

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

**FORT DEARBORN COMPANY,
Respondent**

And

13-CA-46331

**INTERNATIONAL BROTHERHOOD OF
TEAMSTERS GRAPHIC COMMUNICATION
CONFERENCE, DISTRICT COUNCIL FOUR,
Charging Party**

**RESPONDENT'S REPLY TO CHARGING PARTY'S BRIEF IN OPPOSITION TO
RESPONDENT'S EXCEPTIONS¹**

Pursuant to Section 102.46 of the Board's Rules and Regulations Respondent Fort Dearborn Company ("Fort Dearborn" or the "Company") submits this brief in reply to Charging Party's Brief in opposition to Respondent's Exceptions to the Decision of Administrative Law Judge Arthur Amchan ("ALJ")²

**1. CHARGING PARTY'S ATTEMPT TO AVOID DISMISSAL
DUE TO ITS REFUSAL TO ARBITRATE THE
GRIEVANCES FOLLOWING DEFERRAL.**

Charging Party opens its argument with an attempt to cloud the issue raised by its refusal to arbitrate the Hedger grievances, claiming that Respondent did not file any motion to dismiss

¹ In contravention of Section 102.46(j), Charging Party combined into one brief its Brief in Opposition to Respondent's Exceptions and its Brief in Support of Charging Party's Cross-Exceptions. Respondent's ANSWERING BRIEF IN OPPOSITION TO CHARGING PARTY'S CROSS-EXCEPTIONS is being submitted separately.

² References herein to the ALJ's decision, the transcript of record of the hearing held before the ALJ on October 13 and 14, 2011, exhibits introduced at that hearing by Respondent, General Counsel and the Charging Party, and Charging Party's Brief shall be made, respectively, as follows: "ALJ, p. __" "Tr. __" "R Ex. __" "GC Ex __" "CP Ex __" and "CP Brief __."

the Complaint. (CP Brief, p. 24) But Charging Party's claim is belied by its failure to except to the ALJ's opening statement on "*The deferral issue*" that Respondent asserted at the outset of the hearing "that the complaint should be dismissed." (ALJ, p. 1) Charging Party then scours the ALJ's decision for some semblance of support to refute Respondent's assertion that Charging Party "refused to proceed to arbitration," and purports to find it at page 2, lines 12 -13. (CP Brief, p.26 ft.note 25) Tellingly, the ALJ said no such thing. On the contrary, while noting (correctly) that Respondent refused to proceed with arbitration, the ALJ (correctly) found that Respondent's refusal was triggered by Charging Party's insistence that the arbitrator "consider whether the Hedger discharge violated the Act, in addition to whether it violated the parties' collective bargaining agreement." (ALJ, p. 2, lines 7-8) The ALJ's characterization is totally consistent with the arbitrator's acknowledgement that it was Charging Party, not Respondent, that refused to proceed with arbitration of the *grievances*. (R Ex. 2, p. 22,)

The essence of Charging Party's argument against dismissal is that its insistence that the arbitrator separately consider, hear, and decide the NLRA issues raised by its charges was in conformity with Acting General Counsel's January 20, 2011 Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlement in Section 8(a)(1) and (3) Cases (the "Guideline Memorandum"). Indeed, Charging Party even suggests that it acted in reliance on the Guideline Memorandum when it voluntarily withdrew its 8(a)(5) charge. (CP Brief, p. 25) What Charging Party conveniently overlooks, however, is that its withdrawal of its 8(a)(5) charge and the Regional Director's issuance of an order that the case be deferred both took place *before* the Guideline Memorandum was even issued.

Questions of prescience aside, Charging Party's wholesale reliance on the Guideline Memorandum masks the inescapable fact, unmentioned by both the Charging Party and ALJ,

that the Regional Director specifically warned the parties that if Charging Party “declines to have the grievance arbitrated if it is not resolved, I will dismiss the charge.” (GC Ex. 1j)³ When issuing that warning, the Regional Director was acting as the agent of General Counsel who, Charging Party emphasizes, has “final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints...and in respect of the prosecution of such complaints before the Board.” (CP Brief, p. 25, *citation omitted*)

The ALJ believed that the only alternative to having him hear it was “to dismiss this case and sent [sic] it back to the arbitrator.” (ALJ, p. 2, ft. note 1) He was quite clearly mistaken.⁴ The only alternative to having him hear the case was to do precisely what General Counsel ordered would be done: dismiss the charges and the Complaint based upon them. By refusing to pursue that alternative, the ALJ clearly erred.

2. CHARGING PARTY’S ATTEMPTS TO MANUFACTURE ANIMUS.

No doubt recognizing that the alleged record of union animus relied upon by the ALJ is hopelessly deficient, Charging Party makes a desperate attempt to conjure unlawful animus that the ALJ was unable to divine, either by finding animus where the ALJ could not and/or by glossing over the complete absence of record evidence showing that the alleged animus was in any way triggered by Hedger’s protected activity. Starting on page 35 of its Brief, Charging

³ Charging Party ignores this part of the deferral order, quoting only that portion stating that the Regional Director, acting as General Counsel, “will revoke deferral and resume processing of the charge” if Respondent “refuses to arbitrate the grievance.” (CP Brief, p.4, ft. note 3) The reality is that Respondent did not “refuse to arbitrate the grievance” – rather it refused to arbitrate the unfair labor practice charges.

⁴ “Of course, since arbitration is consensual,” neither General Counsel, the ALJ nor the Board could compel Respondent or Charging Party to resubmit the case to an arbitrator. *Subject: Veolia Water*, 2005 WL 2429739, ft. note 6, (NLRBGC Advice Memo., 2005).

Party alludes to 14 alleged incidents or factors it claims establish “the Company’s animus toward Marcus Hedger’s protected activity.” In fact, they do no such thing.

The incidents and factors cited by Charging Party apart from those raised in its Cross-Exceptions⁵ and several dealt with in Respondent’s initial brief in support of its exceptions are numbered as follows:

#1. As discussed in Respondent’s earlier brief (p. 16), it is by no means certain that Hedger’s insistence that Respondent rescind that portion of its no-smoking policy that prohibited smoking anywhere on Company property constituted protected activity. Unlike the statute in issue in *Jones Dairy Farm*, 295 NLRB 113 (1989), those provisions of the *Smoke Free Illinois Act*, 410 ILCS 82/1 et seq. dealing with places of employment were quite obviously designed to protect employees rather than provide cost-savings or other benefits to employers.⁶ Unlike the statute in *Jones Dairy Farm*, the *Smoke Free Illinois Act* does not, by its terms, defer to alternatives set forth in collective bargaining agreements. This being the case, 410 ILCS 82/30 effectively preempted Respondent’s obligation to bargain over designation of its entire property as no-smoking. *Jones Dairy Farm v. NLRB*, 909 F.2d 1021, 1026-1027 (7th Cir. 1990)

#5. As discussed in Respondent’s earlier brief (p. 17), there is absolutely no basis for intimating much less concluding that Kester’s 2009 remarks during his discussion with Hedger of the sudden, premature death of an employee’s spouse manifested “animus towards Marcus Hedger’s protected activity.”

#6. The emphasis accorded by the ALJ and Charging Party to Kester’s testimony that he had had “several conversations with Marcus regarding aggressive behavior towards

⁵ Those raised by Charging Party’s cross-exceptions are discussed in Respondent’s Answering Brief in Opposition to Charging Party’s Cross-Exceptions.

⁶ 410 ILCS 82/5

management and other associates” (ALJ, p. 11; CP Brief, p. 37) is misplaced. Kester’s statement came on cross-examination in response to Counsel for Charging Party’s question whether he was aware of any discipline meted out to Hedger. Counsel did not bother to ask Kester to explain what he meant by “aggressive behavior” or any other details of the “several conversations” nor was Hedger asked about them. Indeed, Hedger was never even asked whether he ever engaged in aggressive behavior towards management or other employees. – and, according to his own testimony, employees “attempted to” file harassment charges against him. (Tr. 88-89) Yet, without any or elucidation or explanation of any kind, the ALJ and Charging now flatly assert that the very fact Kessler ever had the undated conversations is proof positive of unlawful animus against *protected activity*. Respondent submits that it is not.

#11. Like the ALJ, Charging Party finds it telling that Respondent did not discipline any of the “foremen” -- non-supervisory lead persons -- who observed Hedger, their Chief Steward, walking Schmidt, a Union officer, through the plant but did nothing to stop him from doing so. (CP Brief, p. 42) Unlike the ALJ, Charging Party would add a “presumption” that these bargaining unit members took no action because “this was nothing out of the ordinary and they saw no reason to take any action or report it.” But Charging Party’s presumption is less worthy of belief than the plausible possibility that the employees were reluctant to take action against, much less “rat” to the Company on, someone who, by his own admission, had shown the Union’s Fort Dearborn members that he was fully capable of singling out and mounting an “internal union campaign” against dissenters. (Tr. 75) Indeed, there is evidence in the record to support that possibility. (Tr. 280) In any event, Charging Party’s claim that this constitutes proof of animus against Hedger’s protected activity is, we submit, preposterous.

#13. Charging Party's plea that Hedger's "sin" warranted a lesser penalty than discharge is no more convincing than its argument that Respondent's failure to impose a lesser penalty is itself proof of animus toward Hedger's protected activity. Charging Party characterizes Hedger's sin as nothing more than an innocent walk through the plant with a friend. What the Charging Party assiduously avoids are the undisputed facts that, when pressed by the Company for the details, Hedger knowingly lied and, despite being warned that his refusal to answer could lead to his discharge, consciously refused to answer a key question: Who was the person with the bicycle? The ALJ begrudgingly concedes that Hedger's blatant lying -- which the ALJ euphemistically characterized as a "lack of cooperation" -- was "foolish and unnecessary." (ALJ Dec., p. 9, lines 18-19) Significantly, neither Charging Party nor Hedger himself admit to even that. Indeed, at the hearing, Hedger first testified *under oath* that he was telling the truth when he told the Company that he didn't remember walking anyone through the plant with a bicycle and didn't know anyone by the name of Peter Schmidt. (Tr. 87) It was only when he came to the realization that everyone listening to his answers knew he was lying that he admitted doing so. And, conveniently sheltering and shifting the blame away from the man who was admonished to answer the Company's perfectly legitimate questions and warned of the consequences for failure to do so, the ALJ allowed that the *Union's* resistance to identifying the visitor was "unwise and unnecessary." (*Id.*, lines 26-27) Charging Party does not do even that. On the contrary, Charging Party argues that the Company was at fault for asking the questions!

#14. Finally, Charging Party mistakenly attributes significance to the fact that, after Hedger's discharge, several employees who allowed former employees to visit the plant were given suspensions rather than discharges. What Charging Party again fails to mention is that the record is totally devoid of evidence that any of those who were disciplined, or, indeed, any

employees of the Company before or since Hedger's discharge, ever escorted anyone, much less non-employee journeyman printers, on a self-described tour of the plant while it was in full operation, or ever intentionally lied to or intentionally withheld information from the Company during the course of an investigation. This being the case, there is really no significance whatever to the difference in treatment. Charging Party's claim that that difference constitutes proof of Respondent's animus toward protected union activity is specious.

3. THE ISSUE OF HOW LONG HEDGER SPENT WALKING PETER SCHMIDT THROUGH THE PLANT.

Like the ALJ, Charging Party makes much of the fact that the Company's alleged claim that Hedger spent 50 minutes to an hour with his visitor on August 12, 2010 was refuted by Hedger's testimony at the hearing that he left his workstation to meet Peter Schmidt after wash-up was completed and was only gone for several minutes. (CP Brief, p. 11, ft. note 10) Like the ALJ, Charging Party completely misunderstands the relevance of the issue. The Company did not and does not claim that Hedger was discharged because he *actually* spent 50 minutes to an hour with Schmidt on the evening of August 12, 2010. He was discharged because of what Respondent *believed* took place on August 12 and for what he said and refused to say to the Company during the course of the Company's investigation of the August 12 incident.

The record establishes, without any contradiction, that what Hedger said to the Company during the investigation was that he spent less than two minutes with his visitor in the plant on the evening of August 12. (Tr. 214; CP Ex. 1) The record establishes, without any contradiction, that what Hedger said to the Company during the investigation was that he left his workstation to meet his visitor after his crew "had just finished [a] job and they were going into wash-up." (Tr. 204, 266, 285; CP Ex. 1) The record establishes, without any contradiction, that

the time Hedger's crew was "going into wash-up" on August 12 was 7:45pm. (Tr. 219; R. Ex. 10) The record establishes, without any contradiction, that Hedger ushered his visitor out of the east side door of the plant at on August 12 at 8:51pm, one hour and 6 minutes after his crew was "going into wash-up." (Tr. 170-172)

Given these undenied facts, the record unquestionably establishes and Respondent could *only* have concluded that Hedger lied during the August 23, 2010 investigation. He either lied when he said he left his workstation after his crew had just finished a job and was going into wash-up or he lied when he said he spent less than 2 minutes with his visitor. Given Kester's uncontroverted testimony that the path Hedger and his visitor walked could not possibly be traveled in 2 minutes (Tr. 214) and the uncontroverted fact that Schmitt told the Company he thought the visitor was in the plant for between 10 and 15 minutes but wasn't sure "because I went directly back to my press" after speaking with Hedger and the man with the bicycle "in the middle of the plant" at a "little bit after 8:00 o'clock" pm, and did not see where they went thereafter (Tr. 119, 131, 134, 144), the Company was clearly justified in concluding that Hedger was lying when he told Company representatives that he spent less than 2 minutes with his visitor. Given the uncontroverted testimony establishing what Hedger told the Company during the August 23 investigation, it is also manifestly clear that, however long Hedger actually spent with Schmidt, Respondent was fully justified in believing that he had spent 50 minutes to an hour touring the plant with him.

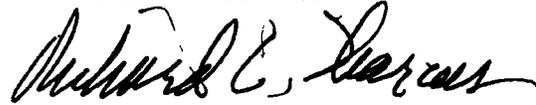
CONCLUSION

Respondent submits that, based on the facts, arguments and authorities cited herein, the Complaint in this proceeding should be dismissed in its entirety.

Respectfully submitted,

FORT DEARBORN COMPANY

By



Richard L. Marcus
Its Attorney

Dated: February 22, 2012

Richard L. Marcus
SNR DENTON US, LLP
233 S. Wacker Drive
Chicago, IL 60606
Telephone: (312) 876-8177
Fax: (312) 876-7934
richard.marcus@snrdenton.com

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that true and correct copies of the attached RESPONDENT'S REPLY TO CHARGING PARTY'S BRIEF IN OPPOSITION TO RESPONDENT'S EXCEPTIONS have been served electronically this 22nd day of February, 2012 upon the following parties:

Helen Gutierrez, Esq.
209 S. LaSalle St.
Chicago, IL 60604
Helen.Gutierrez@nlrb.gov

Thomas D. Allison, Esq.
Allison, Slutsky & Kennedy, P.C.
230 W. Monroe St., Suite 2600
Chicago, IL 60606
allison@ask-attorneys.com



Richard L. Marcus