

**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 ACTING
GENERAL COUNSEL'S CROSS-EXCEPTIONS**

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 opposition to Acting General Counsel's cross-exceptions to the Decision of Administrative Law Judge Arthur Amchan ("ALJ")¹

**1. ACTING GENERAL COUNSEL'S CROSS-
EXCEPTIONS DO NOT COMPLY WITH THE
BOARD'S RULES AND REGULATIONS AND
SHOULD THEREFORE BE DISREGARDED.**

Acting General Counsel' Cross-Exceptions do not comply with the requirements of Section 102.46(b)(1) of the Board's Rules and Regulations in that none of them either "designate by precise citation of page and portions of the record relied on" or "concisely

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 __."

state the grounds for the exception.”² Respondent submits that, pursuant to Section 102.46(b)(2) they should therefore be disregarded.

2. ACTING GENERAL COUNSEL’S CROSS-EXCEPTIONS ARE WITHOUT MERIT AND SHOULD THEREFORE BE REJECTED.

CROSS-EXCEPTIONS 1, 2 AND 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 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.

² Per Section 102.46(e), the quoted provisions apply to General Counsel’s cross-exceptions.

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 your 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 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 General Counsel’s claim that Johnstone’s comments constituted unlawful 8(a)(1) conduct or “established animus in the suspension and discharge of Marcus Hedger.” 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

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)

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.

General Counsel repeatedly asserts that Johnstone's reference to the "union's circus" was obviously a reference to "the Union's success in rallying the bargaining unit to oppose the Respondent's contract proposal." (GC Brief, p. 5) In making this claim, however, General Counsel conveniently 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.

CROSS-EXCEPTION 4

General Counsel's claim that the ALJ should have found that Hedger's suspension on August 18, 2010 was unlawful, "based on the identical set of facts as his discharge." (GC Brief, p. 7) In so arguing, she totally ignores some rather inconvenient facts. Uncontroverted evidence in the record establishes that, on August 18, 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 Schmidt⁵ 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) --

⁵ In his earlier testimony, Hedger had twice acknowledged that Schmidt was a friend of his. (Tr. 48, 49)

demonstrates beyond any doubt that he was repeatedly lying when he said "I don't remember."

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 most certainly 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.

CONCLUSION

Respondent submits that, based on the facts, arguments and authorities cited herein, all of General Counsel's cross-exceptions should be rejected.

Respectfully submitted,

FORT DEARBORN COMPANY

By



Richard L. Marcus
Its Attorney

Dated: February 22, 2012

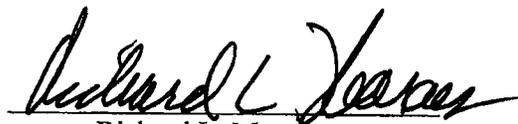
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CERTIFICATE OF SERVICE

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

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