

**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,)**

Complainant,)

v.)

OMNISOURCE CORPORATION,)

Respondent.)

CASE NO. 8-CA-167138

**RESPONDENT OMNISOURCE CORPORATION'S REPLY BRIEF
TO ANSWERING BRIEF FILED BY THE GENERAL COUNSEL**

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Introduction

The General Counsel asserts that many of Respondent OmniSource Corporation's Exceptions deal with factual findings based on credibility resolutions and should not be overruled under *Standard Drywall* because they are "overwhelmingly supported by the record evidence." GC Answering Brief at 3-4. Yet the General Counsel does not bother to dispute the vast majority of OmniSource's challenges to the factual bases of the ALJ's findings, leaving the ALJ's decision to stand on its own. Also unchallenged is the case law cited in OmniSource's opening brief, which demonstrates that the ALJ was not free to ignore evidence, misstate evidence, or construct findings that lack a sufficient factual basis. Because the factual findings lack a sufficient evidentiary foundation and, as such, the conclusions reached by the ALJ that OmniSource committed an unfair labor practice are not supported by the evidence, the Board should sustain OmniSource's Exceptions and dismiss the Complaint.

A. The General Counsel's response to OmniSource's "credibility challenges" ignores the applicable law and fails to address the challenges OmniSource has raised to the insufficient evidentiary bases of the excepted findings.

The General Counsel asserts that "many" of the Exceptions taken by OmniSource "deal with factual findings based on credibility resolutions made by the ALJ in favor of the General Counsel's witnesses." GC Answering Brief at 3. Citing *Standard Drywall Products*, 91 NLRB 544 (1951), the General Counsel sets out the unremarkable proposition that credibility resolutions *that are overwhelmingly support by the record evidence* should not be disturbed. But this assertion merely begs the question and is no substitute for an actual defense of the ALJ's fact-finding. In its Exceptions and supporting brief, OmniSource points out, among other things, the factual errors and failures on the part of the ALJ to consider the inconsistencies in the accounts of its credited witnesses. Despite ample opportunity to take issue with the arguments OmniSource has made on this point, the General Counsel has abdicated the role of advocate on

this point, leaving the Board to rely solely on the ALJ's written decision. GC Answering Brief at 5. The few factual points with which the General Counsel does take issue are discussed below.

Moreover, while the General Counsel is correct that factually solid credibility determinations are not generally disturbed by the Board, the General Counsel does not dispute any of the case law cited in OmniSource's opening brief that factual findings unsupported by the record are not insulated from review merely because they may be part of a credibility determination. *See, e.g.*, Respondent's Brief in Support of Exceptions at 21, 28 (citations omitted) (asserting, *inter alia*, credibility determinations cannot carry the day in the face of contrary evidence).¹ As the Board recognized 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). When properly viewed, the evidence does not support the findings and the ultimate conclusions based thereon: that OmniSource could not have an honest belief the employees concertedly lied 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.

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 noted that although it "attaches great weight to an administrative law judge's

¹ In a footnote to this argument, OmniSource pointed out that the same one-sided uniformity condemned in *N.L.R.B. v. Miami Coca-Cola Bottling Co.*, 222 F.2d 341, 345 & n.2 (5th Cir. 1955) (citations omitted) 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 dispute this. *See* Brief in Support of Exceptions at 28 n.5.

credibility findings based on demeanor, [the Board] 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,² was "discredited in part [by the Trial Examiner] upon 'the content' of her testimony," the Board disagreed and credited her testimony since it found her testimony "plausible and consistent and clearly does not contain the ambiguities and inconsistencies 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

² 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 General Counsel does not in its Answering Brief even mention, let alone, challenge OmniSource's arguments addressing the ALJ's faulty determinations respecting McKinley. Leaving the ALJ's determinations to stand on their own, GC Answering Brief at 5, the General Counsel does not, for instance, address the ALJ's claim that McKinley demanded the employees provide written statements, but did not ask Charlebois for one because 'he's a senior executive with our company,' ALJD at 12, ¶ 1 (citing Tr. 950-51), implying McKinley blindly accepted anything Charlebois said due to a pro-management bias. In fact, the transcript reflected McKinley's explanation of why she may not have asked Charlebois for a statement (since another might have taken the statement) since McKinley could not recall at the hearing whether or not she asked for it. Tr. at 951-52. Although her testimony was clear, the ALJ found McKinley actually did not ask for a statement because she deferentially afforded preferential treatment to Charlebois. The fact is, Charlebois *did* provide a written statement and he spoke to Carman, McKinley, and others. Tr. at 794-98, 806-09; Resp. Ex. 21-22. McKinley also stated she knew Charlebois would be speaking with corporate. Tr. at 951-52. And while she could not recall specifically at the hearing, McKinley's contemporaneous notes from her investigation reflect that when she spoke with Charlebois on the first day of her investigation she "asked [Charlebois] to provide [her] with documentation of the events on December 7th." Respondent's Ex. 9. The General Counsel does not contest this or any of the other challenged factual findings that the ALJ reached to discount McKinley's testimony.

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.

Moreover, the Board in *Que* put to rest another of the General Counsel’s arguments. After asserting there was no need to address the merits of OmniSource’s challenges to the factual underpinnings of the ALJ’s decision, the General Counsel then asserted that many of OmniSource’s challenges concerned “factual findings based on testimony given by Respondent’s own witnesses” GC Answering Brief at 4. But the Board has already determined that it is error to associate bias with a witness merely because the witness was in the employ of the respondent. *Que Enterprises*, 140 NLRB at 1003 n.5.

B. OmniSource’s brief complied with the applicable rules.

The General Counsel asserts in passing that OmniSource’s Exceptions failed to comply with the applicable rules. While it is not entirely clear just what the General Counsel believes should be required of an excepting party, it appears the General Counsel faults OmniSource for not including a specific parenthetical identifying the argument for each exception individually (as opposed to grouping them as OmniSource did) and then restating the common legal argument applicable to each of the 82 Exceptions.³ But this hypertechnical interpretation of the rules serves no purpose other than to burden the Board and the parties in drafting and reviewing

³ The General Counsel faults OmniSource for “chos[ing] instead to recite versions of the facts that are for the most part unsubstantiated in the record.” GC Answering Brief at 4. The General Counsel does not provide examples of what she asserts constitutes the majority of OmniSource’s brief or show (with citations to the record) where OmniSource has strayed from the facts. Nor does the General Counsel claim OmniSource failed to include the required citations to the Record.

unnecessarily long and duplicative filings, even where the arguments are identical. Indeed, the General Counsel does not claim she could not follow the arguments common to the questions raised in OmniSource's brief because they were not repeated after each exception. As an example of OmniSource's alleged non-compliance, the General Counsel cites Exception 30. But that Exception is included and referenced in the heading to Section V(A) and is specifically discussed on pages 16 and 25 of OmniSource's opening brief. The law common to this exception and the others noted in the heading to Section V(A) is set out in Section V(C) of OmniSource's Brief. Although the General Counsel has chosen not to address the case law cited or the arguments made, that does not mean the arguments should be discounted because they were not cut and pasted for each individual exception covered in the heading.⁴ As to the factual support for Exception 30, the citations supporting are specifically set out in the brief (Tr. at 543-44, 567, 623-24). Despite this, the General Counsel asserts that "[o]ne has to surmise" some aspects of OmniSource's arguments, GC Answering Brief at 4 n.3, a claim at odds with OmniSource's detailed briefing in its opening brief. Accordingly, the General Counsel's argument on this point is not well taken.⁵

⁴ Indeed, if the Board were to adopt the hypertechnical interpretation advanced by the General Counsel here, one would expect the Board's resources would be taxed by not only numerous requests to file oversized briefs (to contain the duplicative arguments) but also by the sheer time it would take to read and re-read the same arguments.

⁵ Similarly unavailing is the assertion that the ALJ's "findings and conclusions are unequivocally supported by the record evidence and law as discussed in his decision." GC Answering Brief at 4. The General Counsel does not substantiate this argument by demonstrating to the Board how OmniSource misstated the evidence. Rather, the General Counsel points to one exception in footnote 4 respecting Exception 58. As set out in its opening brief, OmniSource excepted to the ALJ's blanket finding that Thompson was told he would be "suspended" if he failed to complete the safety report. *See* ALJD at 9, 13, 14. While there was conflicting testimony as to whether Thompson *might* be or *would* be suspended, by failing to identify that the threatened suspension was only for *one day* (an undisputed fact), the ALJ supported his related finding that Thompson's failure to speak up about the alleged assault or threat that he would be shot at the time they supposedly happened was reasonable since Thompson "was concerned about losing his job." ALJD at 9; *see also* OmniSource Brief in Support of Exceptions at 33 (detailing Thompson's history and why such behavior was uncharacteristic of him). In any event, the General Counsel's decision to contest so few of OmniSource's challenges to the ALJ's findings underscores the shaky factual foundation of many of the ALJ's findings, as demonstrated in the exceptions and supporting brief.

C. The General Counsel’s two factual arguments do not demonstrate the adequacy of the ALJ’s factual findings to which OmniSource has excepted or the legal soundness of the ALJ’s conclusions that OmniSource committed an unfair labor practice.

The General Counsel takes the position that it is “unnecessary to respond to most of what Respondent has raised in its exceptions and brief as the ALJ has already done so.” GC Brief at 4-5. However, the General Counsel does discuss two points of fact, one not even discussed by the ALJ, presumably to justify all of the ALJ’s findings and conclusions. The General Counsel cites no case law to support the notion that the Board can limit its fact-finding obligation in such a manner. In addition, neither example substantiates the factual underpinnings of the ALJ’s findings or the legal sufficiency of his conclusions.⁶

Respecting the alleged hallway assault, the General Counsel characterizes OmniSource’s argument as simply a failure to credit one account over the other. But this is not the issue. The legal question before the ALJ was whether OmniSource could have had an *honest belief* that the employees were maliciously lying on order to remove a supervisor. A second question was whether the General Counsel proved by a preponderance of the evidence that the employees did not, in fact, engage in such conduct.

The General Counsel sets out the accounts as given at the hearing by Thompson and Charlebois. The General Counsel then asserts that OmniSource is wrong in arguing that Thompson was inconsistent in his accounts, claiming OmniSource’s assertion is “wholly

⁶ The General Counsel also claims the Board cannot consider the fact that NLRB Region 8 found probable cause and issued a Complaint based on OmniSource’s charge that the Union violated the Act by attempting to deprive OmniSource of its choice of representative (Charlebois). See GC Answering Brief at 5 n.5. First, the finding of probable cause is important because it undermines the ALJ’s ultimate conclusion the OmniSource could not have had an honest belief that the employees engaged in such outrageous conduct. Moreover, the General Counsel admits that the Complaint evidencing the probable cause finding “is in the record as GC Ex. (i)(m); Tr. 10-13.” Despite this, the General Counsel asserts OmniSource’s arguments on this point are “imagined theories,” “completely without basis and should not be considered, if not stricken.” *Id.* What the General Counsel ignores is that OmniSource properly requested that the Board take judicial notice of the related proceedings and supplied case law authorizing judicial notice under those circumstances. Brief in Support of Exceptions at 30-31 n.6. The General Counsel ignores this argument and does not provide any authority for the proposition that judicial notice is inappropriate, especially where the finding of probable cause directly contradicts a legal conclusion made by the ALJ.

unsupported by the record and contrary to the judge’s findings.”⁷ GC Answering Brief at 8. While OmniSource’s factual argument is “contrary to the judge’s finding” – that is the entire point of taking exception to the ALJ’s finding – it is not unsupported by the record, and the General Counsel never even considers – let alone counters – the arguments and specific record citations set out in OmniSource’s opening brief. *See* Brief in Support of Exceptions at 33-35 (detailing how Thompson’s story concerning the grabbing morphed into an incident that Thompson claimed by December 14 was something that frightened and intimidated him, a necessary assertion for the touching in the hallway to justify the employees’ demand that Charlebois be removed under the LOU). Rather than attempt to defend Thompson’s changing story, the General Counsel asserts *Charlebois* changed his story and that this fact was “not taken into account by the ALJ.” GC Answering Brief at 9. In making this argument, the General Counsel fails to consider the legal conclusions the factual findings had to support: could OmniSource have an honest belief that the employees engaged in serious misconduct in trying to oust Charlebois from his position and the violent context emphasized by Thompson as the investigation proceeded, since that was the only means by which Charlebois, a person with whom Thompson had clashed from the outset, could be removed.

The final factual issue the General Counsel addressed specifically concerns OmniSource’s assertion that the ALJ failed to consider Timman’s repeatedly changing his story. As before, the General Counsel contends OmniSource’s “assertions are not supported by the record evidence *as found by the judge.*” GC Answering Brief at 9 (emphasis added). However, the Board’s fact-

⁷ The General Counsel also volunteers a theory that OmniSource’s attempt to obtain a safety report from Thompson was “overly exaggerated” because Thompson’s handwritten report lacked details, implying OmniSource was, in fact, trying to create a paper trail on Thompson. *See* GC Answering Brief at 6 n.6. What the General Counsel ignores is that Charlebois and Oney agreed to Thompson’s and the Union’s demand that Thompson’s handwritten report reflect on its face that it could not be used for disciplinary purposes. Even more at odds with the facts is that the General Counsel is apparently faulting OmniSource for failing to require Thompson to re-do the report to supply details the General Counsel believes only Thompson could have supplied, even though Thompson had, by that point, accused Charlebois of threatening him physically and assaulting him that very day.

finding is not limited only to the evidence specifically addressed by the ALJ, especially where, as here, the ALJ ignored the entirety of Timman's shifting accounts. *See, e.g., Standard Drywall*, 91 NLRB at 544-45 (discussing the Board's "power and responsibility of determining the facts, as revealed by the preponderance of the evidence").

The General Counsel first sets out the account Timman gave at the hearing on the topic of what Charlebois said at the December 7 meeting with Thompson. Then, the General Counsel referenced Timman's *hearing* testimony where he stated that he told OmniSource during the investigation that Charlebois had made another comment about a dinosaur on December 3, and points out that the ALJ did not address that other dinosaur statement,⁸ as though (again) this excused another person's repeatedly changing his story on another matter. GC Answering Brief at 10-11 (Timman's claim that on December 3 Charlebois said to him "the old dinosaurs will comply or will be left behind") (citing Tr. at 324-25). The General Counsel then disputes OmniSource's exceptions concerning Timman's changing his story, but *not* (as one might expect) by challenging the cited evidentiary basis for those exceptions, which the General Counsel does not dispute. Rather, the General Counsel points to Timman's hearing testimony that on December 3 Charlebois made a comment that old dinosaurs would be left behind, as

⁸ The ALJ may not have relied on this claim given its shaky foundation. As OmniSource noted in its opening brief at 11 n.3, McKinley testified she did not recall Timman ever claiming Charlebois made another dinosaur comment, Tr. at 1028, and, importantly, none of the written statements from the investigation reference such a comment. Bob Oney's statement respecting the December 8 meetings with Timman documented that Timman first stated that on December 7 "he had heard something about a dinosaur, but did not recall the word being shot used" and then in a second meeting he stated in response to the very same question "that he heard [Charlebois] make that statement about dinosaurs being shot, and that when that comment was made it made the hair stand up on his head." *See* Respondent Ex. 6. Similarly, McKinley's detailed notes reflect that in the first meeting with Timman he said "that in the [12/7] meeting with Roy, Chris had referenced old dinosaurs and may have said something about shooting them but he didn't remember" and that in the later meeting Timman stated, "Chris had said that Roy needed to conform or the dinosaurs would be shot. Terry said that when Chris made the statement the hair on his head stood up. ... I commented that this is not what Terry had said when we met earlier. Terry stated that he hadn't remembered earlier but had thought about it more." Respondent Ex. 9. Although McKinley's notes detail the wide-ranging conversations, including Timman and Smith's complaints about Charlebois, there is not one mention of a second dinosaur comment in her statement or in Oney's. *Id.* Timman's own statements say nothing, GC Exs. 24-27, and none of the other documents collected in the investigation, see Respondent's Ex. 20, refer to the alleged comment.

though that mere fact proved that four days later on December 7 Charlebois threatened actual violence against the employees by threatening to *shoot* dinosaurs. The General Counsel's argument does not follow. If anything, assuming the comment occurred, it supports the Respondent's witnesses' accounts that Charlebois was employing a metaphor and not, in fact, threatening actual violence.⁹ The employees' insistence that Charlebois had repeatedly threatened gun violence and had actually been physically violent was the only means by which they could accomplish his removal. So, if anything, the alleged comment underscores the non-violent nature of any message Charlebois was attempting to communicate and the culpability of the employees in attempting to orchestrate Charlebois' ouster.

As set out in OmniSource's brief supporting its Exceptions, the changes in Timman's story are documented as Timman's first denying hearing Charlebois say anything about dinosaurs, then claiming he heard something about dinosaurs but nothing about shooting them, then vividly stating to the Union representative that not only did he hear Charlebois mention dinosaurs, that he threatened to shoot them, and that the threat was so chilling that it made the hair on his head stand up, and finally Timman's pleading "the fifth," when OmniSource attempted to nail down the employees' conflicting accounts. *See* Brief in Support of Exceptions at 8, 10-11, 13, 15, 26-27, 32, 48. The ALJ did not consider all of Timman's shifting accounts or that they were documented in contemporaneous statements by not only McKinley, but by Oney and Carman too. *See* Respondent's Ex. 6, 9, 22. And in finding Timman's statements were substantially the same, the ALJ did not consider that what changed in Timman's story was the critical element of violence – the only mechanism by which the employees could have demanded Charlebois be removed. When the legal question considered is whether OmniSource could have had an honest

⁹ The General Counsel ignores that even the ALJ concluded that no one would believe Charlebois was threatening actual physical violence. *See* ALJD at 20.

belief that the employees were engaged in serious misconduct and made malicious statements to deprive OmniSource of its rights under the Act, the ALJ's failure to consider this important evidence renders his ultimate conclusions unsustainable.¹⁰ Accordingly, 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 show that the employees did not violate the Act, the Board should sustain the Exceptions and dismiss the Complaint in this matter.

Respectfully submitted,

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¹⁰ Also related to the second legal question – whether the General Counsel could prove the employees did not engage in misconduct – is Timman's and Smith's testimony at the hearing that directly contradicted their written statements to the company about the December 2 alleged "machine gun" threat, which the General Counsel does not (and cannot) contest and which the ALJ wholly ignored. See Brief in Support of Exceptions at 13-14, 38-39, 45-46.

