

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 16**

<b>LION ELASTOMERS</b>	)	
	)	
<b>and</b>	)	<b>Case Nos: 16-CA-190681</b>
	)	<b>16-CA-203509</b>
<b>UNITED STEEL, PAPER AND FORESTRY,</b>	)	<b>16-CA-225153</b>
<b>RUBBER, MANUFACTURING, ENERGY,</b>	)	
<b>ALLIED INDUSTRIAL AND SERVICE</b>	)	
<b>WORKERS INTERNATIONAL UNION,</b>	)	
<b>LOCAL 228</b>	)	

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**RESPONDENT'S REPLY BRIEF**

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ATTORNEYS FOR RESPONDENT

April 16, 2019

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## **I. INTRODUCTION**

The Counsel for the General Counsel (the “General Counsel”) portends that his brief “will begin by presenting a statement of the *relevant* facts.” (GC Brief, p. 1) (emphasis added). Black’s Law Dictionary defines “relevant” as “[l]ogically connected and tending to prove or disprove a matter in issue; having appreciable probative value – that is, rationally tending to persuade people of the probability or possibility of some alleged fact.” A review of the General Counsel’s Statement of Facts – approximately ten pages in length versus Respondent’s twenty-eight – demonstrates the General Counsel’s failure to do as promised. Instead of presenting all of the relevant facts, the General Counsel submits a self-serving, overly simplified version of the robust record evidence – a version that omits key details and misrepresents others. In some instances, the General Counsel conveys outright falsehoods, holding them out to be truths.

While these omissions, misrepresentations and falsehoods are not difficult to detect when comparing the General Counsel’s Brief to Respondent’s Brief, Respondent requested the opportunity to specifically identify them. Administrative Law Judge Michael A. Rosas granted Respondent’s request, and afforded all Parties the opportunity to submit Reply Briefs on or before April 16, 2019.

## **II. OMISSIONS, MISREPRESENTATIONS AND FALSEHOODS**

In lieu of standalone, bullet-pointed references to the omissions, misrepresentations, and falsehoods contained in the General Counsel’s Brief, Respondent presents them by topic for ease of reference. The topics below correspond with the pertinent Subsections in Respondent’s Statement of the Facts.

### **A. Respondent prohibits certain inappropriate behaviors in the workplace.**

As noted in Respondent’s Brief, to enforce its Plant Rules (which the General Counsel does not challenge), and as a general means to promote an orderly work environment, Respondent

enacted a progressive Discipline Policy. (R-3). Discipline may be administered as a Counseling Only, Verbal Warning, Written Warning, 2<sup>nd</sup> Written Warning, Last Chance Agreement/Suspension or Termination. (R-3).

Despite the fact that a Last Chance Agreement is one of the final steps, and despite the fact that Respondent presented Mr. Colone with a Last Chance Agreement in a last and final effort to correct Mr. Colone's persistent misconduct, the General Counsel totally omits any mention of the Discipline Policy. There is only one logical explanation for the General Counsel's failure to acknowledge the progressive nature of Respondent's disciplinary practices: to distract from the irrefutably lawful reasons that led to Mr. Colone's Last Chance Agreement in an effort to attribute the entire Last Chance Agreement to a few allegedly protected activities.<sup>1</sup>

**B. Mr. Colone has a lengthy history of Union service and activity.**

The General Counsel states that Mr. Colone has been active with the Union for at least the last sixteen years. (GC Brief, p. 2). But, the General Counsel omits the fact that Mr. Colone has been this active with the Union – holding elected positions – for the entire time that Ms. Lord has worked at the Plant and for the entire time that Respondent has operated the Plant.<sup>2</sup> (R. Brief, p. 6, n.7; p. 9). The General Counsel only states that “[p]rior to Respondent, the plant was operated by a series of predecessor employees.”<sup>3</sup> (GC Brief, p. 2)

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<sup>1</sup> The General Counsel's approach is also flawed because by cherry picking a handful of allegedly protected activities to prove the purported violation of the Act, the General Counsel totally omits numerous other protected activities. (R. Brief, pp. 10-11).

<sup>2</sup> Although the date that Respondent began operating the Plant is not part of the record, it can be inferred it was between 2006 when Mr. Lord began working for the Plant and 2016 when Mr. Wisenbaker began working for the Plant. (Tr. 32, 457).

<sup>3</sup> This omission is also the basis for a misrepresentation. The General Counsel states, “The number of bargaining unit employees has decreased by roughly half over the past two decades, leading to increased overtime due to lack of manpower.” (GC Brief, p. 2). This statement suggests that Respondent is responsible for the decrease in bargaining unit employees and the attendant consequences. Such a suggestion is unfair since, at best, Respondent has operated the Plant for approximately ten years – not the “past two decades.” *See* n. 3, *infra*.

This information is important because it demonstrates that Mr. Colone has always been an active Union member during the time that Respondent – with all of its alleged (but unproven) anti-Union animus – has operated the Plant. It defies logic that Respondent would suddenly begin to discriminate or retaliate against Mr. Colone beginning in March 2017 because of his ongoing protected activity.

It is also important to note that, while the General Counsel acknowledges Mr. Colone’s lengthy history of Union activity, he completely omits any information regarding the myriad Union activity in which Mr. Colone engaged between August 2016 and his separation from employment in June 2018. (R. Brief, p. 10-11). Perhaps the General Counsel would respond that this information is irrelevant because the Region does not contend that the unidentified protected activity motivated any adverse employment action. But, such a response undercuts the General Counsel’s contention that Respondent harbored discriminatory animus. It also indirectly highlights the difference between the set of protected activity that the General Counsel omits and the alleged protected activity the General Counsel cites in the Complaint and his Brief: Mr. Colone’s misconduct.

**C. Mr. Mosley did not threaten Mr. Colone at the October 24, 2016 Meeting.**

It is not disputed that Mr. Mosley, Mr. Wisenbaker, Mr. Colone, Mr. Griggs, and Mr. Vickers (for part of the time) met on October 24, 2016, and discussed pending Grievances regarding staffing and automation that Mr. Colone had submitted. But, in describing that meeting, the General Counsel conveys falsehoods, and misrepresents and omits key details.

First, the General Counsel falsely states that Mr. Mosley and Mr. Wisenbaker wanted Mr. Colone to drop his “grievances.” (GC Brief, p. 3). But, such a statement contradicts Mr. Colone’s testimony that Mr. Mosley and Mr. Wisenbaker wanted him to drop the staffing Grievance, not all

three of the Grievances that were up for discussion. (Tr. 80-82) (“They were wanting me to drop *it*.”) (emphasis added). Moreover, this false statement also serves as a misrepresentation. It suggests that Mr. Mosley and Mr. Wisenbaker were trying to chill Mr. Colone from filing Grievances or otherwise engaging in Union activity. In reality, Mr. Wisenbaker asked Mr. Colone to drop the staffing Grievance because Mr. Wisenbaker had secured a signed letter of understanding (“LOU”) with Joe Wells and Jordan Johnston. (R. Brief, p. 12). Yet, the undisputed existence of the LOU is totally omitted from the General Counsel’s Brief.

Second, the General Counsel omits Mr. Colone’s allegation that the Grievances discussed at this meeting and presented at the hearing were “doctored.” This is a tacit admission by the General Counsel that Mr. Colone’s testimony should not be credited.

Third, the General Counsel implies that Ms. Lord did not adequately conduct her investigation because she did not ask Mr. Griggs about the specific statement “you’re not going to make it,” until January 18, 2017. (GC Brief, p. 4, n. 3). Such an implication misrepresents the record evidence, which establishes that Ms. Lord discussed Mr. Colone’s allegation that a threat had been made in her first discussion with Mr. Griggs. (R-32, p. 3-5). Indeed, at the Hearing, Mr. Griggs specifically agreed he “probably” told Ms. Lord that he did not feel or believe that Mr. Mosley threatened Mr. Colone and he told Mr. Colone that, as is represented in Ms. Lord’s notes. (Tr. 366; R-32). Although the General Counsel attempts to discredit Ms. Lord’s notes<sup>4</sup> (GC Brief, p. 4, n. 3), Mr. Griggs testified that he had no reason to believe Ms. Lord’s notes would be inaccurate. (Tr. 368). While Mr. Griggs testified he believed the notes contained some

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<sup>4</sup> The General Counsel contends that certain portions of Ms. Lord’s notes “reflect personal conclusions rather than anything that was said, such as the portion including the phrase “it’s [sic] sounds like KC was the aggressor,” which Griggs testified is not something he said.”(GC Brief, p. 4, n. 3). This misrepresents Mr. Griggs’ actual testimony. Mr. Griggs testified: “I don’t *think* that was something I said” (Tr. 373) (emphasis added). Going further, a single example of a personal conclusion is hardly illustrative of the General Counsel’s suggestion that Ms. Lord’s notes are rife with personal conclusions, which is false.

inaccuracies, he could only give a single example after conducting a lengthy review of the material from the witness stand. (Tr. 369-371).

The General Counsel's misrepresentations and omissions concerning Mr. Griggs are particularly notable. Without them, and upon considering the full weight of the evidence relating to Mr. Griggs, the General Counsel's *Covanta Bristol, Inc.* argument totally unravels.<sup>5</sup> (GC Brief, p. 13-14). Specifically, there is no rational basis to conclude that the "other employee present at the meeting," in this case Mr. Griggs, "would reasonably have understood the statement as a threat of retaliation."

Ultimately, the General Counsel asks Judge Rosas to disregard key details regarding this October 24, 2016 meeting, Mr. Griggs' testimony, Mr. Mosley's testimony, Mr. Wisenbaker's testimony, the statements Mr. Griggs almost certainly made in a sworn Board affidavit (for which Judge Rosas should draw an adverse inference), and Ms. Lord's interview notes from her multiple conversations with Mr. Griggs, and find that Mr. Colone was threatened. Respectfully, Judge Rosas should not oblige such a request.

**D. Respondent sends Mr. Colone a letter on April 3, 2017 because he provided false information in connection with a withdrawn Grievance.**

The General Counsel relies on the April 2017 letter to demonstrate the genesis of Respondent's purported decision to unlawfully target Mr. Colone because of his grievance filing activity (not because of Mr. Colone's misconduct). To support this proposition, the General Counsel cites to language in the letter: "The letter warned Colone to be cautious going forward about 'what [he] say[s] in these grievances.'" (GC Brief, p. 6). The General Counsel conveniently

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<sup>5</sup> Respondent submits that the other "threat" cases that the General Counsel cites are similarly distinguishable. At a minimum, the "threats" at issue in those cases were much more obviously threats. That is simply not the case here, and Mr. Mosley has offered a plausible, genuine explanation for what he would have meant if he told Mr. Colone that he "wasn't going to make it." Indeed, the General Counsel does not challenge Mr. Mosley's credibility.

omits the ellipses that are necessary when one does not quote an entire sentence. By doing so, the General Counsel signals the end of the sentence. In fact, the sentence continues – and Respondent emphasizes that Mr. Colone should be cautious about what he says in grievances “*particularly when you attribute the complaints to people who have not complained.*”<sup>6</sup> (GC-2) (emphasis added). The omission of this context (and the misrepresentation that the sentence prematurely concluded) is yet another example of the General Counsel’s attempt to manipulate the record evidence to support his self-serving narrative.

The General Counsel goes on to speculate that “[t]he evidence indicates that, after issuing this letter, Respondent began investigating Colone’s grievances less to come to a position on the merits and more to identify any discrepancy with Colone’s initial account. Rather than simply denying grievances it believed were unmeritorious, Respondent cataloged relatively minor discrepancies between Colone’s initial account and the accounts of other.” There is zero evidence in the record to support such a proposition. In fact, the record evidence, as discussed in Respondent’s Brief and this Reply, demonstrates that this proposition is a total misrepresentation, if not an outright falsehood.

**E. Mr. Colone receives a verbal warning for his conduct at and following the July 12, 2017 safety meeting.**

The General Counsel’s discussion of the Safety Meeting contains several glaring omissions. First, the General Counsel does not substantively discuss Mr. Colone’s hostility toward his co-worker Sherman McCray or his confrontation of Mr. Dean after the meeting concluded.<sup>7</sup>

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<sup>6</sup> As Respondent explains in its Brief, Mr. Colone submitted a grievance on behalf of two employees, but failed to speak to them about the Grievance first. (R. Brief, p. 17-18).

<sup>7</sup> The General Counsel only states that “Respondent’s counsel at several points asked questions related to an exchange between Colone and McCray during the meeting and an exchange between Colone and Dean after the meeting, neither of which is referenced in Colone’s disciplinary notice.”(GC Brief, p. 8, n. 8). This implies that Respondent was required to extensively detail Mr. Colone’s behavior in a single paragraph in the performance correction notice. This is false.

The absence of substantive discussion on these issues is important. By failing to mention them in the general discussion of the Safety Meeting, the General Counsel is able to omit them from the analysis of the *Atlantic Steel* factors.<sup>8</sup>

Second, the General Counsel omits Mr. Colone's adamant testimony that Mr. Dean jumped out of his seat during the safety meeting. There is absolutely no mention of this detail in the General Counsel's Brief, though the General Counsel acknowledges that Mr. Dean's account of the meeting was generally consistent with that of other witnesses who testified (and no one else, including Mr. Dean, testified that Mr. Dean "jumped" out of his seat). (GC Brief, p 8). Respondent submits this is another tacit admission that even the General Counsel does not believe Mr. Colone's sworn testimony.

Third, even though the General Counsel asks that Mr. Bailey's testimony be given additional weight (GC Brief, p. 12), the General Counsel misrepresents Mr. Bailey's testimony regarding the exchange between Mr. Colone and Mr. Dean during the safety meeting. The General Counsel states: "*Unsatisfied with Dean's evasive responses*, Colone repeated his liability question three times." (GC Brief, p. 8, citing Tr. 21) (emphasis added). First, Mr. Bailey acknowledged that Mr. Colone could have asked the same liability-related question four to five times. (Tr. 27). Second, Mr. Bailey explicitly testified that it was clear that Mr. Dean did not have an answer to Mr. Colone's question. (Tr. 21). He did not describe Mr. Dean's answers as evasive.

Finally, the General Counsel omits any reference to Mr. Colone's inappropriate behavior in the meeting in which Respondent issued the verbal discipline to him. By extension, the General Counsel omits any reference to the letter Ms. Lord sent Mr. Colone on July 20, 2017 to encourage him to improve his behavior. These facts are plainly relevant, as established in Respondent's Brief.

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<sup>8</sup> Respondent submits these incidents are critical to the *Atlantic Steel* analysis. (R. Brief, p. 39-44).

(R. Brief, p. 25-26). By leaving them out, the General Counsel again tries to distract from the root cause: Mr. Colone's persistent misconduct.

**F. Mr. Colone receives a first written warning for failing to follow operational guidelines. / Mr. Colone receives a second written warning for failing to follow operational guidelines.**

The General Counsel omits substantive discussion of Mr. Colone's first written warning and second written warning from his Brief.<sup>9</sup> He contends they are "not related at issue in this case." (GC Brief, p. 10, n. 10). This is false, and precisely the reason why the General Counsel omits any mention of the progressive Discipline Policy that Respondent uses to enforce its Plant Rules and maintain an orderly working environment. As Respondent explains in its Brief, these disciplinary actions are part and parcel to the Last Chance Agreement it issued to Mr. Colone. By failing to acknowledge them, the General Counsel misrepresents the basis for the Last Chance Agreement.

**G. The Last Chance Agreement**

It cannot be refuted that Respondent approaches discipline in a progressive manner, and relies on a Last Chance Agreement as a final rung in the disciplinary ladder. Yet, the General Counsel attempts to manipulate the evidence to obfuscate the reasons that Respondent presented Mr. Colone with a Last Chance Agreement.

First, the General Counsel misrepresents the reasons that Respondent presented Mr. Colone with the Last Chance Agreement. "The last chance agreement references the April 2017 warning letter to Colone as well as the July 2017 verbal warning related to the safety meeting . . . . It then cites four specific instances of alleged misconduct or falsification of information in violation of company policy." It barely mentions the first and second written warnings in a footnote, stating that they are "not at issue in this case." (GC Brief, p. 10, n. 10).

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<sup>9</sup> The General Counsel only mentions the first and second written warnings twice. (GC Brief, p. 2 and p. 10, n. 10).

Second, the General Counsel omits pertinent details regarding the “four specific instances of alleged misconduct . . . .” The General Counsel ignores Mr. Colone’s misconduct in connection with an incident on November 7, 2017, and focuses on the fact that the incident – standing alone – would not have warranted disciplined. (GC Brief, p. 2, n. 1; p. 10). With regard to the sabotage Grievance, the General Counsel ignores the fact that Mr. Colone changed his story and only later attributed the sabotage statement to Mr. Mosley. (GC-7; R. Brief, p. 30-31). The General Counsel ignores the fact that Mr. Burton expressly denied to Ms. Lord that he told Mr. Colone and Mr. Butler that he heard Randy Watson cussing Mr. Butler and pointing his finger in his face.<sup>10</sup> (R. Brief, p. 31-32). Finally, the General Counsel ignores the fact that Mr. Colone represented he had personal knowledge of certain allegations in connection with the Granelee Grievances, but Ms. Lord’s investigation revealed otherwise. (R. Brief 32-33).

These omitted details are all important. Presumably the General Counsel excludes them to bolster his *Interboro Contractors, Inc.* argument that protection should apply to individual employees where there is a reasonable and honest belief that the contract has been violated. With the inclusion of these details (as more fully discussed in Respondent’s Brief), it is clear that Mr. Colone did not have a reasonable and honest belief that the contract had been violated. Like the General Counsel, Mr. Colone manipulated the facts (and even manufactured them) to fit his own self-serving narrative. For the same reasons, these omitted details also establish bad-faith, and deliberate or malicious falsehoods.<sup>11</sup> Accordingly, the General Counsel excluded them to bolster his *Ogihara America Corp.* argument. Indeed, with the full facts on the table, it is clear that *United*

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<sup>10</sup> Accordingly, the General Counsel’s conclusion that “[t]he record demonstrates only that the parties disagreed about what occurred that day” is demonstrably false.

<sup>11</sup> Despite the weight of the evidence, the General Counsel falsely states that “Respondent has presented no evidence that Colone at any point intentionally or knowingly presented false information in a grievance. There is similarly no evidence that Colone at any point acted in bad faith” (GC Brief, p. 20).

*Parcel Services of Ohio* is applicable, not distinguishable as the General Counsel argues. (GC Brief, p. 20).

Respondent presented Mr. Colone with a Last Chance Agreement because of his total disregard of the Plant Rules and expected standards of conduct. The General Counsel contends instead that “Respondent has offered no alternative rationale for its decision to discharge Colone” (GC Brief, p. 1) and that “Colone was discharged for his conduct in his role as a Union representative and not for any performance related problems” (GC Brief, p. 2). In light of the evidence highlighted in Respondent’s Brief and this Reply, those contentions are plainly false.

### **III. CONCLUSION**

For these reasons, and those stated in Respondent’s Brief, Respondent requests dismissal of the Consolidated Complaint and all allegations of unlawful conduct made therein.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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I hereby certify that on April 16, 2019, I e-filed the foregoing using the Board's e-filing system and immediately thereafter served it by electronic mail upon the following:

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