

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

In the Matter of:)
)
FORT DEARBORN CORPORATION,)
)
)
Respondent,)
)
and)
)
DISTRICT COUNCIL FOUR, GRAPHIC)
COMMUNICATIONS CONFERENCE OF)
THE INTERNATIONAL BROTHERHOOD)
OF TEAMSTERS,)
)
Charging Party.)

Case No. 13-CA-46331

**BRIEF OF CHARGING PARTY
DISTRICT COUNCIL FOUR, GCC/IBT
IN OPPOSITION TO THE RESPONDENT'S EXCEPTIONS
AND IN SUPPORT OF
CHARGING PARTY'S CROSS-EXCEPTIONS**

Respectfully Submitted By:

Thomas D. Allison
Attorney for Charging Party District Council Four,
Graphic Communications Conference of the
International Brotherhood of Teamsters

Allison, Slutsky & Kennedy, P.C.
230 West Monroe Street - Suite 2600
Chicago, IL 60606
(312) 364-9400
allison@ask-attorneys.com

February 8, 2012

TABLE OF CONTENTS

Preliminary Statement 1

Statement of Facts 5

 The Parties 5

 Marcus Hedger 5

 The Litho Negotiations on June 4, 2010 7

 The “Say No to Blockheads” Sticker 9

 The Union’s Grievances 9

 The Company’s Opposition to Marcus Hedger’s Union Postings 10

 Pete Schmidt’s Visit to the Plant 11

 The Company’s “Full Court Press” Investigation 14

 The First Interrogation and Suspension of Marcus Hedger 17

 The Second Interrogation of Marcus Hedger 20

 The Interrogation of Bob Schmitt 23

 Marcus Hedger’s Termination 24

Argument 24

 I. The Administrative Law Judge Correctly Rejected the Company’s
 Deferral Argument 24

 II. The Company’s Threats to Marcus Hedger Violated Section 8(a)(1)
 of the Act 28

 III. The Administrative Law Judge Correctly Found That the Company’s
 Termination of Marcus Hedger Violated Section 8(a)(3) and (1) of the Act 34

A.	The Administrative Law Judge Correctly Applied the Board's <u>Wright Line</u> Test	34
B.	The Administrative Law Judge Correctly Found Substantial Animus Toward Marcus Hedger as a Result of His Activities as Union Steward	34
C.	The Administrative Law Judge Correctly Found that the Company Did Not Meet Its Burden of Showing that Marcus Hedger Would Have Been Terminated in the Absence of His Protected Activities	43
1.	Bringing an Unauthorized Person into the Plant	44
2.	Marcus Hedger's Responses in the Interrogations	46
	Conclusion	49

TABLE OF CASES AND OTHER AUTHORITIES

Cases

<u>Bally's Atlantic City</u> , 355 NLRB No. 218, (2010)	44
<u>Brookdale University Hospital</u> , 335 NLRB 1094 (2001)	33
<u>Centre Property Management</u> , 277 NLRB 1376 (1985)	44
<u>Climax Molybdenum Co.</u> , 227 NLRB 1189 (1977), enf. denied 584 F.2d 360 (10 th Cir. 1978)	38
<u>Cooper Industries</u> , 328 NLRB 145 (1999)	40
<u>D & F Industries</u> , 339 NLRB 618 (2003)	40
<u>Eddyleon Chocolate Co.</u> , 301 NLRB 887 (1991)	44
<u>General American Transportation</u> , 228 NLRB 808 (1977)	27
<u>Igramo Enterprise</u> , 351 NLRB 1337 (2007)	36, 44
<u>Mar-Jan Supply Co.</u> , 337 NLRB 337 (2001)	40
<u>NLRB v. Transportation Management Corp.</u> , 462 U.S. 393 (1983)	34
<u>Roure Betrand Dupont, Inc.</u> , 271 NLRB 443 (1984)	44
<u>Schrock Cabinet Company</u> , 339 NLRB 182 (2003)	33
<u>United States Postal Service</u> , 345 NLRB 426 (2005)	20
<u>United States Postal Service</u> , 355 NLRB No. 72 (2010)	38
<u>United States Postal Service</u> , 241 NLRB 142 (1979)	38
<u>United States Postal Service</u> , 288 NLRB 864 (1988)	38
<u>United Technologies Corp.</u> , 268 NLRB 557 (1984)	26-27
<u>Veolia Water</u> , 2005 WL 2429739 (Advice Memorandum, 2005)	27-28

<u>Vico Products Co.</u> , 336 NLRB 583 (2001)	36
<u>Weldon, Williams & Lick, Inc.</u> , 348 NLRB 822 (2006), enf'd. 255 Fed.Appx. 535 (D.C.Cir. 2007)	49
<u>Wright Line</u> , 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1 st Cir. 1981), cert. denied, 455 U.S. 989 (1982)	34, 44

Other Authorities

Acting General Counsel's Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)(1) and (3) Cases, Memorandum GC 11-05 (January 20, 2011)	2-4, 25-27
29 U.S.C. § 153(d)	25

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

FORT DEARBORN CORPORATION,

Respondent,

and

**DISTRICT COUNCIL FOUR, GRAPHIC
COMMUNICATIONS CONFERENCE OF
THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS,**

Charging Party.

Case No. 13-CA-46331

**BRIEF OF CHARGING PARTY
DISTRICT COUNCIL FOUR, GCC/IBT
IN OPPOSITION TO THE RESPONDENT'S EXCEPTIONS
AND IN SUPPORT OF
CHARGING PARTY'S CROSS-EXCEPTIONS**

Preliminary Statement

This matter arises upon an unfair labor practice charge filed by Charging Party District Council Four, Graphic Communications Conference of the International Brotherhood of Teamsters (the "Charging Party"), against Fort Dearborn Corporation ("the Company" or "Respondent") on September 30, 2010, and amended on November 24, 2010 (G.C.Exhs. 1(a) and 1(c)).¹ Complaint was issued on December 10, 2010, alleging that the Company (1) on or about June 4, 2010, by its Corporate Vice President Bill Johnstone, threatened to fire employees and watch them with closer

¹ General Counsel's exhibits are referred to as "G.C.Exh. x;" Respondent's exhibits are referred to as "Resp.Exh. x;" and Charging Party's exhibits are referred to as "C.P.Exh. x." Pages of the transcript are referred to as "Tr. x." Administrative Law Judge Amchan's Decision is referred to as "ALJD, p. x, line x."

scrutiny because of their Union and protected concerted activity in violation of Section 8(a)(1) of the Act; (2) on or about August 18, 2010, suspended its employee Marcus Hedger ("Hedger") and on or about September 14, 2010, discharged Hedger, because Hedger formed, joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities in violation of Section 8(a)(3) and (1) of the Act; and (3) since on or about September 7, 2010, failed and refused to furnish the Union with requested information which was necessary for, and relevant to, the Union's performance of its duties as the exclusive collective bargaining representative of a bargaining unit of Company employees in violation of Section 8(a)(5) and (1) of the Act (G.C.Exh. 1(e)).

The Union had filed grievances alleging that the Company's threats toward Marcus Hedger, and the suspension and termination of Hedger, violated the parties' collective bargaining agreement (G.C.Exhs. 9, 17 and 18). After the issuance of the Complaint, and to allow the deferral of the charges to arbitration, the Union withdrew that portion of its unfair labor practice charge alleging that the Company had violated the Act by refusing to furnish the Union with certain requested information. On January 14, 2011, the Regional Director approved the partial withdrawal of the charge, deferred the remaining allegations to arbitration under the parties' collective bargaining agreement, and dismissed the Complaint (G.C.Exh. 1(h)).

Arbitration of the Union's grievances was scheduled to be heard before Professor Martin H. Malin on June 13, 2011. At the opening of the arbitration hearing, the Arbitrator asked the parties what they believed the issues to be. Pursuant to the Acting General Counsel's Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)(1) and (3) Cases, Memorandum GC 11-05, issued on January 20, 2011 ("the Guideline Memorandum"),

counsel for the Union stated that the issues before the Arbitrator included not only the contractual issues of whether the Company had violated the parties' collective bargaining agreement by its actions toward Marcus Hedger, but also the issues of whether the Company violated Section 8(a)(1) of the Act by its threats to Hedger and Section 8(a)(3) and (1) of the Act by its suspension and termination of Hedger (Resp.Exh. 2, pp. 7-9).

Company counsel refused to proceed. The Company refused to allow the Arbitrator to frame the issues as he saw fit, and took the position that the Arbitrator did not have the authority even to comment on whether the Company had violated the Act (Resp.Exh. 2, pp. 10-12). Arbitrator Malin proposed, and the Union agreed, that he hear all of the testimony on the contractual issue;² receive briefs from the parties on the contractual issues, his authority to resolve the statutory issues, and the statutory issues; decide the contractual issues; and if, and only if, his decision on the contractual issues did not resolve the statutory issues, then decide if he had the authority to reach the statutory issues; and, if he found he had that authority, only in that event to address the statutory issues. The Company rejected that proposal, and refused to proceed (Resp.Exh. 2, p. 20-22).

At the Company's insistence, and with its agreement, the Arbitrator agreed not to proceed with taking testimony and instead set a briefing schedule on the issue of his authority to consider the statutory issues as a result of the Regional Director's deferral of the Union's unfair labor practice charges (Resp.Exh. 2, p. 23-24). The Union submitted its brief to the Arbitrator. However, on July 11, 2011, the date its brief was to be filed, the Company formally "withdrew" from the arbitration proceeding, and stated that it would no longer participate in that proceeding, on the ground that the

² The evidence related to the contractual issues and the statutory issues was identical (Resp.Exh. 2, p. 30).

Arbitrator did not have the authority to rule “on the NLRA-related issues” (Resp.Exh. 3).

Faced with the Company’s refusal to participate in the arbitration, the Regional Director on August 2, 2011, revoked the deferral to arbitration (G.C.Exh. 1(l))³ and on August 8, 2011, reissued the Complaint against the Company (G.C.Exh. 1(m)).⁴

Hearing on the reissued Complaint was held in Chicago before Administrative Law Judge Arthur J. Amchan on October 13 and 14, 2011. Judge Amchan issued his Decision and Recommended Order on November 30, 2011. The ALJ found that the Company violated Section 8(a)(3) and (1) of the Act by terminating Marcus Hedger on September 14, 2010, based on his protected activities as union steward. Although the Judge credited the General Counsel’s witnesses’ testimony concerning the alleged threat to Marcus Hedger, he found that the subject matter of the threat was “not clear” and dismissed that allegation (ALJD, p. 3, Lines 37-42). The Judge dismissed without explanation the allegation that the suspension of Marcus Hedger on August 18, 2011 violated Section 8(a)(3) and (1) of the Act (ALJD, p. 9, lines 13-15).

The Company filed Exceptions to Judge Amchan’s Decision. Charging Party’s Cross-Exceptions and Brief are due on February 8, 2012.

³ The General Counsel’s deferral letter (G.C.Exh. 1(h)) and the model “Collyer Deferral Letter” attached to the Guideline Memorandum state (p. 2, emphasis added):

Charged Party’s Conduct: If the Charged Party prevents or impedes resolution of the grievance, raises a defense that the grievance is untimely filed, or refuses to arbitrate the grievance, I will revoke deferral and resume processing of the charge.

⁴ The reissued Complaint (G.C.Exh. 1(m)) did not include the allegations concerning the Company’s refusal to provide requested information which had been part of the initial Complaint (G.C.Exh. 1(e)). The Union had withdrawn that portion of its charge in order to facilitate deferral; by the time the Company refused to participate in the arbitration, that allegation was time-barred.

STATEMENT OF FACTS

The Parties

Fort Dearborn Corporation prints labels, primarily for the food, beverage, and household product industries. Its corporate offices are located in Elk Grove Village, Illinois. This matter arises at its manufacturing facility in Niles, Illinois, where it prints and finishes labels (Tr. 74, 151-152).

Local 458M, Graphic Communications Conference of the International Brotherhood of Teamsters ("Local 458M" or "the Union"), represents three bargaining units of production employees at the Company's Niles facility: a pre-press, imprint and pressroom unit (also called the "litho unit"); a bindery, shipping and sheeting unit; and a unit of J-1 cutter operators. This matter arises in the litho unit (Tr. 21, 25-26, 46-47, 73, 94-95).

Marcus Hedger

Marcus Hedger is a second pressman, and a member of the pre-press, imprint and press ("litho") bargaining unit. Hedger has worked for the Company since July, 2001 and has a virtually perfect record. His only discipline in nine years with the Company is a single verbal warning under the attendance policy (Tr. 18-20, 262-263).

Marcus Hedger has been the elected Chief Union Steward for the past six and one-half years. He has been on the Union's Negotiating Committees for two of the three bargaining units for two contract cycles, for a total of four sets of negotiations. He is the elected Local Union Sergeant-at-Arms, a member of the Local's Executive Board, and a Volunteer Organizer for the Union. He has taken three years of courses at the DePaul University Labor Studies Program, and graduated with a certificate from that Program (Tr. 22-26, 46-47).

Marcus Hedger has been an aggressive Union Steward. He filed 35-40 grievances on behalf

of bargaining unit members, and has vigilantly policed the parties' collective bargaining agreements (Tr. 27-28). Among other things:

- In 2008, the Company announced that it was going to unilaterally expand its no-smoking policy beyond what was mandated by Illinois law.⁵ Marcus Hedger met with the Company and brought several smokers to the meeting, along with Alternate Steward David Ishac and Cutter Steward Guillermo ("Memo") Garcia. Present for the Company were Niles facility General Manager Bob Kester and Niles facility Human Resources Manager Evelyn Vasquez. Hedger insisted that the Company could not make that change unilaterally, and the Company ultimately decided not to change the policy, although it did change the policy at other facilities. Bob Kester was upset because Marcus Hedger wanted to bargain about this and had told Kester that the Union may have to vote on it. Marcus Hedger and David Ishac testified that Kester told the other Union members present, "If Marcus keeps poking management in the ribs like this, and punching them in the mouth, we might close the Company down because of him" (Tr. 44-46, 76-77, 100-101, 108, 225-227, 296-298).⁶

- In June, 2009, the Company announced that it was unilaterally changing its policy on how many employees could be on vacation at one time. Marcus Hedger and other Union representatives met with the Company to protest that unilateral action, and the Company ended up not changing that policy. Corporate Senior Vice-President of Operations Bill Johnstone, Bob Kester,

⁵ The Company's claim that it was only enforcing a new Illinois law (Co.Brief, p. 16) should be rejected. As Marcus Hedger testified, the Union did not object to the Company's steps to comply with the law, but objected when the Company later announced unilateral changes that went beyond what was required by law (Tr. 45).

⁶ Kester testified that he said, "If we keep making big issues over little things, management isn't going to continue to deal with it" (Tr. 227, 297-298).

Pressroom Manager Tom Vlahos and Evelyn Vasquez were present for the Company. Stewards Marcus Hedger, David Ishac, and Memo Garcia were present for the Union. Johnstone asked Hedger when his term as Chief Steward was up; if he really thought he would be re-elected Chief Steward; and if he would be participating in the next contract negotiations. Marcus Hedger and David Ishac testified that Johnstone told Hedger, "You are not a good steward. You lie to the guys and bully and badger them. You feed them half-truths and misinformation. You are leading the guys down the wrong path and leading them to nowhere" (Tr. 42-44, 101-102, 108-109, 235-237, 350-351).

David Ishac responded that he never saw Marcus Hedger lie or bully the members. Ishac asked Johnstone when Hedger had done this, and said that Marcus Hedger should not be a steward if he lied to or bullied the members. Johnstone backed down (Tr. 102-103).⁷

The Litho Negotiations on June 4, 2010

The parties had a negotiating session for the litho contract on June 4, 2010. Present for the Union were Local Union Vice-President Paul Mancillas, Local Union President Robert Hayden, Marcus Hedger, David Ishac, John Chavalier, Frank Posintino, Mike Zenka and Jason Powell. Present for the Company were Bill Johnstone and Bob Kester (Tr. 29, 73-75, 96-97).

The Company representatives were in a bad mood. Negotiations had been difficult. At the last meeting, the Company had asked the Union to bring the Company's most recent proposal to the membership for a vote. The Union did so, recommending rejection, and the membership rejected the proposal by a vote of 41-19. Company representative Bill Johnstone testified that he was "frustrated" at the June 4 meeting by the members' rejection of the Company's proposal. (Tr. 28-29,

⁷ Marcus Hedger credibly testified that he never lied to the bargaining unit employees; if anything, his problem was that he always told them the truth and was not good at "sugar coating" the truth (Tr. 43-44).

97-98, 228-229, 296, 351-353).

Toward the end of the meeting on June 4, Bill Johnstone told the Union Committee that he could look everyone on the Union side in the eye, except for Marcus Hedger. Hedger responded that he wasn't looking at Johnstone because he was busy taking notes. Johnstone told the Union Committee that he wished they "had the courage of their convictions." Hedger replied that they did have the courage of their convictions; they had told the Company they would recommend against its proposal and did so (Tr. 99, 370-371; C.P.Exh. 3, p. 8).

Bill Johnstone then held up a Union newsletter urging members to "Vote No" on the Company's proposal. Johnstone claimed that the newsletter had been copied on the Company's copying machine. The newsletter contained a cartoon, which was not in the document prepared by the Union, and Hedger told Johnstone that the document had not been prepared or distributed by the Union, and had not been copied by the Union. Hedger assured Johnstone that the Union would not copy any Union documents on the Company copier. Johnstone said that anyone using the copier for personal use would be disciplined (Tr. 29-30, 98, 230-231, 345-346, 354-355; C.P.Exh. 3, p. 8).

Bill Johnstone then held up another "Vote No" document which he said Union Business Agent Frank Golden had placed on the windshields of employees' cars in the Company parking lot. Johnstone asked, "What will Frank Golden do when we show him a picture of him putting this on people's car windows?" Marcus Hedger responded, "I thought there were no cameras in the parking lot. If the Company has a picture of Frank Golden doing something they should produce it" (Tr. 30, 98-100, 372).

Marcus Hedger's response got Johnstone "very angry" Looking at Marcus Hedger, Johnstone said, that he was "tired of our Union circus" and that "We are watching you, Marcus, and we are

going to catch you, and we're going to fire you, and many people are going to laugh at you."

Johnstone added, "And tell Frank Golden that if we catch him in the parking lot again, we're going to send him to jail" (Tr. 30, 99, 114).

David Ishac, a member of the Union negotiating committee, confirmed Bill Johnstone's threat to Marcus Hedger on June 4, 2010 (Tr. 98-99). Johnstone's threat was also confirmed in Marcus Hedger's contemporaneous notes of the June 4 meeting (C.P.Exh. 3, pp. 8-9, Tr. 369-376).⁸

The "Say No to Blockheads" Sticker

In connection with an internal union issue, stickers had circulated in the plant showing a cartoon character wearing the letter "H," with the slogan, "Say No to Blockheads." On June 10, 2010, a copy of the sticker appeared in the Company's locked bulletin board, with the question "Does the 'H' in This Sticker Stand for HEDGER?" (G.C.Exh. 11, Tr. 75-76).

Marcus Hedger asked the Company to remove the posting from its locked bulletin board, but it remained posted for two more days (Tr. 32).

The Union's Grievances

Marcus Hedger filed two grievances on June 11, 2010. The first grievance (G.C.Exh. 9) protested Johnstone's threat to Hedger in the negotiations on June 4, 2010. The grievance stated (G.C.Exh. 9):

On 6-4-10 at the bargaining unit negotiation table, Bill Johnstone made a threat that I would be fired in order to harass and intimidate myself and the union negotiating committee.

As a remedy, the grievance asked that "Bill Johnstone make a written public apology to the union

⁸ The Judge credited the testimony of Marcus Hedger and David Ishac as to what Johnstone said (ALJD, p. 3, Lines 37-40), and the Company has not excepted to that finding.

negotiation committee and a posting for the shop” (Tr. 31).

The second grievance protested the Company’s posting of the “Say No to Blockheads” sticker with the words, “Does the ‘H’ in this Sticker Stand for HEDGER?” (G.C.Exh. 10; Tr. 32).

A few hours after Marcus Hedger turned in the grievances to Niles Human Resources Manager Evelyn Vasquez, Bob Kester came up to Hedger and asked if he knew an employee named Linda Gonzales, who worked in the front office. Hedger replied that he knew Gonzales well; she was a good friend and they grew up in the same neighborhood. Kester said that her husband had died that morning from a massive heart attack. Speaking slowly and deliberately, Kester told Hedger, “It happened suddenly, and unexpectedly, and without warning” (Tr. 33-34).

Marcus Hedger said that was terrible, and asked how Linda Gonzales was doing. He asked if Kester wanted him to inform the pressroom employees. Kester said, “Yes,” and again stated slowly, “But I just want to let you know that this happened suddenly, unexpectedly and without warning” (Tr. 34).

Hedger again replied that this was terrible and he felt really bad for Gonzales. Kester said, for the third time, “I just want you to realize that this happened suddenly, unexpectedly and without warning.” Kester then added, “I hope this puts your future here in perspective,” and turned around and walked away (Tr. 34-35, 233-234).⁹

The Company’s Opposition to Marcus Hedger’s Union Postings

After the June 4, 2010 negotiating session, Corporate Senior Vice-President Bill Samuels went through the plant, telling bargaining unit employees that the Union had made a contract

⁹ Bob Kester’s testified that he told Hedger, “we don’t see eye to eye in everything, but this really puts things in perspective. Life is way too short for the bickering that goes on between he and I.’ And that’s all I said. And I turned around and went back to my office” (Tr. 233).

proposal concerning “bumping rights” that would adversely affect another employee. Union Vice-President Paul Mancillas prepared a statement in response to Samuels’s statements and explaining the reasons for the Union’s “bumping rights” proposal (G.C.Exh. 14). Marcus Hedger put Mancillas’s statement on the Union’s locked bulletin board on approximately June 20, 2010 (Tr. 37-38).

The next day, June 21, 2010, the Company took down Mancillas’s letter from the Union’s locked bulletin board (G.C.Exh. 13; Tr. 38-39). Paul Mancillas instructed Hedger to re-post his letter, which Hedger did. On June 23, 2010, Kester wrote to Hedger, telling him that continued posting of material “which is disruptive to the workplace will result in disciplinary action, up-to and including discharge” (G.C.Exh. 15; Tr. 39).

Pete Schmidt’s Visit to the Plant

Marcus Hedger was working as a second pressman on Thursday, August 12, 2010, on second shift, from 3 p.m. to 11 p.m. Some time after 8 p.m., Hedger and the rest of his crew were washing up the press from a completed run when Hedger was paged over the loudspeaker to come to the shipping dock. Marcus Hedger did not respond to the page. He continued to complete the wash up, and then “hung” the printing plates for the next job on the presses’ cylinders (Tr. 47, 77-78).¹⁰

After hanging the plates, there was a natural break in Marcus Hedger’s second pressman job duties. Hedger testified that his practice was to take his contractual break at that time, and wash the sweat and dirt off his hands. At that time, shipping employee Daniel Nevins came up to Hedger and

¹⁰ The Company’s claim (Co. Brief, p. 18) that Marcus Hedger went to the plant’s shipping department when his crew was going into a wash-up distorts the record. Hedger consistently testified that he was paged during a wash-up, but didn’t leave the press until after the wash-up was completed (Tr. 47, 77-78). The Judge correctly credited Hedger’s testimony (ALJD, p. 8, fn. 12), and the Company has not excepted to that finding.

told him that someone was waiting for him in the shipping area (Tr. 47-48, 78).

Marcus Hedger walked with Nevins to the shipping area, where he saw Pete Schmidt inside the building with his bicycle. Pete Schmidt was an out-of-work Union member from another shop, who lived near the plant. Marcus Hedger and Pete Schmidt were both Union Sergeants-at-Arms. Schmidt had been out that evening riding his bike, and asked Hedger if he had time to chat. Hedger told Schmidt that he did not have time to talk; that he was busy on a job; and that if Schmidt wanted to talk to him, he should call in advance. Schmidt then asked Marcus Hedger for the quickest way to get to Lehigh Street (Tr. 48-49, 77-79, 84).

Lehigh Street was on the other side of the plant, and the quickest way to get there was through the building. Marcus Hedger told Pete Schmidt that he would check with his boss, Second Shift Foreman Bob Schmitt (no relation),¹¹ to see if he could walk Pete Schmidt through the plant to the other side of the building. Marcus Hedger walked with Pete Schmidt (who was walking his bicycle) to the nearby vending machine area, where they met Bob Schmitt, who was getting coffee for his crew (Tr. 49, 50, 79-80, 119).

Marcus Hedger introduced Pete Schmidt to Bob Schmitt, and asked Bob Schmitt if it was OK to walk Pete Schmidt through the pressrooms quickly to the other door. Hedger told Bob Schmitt that Pete Schmidt was a web pressman, and had never seen sheet-fed presses, which the

¹¹ Bob Schmitt, a first pressman and member of the bargaining unit, is the highest ranking person in the plant on second shift. His title is Second Shift Pressroom Foreman. Approximately 25 employees work in the pressroom on second shift. Schmitt is responsible for allowing employees to leave early; requesting employees to come in early; reassigning the work in the event of unforeseen production developments; and generally directing the work on second shift. The second shift foremen in the bindery and shipping areas, Marcin Golofit and Kis Kako, report to Bob Schmitt (Tr. 304-305). Schmitt reports to Pressroom Manager Tom Vlahos, who works first shift (Tr. 20-21, 83, 94, 116-118, 223-225).

Company had. Bob Schmitt told Marcus Hedger it was okay to walk Pete Schmidt through the pressrooms as long as he walked him out of the building¹² (Tr. 49-50, 79-80, 119-120).

Marcus Hedger walked Pete Schmidt through the pressrooms to the door on the east side of the building. They looked in the bindery door, and Hedger told Schmidt that they could not go in there. When they reached the other side of the plant, Marcus Hedger shook Pete Schmidt's hand, pointed to Lehigh Street, and closed the door. Marcus Hedger estimated that he was away from his press for five to ten minutes, during his normal break time. Hedger returned to his press and went back to work (Tr. 50-51, 80-81).¹³

This is the entirety of the 11 minute "incident" for which Chief Union Steward Marcus Hedger – who has a virtually perfect record over 9 years – was summarily terminated.

¹² This is the consistent testimony of Marcus Hedger and Bob Schmitt. The Company did not introduce any evidence rebutting the central fact that Bob Schmitt gave Marcus Hedger permission to walk Pete Schmidt through the plant.

¹³ The Administrative Law Judge correctly found (ALJD, pp. 7-8, fn. 12) that Marcus Hedger was away from his press for approximately 11 minutes, from the time the wash-up on his press was completed (8:40 p.m., see Respondent Exhibit 10) until he was seen on the security tape letting Pete Schmidt out of the building (8:51 p.m., see Tr. 127). In those 11 minutes, Hedger walked with Daniel Nevins to the shipping area where he found Pete Schmidt; walked with Schmidt to the vending machines to get foreman Bob Schmitt's approval to walk Schmidt through the pressrooms to the side door; and walked Schmidt to the side door. Bob Schmitt confirmed this time frame in his August 30 interview by Bill Samuels ("Approximately how long was the man with the bicycle in the plant? Bob Schmitt responded '10 minutes'")(G.C.Exh.3, ¶22), a response which the Judge found truthful (ALJD, p. 11, lines 9-13). All of the reports of the Company's witness interviews are consistent with this time frame. Although the Company interviewed Michael Naylor and Tony Sass, the first pressman and feeder on Marcus Hedger's press, they did not ask Naylor or Sass how long Hedger had been away from the press (Tr. 244-247).

The Judge also correctly found that there was no credible evidence for the Company's claim that Hedger was away from his press between 50 minutes to over one hour (ALJD, p. 4, fn. 7; pp. 7-8, fn. 12).

The Company's "Full Court Press" Investigation

Marcus Hedger worked his regular shift the next day, on Friday, August 13, 2010; he was in negotiations on Monday, August 16; and took a vacation day on Tuesday, August 17.

August 17, 2010. Niles General Manager Bob Kester was on vacation the week on August 9, 2010. Kester testified that on his return, on August 17, he was reviewing security camera footage of an alleged incident which took place between 6 and 7 a.m. on Saturday, August 14. Kester claimed that in rewinding the video back to August 14 he saw images taken on August 12 showing Marcus Hedger helping someone out the building side door with a bicycle at 8:51 p.m. (Tr. 169-173, 274-277, 281).¹⁴

Kester and Pressroom Manager Tom Vlahos immediately began a "full court" investigation of Marcus Hedger. The same day, August 17, 2010, Kester and Vlahos interviewed the following supervisors and employees (G.C.Exhs. 3 and 4; Tr. 174-179):

1. Second Shift Foreman Bob Schmitt was called into Tom Vlahos's office, and questioned by Vlahos and Bob Kester. Tom Vlahos testified that the Company did not ask Schmitt if he had given Marcus Hedger permission to walk Pete Schmidt through the pressrooms (Tr. 175-176, 330). Schmitt testified that he told Vlahos and Kester that he had given Marcus Hedger permission to walk Pete Schmidt through the pressrooms. Kester and Vlahos told Schmitt it was poor judgment not to escort the visitor out of the plant, and Schmitt told them he didn't realize that was his responsibility. Schmitt testified that, at the time, he was not aware

¹⁴ Kester's explanation, that he went back to the security tapes of August 12 in the course of viewing something that purportedly happened on August 14, is not credible. The Union believes someone, knowing of the Company's animus toward Hedger, told Kester that Marcus Hedger had escorted a visitor through the plant on August 12, 2010, and that Kester then reviewed the security tapes.

- of any Company policy concerning visitors in the plant (Tr. 125-128, 134).
2. Second Shift Bindery Supervisor Marcin Golofit told Kester and Vlahos that Daniel Nevins went to get Marcus Hedger, and Hedger then walked someone through the plant with a bicycle.
 3. Mike Kusznierez, a cutter, "recalled seeing Marcus stop at the bindery entrance" (G.C.Exh. 4).¹⁵
 4. Chuck Hayney, a palletizer, remembered the person "coming to the warehouse door."
 5. Nina Abo, a die cutter, confirmed that Marcus Hedger was paged, but did not answer the page, so Daniel Nevins went to Hedger's press, and brought him back to the warehouse, and Hedger then escorted the visitor through the facility.
 6. Pressmen Mike Naylor, Art Hammond and Tony Sass were interviewed but did not recall anything.
 7. Doug Barko, a pressman, confirmed that Marcus Hedger walked a man with a bike through the small press room.

August 18, 2010. Bob Kester and Evelyn Vasquez continued the interviews of supervisors and employees the next day (Tr. 179-181):

8. Daniel Nevins said that the visitor said that he was a feeder, and was looking for Marcus Hedger.
9. Shipping leadperson Kis Kako said that the visitor said that his name was Martin Fletcher,

¹⁵ The Judge correctly rejected the Company's claim that Kuznierez told Bob Kester and Vlahos that Marcus Hedger and Pete Schmidt entered the bindery (ALJD p. 11, lines 15-19). Kester's notes of his conversation with Kuznierez state that Hedger and Schmidt "stopped at the bindery entrance" (G.C.Exh. 4, p. 1). This was consistent with Marcus Hedger's testimony that he and Schmidt did not enter the bindery or sheeting department.

and he was looking for Marcus Hedger. Kako paged Hedger, and then sent Daniel Nevins to get him.¹⁶

10. Saul Radilla, a feeder in the pressroom, recalled that Marcus Hedger walked through the pressroom with a man with a bicycle.

11. Robert Hayden, a pressman, told the Company that the visitor's name was Pete Schmidt and that he was a Union member.¹⁷

Armed with this information concerning Marcus Hedger, Kester immediately "reached out to [Corporate Senior Vice-President] Bill Johnstone and [Corporate Human Resources Manager] Bill Samuels to assist in a formal Company investigation into this matter and to determine a plan of disciplinary action" (G.C.Exh. 4; Tr. 194).

Bill Samuels did not waste any time. Samuels went immediately from his office in Elk Grove Village to the Niles facility. As soon as the second shift began work that same day, August 18, 2010, Bob Kester came up to Marcus Hedger at his press, and told him that the Company wanted to talk to him. Hedger went to get a pencil and paper, and Kester told him he didn't need that. Kester walked Hedger back to the office (Tr. 51-52).

¹⁶ There was no explanation as to why, or if, Pete Schmidt said that his name was "Martin Fletcher." The Union suspects that Schmidt said that he asked for "Marcus Hedger" and Kako misheard the name as "Martin Fletcher." Although Kako apparently told Kester and Velasquez that he told the visitor to stay outside, it is undisputed that Pete Schmidt was inside the plant with his bicycle by the time Marcus Hedger arrived in response to the page (See ALJD, p. 4, lines 7-9).

¹⁷ As the Administrative Law Judge found (ALJD p. 8, fn. 12; p. 11, lines 4-6), Marcus Hedger and Robert Hayden did not get along, and the Company knew that (Tr. 53, 272). It is very possible that Hayden informed the Company about Pete Schmidt's unannounced visit, and that Bob Kester's claim that he learned of Schmidt's visit by reviewing old security tapes was fabricated to conceal Hayden's involvement.

The First Interrogation and Suspension of Marcus Hedger

Marcus Hedger had no idea what Bob Kester wanted to talk about. Bill Samuels was waiting for Hedger in the customer lounge.¹⁸ Samuels told Hedger that this was a Company investigation. Hedger said that if the interview had anything to do with his job, he wanted Union Business Agent Frank Golden to represent him. Hedger asked to get his cell phone, which was at his press, to call Golden. Samuels refused to allow Hedger to leave the room and repeated that this was a "Company investigation." Marcus Hedger asked if he could at least call the Union office and get Frank Golden on the phone. Samuels agreed, and Bob Kester telephoned the Union office. The Union's receptionist said that Frank Golden was not in the office (Tr. 51-53, 195-197).

Marcus Hedger again asked if he could get his cell phone, which contained Frank Golden's cell phone number. Samuels again refused. Hedger said that if he could not have the Union representative he wanted, then he didn't want to proceed and the meeting should be over. At that point Evelyn Vasquez entered the room, and Samuels told Vasquez to get Robert Hayden to serve as Marcus Hedger's representative. The Company knew that Robert Hayden and Marcus Hedger did not get along (Tr. 53, 272). Hedger told Samuels that Hayden was not a Union Steward, and was not trained as a Union representative (Tr. 53-54, 196).

Marcus Hedger told the Company that if he couldn't have Frank Golden as his representative, he wanted David Ishac, the Alternate Union Steward. Hedger said that Ishac at least knew how to take notes. The Company huddled, and suggested that Michael Kuznierz, a member of the Union

¹⁸ Marcus Hedger testified that he had participated in other investigatory interviews of employees, and this was the only time Corporate Human Resources Manager Bill Samuels was present. Hedger testified that Company representatives had never before read from prepared questions, and never before threatened employees with discharge if they did not cooperate (Tr. 72-73).

Executive Board, could be his representative. Hedger reiterated that if he couldn't have Frank Golden, he wanted Alternate Union Steward David Ishac as his representative (Tr. 53-54, 196-197).

The Company sent for David Ishac. While they were waiting, Marcus Hedger again asked to call Frank Golden. The Company asked what Golden's cell phone number was, and Hedger again told them that Golden's cell phone number was in his (Hedger's) cell phone, which was at his press. At that point, Evelyn Velasquez said that Hedger could get his cell phone, and walked with Hedger to his press. At the press, Marcus Hedger began to write down Golden's cell phone number, but Velasquez told him (as Kester had earlier), that he could not bring a pencil or paper into the meeting, and that he should just bring his cell phone back to the lounge (Tr. 54-55, 198).

Back in the lounge, Marcus Hedger asked for the opportunity to talk with Frank Golden privately before he was questioned by the Company. (At this point, Hedger still did not know why he had been called into the room.) Samuels refused to allow Hedger to talk privately with Golden, and Marcus Hedger then went ahead and called Frank Golden on his cell phone (Tr. 55).

In the presence of Samuels, Kester and Velasquez, Marcus Hedger explained to Golden that the Company wanted to talk to him about something. Frank Golden told Hedger that he was driving in traffic, his reception was bad, and asked if they could delay the meeting so he could drive to the plant. Bill Samuels overheard that, and told Golden and Hedger that they would not delay the meeting, that this was a "Company matter" and not a "Union matter," and it was going to take place right now (Tr. 55).

It was difficult to hear Frank Golden on Hedger's cell phone, and Marcus Hedger suggested that Golden call back to the Company's main number. The Company agreed, and Frank Golden called back and was placed on a speaker phone. Once on the speaker phone, Frank Golden again

asked to delay the meeting until he arrived; he was driving and reception was bad. Bill Samuels again refused, saying that they were going to hold the meeting now (Tr. 55-56, 199).¹⁹

Over the speaker phone, Frank Golden and Marcus Hedger again asked if they could first talk privately, and Samuels again denied that request.²⁰ Hedger and Golden asked what the meeting about, and Samuels again replied, "This is a Company investigation, not a Union matter." Samuels then began asking prepared questions from a sheet of paper. Samuels asked Hedger if he recalled bringing someone in the plant with a bicycle, and Hedger said he could not recall. He asked if Hedger knew a person named "Peter Schmidt" or "Martin Fletcher." Marcus Hedger said that he did not recall. Hedger told Samuels that he couldn't remember anything, and again asked for time to talk with Frank Golden and possibly refresh his memory. Samuels again refused to allow Hedger to talk privately with Golden, and sent Hedger back to his press (Tr. 56-57, 199).²¹

¹⁹ Bob Kester denied that Frank Golden said he could be there in a few minutes, or that Golden asked that the meeting be delayed until he got there (Tr. 239). However, Kester's own notes of the next interrogation on August 23, 2010, confirm that Frank Golden said, "This could have been done by last Wednesday [August 18, 2010], but you chose to not allow me to come down to the plant" (CP.Exh. 1).

²⁰ Bob Kester testified that Frank Golden didn't say anything about talking privately with Marcus Hedger (Tr. 200-201). However, Evelyn Vasquez's notes of the interrogation on August 18, 2010, state that "Frank protested stating he wanted some time to talk to Marcus" (C.P.Exh. 2; Tr. 295-296).

²¹ Having violated Marcus Hedger's Weingarten rights by refusing his repeated requests to speak with Frank Golden before the meeting began, the Company cannot then complain that Hedger had difficulty answering the Company questions. This is why the Weingarten principle gives employees the right to speak privately with their union representative before being questioned by an employer, as well as the right to be told what the charges are. See United States Postal Service, 345 NLRB 426, 426, fn. 2, and 435-436 (2005). Marcus Hedger testified, "The only thing that came to my mind was 'I don't know' and 'I don't remember.' I was put in a room with all these faces looking at me, that didn't like me. I know they were trying to get rid of me and I didn't know what to say. Any answer I said would have been the wrong answer. All that I could think of was 'I don't

(continued...)

Marcus Hedger returned to his press. About 15 minutes later, Bob Kester told Hedger to go home. Hedger left the plant and went home (Tr. 57-58, 201).

On his way home, Marcus Hedger got a call on his cell phone from Bob Schmitt. Schmitt knew that Marcus Hedger had been questioned that night by Bill Samuels and Bob Kester and then sent home. Schmitt told Marcus Hedger that he had been questioned the day before by Kester and Vlahos. Schmitt told Hedger that Vlahos and Kester were “really mad” at him (Schmitt) because he told them that he had given Hedger permission to walk a friend through the plant (Tr. 133). Bob Schmitt told Hedger the Company was going to try and fire Hedger over this and to tell the truth about what happened (Tr. 58, 81-82, 128, 133).

The Second Interrogation of Marcus Hedger

The next day, Thursday, August 19, Marcus Hedger filed a grievance protesting his indefinite suspension (Tr. 58-59). On Friday, August 20, Kester called Hedger and told him that the Company wanted to meet with him on Monday, August 23.

Marcus Hedger met with Bill Samuels and Bob Kester at the Company on August 23, 2010, with Frank Golden present as Hedger’s union representative. Golden asked Samuels what the meeting was about, and Samuels again said that it was a “Company investigation.” Golden asked if Hedger was being charged with anything, and Samuels said they were doing an investigation to find out (Tr. 59-60, 202).

Uncharacteristically solicitous, Bill Samuels asked Marcus Hedger if he wanted to meet with Frank Golden alone before they went any further – a right which Samuels had repeatedly denied

²¹(...continued)
know’ and ‘I don’t remember” (Tr. 87).

Hedger in the questioning on August 18. Hedger said "Yes," and the Company left the room for a few minutes. As they were leaving, Samuels said that he noticed that Hedger now had a pen and paper, another right the Company had denied Hedger in the previous interrogation (Tr. 60, 202-203).

After the Company returned to the room, Bill Samuels began asking Marcus Hedger questions from a prepared list of questions (C.D.Exh. 1). In response to these questions Marcus Hedger said that a visitor with a bicycle came to the warehouse door on Thursday evening, August 12, to see him; that Hedger was paged over the loudspeaker and someone from shipping came to get him; that he left his press during his normal break, after finishing a job and completing the wash up; that the visitor was already in the building when Hedger arrived at the warehouse; that the visitor was an unemployed union member and held a position in the Local; that the meeting was not pre-arranged; that Hedger got permission from his foreman to walk the visitor through the pressrooms; and that other employees saw the visitor in building (C.P.Exh. 1; Tr. 60-64, 203-205, 210, 273).²²

At that point Marcus Hedger asked to talk privately with Frank Golden. When they returned, Golden suggested it would be easier if Hedger simply told everything that happened in a narrative format. Bill Samuels resisted, but Hedger proceeded to describe the entire incident to Samuels and Kester. Kester's summary notes of Hedger's narrative state (C.P.Exh. 1, pp. 6-7; Tr. 82-83):

Marcus Hedger: Let me tell you what happened. Paged while I was on the press. A friend of mine stopped by the building. I was really busy that night. He wanted to know the quickest way to get to Lehigh. We went in one door and out the other door. As we walked through the staging area I saw the foreman by the coffee

²² Kester's notes also confirm that Frank Golden and Marcus Hedger were not given the opportunity to talk privately at the previous interrogation on August 18, 2010; that Hedger was threatened at the previous interrogation that he would be subject to discipline up to and including termination if he did not provide complete and truthful answers to the Company's questions; and that Frank Golden had asked at the earlier interrogation to be allowed to drive to the plant for the questioning (C.P.Exh. 1).

machine. He said it was ok to give a brief tour.

Bob Kester: Did you get permission before the person came in or after?

Marcus Hedger: He was in the building already. He entered on the west side of the building and left out the east side of the building.

After Hedger finished, Bill Samuels resumed questioning him from the prepared questions.

At one point Bill Samuels asked for the name of the visitor, and Frank Golden questioned the relevance of his name. Bill Samuels moved on to his other questions, without renewing that question to Marcus Hedger. Hedger did not refuse to answer that question, or any of the Company's questions (Tr. 61-62, 255-256, 267-268).²³

At the end of the questioning, Bill Samuels told Marcus Hedger that he was still suspended, pending a decision by the Company. Frank Golden asked if Hedger would be paid during the suspension, and Samuels said that he would. Golden asked Kester if this was the first time an employee had been disciplined for letting someone into the plant, and Kester said it was. Golden asked if it wasn't excessive for an employee who had never been written up in his career with the Company to be suspended for this, while nothing was done to people who made threats of violence. Golden asked what the Company's visitor policy was, and Samuels said visitors should sign in at the front desk. Golden asked what they were supposed to do on second and third shifts, when the front desk is closed, and Samuels did not answer. Golden asked what Marcus Hedger was being charged with, and Samuels replied, "We are investigating to see what the violation is" (Tr. 62-64).

²³ The Judge found that Marcus Hedger answered all of the Company's questions truthfully, other than the name of the visitor which he had been directed not to answer (ALJD, p. 9, lines 8-10).

The Interrogation of Bob Schmitt

Second shift Pressroom Foreman Bob Schmitt was on vacation the week of August 23, 2010. He was questioned on his return on Monday, August 30, by Bill Samuels, Bob Kester and Evelyn Vasquez. Samuels, whom Schmitt has known for years, began the questioning by telling Schmitt that his job was in jeopardy depending on how he answered their questions, and asked if he wanted a Union representative. Schmitt testified that Samuels was “very cold,” and Schmitt told him that he did not need a Union representative. Schmitt twice asked why he was in trouble since he had not done anything wrong (Tr. 128-131, 221, 358-360).

Bill Samuels again read from a list of prepared questions (G.C. Exh. 2). With respect to the incident of August 12, 2010, Schmitt stated, in response to Samuels’s questions, that he saw a man walk his bike through the plant, accompanied by Marcus Hedger; that he did not know who the man was; that he did not know who let the visitor into the plant; that he first saw the visitor at the vending machines; and that the visitor was in the plant about 10 minutes (Tr. 362). Bob Schmitt testified that he told the Company that he did not give Marcus Hedger permission to let the visitor into the plant (because the visitor had been let into the plant before Schmidt got there), but he **did** give Hedger permission to escort the visitor through the pressrooms (Tr. 129-131, 133-134). Bob Kester testified that Bob Schmitt denied giving Marcus Hedger permission to allow the visitor into the plant or to walk through the plant (Tr. 222-223; G.C.Exh. 2, p. 3). However, Kester testified that the Company first told Schmitt that he could be disciplined, depending on his answers, and that if Schmitt admitted that he gave Hedger permission, the Company would have “considered disciplining” him (Tr. 317-

318, 360, 366-368).²⁴

Marcus Hedger's Termination

Marcus Hedger remained on suspension for two weeks, until September 7, 2010. On that day Bob Kester told Hedger in a telephone call that he was being terminated effective September 14, 2010. Hedger asked why, and Kester told him that he would receive a letter (Tr. 64-65). Marcus Hedger received a letter from Kester dated September 7, 2010, stating that he was being terminated (G.C.Exh. 16):

...because we have concluded, after investigation, that you brought an unauthorized person into the plant on August 12, 2010 and that you did not respond truthfully to the Company's questions regarding events on that date of which you were fully aware.

The Union filed a grievance that day protesting Marcus Hedger's termination (G.C.Exh. 17), which was amended three days later (G.C.Exh. 18; Tr. 65-66). The amended grievance stated:

On or about 9/7/10 Marcus Hedger was wrongfully terminated without cause, without progressive discipline and because of protected activity as a Union Steward and as a Union Officer.

ARGUMENT

I. The Administrative Law Judge Correctly Rejected the Company's Deferral Argument

Although the Company did not file any motion to dismiss the Complaint, Company counsel claimed at the hearing that the hearing was "inappropriate," because of the Region's earlier deferral to arbitration (Tr. 6). The Administrative Law Judge correctly rejected that claim (ALJD, p. 1 - p.

²⁴ The Administrative Law Judge correctly found (ALJD, p. 4, n. 6):

...I would note that at the start of its interrogation, Respondent advised Robert Schmitt, who was close to retirement, that he could be discharged on the basis of the answers to its questions. Thus, it would not be surprising if Schmitt denied giving Hedger permission even if he did so.

2, line 17).

The General Counsel has “final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title [Section 10 of the Act], and in respect of the prosecution of such complaints before the Board.” 29 U.S.C. §153(d). Pursuant to this statutory authority, the General Counsel has adopted a formal policy concerning when the prosecution of unfair labor practices should be deferred to arbitration under the parties’ collective bargaining agreement. Acting General Counsel’s Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)(1) and (3) Cases, Memorandum GC 11-05 (January 20, 2011) (“Guideline Memorandum”).

The current case was processed in full conformity with the Acting General Counsel’s Guideline Memorandum:

- The Acting General Counsel issued a Complaint alleging that the Company (1) violated Section 8(a)(3) and (1) of the Act by its suspension and termination of Marcus Hedger; (2) violated Section 8(a)(1) of the Act by its threats to Hedger; and (3) violated Section 8(a)(5) and (1) of the Act by refusing to provide certain requested information (G.C.Exh. 1(e)).
- The Union then withdrew the Section 8(a)(5) charge, so that the matter could be deferred to arbitration, per the Acting General Counsel’s Guideline Memorandum.
- The General Counsel approved the partial withdrawal, and deferred the 8(a)(3) and (1) charges to arbitration (G.C.Exh. 1(h)).
- At the arbitration hearing, the parties stated their respective views of the issues. Pursuant to the Guideline Memorandum (pp. 6-7), the Union “presented the statutory issues to the arbitrator,” stating that in its view the issues before the Arbitrator included not only the

contractual issues of whether the Company's actions violated the parties' contract, but also the statutory issues of whether the Company's actions violated the Act. See Resp.Exh. 2, pp. 7-9.

- The Company was not required to agree to the Union's statement of the issues, but nevertheless refused to proceed. The Company refused to allow the Arbitrator even to decide if he had the authority to decide the statutory issues. Instead, the Company formally "withdrew" from the arbitration proceeding (Resp.Exh. 3).²⁵
- Pursuant to his Guideline Memorandum and the Board's decision in United Technologies Corp., 268 NLRB 557 (1984), discussed below, the Acting General Counsel then revoked the deferral to arbitration and reissued the Complaint, without the 8(a)(5) allegation that the Company had refused to provide information, which was now time-barred.

The Acting General Counsel has acted in good faith and in full accordance with Board

²⁵ Respondent's statement in its Brief that the Union "refused to proceed to arbitration unless the Company agreed to its inappropriate demands" (Co.Brief, p. 9) turns the facts on their head. The Union did not demand that the Company agree that the statutory issues were before the arbitrator; the Union merely presented its view of the issues before the arbitrator. The Company was certainly free to contest that and offer a different statement of the issues. When the Union refused to agree to the Company's insistence that the statutory issues were not before the arbitrator -- despite the express provisions of the Acting General Counsel's Guideline Memorandum -- the Company withdrew from the arbitration.

The Company's claim that the Union refused to proceed to arbitration was properly rejected by the Judge (ALJD, p. 2, lines 12-13). As the transcript of the arbitration proceeding makes clear, the Union accepted the Arbitrator's proposal that the parties try the contractual issues and brief the question of whether the Arbitrator had authority to resolve the statutory issues if that were necessary (Resp.Exh. 2, pp. 20-21). When the Company rejected that proposal (Resp. Exh. 2, pp. 21-22), the Union agreed to the Company's demand to bifurcate the hearing and brief the question of the Arbitrator's authority to resolve the statutory issues if necessary (Resp. Exh. 2, pp. 22-25). The Union submitted its brief to the Arbitrator. After agreeing to that procedure (Resp.Exh. 2, p. 25), the Company refused even to brief the question and withdrew from the arbitration proceeding altogether (Resp.Exh. 3).

precedent and his Guideline Memorandum. The Company's refusal to participate in the arbitration process in a manner consistent with the Guideline Memorandum left the Acting General Counsel no choice but to revoke the deferral and reissue the Complaint. To have done anything else would have allowed the Company to escape prosecution for its own unfair labor practices by its unilateral rejection of the express principles of the Guideline Memorandum.

As Judge Amchan correctly found (ALJD p. 2, fn. 1), the Board's decision in United Technologies Corp., 268 NLRB 557 (1984), and the Advice Memorandum in Veolia Water, 2005 WL 2429739 (2005), are irrelevant. In United Technologies the Board held that an allegation of an illegal threat, in violation of Section 8(a)(1), may be deferred to arbitration, as long as the employer consents to the arbitration process. In its decision in United Technologies, the Board cited with approval the dissent in General American Transportation, 228 NLRB 808, 817 (1977):

And where, after deferral, the respondent [employer] has refused to proceed to arbitration, the Board has rescinded the deferral and decided the case on the merits.

268 NLRB at 560. The Board in United Technologies stated:

We shall continue to be guided by these principles.

That is the precise scenario of this case. After the deferral in this case, the Company refused to proceed to arbitration (Resp.Exh. 3), and the Acting General Counsel rescinded the deferral and presented the case to the Administrative Law Judge for a decision on the merits.

Veolia Water, 2005 WL 2429739 (2005), is an Advice Memorandum issued in connection with an 8(a)(5) charge. In that case, the union withdrew its grievance entirely at the arbitration, and then asked the arbitrator to rule exclusively on the Section 8(a)(5) allegation. The Division of Advice determined that the union had withdrawn the grievance and thereby failed to pursue

arbitration, and that under these circumstances the General Counsel should not reassert jurisdiction over the charge. In the present case, the opposite is true: the Company has withdrawn from arbitration, and the General Counsel had no choice but to reassert jurisdiction over the charge and reissue complaint.

II. The Company's Threats to Marcus Hedger Violated Section 8(a)(1) of the Act

Sections V and VII of the Complaint allege that the Company violated Section 8(a)(1) of the Act by Senior Vice-President Bill Johnstone's threat on June 4, 2010, to watch Chief Union Steward Marcus Hedger with closer scrutiny and to fire Hedger because of his Union and protected concerted activities. As discussed below, the Administrative Law Judge credited the testimony of the General Counsel's witnesses as to what Johnstone said, but dismissed this allegation on the ground that it was "not clear" what Johnstone was referring to (ALJD, p. 3, lines 22-42). The Union has filed Cross-Exceptions 1 and 2 with respect to the dismissal of this aspect of the Complaint. This section of the Brief addresses those Cross-Exceptions.

The context of Johnstone's threat is undisputed. The parties were in a bargaining session on June 4, 2010. The Company had urged the Union to take its last proposal to the membership for a vote. The Union Committee recommended that the Company's proposal be rejected, and it was, by a vote of 41 to 19. Bill Johnstone, the Company Senior Vice-President of Operations and its chief negotiator, admitted that he was "frustrated." Johnstone testified, "I tend to get frustrated when I believe that our associates are not...doing what I think is in their best interest....It's not uncommon for my children to have difficulties in school, but it doesn't prevent me from being frustrated" (Tr. 352).

As discussed in the Statement of Facts, pages 7-9, above, near the end of the meeting, Bill

Johnstone complained that he could look everyone on the Union side in the eye, except for Marcus Hedger. Hedger responded that he wasn't looking at Johnstone because he was busy taking notes. Johnstone told the Union Committee that he wished they "had the courage of their convictions." Hedger replied that they did have the courage of their convictions; they had told the Company they would recommend against its proposal and did so (Tr. 99, 370-371; C.P.Exh. 3, p. 8).

Bill Johnstone then held up a copy of a "Vote No" newsletter, which had apparently been found near the Company copier, and accused the Union of copying it. The document contained a cartoon, which had been added to a Union-prepared document. Marcus Hedger told Johnstone that this was not a Union document, and that the Union did not copy its documents on the Company copier. Johnstone said that anyone using the copier for personal use would be subject to discipline (Tr. 29-30, 98, 230-231, 346, 354-355, 372; C.P.Exh. 3, p. 8).

Johnstone then produced another "Vote No" union flyer, and claimed that the Company had a photograph of Union Business Agent Frank Golden placing the flyer on car windows in the Company's parking lot. Marcus Hedger responded that the Company had told the Union that there were no cameras in the parking lot, and if Johnstone had such a picture he should produce it (Tr. 30, 98-100, 372).

Marcus Hedger's response "set off" Johnstone. Marcus Hedger testified (Tr. 30):

Bill Johnstone got very angry and he said he was tired of our union circus, and he said, "We're watching you, Marcus, and we're going to catch you, and we're going to fire you, and many people are going to laugh at you." And he said, "Also tell your friend Frank Golden if we catch him in the parking lot again, we're going to send him to jail."

David Ishac corroborated Marcus Hedger's testimony. Ishac testified (Tr. 99):

[Mr. Johnstone] was very upset. So, he told Mr. Hedger, "Marcus, we are watching

you, we're going to catch you, we will fire you, and 70 people will be laughing at you."

The Administrative Law Judge credited the testimony of Marcus Hedger and David Ishac as to what Bill Johnstone said, but nevertheless dismissed this aspect of the Complaint on the ground that "it is not clear whether or not Johnstone was referring to catching Hedger using company copying equipment, as opposed to conduct that is protected" (ALJD, p. 3, lines 22-42).

Notwithstanding the Company's ingenious argument, there is no ambiguity in the record. The substantial record evidence is that Johnstone's threat was the result of his frustration with the Union's successful effort to convince the membership to reject the Company's last proposal and Marcus Hedger's leadership of the Union group:

- David Ishac testified that Johnstone was "very upset because the members voted the proposal down" (Tr. 98).
- The gist of Marcus Hedger's testimony is that Johnstone was "very angry" about the Union's action generally, and Marcus Hedger's role particularly, in the "vote no" campaign that resulted in the Company's proposal being rejected, as well as Marcus Hedger's responses to Johnstone's complaints in the bargaining session (Tr. 30). Johnstone's angry statement that he was tired "of our union circus," and his explicit threat to watch Marcus Hedger, catch him, and fire him, and many people are going to be laughing at him (Tr. 30) – credited by the Administrative Law Judge (ALJD p. 3, lines 29-42) – confirm that Johnstone was reacting to the Union's protected action generally, and Marcus Hedger's role specifically. Johnstone was not referring to use of the Company's copier.
- Bill Johnstone admitted that he was "frustrated" because the Union committee was

“not doing what I think is in their best interest,” just as he gets frustrated by “my children” (Tr. 352). Johnstone was not angry over the use of the copier; he was angry over what was happening in negotiations.

- Bill Johnstone’s statement to Marcus Hedger, “Marcus, we are watching you, we’re going to catch you, we will fire you, and 70 people will be laughing at you” only makes sense in the context of Hedger’s leadership role within the bargaining unit. It would have made no sense for Johnstone to refer to “70 people laughing at you” if his remarks were directed to unauthorized use of the Company’s copy machine.

- Marcus Hedger’s contemporaneous notes of the bargaining session confirm that Johnstone’s rage was directed at the Union committee because of their rejection of the Company’s proposal, and his frustration with the collective bargaining process. Hedger’s notes state (C.P. Exh. 3, pp. 8-9; Tr. 369-376):

Bill Johnstone (“BJ”): [The Company] went up from [its] original proposal. It is more than [nothing].

[The Union must] take your responsibility seriously. I’m disappointed. [I can make] eye contact with all but Marcus.

Marcus Hedger (“MH”): I am writing. Trying to keep up. We’re disappointed also.

[Union Vice-President] Paul Mancillas (“PM”): We’ll have to break and have another meeting.

BJ: Why? What are you going to discuss? I’m disappointed. You came in here with nothing.

People are counting on you and you are in the process of failing your members.

Xerox; Windshields; Intimidation; you should have the courage to vote your

convictions.²⁶

MH: [The vote was] 41-19. [We] did vote convictions.

BJ: [Union] intimidation.

MH: No. That's what you're doing.

[Marcus Hedger's symbol for the discussion going "around and around" (See Tr. 374)]. **Watching you - fired - Frank jail/threat.**

BJ: Circus has to end.

Marcus Hedger's contemporaneous bargaining notes further confirm that Bill Johnstone's statement that he was tired of the "Union circus," and his threat that the Company was watching Marcus Hedger, would catch him, would fire him, and that many people would be laughing at him was a response to the Union's rejection of the Company's last proposal, and Marcus Hedger's leadership role in the opposition to the Company proposal.

- Marcus Hedger filed a grievance on June 11, 2010, stating, "On 6-4-10 at the bargaining unit negotiations table, Bill Johnstone made a threat that I would be fired in order to harass and intimidate myself and the Union negotiation committee" (G.C.Exh. 9). The grievance confirms the Union's understanding that Hedger had been threatened because of his protected Union activity, and not because the Company mistakenly thought the Union was using its copier.

- This is not the first time that the Company has made statements of this sort in response to Marcus Hedger's leadership role at the bargaining table. As the Administrative Law Judge found (ALJD p. 7, lines 1-13), the Company announced unilateral changes to its smoking

²⁶ Marcus Hedger testified that this refers to Bill Johnstone's statements about copying a Union newsletter on a Company copying machine; Frank Golden placing flyers on employees' windshields; and Johnstone's claim that the Union had intimidated employees into voting down the Company's proposal (Tr. 373).

policy in 2008. Marcus Hedger objected on behalf of the Union, and a Union committee met with the Company. Bob Kester was upset that Marcus Hedger wanted to negotiate about this, and that the Union body might have to vote on it. Marcus Hedger and David Ishac credibly testified that Kester told the Union committee members, “If Marcus keeps poking management in the ribs like this, and punching them in the mouth, we might close down the Company because of him” (Tr. 44-46, 100-101).

In 2009, Marcus Hedger, David Ishac, and other Union representatives met with Bill Johnstone and other Company representatives about a unilateral change to how many employees could be on vacation at any time. Marcus Hedger and David Ishac testified that Johnstone was upset at Hedger because of the Union’s opposition to this change, and Johnstone told Hedger, “You are not a good steward. You lie to the guys and bully and badger them. You feed them half-truths and misinformation. You are leading the guys down the wrong path and leading them to nowhere” (Tr. 42-44, 101-103).²⁷

- Significantly, the Company did not introduce any evidence in response to the credited testimony of Marcus Hedger and David Ishac concerning Johnstone’s statement in the June 4, 2010, negotiations. Bill Johnstone denied that he ever said this (Tr. 398), and Bob Kester testified that he could not recall it (Tr. 237-238). The Company’s argument that Johnstone may have been referring to the Union’s use of the Company’s copying machine is spun out of complete fantasy, and has no basis in any testimony – either by the Union witnesses (who testified to the contrary) or by the Company’s witnesses (who denied or could not recall that anything was ever said).

²⁷ Marcus Hedger denied that he ever lied to bargaining unit employees, and testified that he always told them the truth (Tr. 43-44). David Ishac confirmed that, and testified that he confronted Johnstone about this statement, and that Johnstone backed down (Tr. 102-103).

The Union urges the Board to find that Bill Johnstone's statement on June 4, 2010, that, "We're watching you, Marcus, and we're going to catch you, and we're going to fire you, and many people are going to laugh at you" threatened Marcus Hedger with being watched with greater scrutiny, and being terminated, because of his protected activities on behalf of the Union, and violated Section 8(a)(1) of the Act. See, e.g., Schrock Cabinet Company, 339 NLRB 182 (2003); Brookdale University Hospital, 335 NLRB 1094 (2001).

III. The Administrative Law Judge Correctly Found That the Company's Termination of Marcus Hedger Violated Section 8(a)(3) and (1) of the Act²⁸

A. The Administrative Law Judge Correctly Applied the Board's Wright Line Test

In addressing this case of purported dual motivation, the Administrative Law Judge correctly applied the test set forth in Wright Line, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in NLRB v. Transportation Management Corp., 462 U.S. 393, 399-403 (1983).

The Administrative Law Judge's findings that (1) Marcus Hedger was engaged in protected activity in his roles as Chief Union Steward and member of the Union Negotiating Committee, and (2) the Company was well aware that Hedger was engaged in protected activity (ALJD, p. 6, lines 26-45) are undisputed. In fact, Chief Steward Marcus Hedger was the Union leader at the Company, and the Company had repeatedly acknowledged his leadership role. Hedger filed and advanced employees' grievances, he was the Union spokesman at meetings with management, and he was the

²⁸ The Administrative Law Judge dismissed without explanation the allegation that Marcus Hedger's termination on August 18, 2010 also violated Section 8(a)(3) and (1) of the Act, perhaps because the suspension was with pay (ALJD, p. 9, lines 13-15). The Union has filed a cross-exception to the dismissal of this allegation. The suspension violated Section 8(a)(3) and (1) of the Act for the same reasons as the termination itself.

person at whom Bill Johnstone and Bob Kester directed their anger and frustration with the Union.

B. The Administrative Law Judge Correctly Found Substantial Animus Toward Marcus Hedger as a Result of His Activities as Union Steward

The Judge correctly found, based on the record evidence, that the Company's animus towards Marcus Hedger's protected activity was a substantial and motivating motive for Hedger's termination (ALJD, p. 6, line 41 – p. 8, line 28). Among other things:

1. There was a history of Company statements that established its animus toward Marcus Hedger as a result of his protected activity. In 2008, Marcus Hedger called a meeting with the Company to protest unilateral changes to the Company's no-smoking policy. As the Judge found, Bob Kester told Marcus Hedger (Tr. 226-227):

I said something as simple as a smoking policy we can't even come to an agreement on? I thought it was kind of ridiculous. It was a very small issue. We were trying to comply with the state new regulation. The Company was changing a policy. I explained that if we keep making big issues over little things, management isn't going to continue to deal with it.²⁹

2. In 2009, the Company unilaterally changed its policy on how many employees could be on vacation at one time. Marcus Hedger again called a meeting, and the Company again decided not to change the policy. In that meeting Senior Vice-President Bill Johnstone told Hedger in front of the Union committee, "You are not a good steward. You lie to the guys and bully and badger

²⁹ Other participants in the meeting recalled the same statement, albeit in slightly different terms. Marcus Hedger recalled Kester saying, "If Marcus keeps poking management in the ribs like this, and punching them in the mouth, we might close the Company down because of him" (Tr. 44-46).

David Ishac testified that Kester said, "Marcus, you're punching the management in the face, and you're going to cause the place to close [if] you keep punching us in the face" (Tr. 100-101)

However it was phrased, Kester's statement reflected the Company's anger over Marcus Hedger's legitimate activities on behalf of the Union.

them. You feed them half-truths and misinformation. You are leading the guys down the wrong path and leading them to nowhere” (Tr. 42-44, 101-103). Marcus Hedger denied that (Tr. 43-44), and Johnstone backed down when Alternate Steward David Ishac challenged him on this (Tr. 102-103).

3. As discussed above, on June 4, 2010 – two months before Marcus Hedger’s termination – Johnstone told Marcus Hedger, in front of the Union Negotiating Committee, “We’re watching you, Marcus, and we’re going to catch you, and we’re going to fire you, and many people are going to laugh at you” (Tr. 30, 99, 114, 373-374; C.P.Exh. 3, p 8). The Company then did exactly what Johnstone promised. Johnstone’s threat by itself establishes union animus, and conclusively establishes that Hedger’s protected activity was a motivating reason for his suspension and termination. Igramo Enterprise, 351 NLRB 1337, 1339 (2007); Vico Products Co., 336 NLRB 583, 588, fn. 16 (2001).

4. On about June 10, 2010 – a week after the June 4, 2010 bargaining session – a sticker with the slogan “Say No to Blockheads,” was posted on the Company’s locked bulletin board, with the writing, “Does the ‘H’ in This Sticker Stand for HEDGER?” The sticker remained posted on the Company’s locked bulletin board, despite the Union’s requests that it be taken down (G.C.Exh. 11; Tr. 32, 75-76).

5. The next day, June 11, 2010, Marcus Hedger filed two grievances with the Company, one dealing with Bill Johnstone’s threat of June 4, 2010, and the other dealing with the posting on the Company’s bulletin board. The same day, Bob Kester came up to Marcus Hedger and told him that the husband of Hedger’s friend and co-worker Linda Gonzalez had suddenly died. According to Kester, he told Hedger (Tr. 233):

...my comment to Marcus was we don't see eye to eye on everything, but this really puts things in perspective. Life is way too short for the bickering between he and I. And that's all I said. And I turned around and went back to my office.³⁰

6. As the Administrative Law Judge found (ALJD p. 7, lines 28-32), despite the fact that the only discipline in Marcus Hedger's file after nine years with the Company was a single verbal warning under the attendance policy, Bob Kester testified that he had spoken with Hedger several times about his "aggressive behavior towards management and other associates" (Tr. 263).

7. The Administrative Law Judge correctly found that Bob Kester's insistence that Pete Schmidt was in the plant with Marcus Hedger for 50 minutes to over an hour – when all of the information gathered by the Company showed that Schmidt was in the plant for no more than 11 minutes³¹ – was "also indicative of Kester's animus towards Hedger as a result of his activities as union steward" (ALJD p. 7, lines 36-38).

8. The Company's disproportionate response to learning that Marcus Hedger had walked a visitor through the plant further confirms that Hedger's union activity was a motivating factor for his suspension and discharge. Top management officials immediately dropped everything, and devoted themselves to investigating what was, at the most, a very minor infraction of a previously unenforced Company rule:

- On August 17, 2010 – the same day that management first learned that Marcus

³⁰ Marcus Hedger testified that Kester repeatedly said to him, "Do you realize this happened suddenly, unexpectedly and without warning," and then told Hedger, "I hope this puts your future here in perspective," and walked away (Tr. 34-35, 233-234).

³¹ See, e.g., Bob Schmitt's statements to the Company in its investigation (G.C.Exh. 3, ¶ 22); Marcus Hedger's statements to the Company in its investigation (C.P.Exh. 1); the 11-minute time differential between the end of the wash-up as reflected on the press report (Resp.Exh. 10) and the door opening on the security tape (Tr. 127); as well as the Company's failure to ask the other members of Hedger's press crew how long he was away from the press (Tr. 244-247).

Hedger had walked a visitor through the plant a week earlier -- Bob Kester and Tom Vlahos interviewed second shift foreman Bob Kester twice, bindery manager Marcin Golofit, cutter Mike Kuszniarz, palletizer Chuck Hayney, die cutter Nina Abo, and pressmen Mike Naylor, Art Hammond, Tony Sass, and Doug Barko (G.C.Exhs. 2 and 3, Tr. 125-128, 134, 174-179).

- The next day – August 18, 2010 – Kester and Evelyn Vasquez continued the investigation, and interviewed shipping employee Daniel Nevins, shipping supervisor Kis Kako, feeder Saul Radilla, and pressman Robert Hayden (Tr. 179-181). At the conclusion of the interviews, Kester contacted corporate officials Bill Johnstone and Bill Samuels in Elk Grove Village “to determine a plan of disciplinary action” (G.C.Exh.4; Tr. 194).

- Corporate Human Resources Manager Bill Samuels came to Niles from Elk Grove Village the same day to interrogate Marcus Hedger. Samuels had prepared a list of written questions when Hedger was brought into the office minutes after his 3 p.m. shift began (Tr. 51-54, 195-197).³² Marcus Hedger had no idea why he was called into the office, and asked for Union Business Agent Frank Golden as his Union representative. The Company refused to delay the questioning so that Golden could get there, and denied Hedger’s and Golden’s request to talk privately before Hedger was questioned (Tr. 53-55, 196-197).³³ Immediately after the interview Marcus Hedger was

³² Marcus Hedger testified that he had sat in on other investigatory interviews, and this was the first time that Corporate Human Resources Manager Bill Samuels had been present; the first time that the Company had interrogated employees based on prepared questions; and the first time that an employee was threatened with discipline if he did not cooperate in an interview (Tr. 72-73).

³³ The Company’s refusal to allow Marcus Hedger and Frank Golden to consult before Hedger’s interrogation, the refusal to state the charges against Hedger, and the refusal to recognize Hedger’s right to discontinue the interview in the absence of his requested representative all violated Hedger’s Weingarten rights. United States Postal Service, 355 NLRB No. 72 (2010); United States Postal Service, 241 NLRB 142 (1979); United States Postal Service, 288 NLRB 864, 866 (1988); (continued...)

indefinitely suspended and sent home (Tr. 56-58, 199-201).

- Bob Schmitt telephoned Hedger on his cell phone that night. Schmitt told Hester that Bob Kester and Tom Vlahas were “really mad” at Schmitt because he had told them that he gave Hedger permission to walk the visitor through the plant. Schmitt told Hedger that the Company was going to try and fire Hedger, and that he should tell the truth about what happened (Tr. 58, 81-82, 128, 133).

- The Company interrogated Marcus Hedger a second time the next Monday, August 23, 2010. This time they allowed Frank Golden to be present as Hedger’s Union representative. Bill Samuels had prepared another list of questions. As the Administrative Law Judge found, Marcus Hedger answered all of the questions truthfully, except for the name of the visitor, which the Union objected to and which the Company already knew. (Tr. 59-64, 82-83, 202-205, 210, 255-256, 273; C.P.Exh. 1).

- The Company interviewed Bob Schmitt for a third time on August 30, the day he returned from a week’s vacation, this time by Bill Samuels, Bob Kester and Evelyn Vasquez. By that time, Marcus Hedger had told the Company that he had permission from Schmitt to walk the visitor through the plant (Tr. 62, 82, 210, 273), which Bob Schmitt confirmed with the Company (Tr. 126-127, 129, 133).

The Company clearly seized Pete Schmidt’s visit to the plant as the excuse it had been looking for to terminate Marcus Hedger -- just as Bill Johnstone had threatened on June 4, 2010. The immediate full-court interviews by Bob Kester and Tom Vlahos, the unusual and coercive

³³(...continued)
Climax Molybdenum Co., 227 NLRB 1189 (1977), enf. denied 584 F.2d 360 (10th Cir. 1978).

interrogations of Marcus Hedger and Bob Schmitt by Bill Samuels, and Samuels's wholesale violations of Hedger's Weingarten rights were unprecedented and totally disproportionate to Marcus Hedger's alleged rule violation. The Company's massive reaction further establishes that Marcus Hedger's union activity was a motivating factor for his discharge.

9. Bob Schmitt and Marcus Hedger both testified that Hedger had asked for, and received, Schmitt's approval to walk Pete Schmidt through the plant and out the other side (Tr. 49-50, 79-80, 119-120). That fact is uncontroverted. The Company's decision to summarily terminate Marcus Hedger for something that his foreman had expressly approved further confirms that the real reason for Hedger's discipline was his protected activity as Union steward.

While the Company claims that Bob Schmitt did not tell them that he gave Marcus Hedger permission to go through the plant, he undisputably gave Marcus Hedger permission, and the Company admits that Marcus Hedger informed them of that (C.P.Exh. 1; Tr. 61-62, 210, 273). In addition, Bob Schmitt testified that, in fact, he did tell the Company that he had given Marcus Hedger permission to escort Pete Schmidt through the pressrooms (Tr. 129-131, 133-134). Bob Schmitt also told Marcus Hedger, in their telephone call on August 18, 2010, that he had told the Company that he had approved Hedger walking Pete Schmidt through the plant, and that the Company was "really mad" (Tr. 58, 82).

Whatever Bob Schmitt may have told the Company, it is undisputed that Marcus Hedger had permission from his foreman to walk Pete Schmidt through the plant (Tr. 49-50, 79-80, 119-120). Marcus Hedger's summary termination for doing something that his foreman had expressly approved further establishes that Hedger's union activity was the real reason he was terminated.

10. The Administrative Law Judge also correctly found that the Company's stated reasons

for terminating Marcus Hedger were pretextual, which further confirmed that Hedger's termination was discriminatorily motivated (ALJD p. 8, lines 1-9). The Judge correctly found that Marcus Hedger was terminated for something that happens on a virtually daily basis without discipline: escorting a visitor in the plant. Bob Schmitt, David Ishac and Marcus Hedger testified in detail about the traffic of unescorted visitors in the plant on second and third shifts. Food delivery people regularly deliver food to employees in the plant. Family members regularly come into the plant, bringing food or visiting their relatives. Retired employees come back to see their former co-workers. Truck drivers walk into the vending machine areas for coffee. Package delivery people on second and third shift must walk through the entire plant to pick up packages outside of the front office. (Tr. 68-72, 104-111, 120-124, 305-306, 314-315). All of this happens on a regular basis.

Until Marcus Hedger was summarily terminated for walking Pete Schmidt through the plant, no employee had ever been disciplined – even with a verbal warning – for allowing visitors into the plant (Tr. 72, 109-113, 132, 260). The summary termination of Hedger for doing something that other employees had done on a regular basis without any discipline further establishes that Hedger was really terminated for his protected union activity.

11. In addition, as the Administrative Law Judge found (ALJD p. 8, lines 20-22, p. 10, lines 4-6), second shift foremen Bob Schmitt, Marcin Golofit, and Kis Kako were all aware that Marcus Hedger had walked Pete Schmidt through the plant, but did nothing to stop it and did not report it to management (presumably because this was nothing out of the ordinary, and they saw no reason to take any action or report it). Yet Schmitt, Golofit and were not disciplined by the Company for allowing this to happen and not enforcing the visitor policy. The failure to discipline the foremen for allowing a rules violation that resulted in the summary termination of a long-term

employee further establishes that the rules violation was a pretextual reason for Marcus Hedger's termination (Tr. 132, 251, 271-279, 312, 332-333).

12. In addition, as the Administrative Law Judge found (ALJD, p. 8, lines 11-12), it is not even clear that Marcus Hedger violated any "visitors policy." To the extent there was such a policy, it apparently required visitors to sign in at the front desk and be escorted through the plant.³⁴ However, the front desk closes at the end of the first shift, and there is no place for visitors to "sign in" on second or third shift, even though there are many visitors in the plant on those shifts (Tr. 68, 83, 122-123). In addition, as Bob Schmitt asked, Marcus Hedger physically escorted Pete Schmidt through the plant and out the side door. Since Pete Schmidt was never without an escort, and there was no place for him to sign in, it appear that there was no violation of the "visitor policy." The Company's termination of Hedger under these circumstances further shows that Hedger's Union activity was the real reason for his discharge.

13. In addition, as the Administrative Law Judge found, the Company's failure to apply its progressive discipline policy to this situation further establishes that the alleged violation of an unenforced rule was a pretext for getting rid of Marcus Hedger for his protected activity (ALJD p. 8, lines 12-14). Bob Kester admitted that the Company has a progressive discipline policy, but did not use it in disciplining Marcus Hedger (Tr. 260-262). Even assuming that there was a legitimate

³⁴ In fact, it is not clear if there even was a "visitors policy." No policy was introduced in evidence, and no Company witness testified to such a policy. (The only policy introduced by the Company was an unsigned "confidentiality agreement," which the Judge correctly found to be irrelevant.) The only reference in the hearing to a "visitors policy" was Marcus Hedger's testimony that he understood that visitors had to sign in at the front desk and be escorted while they were in the plant (Tr. 67-68). Bob Schmitt -- a 36-year Company employee -- told the Company in its investigation, and testified at the hearing, that at the time he authorized Marcus Hedger to walk Pete Schmidt through the plant he was unaware of any "visitors policy" (Tr. 134, 362-363).

basis for some discipline – which the Union believes is not the case – this was an ideal situation for progressive discipline. Marcus Hedger has a virtually perfect record, having received a single attendance warning in nine years with the Company. His “sin” was doing something which was widespread in the plant, and which had never before been the basis for any discipline. At the least, if the Company had been acting in good faith, Hedger’s alleged rule violation would have been dealt with by a verbal warning, which would have put him on notice that the rules had been changed. The Company’s treatment of this minor and previously unenforced rule violation by summary termination, and its failure to follow its own progressive discipline policy, further establishes that Hedger’s Union activity was a motivating factor in his discharge.

14. As the Administrative Law Judge correctly found (ALJD p. 8, lines 22-24), the Company’s substantially lesser discipline of employees who allowed visitors into the plant after Marcus Hedger’s termination further establishes that Hedger’s purported rules violation was a pretext for his termination, and the real reason was his protected activity. After Hedger’s termination, and the public announcement of a new visitors policy, two second shift employees allowed former cutter Al Noto into the plant. When the Company learned about this -- after the employees had been expressly instructed not to allow visitors into the plant anymore – it issued only one-day suspensions to the two employees who had let Noto into the plant (Tr. 109-113, 122-124, 264). Yet in Marcus Hedger’s case – where the Company was enforcing a policy that the employees were previously unaware of – Marcus Hedger was summarily terminated.

Given the massive amount of evidence that the Company’s termination of Marcus Hedger was based on his protected concerted activity, and that the asserted reasons for his termination were pretextual, the Administrative Law Judge correctly found that Marcus Hedger’s protected conduct

was a “motivating factor” in his termination, and that the burden shifted to the Company to demonstrate that the same action would have taken place even in the absence of protected conduct.

(ALJD, p. 6, line 40 – p. 8, line 28).

C. The Administrative Law Judge Correctly Found that the Company Did Not Meet Its Burden of Showing that Marcus Hedger Would Have Been Terminated in the Absence of His Protected Activities

Once the General Counsel makes a *prima facie* case that an employee’s union activity was a motivating factor for his discharge, the burden shifts under Wright Line to the employer to establish that the same action would have taken place in the absence of the employee’s union activities. Where, as here, the General Counsel makes a strong *prima facie* case under Wright Line, the burden on the employer is substantial to overcome a finding of discrimination. Bally’s Atlantic City, 355 NLRB No. 218, slip op. 4 (2010); Eddyleon Chocolate Co., 301 NLRB 887, 890 (1991). An employer cannot carry its Wright Line burden simply by showing that it had a legitimate reason for the action, but must “persuade” that the action would have taken place even absent the protected conduct. Bally’s, *supra*; Igramo Enterprise, Inc., 351 NLRB 1337, 1337-1339 (2007); Centre Property Management, 277 NLRB 1376 (1985); Roure Betrand Dupont, Inc., 271 NLRB 443 (1984).

The Company’s letter terminating Marcus Hedger stated that he was terminated for two reasons (G.C.Exh. 16):

...you brought an unauthorized person into the plant on August 12, 2010 and ... you did not respond truthfully to the Company’s questions regarding events on that date of which you were fully aware.

As discussed below, the Administrative Law Judge correctly found that the Company did not “prove its affirmative defense that it would have fired Hedger in the absence of its animus towards his activities as a union steward” (ALJD p. 9, lines 12-16).

1. Bringing an Unauthorized Person into the Plant

In the first place, there is no evidence that Marcus Hedger “brought Pete Schmidt into the plant.” All of the evidence establishes that by the time Marcus Hedger got to the warehouse area, Pete Schmidt was already in the plant (Tr. 48, 79; G.C.Exh. 3 (Golofit)).

Beyond that, if the Company meant to terminate Marcus Hedger for escorting Pete Schmidt through the plant, the evidence establishes that second shift foreman Bob Schmitt authorized Hedger to do that. Given that central fact, there can be no basis for discipline.

In addition, it is well established that visitors were constantly in the plant, at least on second shift, and no one had ever been disciplined for this before, much less terminated. “Bringing an unauthorized person into the plant” had never been the basis for discipline in the past, and would not have been in this case but for Marcus Hedger’s protected union activities.

Moreover, only Marcus Hedger was disciplined. Second shift foremen Bob Schmitt, Marcin Golofit, and Kis Kako all knew that Pete Schmidt was in the plant, but did not ask Schmidt to leave and did not report his visit to Pressroom Manager Tom Vlahos (for whom they allegedly served as his “eyes and ears”). In addition, Marcus Hedger told the Company that Bob Schmitt had authorized him to escort Schmidt through the plant. Yet, Bob Schmitt, Marcin Golofit and Kis Kako received no disciplinary action at all. Marcus Hedger, on the other hand, was summarily terminated. Hedger would not have been disciplined at all but for his union activity.

At the hearing, the Company argued that some of its production processes were unique, and that it was worried that the visitor may have been engaged in some type of industrial espionage (Tr. 152-164). That after-the-fact argument must be rejected. As the Administrative Law Judge found (ALJD p. 11, lines 21-28), the Company has never before shown any concern about “trade secrets.”

The plant's five or six doors to the outside are unlocked and frequently open during the second and third shifts (Tr. 69-72, 105, 122). Bob Schmitt, David Ishac and Marcus Hedger testified that food delivery people, family members, truck drivers, former employees, and package delivery people routinely enter and leave the plant through these open side doors without escorts (Tr. 68-70, 104-107, 120-124, 305-306, 314-315).

Despite the Company's purported concern about confidentiality, there is no security in the plant (Tr. 89). Despite the Company's purported concern about strictly enforcing its "visitors policy," Bob Schmitt testified that in his 36-year history with the Company he never heard of such a policy (Tr. 134, 362-363), and it had never before been enforced (Tr. 260). Beyond that, as the Administrative Law Judge found (ALJD p. 9, line 45 - p. 10, line 2), to the extent the Company had a visitors policy, it was meaningless. The policy purportedly required visitors to sign in and out at the front desk, but the Company admitted that the front desk is closed on second and third shifts (Tr. 67-68, 83, 122-123).³⁵

The Company's asserted concern about "industrial espionage" was a fiction, designed after-the-fact to justify its summary termination of Marcus Hedger. As the Administrative Law Judge found, but for Marcus Hedger's union activity, the Company would not have taken any disciplinary action in connection with Pete Schmidt's visit.

2. Marcus Hedger's Responses in the Interrogations

Marcus Hedger was interrogated twice: on August 18, 2010, with Frank Golden on the

³⁵ As the Administrative Law Judge found, it is not clear how the Company's unsigned "confidentiality agreement" (Resp.Exh. 8, p. 2) is relevant to Marcus Hedger's conduct on August 12, 2010 (ALJD, p. 9, lines 32-37). Marcus Hedger was never charged with violating the confidentiality agreement, he never signed the confidentiality agreement, and, in fact, the Union had challenged the Company's unilateral implementation of that policy (Resp.Exh. 7, pp. 2-3).

telephone, and on August 23, 2010, with Frank Golden present in person. The Company's September 7, 2010 letter does not state in which interrogation they claim Hedger did not give truthful answers, although at the hearing the Company witnesses focused exclusively on the questioning of August 23, 2010.

The interrogation of Marcus Hedger on August 18, 2010, was loaded with Weingarten violations: the Company refused to grant Marcus Hedger's and Frank Golden's requests for an opportunity to talk privately; the Company refused to postpone the interrogation for Frank Golden to be there; when Marcus Hedger said that he did not want to proceed without Frank Golden as his representative and that the meeting should be over, the Company responded that he would be terminated if he left the room; the Company refused to tell Marcus Hedger what the charges were; the Company refused to allow Marcus Hedger even to have a pencil and paper. Thereafter, in response to Bill Samuels's questions, Hedger said that he "did not know" or "did not remember," and again asked to talk privately with Frank Golden, saying that might refresh his recollection (Tr. 57-58, 201).

Marcus Hedger's inability to answer questions on August 18 was directly related to the Company's refusal to allow him to talk privately with Frank Golden and its threat to terminate him if he left the meeting, both of which violated Hedger's Weingarten rights. See Tr. 87. Marcus Hedger did not answer any questions untruthfully in that meeting, and the Company should not be able to rely on its own gross violations of the Act to justify its termination of Marcus Hedger.

Once Marcus Hedger was allowed to talk with Frank Golden in the interrogation on August 23, 2010, Hedger truthfully answered all of the questions, and even volunteered a full and complete narrative of everything that happened in connection with Pete Schmidt's visit to the plant on August

12, 2010. As the Administrative Law Judge found (ALJD, p. 9, lines 8-10), Marcus Hedger answered all of the Company's questions on August 23, 2010 truthfully. The only question not answered was the visitor's name. When Bill Samuels asked that question, Frank Golden questioned its relevance, and Bill Samuels went on to the next question. Samuels did not repeat the question to Marcus Hedger, and did not tell Hedger that he was required to answer it.

At the hearing, when pressed about the specific instances where Marcus Hedger had not responded truthfully, Bob Kester stated that Marcus Hedger said that the quickest way to get to Lehigh Street was to walk through the plant, and that he had received permission from Bob Schmitt to walk Pete Schmidt through the plant (Tr. 269-270, 307-308). The Company was grasping at straws. These statements in the course of Marcus Hedger's full and accurate description of the events of August 12 would not have resulted in any discipline but for Hedger's protected activity.

- When Pete Schmidt asked Marcus Hedger the quickest way to get to Lehigh Street, Hedger told Schmidt that he could go through the plant (C.P.Exh. 1, p. 6; Tr. 49, 213). In fact, looking at Respondent Exhibit 9, that is the most direct route from where Schmidt was standing inside the warehouse, rather than going outside and around the facility. Even if it had been quicker to walk all the way around the plant, rather than through it, Marcus Hedger did not say that to the Company, he said it to Pete Schmidt. Marcus Hedger cannot be terminated for accurately telling the Company what he had told Pete Schmidt.

- The credible evidence is that Bob Schmitt did give Marcus Hedger permission to walk Pete Schmidt through the plant, as long as Hedger accompanied Schmidt out the door. Bob Schmitt testified to that; Marcus Hedger testified to that; and Schmitt told Hedger at the time that he had told that to the Company (Tr. 49-50, 79-80, 119-120, 133). The Company claims that Schmitt denied

giving permission to Hedger when he was asked by the Company – immediately after Schmitt was told that he could be disciplined depending on how he answered that question (Tr. 317-318, 360, 366-368). Schmitt's denial to the Company under those circumstances, even if it happened, does not mean that Schmitt did not give Hedger permission to do that. Marcus Hedger truthfully answered that question as well.

The Company was clearly grasping at straws to justify its discriminatory termination of Marcus Hedger. The Company has not met its considerable burden of showing that Marcus Hedger would have been discharged absent his union activities. Rather, the flimsiness of the Company's arguments only further supports the *prima facie* case that the Company discharged Hedger because of his union activities. Weldon, Williams & Lick, Inc., 348 NLRB 822, 832 (2006), enf'd. 255 Fed.Appx. 535 (D.C.Cir. 2007).

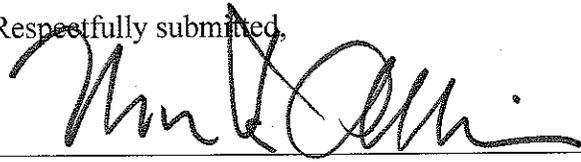
For all of these reasons, the Administrative Law Judge correctly rejected the Company's asserted reasons for its summary termination of Marcus Hedger, and correctly found that the Company had not met its burden of proving that it would have discharged Marcus Hedger in the absence of his protected activities as Union steward

CONCLUSION

For all of these reasons, Charging Party District Council Four, GCC/IBT, respectfully asks the National Labor Relations Board to deny the Company's Exceptions to the Decision and Recommended Order of the Administrative Law Judge; to grant the Union's Cross-Exceptions, including findings that the Company's threats to Marcus Hedger on June 4, 2010, violated Section 8(a)(1) of the Act and that the suspension of Marcus Hedger violated Section 8(a)(3) and 8(a)(1); and to enter the Judge's Recommended Order, amended to include findings and remedies related to the

additional Section 8(a)(1) and 8(a)(3) violations.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Tom Allison", written over a horizontal line.

Thomas D. Allison
Attorney for Charging Party District Council Four,
Graphic Communications Conference of the
International Brotherhood of Teamsters

Allison, Slutsky & Kennedy, P.C.
230 West Monroe Street - Suite 2600
Chicago, IL 60606
(312) 364-9400
allison@ask-attorneys.com

February 8, 2012

CERTIFICATE OF SERVICE

The undersigned counsel for Charging Party certifies that he electronically filed the foregoing Brief to the National Labor Relations Board on Behalf of Charging Party District Council Four, Graphic Communications Conference of the International Brotherhood of Teamsters, with the Executive Secretary of the NLRB, and served copies of the Brief on the following counsel for the parties, all by e-mail on February 8, 2012:

Helen I. Gutierrez, Esq.
Region 13, National Labor Relations Board
209 S. LaSalle Street, 9th Floor
Chicago, IL 60604
Helen.Gutierrez@nlrb.gov

Richard L. Marcus, Esq.
SNR Denton
233 S. Wacker Drive - Suite 7800
Chicago, IL 60606
Richard.Marcus@snrdenton.com



Thomas D. Allison