

**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 BRIEF IN REPLY TO ACTING GENERAL COUNSEL'S
ANSWERING BRIEF**

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 Acting General Counsel's Answering Brief to Respondent's Exceptions to the Decision of Administrative Law Judge Arthur Amchan ("ALJ")¹

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

General Counsel makes much of the fact that Respondent withdrew from the arbitration proceeding, but assiduously avoids any examination of the reasons Respondent did so. Not

¹ 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 General Counsel's Brief shall be made, respectively, as follows: "ALJ, p. __" "Tr. __" "R Ex. __" "GC Ex __" "CP Ex __" and "GC Brief __."

wanting to deal with these “details,” General Counsel calls Respondent’s discussion of them “a game of smoke and mirrors.” (GC Brief, p. 4)

There are no smoke and mirrors; just uncontroverted facts the ALJ considered and misconstrued but that General Counsel does not want to consider at all. Thus, while both the ALJ and General Counsel state (correctly) that Respondent refused to proceed with arbitration, the ALJ (correctly) looked for and found that the reason for 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), a characterization 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) For her part, Counsel for General Counsel apparently doesn’t think the reason for Respondent’s refusal to arbitrate is relevant. She is wrong.

She is wrong because, her reliance on other cases notwithstanding, the Regional Director in *this* case had 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)² When issuing that warning, Respondent was acting as the agent of General Counsel who 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.” (29 U.S.C. §153(d))

² The Regional Director also made it clear that “I will revoke deferral and resume processing of the charge” if Respondent “refuses to arbitrate the grievance.” The reality that General Counsel neglects to accept is that Respondent never “refused to arbitrate the grievance” – it refused only to arbitrate the unfair labor practice charges.

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) Apparently, Counsel for General Counsel, who believes Respondent is now seeking “a third bite at the apple,” agrees. They are both quite clearly mistaken.³ The only alternative to having the ALJ 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.

1. **GENERAL COUNSEL’S DISCUSSION OF ANIMUS.**

Counsel for General Counsel’s arguments to the contrary notwithstanding, 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. She accuses Respondent of “grossly misstat[ing] record testimony to suit its spurious position” on this issue (GC Brief, p. 8) but she neglects to identify what “misstatements” Respondent made. As for Respondent’s supposedly “spurious position,” General Counsel completely ignores the legal reality that, 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.⁴ 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

³ “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).

⁴ 410 ILCS 82/5

as no-smoking. *Jones Dairy Farm v. NLRB*, 909 F.2d 1021, 1026-1027 (7th Cir. 1990)

Accordingly, it was Hedger's position – that the “overall change was ‘something that had to be voted on, that the company could not just change a policy’” (GC Brief, p. 9) – that was and is “spurious,” not Respondent's.

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

The emphasis accorded by the ALJ and General Counsel to Kester's testimony that he had had “several conversations with Marcus regarding aggressive behavior towards management and other associates” (ALJ, p. 11; GC Brief, p. 11) 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. Neither Counsel for Charging Party nor Counsel for General Counsel bothered 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)

Respondent did not elicit this testimony. General Counsel argues, in essence, that it was incumbent upon Respondent to explain what Kessler meant when he responded to questions on cross-examination; and that, failing such an explanation, the “logical inference is that Kester was describing his feelings toward Hedger because of Hedger's active role as a union steward.” (GC Brief, p. 12) The inference is completely illogical. General Counsel's “logical inference”

would dictate that, if Kester was asked on cross-examination if he was fond of Hedger and he replied in the negative, Respondent would either be required to drum up evidence of a legitimate basis for Kester's feelings or suffer the inference that he wasn't fond of him because of his protected concerted activity. Respondent submits that the ALJ's and General Counsel's presumption of guilt makes a mockery of the *Wright Line* analysis and the evidentiary standards supposedly applicable to Board proceedings.

Like the ALJ, General Counsel 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, General Counsel would bootstrap the Company's alleged mistake on time into a proof of animus. Like the ALJ, General Counsel 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)⁵, 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.

General Counsel assiduously avoids the undisputed facts that, when pressed by the Company for the details, Hedger knowingly lied and, despite being warned that his refusal to

⁵ Counsel for Respondent assures General Counsel he was not "reading from a different transcript" when he referred to page 289 of the transcript, but he does apologize for the typo.

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 General Counsel 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) General Counsel now argues that the proof positive that Respondent was singling out Hedger lies in the fact that it did not impose penalties on other employees who, asked about the incident, asked not to be involved in ratting on their steward. (Tr. 17) Her willingness to equate their reluctance with Hedger's admitted lies speaks volumes about the weakness of General Counsel's case.

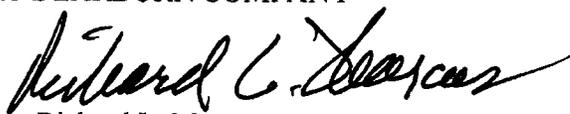
CONCLUSION

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

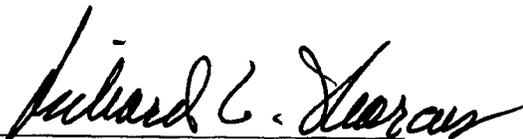
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CERTIFICATE OF SERVICE

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

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