

**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 ANSWERING BRIEF IN OPPOSITION TO CHARGING
PARTY'S CROSS-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 opposition to Charging Party's cross-exceptions to the Decision of Administrative Law Judge Arthur Amchan ("ALJ")²

CROSS-EXCEPTIONS 1, 2 & 3

Paragraph V of the Complaint alleged that during contract negotiations held on June 4, 2010, Johnstone threatened to (a) fire employees, and (b) watch employees with closer scrutiny, because of their Union and protected concerted activities. The ALJ

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 REPLY TO CHARGING PARTY'S BRIEF IN OPPOSITION TO RESPONDENT'S 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 __."

correctly determined that the evidence in the record was not sufficient to support these allegations and therefore correctly dismissed them. (ALJ, p. 3, lines 40-42)

Two witnesses testified for General Counsel on these allegations, Hedger and David Ishac. The sum and substance of Hedger's testimony regarding the events of June 4 is as follows:

"Q. What happened at this meeting?

A. Oh, it was a pretty heated meeting. And toward the end of the meeting, Bill Johnston [sic] stood up and he produced the newsletter that the committee had passed out to some of the members urging them to vote no on the previous ratification.

* * * * *

Q. What happened after that?

A. He showed me this newsletter and it had been altered with a cartoon on it that somebody had put on there to poke fun at it. And then he told me that this was reproduced on the company copy machine. I looked at them and I told him I had no knowledge of that, that that was not the one we gave to the members, and anything we reproduced, you know, it was not allowed to be done on company machines.

Q. What happened after that?

A. He produced another document that was put on people's car windshields in the parking lot. And he asked me what is you buddy [Union business agent] Frank Golden going to do when we show him a picture of him putting this on people's car windows?

Q. And what if anything did you respond?

A. I replied that I thought there were no cameras in the parking lot, and if he had a picture of Frank Golden doing something, he should produce it.

Q. What happened after that?

A. Bill Johnston 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.

Q. Did that end the meeting?

A. The meeting went on for a little bit after that but that was towards the end of it." (Tr. 29-30)

In its entirety, Ishac's testimony regarding that meeting was as follows:

"Q. And what do you recall happening at that meeting?

A. What I recall at that meeting? Mr. Johnston was very upset and he had a copy of [an "informative letter from the union sent to the membership"] that was altered and he had accused Marcus of making that copy on the company's machinery. Mr. Marcus denied making that copy and he was told that it was altered because it wasn't the original, somebody took that original letter, put some cartoon on it and copied it. And Mr. Johnston had letter in his hand, and Mr. Hedger denied copying the letter on the machinery.

Q. What happened after that/

A. After that, Mr. Johnston was very upset because the members voted the proposal down and he was very upset. So, he told Mr. Marcus, because Marcus said something to Mr. Johnston about that letter, there was another thing that was put on windshields, he had that in hand as well.

Q. Mr. Johnston had a second flyer in his hand?

A. Yes. He had that and he 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.

Q. Did Mr. --

A. And Mr. Hedger was busy because I recall Mr. Johnston said that I looked everybody in the face, I couldn't look you in the face, Marcus. Marcus was busy taking notes and that's why he didn't look in the face, you know.

Q. Did Mr. Hedger respond?

A. No.

Q. After he was told that?

A. No, he didn't.

Q. Did Mr. Johnston say anything else at that time?

A. No.

Q. Now, you stated that Mr. Johnston had something in his hand regarding, some sort of flyer that was put on windshields.

A. Yes.

Q. Did he saying anything referring to that flyer?

A. He said that somehow he found that Mr. Frank Golden was in the parking lot, he put it on everybody's windshield in the parking lot and the next time we catch Mr. Frank Golden in the parking lot he will be arrested." (Tr. 98-100)

Notably, neither General Counsel nor Charging Party ever produced or sought to introduce into evidence the referred to "newsletter," the "informative letter to the membership," the document "that had been altered with a cartoon on it that somebody had put on there to poke fun at it," or the document or "flyer that was put on windshields" by Union business agent Frank Golden.³

Thus, for all that the record shows, the original and/or altered documents referred to may have contained wholly unprotected material of a libelous, scurrilous, or highly scatological nature. For all that the record shows, Hedger and the other employees were quite legitimately barred from using the Company's copy machines, for completely nondiscriminatory reasons.⁴ In short, because counsel for General Counsel completely failed to establish that the activities that, according to her own witnesses, provoked

³ Although present at the hearing (Tr. 11), Golden was never called to testify.

⁴ Indeed, Hedger acknowledged that "anything we reproduced, you know, it was not allowed to be done on company machines." (Tr. 30)

Johnstone's threats were protected activities, she failed to carry her burden of proving that those threats were unlawful.

Given this reality, there is not a scintilla of evidence in the record to support Charging Party's claim that Johnstone's comments constituted an "illegal threat to fire Hedger and watch him with closer scrutiny because of his Union and protected concerted activity." Neither the testimony of Hedger nor Ishac has Johnstone himself giving any reason for his alleged threats to fire or watch employees with closer scrutiny. Both of them recounted that Johnstone's threat was to "watch," "catch," and "fire" Hedger; but neither claimed that Johnstone indicated why the Company was going to watch him, what the Company expected to catch him doing, or why or for what reason the Company wanted or expected to fire him. Hedger testified only that Johnstone prefaced his threats with the comment that "he was tired of our union circus" (Tr. 30), and Ishac remembered only that Johnstone had some documents in his hand when he made the threats. (Tr. 98-99) Both made it abundantly clear that the alleged threats came immediately after a heated discussion of the documents. Given the uncontroverted evidence in the record that the Company had, that morning, found one of the documents on its document reproducing equipment (Tr. 230, 345), the most damning conclusion the ALJ could legitimately have drawn from this testimony is that Johnstone believed Hedger was using the Company's duplicating equipment for unauthorized production of documents, and that he threatened to keep an eye on Hedger and, if and when the Company caught him doing it again, fire him for doing so. Assuming this conclusion was established, it clearly would not form the basis for a finding of violation of the Act.

Charging Party claims that:

“[t]he 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.)” (CP Brief, p. 33)

In making this claim, Charging Party obviously overlooked (1) Hedger’s own testimony confirming that at the time he made his comment, Johnstone was holding a document that (a) made reference to the Union, (b) contained a cartoon, and, as the uncontroverted evidence shows, (c) was found on the Company’s duplicating equipment, and (2) General Counsel’s own Exhibit establishing that the Company’s response to Hedger’s grievance protesting Johnstone’s comments made it crystal clear that Johnstone was saying, on the 4th of June, that the Company’s copying machines were not to be used for union business and that any employee found to be in violation of that rule would face disciplinary action. (GC Ex. 12b)

In short, assuming, as the ALJ found, that Johnstone made the comment, its utterance would support neither an 8(a)(1) nor 8(a)(3) claim because, given its context, Johnstone’s expression of annoyance would not have been unwarranted and, as discussed above, the record is devoid of evidence to show that Hedger or any other employee was engaging in protected concerted activity when he or they distributed documents, whether or not those were the documents Johnstone thought they had produced on Company equipment and whether or not Johnstone was mistaken in thinking so.

Throughout its Brief, Charging Party makes the quite remarkable claim that, standing alone, any angry or negative comment made to Hedger by any of Respondent’s representatives by itself proves anti-protected activity animus and establishes that Hedger’s protected activity was a motivating reason for his suspension and termination.

Nothing short of a statutory mandate vesting stewards with complete immunity and a guarantee against all of the vicissitudes of the workplace could possibly sustain such an assertion. The cases cited by Charging Party⁵ most certainly do not.

CROSS-EXCEPTION 4

Uncontroverted evidence in the record establishes that, on August 18, 2010, despite being repeatedly warned that failure to cooperate or answer questions truthfully could subject him to discipline up to and including discharge (Tr. 199-200), Hedger told Company representatives that he did not remember bringing anyone into the Niles plant (Tr. 56), did not remember bringing someone wheeling a bicycle into the plant (Tr. 200), did not remember walking with anyone with a bicycle through the plant (Tr. 56), and did not remember whether he knew anyone by the name of Peter Schmidt. (Tr. 87) Though he first testified at the hearing that these were truthful answers, he later conceded that he did, in fact, know Peter Schmidt⁶ and conceded as well that he lied when he told the Company representatives he did not remember knowing anyone by that name. (Tr. 87) In fact, his own explanation for his “I don’t remember” response to all of the other simple “yes” or “no” questions regarding a unique event that had occurred less than a week earlier -- “Any answer I said would have been the wrong answer.” (Tr. 87) -- demonstrates beyond any doubt that he was repeatedly lying when he said “I don’t remember.”

⁵ *Igramo Enterprise, Inc.*, 351 NLRB 1337, 1339 (2007)(The 8(a)(3) discriminatee had joined “in the ‘presentment of grievances by a group of [non-union] employees to their employer.’”); *Vico Products Co.*, 336 NLRB 583, 588 (2001)(Relocation of operations and layoff of 33 employees less than 3 months after union won election and after employer’s warning that “If the Union gets in here, you can be laid off.”)

⁶ In his earlier testimony, Hedger had twice acknowledged that Schmidt was a friend of his. (Tr. 48, 49)

The Company clearly had the right to conduct an investigation into the August 12 incident and Hedger was the key figure in that incident. Hedger was not engaged in protected activity when he lied repeatedly in response to the questions put to him on August 18. Hedger's actions in refusing to cooperate with the Company's investigation and/or lying in response to the legitimate questions posed to him would have warranted his immediate discharge. Respondent's act of putting him, instead, on paid suspension while it continued its investigation was clearly not violative of the Act.

Charging Party's claim that the Company's action in suspending Hedger with pay was unlawful because the interview preceding the suspension was conducted in violation of Hedger's *Weingarten*⁷ rights has no merit. Though the Union charged Respondent with violating Hedger's *Weingarten* rights in its Charge filed September 30, 2010 (GC 1a), it withdrew that allegation from its amended Charge filed on November 24, 2010 (GC 1b); and no complaint alleging such a violation was ever issued. Moreover, the record does not support any claimed violation of *Weingarten* for several reasons. First, it is undisputed that Hedger was offered and rejected the opportunity to be represented by the Union's President and a member of its Executive Board, both employed by the Company and present in the workplace at the time the interview was taking place. (Tr. 196) After turning down such representation, Hedger asked for representation by assistant steward David Ishac, a request that was immediately granted by Respondent and then abandoned by Hedger. (Tr. 197-198) According to Hedger himself, it was then and only then that he asked instead for representation by Union business agent Frank Golden who was not employed by the Company. (Tr. 54) It is by no means certain that Hedger

⁷ *NLRB v. J. Weingarten, Inc.*, 420 US 251, 95 S.Ct. 959 (1975)

was legally entitled to have Frank Golden present, either in person or by telephone, during the interview on August 18.

Even assuming he was legally entitled to Golden's representation, he did, in fact, have it; and while Hedger testified that he requested but was denied the opportunity to speak with Golden before the meeting began, the record is, at best, unclear on this score. Kester denied that Hedger or Golden ever made that request (Tr. 294) and Golden, though present at the hearing, did not testify at all. In any event, because Charging Party deleted any reference to Hedger's *Weingarten* rights from its Amended Charge and the Complaint makes no reference to them, Respondent was never apprised that Hedger's *Weingarten* rights were in issue this case and Respondent cannot now be prejudiced by its failure to adduce additional evidence regarding that matter.

CROSS-EXCEPTION 5

Company Vice President Johnstones' alleged comments regarding the quality of Hedger's stewardship, were never found by the ALJ to have been uttered. Johnstone denied having made the statements upon which the Charging Party relies (Tr. 347-348) and the ALJ never resolved the question of credibility, *i.e.*, whether the statements were or were not in fact made. Moreover, the activity that prompted the alleged comments -- Hedger's self-characterized undertaking to prohibit a "unilateral midterm change" in the parties' collective bargaining agreement (Tr. 43) -- was, in fact, an attack on a Company vacation policy that was not part of the contract, did not require Union acquiescence (Tr. 237), and was therefore not protected at all.⁸ Charging Party's exception to the ALJ's

⁸ This alleged incident occurred more than one year before the events giving rise to Hedger's discharge, negating the claim that, even if it occurred, it was a proximate motivating reason for Respondent's actions. See, *Meco Corp. v. NLRB*, 986 F.2d 1434,

failure to find that Johnstone made the remarks it attributes to him and failure to find that those remarks “further established the Company’s animus” is without substance.

CROSS-EXCEPTION 6

There is no evidence that the posting of a sticker on the Company’s bulletin board with the slogan “Say No to Blockheads” and the writing “Does the ‘H’ in This Sticker Stand for Hedger?” was in any way attributable to the Company; and Hedger’s own testimony suggests that he himself had something to do with the “Say No to Blockheads” sticker’s genesis -- “That was an internal union campaign we had against people running for, there were two brothers running for office in our local union [whose] last name was Hayden” and “Blockhead is a Gumby and Pokey character. He was clumsy and awkward.” (Tr. 75) Moreover, Charging Party’s claim that the “sticker remained posted on the Company’s locked bulletin board, despite the Union’s requests that it be taken down” is completely refuted by the record. (GC Ex. 12a) Charging Party’s claim that these events “further establish the Company’s animus” is not credible.

CROSS-EXCEPTION 7

The last post-June 4, 2010 event of alleged protected activity and alleged animus it prompted relates to Hedger’s posting of material on a union bulletin board. The evidence establishes that, in June, 2010, Hedger posted a document signed by the Union’s Vice-President, Paul Mancillas on what Hedger testified was “my union, union bulletin board.” (Tr. 17, GC Ex. 14) The evidence also establishes that the Company removed the material from the union bulletin board on or about June 21, 2010, and that Kester simultaneously informed Hedger, in writing, that it did so because the material was

1437 (DC Cir. 1933) and other cases cited at pp. 16-17 of Respondent’s initial Brief to the Board.

posted without prior notice to the Company, in violation of what the Company understood to be an agreement with the Union. (GC Ex. 13) It is also undisputed that on the same day that he received Kester's written notice Hedger reposted the same material on the same bulletin board. The record also shows that on June 23, 2010, two days later, Kester again wrote to Hedger, informing him that he was aware of Hedger's action in reposting the material, and this time warned him that continued action of this kind "will result in disciplinary action up-to and including discharge." (GC Ex. 15) Finally, the record shows that on July 1, 2010, Kester wrote a letter to the Union, with a copy to Hedger, reiterating "our understanding that the union agreed to show all postings prior to placing something on the board." (R Ex. 11) It is clear that whatever protected right any Fort Dearborn employee had to post material on a union bulletin board was subject to limitations imposed by agreement between the Company and the Union. Given General Counsel's and Charging Party's total failure to refute the Company's repeated written assertions of the existence of just such an agreement, Charging Party's claim that Hedger's actions in posting and reposting material on the union bulletin board on June 21, 2010 in violation of that agreement constituted "protected activity" is completely without merit.

CROSS-EXCEPTION 8

There are 2 reasons why the Company's allegedly "disproportionate response to learning that Marcus Hedger had walked a visitor through the plant" obviously does not imply or suggest, much less constitute evidence of "the Company's animus towards Marcus Hedger's protected activity." (CP Brief, p. 35)

First, given the absence of any evidence even remotely implying that complete strangers -- that is, neither retirees, employees' family members or food delivery persons -- had ever previously spent up to an hour in the plant⁹ or had previously traveled through the entire Niles operation with or, according to Schmitt, "on" bicycles (Tr. 119) while the plant was in full production, the Company's decision to mount an investigation directed at finding out what actually occurred, including how and why the employee who was clearly responsible for staging that event did so, is anything but suspicious much less, as Charging Party claims, unlawful. Notably, Schmitt did not deny what he told the Company, that plant safety rules did not countenance a stranger walking through the plant with a bicycle. (Tr. 365) Schmitt did not deny that he acknowledged to the Company that he was aware of the Company's stressed emphasis on confidentiality, and that "whatever you do in your job and learn through your job should stay with you. You shouldn't share it with other people because of the confidentiality of the information and expertise...and technical issues involved in our processes." (Tr. 361) Moreover, though Hedger refused to sign it, the record establishes that the Company and Hedger's union had taken pains to negotiate and had agreed upon a specific, detailed policy requiring that all employees keep the Company's production techniques and equipment strictly confidential and refrain from revealing or disclosing this or any other confidential information to any other person. (Tr. 164-166; R Exs. 6-8) The record also shows that this policy is shown to employees in meetings held every quarter; and that Schmitt's acknowledged awareness of the rule that "whatever you do in your job and learn through

⁹ Though the ALJ, General Counsel and Charging Party insist that Hedger spent no more than several minutes with his friend Schmidt, no one disputes the fact that Schmidt walked into the shipping area of the plant at or before 8pm and left through a door at the opposite end of the plant at 8:51pm.

your job should stay with you” was similarly reinforced. (Tr. 168) Second, even if Charging Party’s claim that the Company disproportionately responded to this novel event were plausible, Charging Party’s claim that its genesis was animus toward that person’s *protected activity* is neither plausible nor any more than totally unfounded speculation.

CROSS-EXCEPTION 9

The essence of Charging Party’s exception is that, because the ALJ found that Schmitt had given Hedger permission to walk Peter Schmidt through the plant, the Company’s action in terminating him was, Q.E.D., proof of the Company’s animus toward Hedger’s protected activity. Charging Party’s exception is not valid.

If, as Charging Party now claims, Respondent is to be found guilty of taking action against Hedger for doing something that his non-supervisory (Tr. 136) foreman gave him permission to do, one would suppose that Respondent had been shown to have knowledge that that permission had been granted. But the ALJ did *not* find that Schmitt told the Company he had given Hedger permission to walk the visitor through the plant. While Schmitt testified that he did, there is ample testimony, *i.e.*, Kester, and Samuels insist that Schmitt specifically told them he did not. (Tr. 223, 362; GC Ex. 2) The ALJ never resolved the question of who was telling the truth, and Charging Party did not take any exception to his failure to do so. Charging Party would have the Board overlook these messy details. It should not. Charging Party’s additional claim -- that the Board should find Respondent’s actions were motivated by animus toward protected activity -- is, *a fortiori*, even less deserving of consideration.

CROSS-EXCEPTION 10

Charging Party's exception number 10 is, pure and simple, that the ALJ improperly "credit[ed] Kester's account" of the conversation with Hedger regarding the death of an employee's spouse rather than "Hedger's testimony...that Kester took this opportunity to convey a veiled threat that he [Hedger] could be terminated suddenly and without warning, just as [the employee's spouse who] had died suddenly." (ALJ, p. 7, ft. note 11) Charging Party does not offer any explanation as to why the ALJ erred or any reason why he should have credited Hedger's paranoid speculation rather than Kester's statement of fact as to what was actually said. Clearly, in light of Hedger's reluctant admission on cross-examination that he lied to the Company on August 18, 2010 and that he again lied when he testified under oath that he had told the truth to the Company during his interview that day (Tr. 87), Charging Party is hardly in a position to claim that his proven veracity warrants it. Clearly, given "[t]he Board's established policy...not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the evidence convinces us that they are incorrect" *Vico Products Co.*, 336 NLRB 583, 591, ft. note 1 (2001)(citations omitted), there is obviously no merit to Charging Party's objection.

CONCLUSION

Respondent submits that, based on the facts, arguments and authorities cited herein, none of Charging-Party's cross-exceptions are meritorious and the Board should therefore reject them all.

Respectfully submitted,

FORT DEARBORN COMPANY

By 

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CERTIFICATE OF SERVICE

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

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