

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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

CASE NO. 8-CA-167138

Complainant,)

v.)

OMNISOURCE CORPORATION,)

Respondent.)

**RESPONDENT OMNISOURCE CORPORATION'S REPLY BRIEF
TO ANSWERING BRIEF FILED BY UNITED STEELWORKERS UNION**

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Introduction

The Union reduces Respondent's Exceptions and supporting brief to nothing more than an attack on the credibility determinations made by the ALJ. Viewed through that lens, the Union points to *Standard Drywall* and argues OmniSource's challenge must be overruled. As set out herein, the ALJ was not free to ignore evidence, misstate evidence, or construct findings that lack a sufficient factual basis. As the Board observed in *Standard Drywall*, "the Act commits to the Board itself, not to the Board's Trial Examiners, the power and responsibility of determining the facts, as revealed by the preponderance of the evidence." *Id.*, 91 NLRB 544, 544-45 (1950) (noting the Board bases its findings upon "a de novo review of the entire record, and do not deem ourselves bound by the Trial Examiner's findings") (footnote omitted). While the ALJ here did make some credibility determinations, the facts as found must nevertheless support the findings, and erroneous factual determinations cannot be the basis of a negative credibility finding. When properly viewed, the evidence does not support the findings and the ultimate conclusions based thereon – that OmniSource could not have had an honest belief the employees lied in concert to remove a disliked supervisor or that the General Counsel could show by a preponderance of the evidence that the employees were, in fact, telling the truth. For those reasons, the Board should sustain OmniSource's Exceptions and dismiss the Complaint.

A. By mischaracterizing a number of OmniSource's Exceptions as "credibility challenges," the Union ignores their underlying merit.

The Union dismisses most of OmniSource's Exceptions¹ as mere "credibility challenges" that must be overruled since the employees' versions of events "were simply not so different

¹ The following Exceptions are not claimed to be credibility challenges: 8, 10, 12-13, 15, 20-21, 24, 29-32, 37-40, 43-47, 49, 52-53, 55, 58, 61-66, 69, 71-73, and 76. Other than Exceptions 72-74, each challenges a finding by the ALJ as unsupported by the record. The Union does not defend the ALJ's findings by supplying record support for what the ALJ has found. Moreover, most, if not all, of the Exceptions that the Union claims are credibility challenges are based on factual inaccuracies in the ALJ's findings or questions that have nothing to do with a witness's demeanor, other than the fact that the ALJ made an erroneous finding to support a claim of bias.

from the versions told by Company officials.” Union Answering Brief at 14. Thus, it contends, the ALJ properly determined OmniSource did not have an honest belief the employees lied in order to orchestrate Charlebois’ removal. Although the Union spends several pages arguing that the employees’ acts were in the course of what was otherwise protected activity, OmniSource does not dispute this. What OmniSource disputes – and what many findings to which it has excepted concern – are the ALJ’s conclusions that OmniSource did not have an honest belief that the employees were deliberately lying in order to orchestrate Charlebois’ removal and that the employees were telling the truth. The ALJ’s factual findings supporting these conclusions, even those involving credibility, must still be supported by the evidence.

As OmniSource recognized in its opening brief, determinations as to credibility based on demeanor evidence are typically afforded great weight on review, but they are not absolute. Respondent’s Brief in Support of Exceptions at 21 (citing *El Rancho Market*, 235 NLRB 468, 470 (1978), *enfd.* 603 F.2d 223 (9th Cir. 1979) (“[T]he ultimate choice between conflicting testimony rests not only on the demeanor of the witnesses, but also on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole.”); *id.* at 28 (“[C]redibility determinations cannot carry the day in the face of contrary evidence. ***All such evidence cannot be casually eliminated by the simple expedient of ‘discrediting’ respondent’s witnesses.*** We cannot escape the conclusion that the trial examiner, in uniformly crediting the General Counsel’s evidence and discrediting all of respondent’s, whether or not the latter was contradicted or corroborated, exhibited that degree of bias which deprives his credibility findings of the weight usually accorded them.”) (quoting *N.L.R.B. v. Miami Coca-Cola Bottling Co.*, 222 F.2d 341, 345 & n.2 (5th Cir. 1955) (citations omitted) (emphasis added) (noting “a reading of the record reflects a similar degree of one-side

uniformity in the examiner’s rulings upon the propriety of questions and upon objections to the admissibility of evidence”).² Here, the Union, which does not distinguish this case law, “casually eliminate[s]” damning evidence either by ignoring it or claiming it was all part of a credibility determination.

In *In Re Mercy Hosp. of Buffalo*, 336 NLRB 1282 (2001), the Board considered credibility findings made by the ALJ based in part on certain documentary evidence and testimony. Finding the ALJ erred in discrediting some testimony, the Board reversed the judge’s credibility findings. The Board clarified that although it “attaches great weight to an administrative law judge’s credibility findings based on demeanor, it may proceed to an independent evaluation of a witnesses’ credibility when the administrative law judge, such as here, has based his credibility findings on factors other than demeanor.” *Id.* at 1285 (citing *Standard Drywall Products*, 91 NLRB 544 (1951), *Canteen Corp.*, 202 NLRB 767 (1973); *Valley Steel Products Co.*, 111 NLRB 1338 (1955)). Since the Board found the testimony and evidence did not contradict the witness’s testimony, it overruled the ALJ’s determination not to credit that testimony. *Id.*

In *Que Enterprises, Inc.*, 140 NLRB 1001, 1002 (1963), the Board sustained exceptions and dismissed a case asserting the respondent unlawfully terminated five employees for engaging in protected conduct. The Board did so because it found the trial examiner failed to consider the inconsistencies in the credited witness’s testimony (relying only on his testimony on direct) and discredited the respondent’s witnesses because their testimony was contrary to the credited witness’s. As to one of these witnesses, who, like Linda McKinley here, was “discredited in part [by the Trial Examiner] upon ‘the content’ of her testimony,” the Board disagreed and credited

² In a footnote to this argument, OmniSource pointed out that the same one-sided uniformity was present here and that both during the hearing and off the record the ALJ noted his belief that OmniSource’s response was extreme. Neither the Union nor the General Counsel disputes this. Brief in Support of Exceptions at 28 n.5.

her testimony since it found her testimony “plausible and consistent and clearly does not contain the ambiguities and inconsistencies³ possessed by that of [the credited witness].” *Id.* at 1003.

The Board’s analysis of the contradictions in the testimony and its resulting decision to sustain the exceptions was, as it found, for “reasons apart from demeanor.” *Id.* The same inquiry and result applies here. OmniSource asks the Board to examine the inconsistencies in the record pointed out in the Exceptions – the majority of which are not even mentioned, let alone contradicted – an examination mandated (not prohibited) by the Act. As in *Que*, when the hearing officer’s decision to credit or discredit testimony is based on ignoring inconsistencies in the record, those determinations cannot stand in the face of a contradictory record.⁴

This case law and the case law cited in OmniSource’s opening brief, which the Union has not even tried to distinguish, stands for the proposition that, while credibility determinations based on demeanor are afforded great deference, the Board will not abrogate its fact-finding role in light of contrary evidence that the ALJ ignored in reaching the factual findings upon which he concluded OmniSource committed an unfair labor practice. Where the ALJ does not even acknowledge, for instance, the conflict between the witnesses’ prior written statements to the company and the contrary testimony provided at the hearing, his subsequent credibility determination cannot be insulated from the Board’s fact-finding responsibility.

B. The facts do not support the ALJ’s findings or the conclusion that OmniSource did not have an honest belief that the employees engaged in serious misconduct; nor did the General Counsel prove the employees were telling the truth.

³ In attempting to discredit McKinley’s testimony, the ALJ cited several reasons. But as set out in the Exceptions and supporting brief, the ALJ’s findings were factually wrong, and the Union does not in its Answering Brief challenge these assertions. The Union does not address these unsupported findings, apparently taking the position that the ALJ is free to disregard the evidence if he characterizes a witness as incredible. But the Board is bound to address the factual inconsistencies in the Record, even if the Union again ignores them.

⁴ The Board also found the trial examiner erred in associating bias with a witness merely because the witness was in the employ of the respondent. *Que Enterprises*, 140 NLRB at 1003 n.5.

While not disputing the shaky (or non-existent) factual basis for the ALJ's critical findings, the Union ignores them and, in its Brief, presents the Board with a nothing more than a limited, sanitized version of the facts as brought forth in the hearing.⁵ What is missing is much of the context of what gave rise to two complaints – one asserting OmniSource committed an unfair labor practice and one asserting the Union interfered with OmniSource's rights under the Act.⁶ For instance, the December 7 meeting between Oney and Charlebois on the one hand and Timman and Thompson on the other only came about after Thompson had repeatedly refused to comply with company policy about making a safety report. Tr. at 54, 215-20, 256-57, 719, 875-77, 907-08. The Union also ignores Thompson's confrontational history with Charlebois. Tr. at 209-10, 212-13, 253-56, 300, 301, 372, 375, 575. Ignoring these *undisputed* facts allows for the otherwise incredible finding that Thompson would have been too cowered to speak up and tell his Union representative that Charlebois had assaulted him in the hallway.

In supporting the ALJ's finding that the parties' accounts were only slightly different, the Union also ignores that what is alleged to be a *slight* difference is, from the employees' point of view, a *major* difference, since a complaint about a dinosaur metaphor or an innocent touch in a narrow hallway would yield them nothing. But a complaint about a physical assault and repeated threats of gun violence would, under the Letter of Understanding ("LOU"), rid them of a meddling supervisor they wanted to remove. Indeed, the Union claims the reason why OmniSource terminated the employees was because there were subtle differences in what they

⁵ Rather than detail all the Union ignored, which space limitations will not allow, OmniSource stands on the factual history set forth and sourced in its opening brief. It will address factual misstatements or omissions made in the Union's Answering Brief as space permits.

⁶ While the Union mentions that OmniSource filed a charge against the Union, it does not disclose that NLRB Region 8 *found merit in OmniSource's charge* after investigating the charge, issued a Complaint, and the Union eventually settled, agreeing to post a notice promising that it would not interfere with OmniSource's rights under the Act. Despite the finding of probable cause based on the same facts OmniSource used to justify its terminations of the four employees, the Union argues that OmniSource could not have had an honest belief that the employees were lying in concert to orchestrate Charlebois' ouster.

said, a claim based on a gross mischaracterization of Andrew Ables' testimony. The Union asserts that "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." Union's Answering Brief at 4 (citing Tr. at 74) (emphasis added); *id.* at 18. The quoted material was from the General Counsel's question to Ables, not Ables' own words. Ables response was that there was a "[b]ig difference to [him] in the two statements or the alleged statement being shot versus not having that as part of his statement." Tr. at 74. Similarly, the Union claims "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" Union Answering Brief at 4 (citing Tr. at 93). Ables answered, "Right, *that false statement, yes.*" Tr. at 93 (emphasis added). Ables was not faulting Timmons or Thompson for failing to recall a conversation word-for-word. Ables pointed to the "big difference" between a threat of violence (which was *necessary* to trigger Charlebois' demanded termination under the LOU) and a dinosaur-themed metaphor. The ALJ similarly ignored the significance of this determination, specifically finding the difference was "*not legally consequential* under the Act," ALJD at 14 (emphasis added), a finding that has nothing to do with the limits on challenging the demeanor aspect of a credibility determination under *Standard Drywall*.

Indeed, it is the *legal significance of the ALJ's determination* as to the meaning of the accounts – as opposed to any observation about demeanor or the broader question of credibility – that is at the center of how the Union defends the ALJ's factual findings and subsequent conclusions. According to the Union, it is because the accounts are *not* legally significantly different that OmniSource *could not have an honest belief* that the employees were lying about the violent nature of the alleged threats and assault for the purpose of ousting a supervisor who

was spearheading unwanted changes at the facility.⁷ Yet the Union completely ignores that the employees specifically were pushing a violent narrative because it was the only means by which they could demand Charlebois' ouster.

Similarly, the Union ignores a critical factor supporting OmniSource's termination decision: Timman's changing testimony. *See* OmniSource Brief in Support of Exceptions at 11, 13-14, 18-19, 26-28, 40-41, 45-46, 48. And, just as the Union ignored Timman's changing stories, the Union presents in its Statement of Facts the critically missing context of the alleged December 2 "machine gun" statement (that Charlebois was frustrated people were not joining committees), which was conveniently supplied for the first time at the hearing by Timman and Smith, even though it *specifically contradicted* the written statements they gave to McKinley during OmniSource's investigation. *See* Union Answering Brief at 7 (citing Smith and Timman's testimony but ignoring the contradictory evidence repeatedly set out in OmniSource's opening brief at 13-14, 32, 36, 38-39, 41, 46). Although the Union recounts that the ALJ credited the employees' account based on his review of the record, *including* (but not limited solely to) the witnesses' demeanor, Union Brief at 8, the Union does not take issue with *any* of the numerous contradicted factual findings as set out in OmniSource's Exceptions and supporting brief. As the cited case law demonstrates, a credibility finding is not insulated from review where the judge has ignored contradictory evidence or changing statements. The Board is still required under the Act to ensure the findings are supported by the evidence.

⁷ The Union spends several pages arguing that the employees were engaged in protected activities. But OmniSource does not dispute that proposition. Thompson filed a grievance and Dean, Timman, and Smith processed the grievance, as well as becoming fact witnesses relating to the alleged threat of violence they claim to have heard on December 2. For the three Union officers, their actions as factual witnesses in claiming Charlebois threatened to turn a machine gun on the employees and their insistence that this later-reported statement was a threat of violence warranting Charlebois' removal under the LOU go beyond the act of merely prosecuting *Thompson's* grievance. They were not, as the Union argues, merely relaying information in good faith. *See* Union Answering Brief at 20. They were themselves fact witnesses who claimed Charlebois was threatening the workers.

The Union also claims there was not enough of a difference in Thompson’s account of the alleged hallway assault for Thompson to lose the protections of the Act, calling it merely an “expression of a different perception.” Union Answering Brief at 20. But the Union ignores how Thompson portrayed the account not as two persons coming together in a narrow hallway and touching, but as a *violent physical act* that implicated the LOU. The police report reflected that Thompson reported a more violent touching than he originally recounted. GC Ex. 19. And by December 14, 2017, in his written statement, Thompson claimed he was “intimidated” by the hallway encounter and that it “basically scared the shit out of me.” GC Ex. 18. Thompson did not claim to be in fear from the hallway incident until nearly a week after it happened. *See* OmniSource Brief at 34. But the ALJ and the Union ignored these changes and ignored how the emphasis that the encounter was violent – the alleged “different perception” – was the only one that served the employees’ underlying purpose to remove OmniSource’s choice of management.

In the Statement of Facts, the Union also points to its request that Charlebois be transferred out of Mansfield, unfairly implying that the mere making of a “proposed settlement” triggered the terminations. Union Answering Brief at 9. While that might, as nakedly presented, sound like a rash step, the Union and the ALJ ignore *why* OmniSource thought the proposal supported termination. As Ables made plain in his testimony, the employees demanded Charlebois’ removal as a person who had not only threatened actual violence, *but who also committed an act of violence*. The fact that the employees and Union were satisfied with moving an allegedly violent manager *to another Union facility* demonstrated to management that the employees did not really believe Charlebois was actually violent or had threatened violence, but made those false claims since it was the only way they could pursue Charlebois’ removal under the LOU. *See, e.g.,* Tr. at 79-80.

The cases cited by the Union in support of the ALJ's conclusion that the employees' accounts, even if they were wrong, are still protected under the Act are inapposite. *Walls Mfg. Co., Inc.*, 137 NLRB 1317, 1319 (1962), involved an employee complaint to a regulator about "sanitary conditions of common concern." *Simplex Wire & Cable Co. & Gaiamo*, 313 NLRB 1311, 1315 (1994), involved an alleged false statement about the possession of a "hit list" of employees who were going to be fired. The Union claims that here the employees were only complaining to the company itself and expressing their concerns. But the Union ignores that the complaints were framed and given context through the LOU so as to be more than a complaint, but concerted falsehoods to effect the ouster of a disliked supervisor. This is conduct outside the type of conduct that would be protected, and, in fact, is conduct that itself is a violation of the Act. *See, e.g., HCA/Portsmouth Reg'l Hosp.*, 316 NLRB 919, 930 (1995) (adopting ALJ's order) (citations omitted) (spreading malicious falsehoods about a supervisor to effect her removal is not protected). Here, the employees acted in concert to provide what OmniSource concluded was false information about a supervisor and claimed that the supervisor had threatened violence against the employees and one asserted he had actually been the victim of an assault. Nevertheless, the Union ignores this and states "there is absolutely no evidence of malicious intent in regard to the employees' recounting of Charlebois' statements" Union Answering Brief at 19. Essentially, the Union would have the Board conclude that actions violating the Act (concerted lying to deprive an employer of its choice of representative) are actually *protected* by the Act. There is no support for such a proposition.

Ignoring the evidence, the Union claims the differences in the accounts between the terminated employees and the company officials "barely varied in substance," that there was no evidence that any of the employees did anything egregious and, as a result, OmniSource could

not have in good faith believed it so. *Id.* at 21. As set out in OmniSource's opening brief, the evidence compellingly shows the employees were not only lying, but were lying for the purpose of removing a disliked supervisor. *See* Brief in Support of Exceptions at 36-44. The Union ignores that the critical difference in the accounts are that the employees' versions all depend on the statements and action having a *violent* connotation. That connotation – one the ALJ himself could not make – was necessary to trigger Charlebois' demanded ouster. The evidence set out in OmniSource's opening brief, which does not ignore the inconsistencies and changed stories on the part of the employees, amply demonstrate the error in the ALJ's factual findings and the fallacy in his legal conclusions. Because OmniSource had an honest belief that its employees deliberately lied in order to get rid of Charlebois and because the evidence was patently insufficient to demonstrate that the employees did not violate the Act, the Board should sustain OmniSource Corporation's Exceptions and dismiss the Complaint in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have this 9th day of May, 2017, filed the foregoing document electronically with the NLRB in Washington, D.C. and copies were served via email on the following:

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