions.

(GC Ex. 1(a)). NLRB Region 8 found merit in the above allegations and issued a Complaint on the charge. (GC Ex. 1(e)).

Subsequently, on January 29, 2016, the Company filed charge 08-CB-168962 alleging that the four bargaining unit employees "attempted to restrain OmniSource in the selection of its representatives in violation of Section 8(b)(1)(B) by fabricating stories about a supervisor in an effort to have the supervisor terminated." (GC Exs. 13-14). While this CB charge was originally to be heard along with the Local's instant CA charge, those two charges were ultimately severed from each other (GC Ex. 1(m)).

Finally, on February 29, 2016, Charlebois filed a civil suit against the four discharged employees (GC Ex. 36). OmniSource is paying the attorney's fees for this lawsuit (Tr. 122-123; ALJD at p. 4).

Decision of ALJ

In light of the above, the ALJ determined that the Company's "view that the alleged discriminatees had made slanderous statements was the product of bias, not honest inquiry." (ALJD at p. 14). And, this conclusion, as the ALJ related, doomed the Company's legal position.

As the ALJ explained, there is no doubt that the employees in this case were fired for statements made in the course of the grievance procedure, and it is well-settled that the processing of a grievance is concerted, protected activity within the meaning of Section 7 of the Act (ALJD at 15) (citing, *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 836 (1984). As the ALJ emphasized, "the protection afforded the union representatives who are processing a grievance is robust and is not lost even if the representatives engage in misconduct, 'unless the excess is extraordinary, obnoxious, wholly unjustified, and departs from the *res gestae* of the grievance procedure,' *Roemer Indus., Inc.*, 362 NLRB No. 96 (2015), quoting *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028, 1034 (1976), and 'is so violent or of such character as to render the employee unfit for further service.'" (ALJD at 15-16). Moreover, the ALJ explained that "[t]he Act's protection extends beyond the grievance process to employee complaints about supervisors' treatment of them.'" (ALJD at 16) (citing, *Calvin D. Johnson Nursing Home*, 261 NLRB 289, n. 2 (1982); *Avalon-Carver Community Center*, 255 NLRB 1064 (1981)).

In the instant case, the ALJ concluded that the Company could only prevail if it could "show an honest belief not only that the employees' reports were inaccurate, but that their reports were deliberately or maliciously false. In the case of the three union representatives, the Respondent must show, in addition, an honest belief that the statements were wholly unjustified,

beyond the *res gestae* of the grievance procedure, and so violent or of such character as to render those employees unfit for service." (ALJD at 16-17) (citing, *Universal Fuels*, 298 NLRB 254, 255 (1990); *Walls Mfg. Co.*, 137 NLRB 1317 (1962)). Moreover, the ALJ explained, even if the Company could show such an honest belief, "its actions are still a violation of the Act if the General Counsel shows by a preponderance of the evidence that the employees did not, in fact, engage in the misconduct of that extreme character. (ALJD at 17) (citing, *Modern Mgmt. Serv. LLC*, 361 NLRB No. 24 (2014)).

In short, the ALJ ultimately found that the Company could not succeed in surmounting any of these hurtles. First and foremost, the ALJ concluded that the Company did not in fact have an honest belief that the dischargees' claims were wholly unjustified by the facts. Indeed, as the facts above demonstrate, the Company could not have had such a belief because the dischargees' version of relevant events was not that different from the version being told by Company representatives. And, of course, this also meant that it was quite easy to show that their conduct was not "so violent or of such character as to render those employees unfit for service."

Indeed, far from finding that the dischargees had engaged in any type of egregious conduct or that the Company had an honest belief that they had, the ALJ concluded that the Company, by turning one employees' grievance into an occasion to investigate him as well as all of the union officers and by then firing all of these employees, had itself acted egregiously. As the ALJ concluded:

> The ferocity of management's response to the Union's grievance in this case is in my view, shocking. Rather than simply accepting or rejecting the grievance, the Respondent discharged every one of the employees involved with pursuing that grievance. All of those individuals were long-term employees of the Respondent, and they included every current union representative at the facility. The Respondent did not stop there, but also funded a defamation lawsuit

> seeking to extract monetary damages from the discharged workers. Although a showing of employer animus against protected union or concerted activity is not part of the legal analysis under the circumstances present here, I note that the ferocity of the Respondent's actions is hard to fathom in the absence of a commitment on its part to chilling protected activity.

In light of the above, the ALJ found the Company to have acted in violation of Sections 8(a)(1) and (3) of the Act, and ordered that they be reinstated to work and made whole for their losses.

Argument

The Company's Numerous Credibility Challenges Must Fail

Despite the damning opinion of the ALJ in this case, the Company nonetheless persists in attempting to defend its indefensible actions before the NLRB. This attempt must fail.

First of all, nearly all of the Company's exceptions amount to a challenge to the ALJ's credibility findings. Indeed, the following exceptions are based upon such a challenge: Exceptions 1, 2, 3, 4, 5, 6, 7, 9, 11, 14, 16, 17, 18, 19, 22, 23, 25, 26, 27, 28, 33, 34, 35, 36, 41, 42, 48, 50, 51, 54, 56, 57, 59, 60, 67, 68, 70, 74, 75, 77 and 78.

These exceptions must be rejected. Applicable here is the decision in *Fantasia Fresh Juice Company*, 339 NLRB 928 (2003), in which the Board actually awarded attorney's fees to the respondent under the Equal Access to Justice Act (EAJA) in light of exceptions filed by the General Counsel which were much like those filed by the Company here. As the Board held in that case:

> The large majority of these exceptions either directly contested the judge's credibility findings or were premised solely on the reversal of those findings . . . . Accordingly, the General Counsel's exceptions can only be characterized, in their totality, primarily as an attempt to reverse credibility findings. It is well established that the Board will overrule a judge's credibility findings only where "the clear preponderance of all the relevant evidence convinces us that they are incorrect." *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362

> (3d Cir. 1951). This is a high standard, which must be applied not only in evaluating the merits of the General Counsel's exceptions, but also in determining whether, despite lacking merit, they were substantially justified under EAJA. Considering the nature of the judge's credibility findings here, and the record evidence as a whole, we conclude that the General Counsel was not substantially justified in challenging them.

The very same can be said of the Company's exceptions in this case where the record as a whole supports the ALJ's credibility findings, and in particular, his finding that the Company did not and could not have had an honest belief that the dischargees engaged in egregious conduct making them unsuitable for continued employment. This is so because, as discussed above, and further below, the claims these employees made about relevant events were simply not so different from the versions told by Company officials. Therefore, it strains credulity for anyone to believe that the Company truly felt justified in firing one long-term employee along with all three officers of the local union based upon the nature of their claims.

The Company Fired The Dischargees For Pursuing a Grievance

The employees at issue in this case were discharged by the Company for conduct that occurred in the course of their protected activities – specifically, for filing a grievance and participating in the grievance process – and that none of the employees engaged in any conduct in the course of activities that relieve them of the protection of the Act.

In such a case, "the first inquiry in the analysis is whether" the employees were indeed "engaged in protected activity, and specifically, whether the actions for which they were disciplined were part of that protected activity." *Roemer Industries*, 362 NLRB No. 96, slip op. at 6 (2015).[2] There is no doubt that this was the case.

[2]As the Board makes clear in *Roemer Industries*, slip op. at p. 7 fn. 15, the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), is not appropriate in a case such as this one.

First of all, in filing and processing a grievance about the conduct of Charlebois pursuant to the letter of understanding between the parties the four employees at issue in this case were engaging in protected, concerted activities. Thus, it is a basic principle that the process of filing a grievance is protected under the Act, as are employee discussions about safety concerns in the workplace. *See NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 436 ("it would make little sense for § 7 to cover an employee's conduct while negotiating a collective-bargaining agreement, including a grievance mechanism by which to protect the rights created by the agreement, but not to cover an employee's attempt to utilize that mechanism to enforce the agreement").

In particular, the conduct of the three Local officers in processing the grievance, including their gathering information in support of the grievance, is especially protected by the Act. Thus, "the Board has long made clear that the grievance activities of union stewards are especially important to the effectiveness of contractual grievance-arbitration mechanisms." *Postal Service*, 360 NLRB No. 74, slip op. at 7 (2014); *see also*, *Roemer Industries, Inc.*, slip op. at p. 7 ("[i]t is beyond cavil that a union steward's grievance activity is concerted activity protected by Section 8(a)(1) and (3) of the Act."); *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028, 1033 (1976).

As the Board recently held, "[t]he protected status of grievance activities extends to all manner of grievance-related conduct, including . . . the investigation of grievances." *Roemer Industries, Inc.*, slip op. at p. 7 (*citing*, *Dover Energy, Inc.*, 361 NLRB No. 48, slip op. at 2 (2014) ("Section 7 protects a union steward's activity in seeking information for the purpose of investigating grievances under the terms of a collective bargaining agreement."); *Roadmaster Corp.*, 288 NLRB 1195, 1197, *enforced*, 874 F.2d 448 (7th Cir. 1989)("Union stewards filing and

processing grievances on behalf of other employees . . . enjoy the protection of the Act, even if, while doing so, they exceed the bounds of contract language, unless the excess is extraordinary, obnoxious, wholly unjustified, and departs from the *res gestae* of the grievance procedure.")

The protected status of such activities also extends to the statements made by representatives of an employee (or of management for that matter) during the grievance steps and in the process of attempting to settle a grievance. Thus, as the court held in the seminal case of *General Motors Corp.* v. *Mendicki*, 367 F.2d 66, 70 (1966), such statements in the course a labor-management meeting "having for its purpose the adjustment of a grievance of the employee or other peaceable disposition of such grievance are unqualifiedly privileged." It is well-understood that such a privilege advances "the declared policy of the national legislation on labor relations . . . to encourage, facilitate and effectuate the settlement of issues between employers and employees . . . in order to promote and preserve industrial peace." *Id.* As the court in *Mendicki* opined, this labor policy is best advanced when "the respective representatives of employer and employee at such conferences and bargaining sessions . . . ***feel free to express their respective contentions as to the pertinent facts*** and the issues involved fully and frankly and to strongly support their positions with respect to the controversy, and – employing the words of Mr. Justice Fortas in his dissent in *Linn* – do so 'untrammelled by fear of retribution for strong utterances.'"[3] 367 F.2d at 71 (emphasis added).

[3]Or, as the Board put it some time ago in the oft-cited *Berbiglia, Inc.*, 233 NLRB 1476, 1495 (1977), "[i]f collective bargaining is to work, the parties must be able to formulate their positions and devise their strategies without fear of exposure." And, of course, as the Board noted in *Roemer Industries, supra.*, slip op. at p. 8 fn. 17, "'[t]he grievance procedure is . . . part of the continuous collective bargaining process.'" (*quoting, Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578, 581 (1960)).

There is no doubt but that the four employees in this case were fired precisely for their "express[ing] their respective contentions as to the pertinent facts" relating to Roy Thompson's grievance.

Given this, the Company could only prevail, as the ALJ correctly found, if it could "show an honest belief not only that the employees' reports were inaccurate, but that their reports were deliberately or maliciously false. Moreover, in the case of the three union representatives, the Respondent must show, in addition, an honest belief that the statements were wholly unjustified, beyond the *res gestae* of the grievance procedure, and so violent or of such character as to render those employees unfit for service." (ALJD at 16-17) (citing, *Universal Fuels*, 298 NLRB 254, 255 (1990); *Walls Mfg. Co.*, 137 NLRB 1317 (1962)).

Moreover, even if the Company could show such an honest belief, its actions are still a violation of the Act if the General Counsel shows by a preponderance of the evidence that the employees did not, in fact, engage in the misconduct of that extreme character. *Modern Mgmt. Serv. LLC*, 361 NLRB No. 24 (2014). Put another way, the Company cannot prevail unless "the conduct for which they [the employees] were disciplined was so egregious as to cause them to lose the protection of the Act, and thus permit the employer to lawfully punish them for otherwise protected activities." *Roemer Industries*, 362 NLRB No. 96, slip op. a 6 (2015) (*citing, Union Fork & Hoe Co.*, 241 NLRB 907, 908 (1979) (it is "well-established Board law that a steward is protected by the Act when fulfilling his role in processing a grievance" unless the steward "exceed[s] the line . . . [in a manner] in which the misconduct is so violent or of such character as to render the employee unit for further service"); *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028, 1034 (1976) (union steward's conduct in processing

grievance protected by the Act "unless the excess is extraordinary, obnoxious, wholly unjustified, and departs from the *res gestae* of the grievance procedure").

The Company cannot succeed on any of these counts, as the ALJ correctly found, given the fact that the statements they made about relevant events were simply not at much variance with the version of events that OmniSource officials told. To put a finer point on it, these employees were fired for expressing versions of the facts which were mere shades different than OmniSource's claimed versions of what transpired.

To wit, as demonstrated above in the Statement of Facts, Thompson and the three Local officers contended in both the grievance itself and during the grievance proceedings that Charlebois on a couple of occasions said, in referring to employees who did not follow the rules or who were not more proactive, that "old dinosaurs . . . will be shot." They also claimed that he said, rhetorically, "'What do I got to do, hold a machine gun to you guys to get something done here?'" For their part, the OmniSource representatives believed that what Charlebois did say, in reference to non-compliant employees, was that "old dinosaurs . . . don't survive." A number of OmiSource representatives also remembered at least fragments of the conversation in which the "machine gun" comment came up on December 2, at least to the extent of remembering references to both Stalin and Hitler made in the course of that conversation.

By his own admission, OmniSource Human Resources Manager Andrew Ables, who made the ultimate decision to fire the four employees (Tr. 45), decided to fire Thompson, and the Local officers who provided support to his story, because "he alleged the dinosaur statement . . . and didn't say it in the exact way that Mr. Charlebois or Mr. Oney had reported it" to him (Tr. 74, 93). The difference in the wording of "dinosaur" comments is so slight as to be insignificant, and certainly not significant enough to warrant the discharge of the employees who proffered

their version of these comments during the grievance process even assuming, *arguendo*, that their version of the comments were not correct. *See, e.g. Walls Mfg. Co*., 137 NLRB 1317 (1962) (employer violated Act for discharging employee for reporting allegedly false sanitary concerns to State health department).[4] This is so because it is well-settled that an employer may not "restrict employees in the exercise of their Section 7 rights by prohibiting statements which are merely false, as distinguished from those which are maliciously so." *Simplex Wire & Cable Co.*, 313 NLRB 1311, 1315 (1994), *citing Texaco, Inc. v. NLRB*, 462 F.2d 812, 815 (3rd Cir. 1972) (emphasis added), cert denied, 409 U.S. 1008 (1972); *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1257 (4th Cir. 1969). And, there is absolutely no evidence of malicious intent in regard to the employees' recounting of Charlebois' statements, and the ALJ was correct in finding that the Company could not have had an honest belief that the employees had such an intent.

The same can be said of the employees' claims about Charlebois' confrontation with Thompson in the hallway. Again, no one disputes the fact that Charlebois remonstrated Thompson for not shaking his hand when extended towards Thompson, and Charlebois himself admits that he may have made physical contact with Thompson on this occasion, possibly brushing up against him (Tr. 713-714). Thompson's story is wholly consistent with Charlebois' version of events with the exception of his claim that Charlebois actually grabbed him rather

[4] The case of *Walls Manufacturing*, *supra.*, is instructive in that the Board found there that an employee should not have been fired for giving arguably inaccurate information about her employer's sanitary conditions to the State health department given that the concerns were of "common concern and were directed solely to the State regulatory agency which polices such matters." 137 NLRB at 1319. In the instant case, on the other hand, the four dischargees were fired for expressing concerns to the Company itself. That is, they were fired for comments which were not even made to any person or entity outside the four walls of the OmniSource Mansfield facility. Therefore, their comments should receive even more protection and leeway.

than just making contact with him. But in the end, the difference in the accounts most likely is the function of different perceptions of what happened – to wit, what Charlebois interpreted as merely brushing his hand against Thompson may have felt to Thompson as a grab.

Again, even if Thompson's accounting of the interaction in the hallway with Charlebois is incorrect, there appears to be absolutely no legitimate basis for his discharge under the circumstances. *See, e.g., KBO, Inc.*, 315 NLRB 570 (1994) (finding unlawful an employer's discipline of an employee who made baseless and false accusations in the course of a union organizing drive about the employer misusing funds). Rather, in order to lose the protection Act for protected, concerted activity – in this case, for utilizing the grievance process to raise an issue of common concern -- an employee's conduct must be significantly opprobrious, outlandish, or maliciously false. *Union Fork & Hoe Co.*, 241 NLRB 907, 908 (1979). And, there again Thompson's expression of a different perception of the hallway encounter was not so outlandish as to have lost him the protection of the Act.

As for the three Local officers, they do not even claim to have witnessed the hallway encounter. Rather, they simply believed Thompson's version of events, especially after he insisted that the security cameras be reviewed (Tr. 595-597), and their only alleged crime is to have processed the grievance related to this claim. Therefore, their discharge for this conduct amounts to nothing more than a discharge over their protected conduct of carrying out their union duties of grievance processing. As such, this basis for the discharge is unquestionably unlawful. *See, e.g., KBO, Inc.*, 315 NLRB 570 (1994) (employee spearheading union organizing drive did not lose the protection of the Act when he in good faith relayed information, albeit incorrect, told to him about the employer's allegedly funding its anti-union campaign by taking money out of employees' profit-sharing accounts).

The Company simply cannot overcome the undisputed fact that it fired four employees, including the only three union officers, for making statements which barely varied in substance from the characterization of events that Company officials made. In such circumstances, the usual hurdle which a party such as the Company has to try to overcome an ALJ decision based largely upon a challenge to credibility findings is made impossible, for there is simply no support for the proposition that the employees did anything egregious or that that the Company had an honest belief that they did. In the end, as the ALJ concluded, while it is not necessary to show, it is nonetheless clear that the Company, far from firing these employees based upon an honest assessment of wrongdoing, fired them in order to chill union activity and to fatally undermine the union by firing all of its officers.

Conclusion

For the reasons given above, the NLRB should adopt the ALJ's Decision that the Company's discharge of employee Roy Thompson along with all three Local officers violated Sections 8(a)(1) and (3) of the Act. The Board should also adopt the ALJ's recommendation that these employees be immediately reinstated to their jobs and made whole for all losses associated with their unlawful discharges.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Daniel M. Kovalik, do hereby certify that on April 21, 2017, a copy of the foregoing document was filed electronically with the National Labor Relations Board in Washington, DC and copies were served via e-mail on the following:

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