

**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 REPLY TO THE ANSWERING BRIEF OF RESPONDENT**

Charging Party District Council Four, GCC/IBT (the “Charging Party”), submits this Brief in Reply to the Answering Brief filed by Respondent Fort Dearborn Corporation (“the Company” or “Respondent”) in opposition to Charging Party’s cross-exceptions to the Decision of Administrative Law Judge Arthur J. Amchan.

I. Charging Party’s Cross-Exceptions 1, 2 and 3: Bill Johnstone’s June 4, 2010 Threats to Marcus Hedger

Bill Johnstone’s threats to Marcus Hedger in the bargaining session on June 4, 2010 are undisputed. Judge Amchan found that Johnstone said to Hedger, “Marcus, we’re watching you, we are going to catch you and we are going to fire you” (ALJD, p. 3, lines 22-42). The Company did not except to this finding by the Judge.

However, the Judge found that it was “not clear whether or not Johnstone was referring to catching Hedger using company copying equipment, as opposed to conduct that is protected,” and for that reason dismissed the allegations of the Complaint related to the undisputed threat (ALJD,

p. 3, lines 40-42). In its Answering Brief, the Company manufactures a cloud of conjectures as to why Bill Johnstone was upset, none of which has even the most remote basis in the record. The Company argues (Co.Brief, p. 4):

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.

The Company's claim that it may have threatened Marcus Hedger because the Union had used the Company copier to print "libelous, scurrilous or highly scatological" materials has absolutely no support in the record. None of the Company's witnesses testified to such a concern, and none of the Union's witnesses testified that the Company ever mentioned any such concern.¹

Moreover, it is undisputed what had upset Bill Johnstone: the Union membership had recently voted down the Company's last proposal. Bill Johnstone admitted that he was "frustrated" because the Union committee had recommended that the Company's proposal be rejected, saying, "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). David Ishac testified that Johnstone was "very upset because the members voted the proposal down" (Tr. 98). Marcus Hedger testified, and his notes confirm, that

¹ The Company's complaint that the Union did not introduce any of the documents that Johnstone complained about is disingenuous. The Union did not have these documents. They were brought to the June 4 meeting by Bill Johnstone, and not distributed. At least one of the documents was not created by the Union. Moreover, it is the Company – and not the Union – that is claiming that the substance of the documents may have been the source of Bill Johnstone's anger. If the Company wanted to argue that documents in its possession were "libelous, scurrilous or highly scatological" it should have introduced them. This is consistent with the Company's burden of showing it had a real and legitimate reason for its action under Wright Line.

Johnstone told Hedger that he was “tired of our union circus” (Tr. 30, 374; C.P.Exh. 3, p. 9).

Nothing supports the Company’s unfounded conjecture that Bill Johnstone may have been upset because the Union’s literature may have been “libelous, scurrilous or highly scatological.” Charging Party urges the Board to find that Bill Johnstone’s undisputed threat to catch and fire Marcus Hedger was based on Hedger’s protected activity.

II. Charging Party’s Cross-Exception 4: The Suspension of Marcus Hedger

The interrogation and suspension of Marcus Hedger on August 18, 2010, was part of a series of actions taken against Hedger because of his Union activity. The investigation was clearly motivated by the Company’s expressed desire to “catch Marcus Hedger, and fire him.” From the moment on August 17, 2010 when Bob Kester learned that Marcus Hedger had escorted a visitor through the plant, the Company was determined to use this event as the pretext for Hedger’s termination. In 24 hours, Bob Kester reviewed the security tapes and interviewed 12 second shift bargaining unit employees and foremen; Corporate HR Manager Bill Samuels came to the Niles facility and interrogated Hedger from a list of prepared questions; and the Company then suspended Hedger. The suspension was a part of this continuum of Company actions against Hedger because of his protected activity.

The Company’s Answering Brief misstates the scope of the Company’s Weingarten violations in its interrogation of Marcus Hedger on August 18, which was the asserted basis for his suspension. Contrary to the Company’s Answering Brief, Hedger immediately asked for Frank Golden to be his Union representative at the outset of the interview.² Samuels denied Hedger’s

² The Company claims that Marcus Hedger asked for Frank Golden as his representative only after other possible representatives had been offered to him (Co.Brief, p. 9). In
(continued...)

requests for Frank Golden to be his representative; refused to allow Hedger to have a pencil and paper in the interview; refused to grant Hedger's request to end the interview when he was denied representation by Golden; threatened Hedger with immediate termination if he left the interview after being denied representation; insisted that Hedger be represented by a former Union officer whom the Company knew did not get along with Hedger; and repeatedly refused Hedger's and Golden's requests that they be allowed to talk privately before the interrogation began. (Tr. 51-58, 195-199).

Marcus Hedger did not lie in the interrogation. He repeatedly told Bill Samuels that if he could talk privately with his Union representative -- which was his right under the Act -- he might be better able to recall what had happened. The Company never honored that right, and then suspended him for being non-cooperative. The Company cannot take advantage of its own Weingarten violations to suspend an employee for protected activity on the ground that he did not fully respond to their questions in the illegal interrogation.

III. Charging Party's Cross-Exception 5: Bill Johnstone's June, 2009 Verbal Attack on Marcus Hedger Further Established the Company's Animus

As the Judge found, "the record is replete with evidence that establishes substantial animus on the part of management towards [Hedger's activities as union steward]" (ALD p. 6, lines 41-42). Included in that evidence is Bill Johnstone's verbal attack on Marcus Hedger in a labor-management

²(...continued)

fact, Marcus Hedger testified that when Samuels opened the meeting by saying that this was a Company investigation, Hedger replied, "If this has anything to do with my job, I'd like Business Agent Frank Golden to represent me on this" (Tr. 52-53). The Company also claims that it was "unclear" if Marcus Hedger or Frank Golden had asked for the opportunity to confer before the interrogation began (Co.Brief, p. 9). In fact, Marcus Hedger testified that he twice asked to speak with Golden before any questioning, and that Golden also requested to meet with Hedger, and that Samuels and Kester repeatedly denied their requests (Tr. 55-56). Hedger's testimony was corroborated by the notes of Company Human Resources Manager Evelyn Vasquez, which state that, "Frank protested stating he wanted some time to talk to Marcus" (C.P.Exh. 2).

meeting in June, 2009. Marcus Hedger had requested the meeting to discuss the Company's proposed unilateral reduction in the number of employees on vacation at one time (Tr. 42).

Bill Johnstone opened the meeting by asking Hedger if he thought he would be re-elected as steward and be on the next negotiating committee. When Hedger said that he expected to be re-elected, Johnstone went on the attack. He told Hedger that he didn't think Hedger would be re-elected; that Hedger was "leading the members down the wrong path;" that Hedger "bullied and badgered" the members; and that he "was not a good steward" (Tr. 42-44).

David Ishac corroborated Hedger's testimony. Ishac testified that he asked Hedger if he was harassing the members, and, if he was, he should not be steward. Hedger said that he had not harassed any members. At that point, Johnstone backed down, and said, "I shouldn't be talking about this, this never happened, just forget about it." Bob Kester "could not recall" if Johnstone made these statements and Johnstone "could not remember" if he had (Tr. 101-103, 237, 350-351).

Judge Amchan did not discuss this incident. The testimony of Marcus Hedger and David Ishac – generally credited by the Judge (ALD, p. 3, lines 37-40) – should be credited here, compared to the vague non-denials by Kester and Johnstone. Johnstone's false accusations further establish the Company's animus toward Marcus Hedger's protected activity.

The Company claims that this unilateral change to its vacation policy did not require Union acquiescence, and therefore Marcus Hedger's participation in the labor-management meeting was not protected. That argument should be quickly rejected. The Company's vacation policy is a term and condition of employment. Whether or not the Company had the right to make such a change unilaterally is irrelevant to the undeniable fact that Marcus Hedger was engaged in protected activity when, as the Chief Steward, he raised this workplace issue at a labor-management meeting.

IV. Charging Party's Cross-Exception 6: The Marcus Hedger Cartoon in the Company's Locked Bulletin Board

On about June 10, 2010 – a week after the June 4, 2010 bargaining session where Bill Johnstone told Marcus Hedger, “We’re watching you, Marcus, and we’re going to catch you, and we’re going to fire you” – a sticker appeared on the Company bulletin board. The sticker showed a person with a hat with the letter “H” and the pre-printed slogan, “Say No to Blockheads.” Handwritten below the sticker was “Does the ‘H’ in This Sticker Stand for HEDGER???” (G.C. Exh. 11). The sticker remained posted in the Company’s locked bulletin board, despite the Union’s requests that it be taken down (G.C.Exh. 10; Tr. 32, 75-76).

The Company argues that the posting of the anti-Hedger document in its bulletin board is not “in any way attributable to the Company.” That argument should be rejected. The bulletin board is locked; the Company has control over it. The Company also claims that the record “completely refutes” the Union’s claim that the sticker remained posted after the Union’s request that it be taken down. However, Marcus Hedger testified that the sticker remained posted, even after he filed a grievance over it (Tr. 75-76). For all of these reasons, it should be found that the continued posting of this anti-Marcus Hedger sticker further establishes the Company’s animus toward Hedger.

V. Charging Party's Cross-Exception 7: The Company's Threat to Terminate Marcus Hedger for Authorized Union Postings on the Union Bulletin Board

Shortly after the June 4, 2010 negotiating session, Corporate Senior Vice-President Bill Samuels walked through the plant, telling bargaining unit employees that the Union had made a contract proposal concerning “bumping rights” that would adversely affect another employee. Union Vice-President Paul Mancillas prepared a written response to Samuels’s statements, explaining the reasons for the Union’s proposal (G.C.Exh. 14). Marcus Hedger posted Mancillas’s statement on

the Union's locked bulletin board on June 20, 2010 (Tr. 37-38).

The next day, June 21, 2010, the Company removed Mancillas's letter from the Union's locked bulletin board (G.C.Exh. 13; Tr. 38-39). Union Business Agent Frank Golden instructed Hedger to re-post Mancillas's 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).

The Company claims that it was free to threaten Hedger with discipline, "up to and including discharge," for carrying out his duties as a Union steward because there was some sort of "agreement" that nothing could be posted by the Union on its own bulletin board without prior notice to the Company (Co.Brief, pp. 10-11). There is no record evidence of such an "agreement," and no witness testified that such an "agreement" existend. In addition, even if there were such an agreement, the Company still cannot threaten a steward with termination for carrying out his legitimate duties as a steward. The Company's explicit threat to do so (G.C. Exh. 15) further establishes the Company's animus toward Hedger.

VI. Charging Party's Cross-Exception 8: The Company's Disproportionate Reaction to Marcus Hedger Escorting a Visitor through the Plant

Until the Company learned that Marcus Hedger may have escorted a visitor through the plant, it had never enforced any policy on visitors, if such a policy even existed. As the Judge found, there was a widespread practice of allowing unescorted friends, family members, retirees, food delivery people, package delivery people, truckers, and other visitors walk throughout the plant on the second shift. (ALJD, p. 10, lines 8-15). No one had ever been disciplined for doing this

All this changed when the Company learned that Marcus Hedger may have escorted a visitor

through the plant. In the next 24 hours, Plant Manager Bob Kester conducted a “full court” investigation into what happened, reviewing security tapes, interviewing 11 second shift employees and foremen, some of them three times, and bringing Bill Samuels to the Niles facility for two interrogations of Marcus Hedger. The investigation continued unabated even after the Company learned that Marcus Hedger’s foreman, Bob Schmitt, had authorized Hedger to escort the visitor through the plant. The Company’s investigation was unprecedented, and completely out of proportion to a mundane and unremarkable event. The disproportionate nature of the Company’s response further establishes the Company’s animus toward Marcus Hedger.

The Company’s response to this cross-exception is a patchwork of unrelated distortions of the record. The Company continues to claim that Peter Schmidt was in the plant for “up to an hour” (Co.Brief. p. 12), although that is contrary to the Judge’s express finding and unsupported by any credible evidence (ALD, p. 7, note 12). The Company claims that Pete Schmidt was riding his bicycle in the plant (Co.Brief, p. 12), although it is undisputed that Schmidt walked his bike (Tr. 81; see also G.C.Exh. 3 (Schmidt, Kuszniarz, Nina, Barkho); G.C.Exh. 4 (Schmidt, Barkho,); C.P.Exh. 1, p. 6 (Hedger)). The Company claims that its actions were warranted by its “Confidentiality, Secrecy and Invention Agreement” policy, although that policy (Resp. Exh. 8, p. 2) has nothing to do with the events of August 12, 2010. The Company claims the Union had agreed to this policy, although the record evidence establishes that the Union objected to it (Resp. Exhs. 7, pp. 2-3, and 8). The Company claims that Bob Schmidt “did not deny that he acknowledged to the Company that he was aware of the Company’s stressed emphasis on confidentiality” (Co.Brief, p. 12), while in fact Schmidt testified he was unaware of any confidentiality policy (Tr. 143). Finally, the Company claims that there was no basis to claim that its disproportionate response had its “genesis” in its

animus toward Marcus Hedger, despite the substantial evidence that the Company was admittedly watching Marcus Hedger, and looking for a reason to terminate him.

VII. Charging Party's Cross-Exception 9: Terminating Marcus Hedger for Something His Foreman Had Approved Further Established the Company's Animus

It is undisputed that Marcus Hedger told the Company on August 23, 2010, that Second Shift Foreman Bob Schmitt had given him permission to walk Pete Schmidt through the plant (C.P.Exh. 1, pp. 6-7; Tr. 82-83). Bob Schmitt testified that he told the Company on August 17 and 30, 2010, that he gave Marcus Hedger permission to walk Pete Schmidt through the plant (Tr. 126-127, 129-130, 133-134). In addition, Bob Schmitt told Marcus Hedger after Hedger was sent home on August 18, 2010, that he had told the Company he gave Hedger permission to escort Pete Schmidt through the plant, and the Company was upset about that (Tr. 82, 133).

Despite this testimony, the Company claims that it never knew that Bob Schmitt gave Marcus Hedger permission to walk the visitor through the plant. The Judge did not resolve that issue, finding that the Company's admitted threat to Bob Schmitt that his job could depend on his answers to their questions (Tr. 317-318, 360) could have affected what Schmitt told the Company (ALJD, p. 4, n. 6). At the least, the Company was undisputably aware from Marcus Hedger that Bob Schmitt had given him permission to walk Pete Schmidt through the plant.

VIII. Charging Party's Cross-Exception 10: What Did Bob Kester Say to Marcus Hedger in Connection with the Death of Linda Gonzalez's Husband?

Bob Kester and Marcus Hedger had different recollections of what Kester said when he informed Hedger on June 11, 2010, that Linda Gonzalez's husband had died suddenly that day. Hedger had just filed two grievances, protesting Bill Johnstone's threat to Hedger in negotiations on June 4, 2010 and the Company's failure to remove the anti-Hedger posting from the Company's

bulletin board. Marcus Hedger testified that Kester came up to him and told him three times, speaking slowly and deliberately, that Linda Gonzales's husband's death happened "suddenly, and unexpectedly, and without warning." Kester then added, "I hope this puts your future here in perspective," and walked away (Tr. 33-35).

Whichever recollection is credited, the Judge correctly found that, Kester's statement reflected the Company's animus toward Marcus Hedger for his Union activities (ALJD, p. 7, lines 19-24). The Judge generally credited Marcus Hedger's testimony when there was a conflict in the testimony (see ALJD, p. 3, lines 37-40). In this one instance, the Judge credited Kester's testimony over Hedger's, without explanation (ALJD, p. 7, n. 11).

CONCLUSION

For all of these reasons, Charging Party respectfully asks the National Labor Relations Board to deny the Company's Exceptions; to grant the Union's Cross-Exceptions; and to enter the Judge's Recommended Order, amended as described above.

Respectfully submitted,



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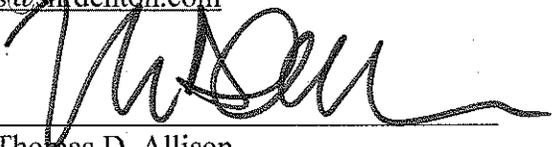
March 7, 2012

CERTIFICATE OF SERVICE

The undersigned counsel for Charging Party certifies that he electronically filed the foregoing Brief in Reply to the Answering Brief of Respondent 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 March 7, 2012:

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