

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

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*
HOWARD INDUSTRIES, INC., *
TRANSFORMER DIVISION *
*
and *
*
INTERNATIONAL BROTHERHOOD OF *
ELECTRICAL WORKERS, LOCAL *
UNION 1317 *
* * * * *

**Case Nos. 15-CA-18637
 15-CA-18772**

General Counsel's Exceptions to the Decision of the Administrative Law Judge

August 24, 2009

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NOW COMES the General Counsel, through the undersigned, in the above captioned matter and files these exceptions to the Decision issued by the Administrative Law Judge on July 28, 2009, and transferred to the Board on the same date. The General Counsel excepts to the following:

Exception No. 1

The ALJ erred by not making a finding whether Respondent threatened the steward, James Chancellor, with suspension (Findings located on page 2 of the ALJ’s Decision; relevant Transcript page nos. 27-30, 45-46, 84-85, 97, 101, and 128-33).

Exception No. 2

The ALJ erred by not concluding that Respondent violated the Act by threatening the steward, James Chancellor, with suspension (Findings located on page 2 of the ALJ's Decision; relevant Transcript page nos. 27-30, 45-46, 84-85, 97, 101, and 128-33).

Exception No. 3

The ALJ erred by concluding that Respondent acted within its rights by instructing a steward, James Chancellor, to close (and remove) a notebook he was using during an investigatory interview (Findings located on page 2 of the ALJ's Decision; relevant Transcript page nos. 27-30, 45-46, 84-85, 97, 101, and 128-33).

Respectfully submitted this 24th day of August, 2009.

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Certificate of Service

I hereby certify that I have served a copy of the foregoing Exceptions on the following parties, by email:

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/s/ Joseph A. Hoffmann, Jr.
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**Case Nos. 15-CA-18637
 15-CA-18772**

**General Counsel’s Memorandum in Support of Exceptions filed by the International
Brotherhood of Electrical Workers, Local Union 1317**

NOW COMES the General Counsel, through the undersigned, who file this
Memorandum in Support of its Exceptions to the Decision of the ALJ in the matter noted above.

I. Procedural History

On December 22, 2008, the General Counsel, through the Acting Regional Director of Region 15, issued the Consolidated Complaint in the instant matter. The Consolidated Complaint alleged that Respondent, Howard Industries, Inc., Transformer Division, violated the Act by threatening James Chancellor, a steward and employee, with discipline while he was representing another employee.¹

On January 2, 2009, Respondent filed its Answer.

¹ The Consolidated Complaint contained another ULP allegation that is not relevant to these Exceptions.

On July 6, 2009, a hearing on the matter was held before Administrative Law Judge George Carson, III, in Laurel, Mississippi. After hearing the evidence, the ALJ issued a bench decision found at pages 128 through 133 of the transcript.²

On July 28, 2009, the ALJ issued his formal Decision transferring the case to the Board.³

II. The Relevant ULP Allegation

The ULP allegation at issue in these Exceptions is Paragraph 7 of the Consolidated Complaint, which alleges:

On or about April 7, 2008, Respondent, by Brent Stringer, at Respondent's facility, threatened employees [James Chancellor] with discipline for using notes while representing other employees [Dasmeon Caraway] during investigatory interviews.

III. The Relevant Facts⁴

As noted by the ALJ in his decision, the incident at issue occurred on April 7, 2008. Dasmeon Caraway, a painter, was directed to report to Respondent's Human Resources office. He requested the presence of a union steward, specifically James Chancellor. When Chancellor arrived, he and Caraway met privately to discuss the possible reasons Caraway was being called into the office, including Caraway's failure to use a "breakdown pad" during a particular procedure. During the private discussion, Chancellor wrote in his notebook Caraway's assertion that, "I never was actually trained to do that job. I only filled in when he needed me. I'm actually a pay rate 17-painter."

² Cites to the transcript will be noted as "Tr. {page no.}."

³ Cites to the ALJ's Decision will be noted as "Dec. p. #, ln. #."

⁴ As determined by the ALJ, see page 2 of his Decision.

The investigatory interview was conducted by Brent Stringer, Human Resources Generalist. Also present was Rufus McGill, Caraway's supervisor. Stringer asked Caraway various questions about what Caraway did on the job in question. Eventually, at a point during the interview Chancellor tapped his notebook indicating the note described above. Caraway read the note aloud. Stringer, believing that Caraway was reading the note, asked Chancellor to close the notebook. Stringer did not ask to see the note. Chancellor did not immediately close the notebook, but instead questioned the instruction claiming he needed the notebook "as a tool" to represent Caraway. Both Caraway and Chancellor claim Stringer threatened Chancellor with suspension if he did not close and then remove the notebook. Stringer denies making any threat. The ALJ declined to make a finding on the issue, asserting that it was unnecessary given his conclusions. Stringer then instructed Chancellor to remove the notebook from the office. Chancellor complied. The meeting then continued but ended shortly thereafter.

In Paragraph 7 of the Consolidated Complaint, the General Counsel alleged that Stringer threatened Chancellor with discipline for "using notes" while representing Caraway, which violated the Act.

IV. The Relevant ALJ Findings

The ALJ dismissed Paragraph 7 of the Consolidated Complaint concluding that Respondent did not violate the Act. In making his decision, the ALJ noted that the meeting in question was an investigatory interview as opposed to a grievance meeting (Dec. p. 2, ln. 38-39). Consequently, according to the ALJ, Respondent (Stringer) was within its rights to hear Caraway respond in his own words rather than read from a script (Dec. p. 2, ln. 39-40). Because of this

finding, the ALJ did not make a finding on whether Respondent threatened Chancellor with suspension, or whether the threat, if made, violated the Act (Dec. p. 2, ln. 30-35).

Further, in reaching his conclusion, the ALJ noted that Steward Chancellor was not prohibited from using or taking notes, that Caraway completed the statement Chancellor wanted him to make, and that Chancellor was allowed to use notes in subsequent meetings (Tr. 129-30, Dec. p. 2). However, for the reasons explained more fully below, the ALJ erred.

V. Argument

The ALJ erred by, 1) not making a finding concerning whether Stringer threatened Chancellor; 2) not concluding that the threat violated the Act; and 3) concluding that Respondent acted within its rights by instructing Chancellor to close (and remove) the notebook.

The basis of the ALJ's decision is that during an investigatory interview an employer is within its rights to hear the employee's own account of the events. Consequently, if that right is being interfered with by another employee, an employer is within its right to instruct that employee to stop his interference. However, while it might be true that an employer is within its right to hear the employee's own account of the events, in the current matter Respondent was not deprived of that right. Consequently, Respondent was not within its right to either instruct Chancellor to close (or remove) his notebook, or to threaten him with suspension.

A. Respondent's Rights Versus the Employees' Rights Under Weingarten

It is undisputed that an employee is entitled to assistance from another employee/steward during an investigatory interview, with some of the functions of that other employee/steward being to help clarify the facts, raise extenuating circumstances, or suggest other employees who may have knowledge of them. See *NLRB v. Weingarten*, 420 US 251 (1975), and its progeny.

In its *Weingarten* decision, in response to the employer's argument that union representation during an investigatory interview is unnecessary because a decision as to employee culpability or disciplinary action can be corrected after the decision to impose discipline has become final, the Supreme Court noted, "[a]t that point, however, it becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished." *Id.* at 263. In the current matter, Steward Chancellor simply fulfilled his duties/rights under *Weingarten* by using his notes to remind Caraway to assert the extenuating fact that Caraway had not been trained to do the job about which he was being questioned.

Before the interview, Chancellor and Caraway discussed the matter and Caraway pointed out to Chancellor that he had not been trained to perform the particular job he was given to do – and for which he might be disciplined. Chancellor recognized the lack of training as an extenuating fact that should be taken into consideration by Respondent during its investigation. Thus, during the meeting when Stringer asked about instructions given to Caraway by his supervisor, Chancellor identified it as the perfect time for the information to be presented. After Caraway answered Stringer's question, Chancellor tapped on the notebook to remind Caraway about what Caraway told Chancellor earlier – that he had not been trained for that particular job. Consequently, Chancellor was merely fulfilling his role protected by *Weingarten* when he tapped his notebook prompting Caraway to explain that he had not been trained.

On the other hand, and as Respondent will doubtlessly point out, while it is undisputed that stewards have a role during the investigative process, it is also undisputed that an employer is "free to insist that he is only interested, at that time, in hearing the employee's own account of

the matter under investigation.” *Id.* at 260. Consequently, to justify its actions Respondent claimed that Caraway was reading a “script” and that Respondent, as a result, was deprived of its right to hear Caraway’s own account. But this is simply not true.

First of all, calling twenty-three words on a notebook page a “script” mischaracterizes the situation. It suggests that Caraway simply recited a prepared generally-worded statement in lieu of providing the information sought by Respondent during the interview. But even Stringer admits this is not true. Stringer admitted that, before the notebook was put to use the one time it was used toward the end of the interview, Caraway was answering questions and doing so without the use of the notebook (Tr. 85, 101).

Second, the statement was, in fact, Caraway’s *own account* of events. Stringer admitted he “didn’t care if [Caraway] looked at notes or had counsel from Mr. Chancellor. I just simply asked that he say it in his own words” (Tr. 97). But even if Caraway were reading words written on a notebook page, and even if those words were written by someone else, the words expressed a point that Caraway himself raised. In other words, it was Caraway’s *own account* of events.⁵ That it was Caraway’s own account of events is evident from the facts because Chancellor would not have known that Caraway had not been trained for the job in question if Caraway had not told him.⁶ Moreover, if Stringer had bothered to ask either Chancellor or Caraway what Caraway was looking at, instead of just demanding that the notebook be closed (and removed), Stringer would have known that it was Caraway’s own account.

Finally, and perhaps most importantly, it should be noted that Caraway was not answering a question when he allegedly *read* the statement. Both Chancellor and Caraway testified that the statement in question was preceded by Caraway asking permission to make a

⁵ Note that *Weingarten* uses the phrase “own account” and not “own words.”

⁶ Note that Respondent has over 2,000 employees (Tr. 13) and Caraway did not even know Chancellor’s name before that day (Tr. 44).

statement (Tr. 27-28, 46). Even Stringer admitted that Caraway, when allegedly reading the notebook page, was not necessarily answering a question but, rather, was providing “extra information” (Tr. 84-85). Stringer also admitted he was interested not only in Caraway’s responses to the questions put to him, but also any additional information Caraway had to offer (Tr. 84). Consequently, not only was Respondent not deprived of anything it had a right to under *Weingarten*, but, thanks to Chancellor, was actually getting additional information it desired – exactly as envisioned by *Weingarten*.

The instant case is not the first instance in which the Board has had to balance the two divergent interests protected by *Weingarten* – an employer’s right to investigate a matter versus an employee’s right to assistance. In *Southwestern Bell Telephone Company*, the Board construed these divergent rights to mean that the Supreme Court “intended to strike a careful balance between the right of an employer to investigate the conduct of its employees at a personal interview, and the role to be played by a statutory representative who is present at such an interview.” 251 NLRB 612, 613 (1980), enforcement denied by *Southwestern Bell Telephone Company v. NLRB*, 667 F 2d 470 (5th CA 1982). In that case, the Board found that an employer who told a steward to remain silent during an investigatory interview deprived the employee of his rights under *Weingarten*. By instructing the steward to remain silent, according to the Board, the employer deprived the steward of his ability to “assist the employee,” to “clarify the facts,” and to “suggest other employees who may have knowledge of them.” *Id.*

However, the Fifth Circuit refused to enforce the Board’s order. In refusing to do so, the Fifth Circuit found that the instruction to the steward to remain silent during the interview did not deny the employee his rights under *Weingarten* because the steward was also told that after the employer completed the interview the steward would be free to make any additions,

the employee's *Weingarten* rights were protected because the steward was present at the investigatory interview and was allowed to assist the employee, to clarify the facts, and to suggest other employees who may have knowledge of them. *Id.*

Respondent might look to this case to support its position that it was within its rights to instruct Chancellor to close (and remove) his notebook, claiming that Chancellor would have had his chance to present his case later during the meeting. However, Respondent's reliance on this case would be misplaced because the Fifth Circuit's reasoning in the *Southwestern Bell* case is inapplicable to the facts of the current case.

In finding the employer did not violate the Act, the Fifth Circuit noted that, while the steward was told to not speak during the interview, he was *also* assured he would have the opportunity to ask questions before the end of the meeting and, at the conclusion of the interview, was invited to do so.⁷ This is not the situation in the current matter. While an employer might be within its rights to have a steward hold all questions/statements until the end of the interview, it is incumbent upon the employer to advise the steward of this. Otherwise, it stands to reason the steward will interject when he feels it is appropriate – as Chancellor did. However, in the current matter, Chancellor was not so advised.

Instead, according to the *unrebutted* testimony of Chancellor, the only restraint Respondent places on stewards' conduct during investigatory interviews is that they are not to interact with the managers conducting the interview (Tr. 29). Further, stewards are allowed to interact with the employee without limitation (Tr. 30). Moreover, as noted above, Stringer admitted he "didn't care if [Caraway] looked at notes or had counsel from Mr. Chancellor"

⁷ Though, when given the opportunity before the interview was concluded, the steward declined. *Southwestern Bell*, 667 F 2d at 473.

during the interview (Tr. 97). Thus, when Stringer instructed Chancellor to close and then remove his notebook, but was not told he would have an opportunity to speak later during the meeting, it quite reasonably appeared to Chancellor, as it should to the Board, that Caraway was being deprived of Chancellor's assistance. If Respondent told Chancellor to hold his questions/statements until the end of the interview and assured him he would then have the opportunity to have his say, and Chancellor nevertheless encouraged Caraway to make the statement when he did, then perhaps Respondent could argue that its right to conduct its investigation was being interfered with. But since that is not what happened, Respondent has no basis on which to assert that Chancellor wrongfully interfered with its investigation.

B. The Threat of Discipline

Given the above, Respondent violated the Act when it threatened Chancellor with suspension. It has long been a violation of the Act for an employer to threaten to discipline employees who engage in protected concerted activity – even if the employer has a good faith, though erroneous, belief that the employees engaged in wrongful conduct. *Publix Supermarkets*, 347 NLRB No. 124 (2006), applying *Burnup and Sims*, 379 US 21 (1964). In *Burnup*, the Supreme Court held that:

Section 8(a)(1) is violated if it is shown that the [disciplined] employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the [discipline] was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.

Id. at 23. The Court found that this rule appropriately guarded the immunity of protected activity; otherwise, the example of employees who are discharged on false charges would or might have a deterrent effect on other employees. *Id.* Consequently, in the current case Respondent violated

the Act when Stringer threatened Chancellor with discipline for using his notebook while assisting Caraway.

While there is a dispute among the witnesses whether Stringer threatened Chancellor – Chancellor and Caraway say yes, Stringer says no – the evidence more strongly suggests the threat was made. In terms of credibility, on balance Stringer’s and Chancellor’s testimony cancel each other out; neither appeared to be lying but both have self-serving reasons to lie. Caraway, on the other hand, does not; and Caraway testified that Stringer threatened Chancellor with suspension.

While Respondent would almost certainly argue that Caraway was biased against Respondent because he was fired, Respondent provided no evidence of such bias other than its assertion. Moreover, reason suggests that, even if Caraway were biased against Respondent, it did not affect his testimony because Caraway testified in ways that were beneficial to Respondent and detrimental to the General Counsel and the Union. First, Caraway testified that he read the statement even though Chancellor, the Union and the General Counsel maintained that he did not (Tr. 46). Second, Caraway’s testimony that the threat was made after Chancellor questioned the instruction to close the notebook conflicts with Chancellor’s testimony that the threat was made immediately following the instruction, before Chancellor could even respond (Tr. 46). If Caraway were motivated to lie to hurt Respondent, or to collude with Chancellor, his testimony would have been markedly different.⁸ Consequently, Caraway should be believed when he testifies that Stringer threatened Chancellor. However, because Chancellor was not engaged in misconduct, Stringer had no lawful reason to threaten Chancellor with suspension and Respondent violated the Act.

⁸ Moreover, it should be noted that Caraway appeared only pursuant to a subpoena.

If Respondent truly were concerned that Chancellor was feeding Caraway an answer, the proper course would have been to instruct Chancellor to stop showing Caraway his notebook and then explain that he would have the opportunity later to bring up any facts he deemed pertinent. Instead, Stringer instructed Chancellor to close, then remove, his notebook. As Chancellor pointed out (and as Stringer admits), Chancellor explained that the notebook was a tool he was using to assist Caraway. Given this, it was prudent for Chancellor to question and verify Stringer's instruction before complying. Once Stringer insisted that Chancellor close and/or remove his notebook, Chancellor complied.

In *Publix Supermarkets, supra*, the employer disciplined two employees who accompanied another employee to what they believed was an investigatory interview being conducted by the department head. Because of a misunderstanding by another supervisor, the department head subsequently came to believe the two employees lied about their reason for wanting to leave the work area and threatened the employees with discipline. The department head later concluded, and the employer conceded during the hearing, that the employees did not lie. The Board, citing *Burnup*, determined the employer violated the Act. Moreover, the Board found the employer to be in violation of the Act even though, as it turned out, the employer did not even have an obligation to allow the employees to attend the meeting because the meeting was not, in fact, an investigatory interview.

Applying the same *Burnup* analysis in the current case shows that Respondent similarly violated the Act. In the current case, Chancellor was engaged in protected activity, of which Stringer was well aware; Stringer threatened Chancellor for something he did (or did not do) while engaged in that protected activity; but, as explained above, Chancellor was not, in fact,

guilty of any misconduct. Consequently, Stringer's threat to suspend Chancellor violated the Act.

Conclusion

The ALJ erred in his decision. While it might be true that an employer is within its right to hear an employee's own account of events, in the current matter Respondent was not deprived of that right. The statement that Caraway read expressed a fact that Caraway thought was relevant to the matter being investigated. Moreover, the statement was not in lieu of an answer to a question put to him but, rather, was additional information. Additionally, Respondent was not deprived of its right to conduct the interview in its own way. While Respondent could have asked Chancellor to wait until the end of the interview to actively participate, Respondent did not do so. Therefore, because Chancellor did not engage in misconduct when he reminded Caraway to inform Stringer that he had not been trained, Respondent violated the Act when Stringer threatened Chancellor with suspension for doing so.

Signed this 24th day of August, 2009.

/s/ Joseph A. Hoffmann, Jr.

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Certificate of Service

I hereby certify that I have served a copy of the foregoing Memorandum in Support of

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