

**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 SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE
LAW JUDGE’S DECISION**

Pursuant to Section 102.48 of the Board’s Rules and Regulations Respondent Fort Dearborn Company (“Fort Dearborn” or the “Company”) submits this brief in support of its Exceptions to the Decision of Administrative Law Judge Arthur Amchan (“ALJ”)¹

1. Statement of the Case

A. The Unfair Labor Practice Charges.

On September 30, 2010, the Charging Party, International Brotherhood of Teamsters Graphic Communication Conference, District Council Four (the “Union”) filed an unfair labor practice charge alleging that the Company had violated Sections 8(a)(1), (3) and (5) of the Act as follows:

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, and exhibits introduced at that hearing by Respondent, General Counsel and the Charging Party shall be made, respectively, as follows: “ALJ, p. __” “Tr. __” “R Ex. __” “GC Ex __” and “CP Ex __”

- a. On or about August 18, 2010, the Respondent violated the Weingarten rights of bargaining unit employee Marcus Hedger.
- b. On or about August 18, 2010, the Respondent suspended Mr. Hedger as a result of his protected activity on behalf of the Union that represents him.
- c. On or about September 14, 2010, the Respondent terminated Mr. Hedger as a result of his protected activity on behalf of the Union.
- d. Since on or about August 30, 2010, the Respondent has refused to provide relevant information requested by the Union related to the suspension and termination.” (GC Ex 1a)

On November 24, 2010, the Union filed an amended charge from which it dropped its claimed violation of “Weingarten rights” and to which it added two new allegations: that Respondent, on June 4, 2010, (a) “threatened closer scrutiny of Marcus Hedger because of his union activities,” and (b) “threatened to terminate Marcus Hedger because of his union activities.” (GC Ex 1c)

B. The First Complaint.

On December 10, 2010, the Regional Director issued a Complaint and Notice of Hearing (the “First Complaint”) alleging that Respondent violated Sections 8(a)(1), (3) and (5) of the Act by (1) threatening on June 4, 2010 to “fire employees because of their Union and protected concerted activities,” (2) threatening on June 4, 2010 to “watch employees with closer scrutiny because of their Union and protected activities,” (3) suspending its employee Marcus Hedger on August 18, 2010, (4) discharging its employee Marcus Hedger on September 14, 2010, and (5) failing and refusing to furnish the Union with information requested by it on August 30, 2010. (GC Ex 1e)

C. Order Approving Partial Withdrawal of Some Charges and Deferral of Remaining Charges to Arbitration.

On January 14, 2011 the Regional Director issued an Order (1) approving the Union's withdrawal of that portion of the Union's amended charge alleging refusal by Respondent to provide requested information, (2) deferring the remaining allegations contained in the First Complaint to arbitration, and (3) dismissing the First Complaint. (GC Ex 1j)

D. Order Revoking Deferral to Arbitration.

On August 2, 2011, the Regional Director issued an Order Revoking Deferral stating that, based on Respondent's action in withdrawing "from the arbitration proceeding to which the Regional Director had deferred...it is hereby ordered that the deferral of the outstanding issues in this matter be revoked and normal processing of the case be resumed." (GC Ex 1l)

E. The Second Complaint and Respondent's Answer.

On August 8, 2011, the Regional Director issued another Complaint and Notice of Hearing (the "Second Complaint") based upon the charges filed on September 30 and November 24, 2010. (GC Ex 1m) At the beginning of the Second Complaint, the Regional Director reiterated his August 2 Order Revoking Deferral and direction that "normal processing of the case be resume." But for that and the deletion of the withdrawn 8(a)(5) allegations, the Second Complaint is identical to the First Complaint.

At the outset of its timely Answer to the Second Complaint, Respondent explicitly denied the "legality and legitimacy" of the Regional Director's order for resumption of "normal processing" of the case and asserted that the Complaint should, instead, be dismissed in its

entirety because of the Union's refusal to arbitrate contractual matters in accordance with the Regional Director's August 2, 2011 deferral order. (GC Ex 1o)

F. The Hearing and the ALJ's Decision.

A hearing on the Second Complaint was conducted by Administrative Law Judge Arthur Amchan in a proceeding held in Chicago, Illinois, on October 13 and 14, 2011. On November 25, 2011, all of the parties filed their briefs with the ALJ. Five days later, on November 30, the ALJ issued his decision. In his decision, the ALJ first rejected Respondent's arguments regarding the impropriety of the Regional Director's order for resumption of "normal processing" of the case together with Respondent's assertion that the Complaint be dismissed in its entirety because of the Union's refusal to arbitrate contractual matters in accordance with the Regional Director's August 2, 2011 deferral order. Thereafter, the ALJ's decision (1) dismisses the allegation that on June 4, 2010 Respondent threatened to fire employees because of their Union and protected concerted activities, (2) dismisses the allegation that on June 4, 2010 Respondent threatened to watch employees with closer scrutiny because of their Union and protected concerted activities, (3) dismisses the allegation that Respondent violated the Act by suspending Marcus Hedger on August 18, 2010, but (3) concludes that Respondent violated Sections 8(a)(1) and (3) by terminating Hedger's employment on September 14, 2010.

2. Specification of Questions Involved and to be Argued

A. Whether the ALJ erred in upholding the Regional Director's order that "normal processing of [this] case be resumed" and rejecting Respondent's assertion that the case be dismissed instead. (Respondent's Exceptions 1 and 2) .

B. Whether the ALJ erred in concluding that Respondent violated the Act by discharging Marcus Hedger on September 14, 2010. (Respondent's Exceptions 3-15)

3. Argument

A. **The Administrative Law Judge Erred in Upholding the Regional Director's August 2, 2011 Order that "Normal Processing of [this] Case be Resumed" and Rejecting Respondent's Assertion That the Case Should Be Dismissed.**

In its August 19, 2011 Answer to the Second Complaint, Respondent set forth what the ALJ referred to as an "affirmative defense" reading as follows:

"I

Respondent denies the legality and legitimacy of the Regional Director's order that "normal processing of [this] case be resumed." Respondent further asserts that the Complaint should be dismissed because:

(a) Respondent and the Union have a collective bargaining relationship spanning many years and, at all times relevant to this proceeding, were parties to collective bargaining agreements providing a "Procedure for Disputes" culminating in binding arbitration of "any disagreement or dispute...arising out of the application or interpretation of this contract."

(b) The alleged actions of Respondent referred to in Paragraphs V(a), VI(a), and VI(b) of the Complaint were the subjects of grievances filed by Respondent's employee Marcus Hedger on June 11, August 19, and September 10, 2011 (the "Hedger Grievances").

(c) On January 14, 2011, by order of the Regional Director, a complaint containing allegations identical to those set forth in the Complaint (plus additional allegations raised in unfair labor practice charges that had been withdrawn with the Regional Director's approval) was dismissed and the allegations deferred to arbitration.

(d) On February 15, 2011, by mutual agreement between counsel for Respondent and counsel for the Union, Professor Martin H. Malin of Chicago-Kent College of Law was informed by letter from counsel for Respondent that he had been selected "to hear and decide certain unresolved grievance(s) alleging violation(s) of a collective bargaining agreement to which [Respondent and the Union] are parties.

(e) At no time since January 14, 2011 did Marcus Hedger or the Union file or submit any grievances alleging that Respondent violated the collective bargaining agreement by conduct alluded to in Paragraphs V or VI of the Complaint or on or about the dates referred to therein.

(f) At the opening of the grievance hearing scheduled by the arbitrator for June 13, 2011, Arbitrator Malin asked the parties to identify the issues he had the authority to hear and resolve. Respondent replied that those issues were whether or not the Company violated the collective bargaining agreement as alleged in the Hedger Grievances. The Union, however, insisted that the arbitrator also consider and resolve “NLRA determinations” as to whether or not Respondent violated Sections 8(a)(1) and (3) of the Act.

(g) Respondent vehemently objected to the Union’s claim that the arbitrator had the jurisdiction or authority to rule on the Union-asserted “NLRA determinations” or that the arbitrator do so.

(h) Respondent refused to participate in the arbitration proceeding and, by notice dated July 11, 2011 withdrew from that proceeding, solely because of the Union’s demand that the arbitrator consider and resolve issues other than whether or not the Company violated the collective bargaining agreement as alleged in the Hedger Grievances.” (GC Ex 1o)

Respondent introduced evidence in support of the factual assertions set forth in Section I of its Answer. (R Exs 1-3) Neither General Counsel nor the Charging Party offered any evidence contradicting those assertions.

Among other things, this evidence reveals that, after a lengthy off-the-record conference during the arbitration proceeding, the arbitrator noted, *inter alia*, that he had inquired of Union counsel:

“as to whether the union might be willing to withdraw the statutory issues from the proceeding as independent and simply argue that I should look to the statute in interpreting the contract, and [Union counsel] indicated that the union was not prepared to do that.” (R Ex 2, p. 22)

This evidence also reveals that Respondent did not demand that the Union waive its claim that the arbitrator had authority to rule on the statutory issues, and indeed made it clear that the

Company was ready and willing to proceed with a hearing on all of the contract violation issues raised in the grievances without prejudice to the Union's right to attempt to pursue the statutory issues in front of the arbitrator or the NLRB after the arbitrator had ruled on the contract issues. (*Id.*, 27-28) The Union made it clear, however, that it was not willing to proceed in that manner. (*Id.*, 31-33)

The evidence shows that the solution finally adopted by the arbitrator to resolve the impasse was to have the parties brief the issue of his authority with the understanding that, should the arbitrator decide he had the authority to resolve the statutory issues raised by the Union, the Company would have the opportunity to challenge that decision in court. (*Id.*, 24) Although the Company initially agreed to proceed in that manner, a very recent decision of the U.S. Court of Appeals for the 7th Circuit holding that a party who submits the legal issue of arbitral authority to an arbitrator thereby waives its right to challenge such authority compelled the Company to withdraw its agreement. (R Ex 3) citing *Roughneck Concrete Drilling & Sawing Co. v. Plumbers' Pension Fund, Local 130, UA*, 640 F.3d 761, 766-767(7th Cir. 2011)

Given these undisputed facts, Respondent submits that the principles enunciated by the Board in *United Technologies*, 268 NLRB 557 (1984) make it clear that the Regional Director erred in directing that the case be submitted for "normal processing" by the ALJ and that the Complaint should have instead been dismissed. The Regional Director's own deferral order advised Respondent and the Union alike that the Board's *United Technologies* policy

"requires that a charge be dismissed if the charging party fails to promptly file and attempt to process a grievance on the subject matter of the charge....If the Charging Party fails either to promptly file or submit the grievance to the grievance arbitration process, or declines to have the grievance arbitrated if it is not resolved, I will dismiss the charge."
(GC Ex 1j)(emphasis added)

Without any discussion or explanation, the ALJ simply ignored Respondent's documented claim that the Union quite clearly "decline[d] to have the grievance[s] arbitrated" in this case.

In its brief to the ALJ, Respondent made specific reference to a situation discussed in a 2005 General Counsel advice memo that bears a meaningful resemblance to this case. In the circumstances presented in *Veolia Water*, 2005 WL 2429739 (NLRBGC Advice Memo., 2005) the Union's charges were also the subject of grievances that had been filed; in both cases the Regional Director invoked the Board's *United Technologies* deferral policy; in both cases the charged-party employer agreed to arbitrate the grievances; in both cases the employer acknowledged that the grievance was properly before the arbitrator; in both cases the Union asked the arbitrator to resolve the merits of its unfair labor practice charges; and in both cases the employer steadfastly maintained that the only issues properly before the arbitrator were the alleged contract violations and that the arbitrator "had no authority to expand upon his contractual jurisdiction to resolve the unfair labor practice issue[s]." (*Ibid.*)

When confronted with the employer's opposition at arbitration, the union in the cited case withdrew its contract claim and asked the arbitrator to rule solely on the statutory issues raised by its unfair labor practice charge. The fact that the Union in the instant case simply refused to proceed to arbitration on the contract issues is not a material distinction. Here, the Regional Director announced that the surviving allegations contained in the unfair labor practice charges "appear to be covered by certain provisions of the collective bargaining agreement," and that it was therefore "likely that such allegations may be resolved through the grievance/arbitration procedure." (GC Ex 1j) Here, as in the *Veolia Water* case, the Union was specifically warned by the Regional Director that if it "fails either to promptly file or submit the grievance to the grievance/arbitration process, or declines to have the grievance arbitrated if it is not resolved, I

will dismiss the charge.” (*Ibid.*)(emphasis added) By refusing to proceed to arbitration unless the Company agreed to its inappropriate demands,² the Union completely thwarted the grievance/arbitration process. By refusing to proceed to arbitration on the *grievances* unless the arbitrator assumed jurisdiction over and decided the unfair labor practice charges, the Union most assuredly declined to have the *grievances* arbitrated as much as if it had walked away from the arbitration hearing altogether.

Acknowledging Respondent’s claim that the Regional Director’s revocation of deferral and direction that the case be resumed before the ALJ was improper and that the Complaint should be dismissed because the arbitration proceeding was aborted by “the Union’s insistence that the arbitrator decide whether [Respondent] violated the Act, as opposed to simply determining whether Respondent violated the collective bargaining agreement” (ALJ p. 1-2), the ALJ rejected it with comments demonstrating that he (1) never read Respondent’s brief, (2) never read the Regional Director’s order of deferral, (3) never bothered to consider whether, by refusing to arbitrate the contract issues despite the arbitrator’s assurances that he would “look to the statute in interpreting the contract do so,” the Union effectively declined to have the grievances arbitrated, and (4) does not understand the *United Technologies* deferral policy at all:

“...*United Technologies* is completely irrelevant to the instant case. There the Union refused to go to arbitration. I would also note that the Board in *United Technologies* dismissed the complaint *provided* that the matter either be resolved or be submitted to an arbitrator. Thus, to dismiss this case and sent [sic] it back to the arbitrator would, at a minimum, unduly delay resolution of the merits of this case.” (ALJ p. 2, footnote 1, emphasis in original)

* * * * *

² “Of course, since arbitration is consensual, the Union could not compel the Employer to agree to arbitrate the alleged [statutory] violation.” (2005 WL 2429739, footnote 6)

“Since the case on its face involves a claim of employer animosity to Hedger’s exercise of protected rights, deferral to arbitration would only have been appropriate if the Arbitrator would have determined whether Hedger would have been discharged in the absence of his activities as union steward.²” (ALJ p. 2, lines 14-17)

“It strikes me that the arbitrator could have made such a determination by reference to Article 26.2 of the parties’ collective bargaining agreement, G.C. Exh 6, which forbids disciplinary action against a shop steward for performing his normal duties. However, one cannot determine whether the Arbitrator would have applied the standards applied by the Board in deciding a Section 8(a)(3) case due to Respondent’s refusal to go forward with the arbitration.” (ALJ p. 2, footnote 2)

For the reasons set forth above, Respondent submits that the ALJ erred in rejecting Respondent’s contentions with respect to the Regional Director’s order that normal processing of this case be resumed, and that this case should be dismissed in its entirety.

B. The Administrative Law Judge Erred in Deciding that Respondent Violated the Act by Discharging Marcus Hedger.

Undisputed Facts Regarding Respondent

Fort Dearborn operates 10 manufacturing facilities in the United States and Canada where it produces decorative labels for metal and plastic containers which it sells to its customers in the food, beverage, household products, paint, personal care and spirits industries. (Tr. 150, 152, 161) Respondent is, by far, the largest producer of these labels. (Tr. 162)

The Fort Dearborn plant in Niles, Illinois has 600 active customers for whom it produces labels. (Tr. 152) At any given time, one customer may have as many as 5,000 different labels in use that it periodically orders from Respondent. When customer orders are received, the Employer’s layout department downloads the relevant labels from the Employer’s computer system and lays them out in such a way as to maximize the number of labels being produced at a

time on each sheet produced off Fort Dearborn's multi-color presses. Each sheet produced contains many different labels, often those of many different customers. The Employer's goal is to have the longest possible uninterrupted production runs³ of sheets that contain the least amount of dead space. To accomplish this goal, when assembling the forms for sheets to be run on the presses Fort Dearborn's layout department is regularly required to simultaneously juggle label configurations, press color capabilities, order quantities, and customer target delivery dates. It is undisputed that the ability to achieve that goal differentiates the Company from and makes the Company far more cost efficient than its competitors. (Tr. 152-157, 257; R Ex 5)

Nor is the uniqueness of Fort Dearborn's techniques limited to layout and assembly of sheets. Once the sheets are produced, they are fed, 1,000 at a time, into multiple cutters that, using computerized settings, render the multiple label stacks into individual stacks. The individual stacks are, in turn, banded, scanned, photographed, and digitally analyzed by a system noted by the Company's customers as a "differentiator [between] us and our competition" and "unmatched in the industry" that prevents the wrong labels from being put into and sent out to customers.⁴ (Tr. 158-160, 258)

Recognizing that the Company's custom, "creative" labeling techniques have "unique aspects," the Company and the Union have negotiated and agreed upon an unusually comprehensive and forceful policy applicable to the employees at the Niles plant aimed at

³ The average production run at Fort Dearborn is 30,000 to 35,000 sheets on presses producing approximately 7,000 sheets per hour. (Tr. 158)

⁴ The importance of avoiding such errors -- known as "mixes" -- is vital. At best, the consequences of mixes involves recalls that could cost as much as millions of dollars; at worst, they pose the threat of physical harm, including death, to consumers, the customers' end users. (Tr. 159-160)

insuring that these techniques and other information be kept strictly confidential (Tr. 164-166; R. Exs 6-8):

“I hereby acknowledge that as part of my duties I have access to Confidential Information, secret and proprietary information and must use and/or disclose information learned or acquired through the performance of my job. All knowledge and information I acquire, including all employee lists, policies, procedures, customer information, supplier information, information technology, unpatented inventions, designs, know-how, trade secrets, technical information and data, specifications, blueprints, transparencies, test data, and additions, modifications and improvements thereon which are revealed to me (“Confidential Information”) shall for all time and for all purposes be regarded by me as strictly confidential and held in trust by me. Confidential Information does not include information which is or becomes generally available to the public other than directly or indirectly as a result of a disclosure by me. I will not reveal or disclose this Confidential Information or Company Inventions to any other person, firm, corporation, company or entity now or at any time in the future unless an Officer of the Company instructs me to do so in writing. This secrecy protection will continue even if I no longer am employed by the Company. I understand that if I reveal Confidential Information or Company Inventions to unauthorized persons I personally may be subject to penalties and lawsuits for injunctive relief and money damages as well as possible criminal charges by my employer.” (R. 8)

At the opening of each of the quarterly meetings regularly conducted by the Company’s CEO or Senior Vice President with all Fort Dearborn employees, this specific policy is projected as the “first slide” and it is emphasized that the information given to and learned by employees during the course of their employment must “stay within the four walls of Fort Dearborn.” (Tr. 168)

Respondent’s collective bargaining relationship with the Union spans many years. They have negotiated and been parties to successive separately bargained collective bargaining agreements with separate expiration dates covering three separate units of employees in the Niles plant. The negotiation and consummation of each of these many agreements has been

accomplished without any strikes; and though there have been grievances,⁵ all have been resolved by the parties themselves without having to resort to arbitration. (Tr. 150-151)

Undisputed Facts Regarding Marcus Hedger⁶

Marcus Hedger began working for the Employer in 2001. (Tr. 18) In August, 2010, he was performing the job of a second pressman on the second shift, 3:00pm to 11:00pm, at the Niles plant. (Tr. 20)

Sometime during the evening of August 12, 2010, Hedger was informed that there was a visitor waiting to see him at the entrance to the shipping department, located on the West side of the plant. (Tr. 47) Hester left his work area, located in the far East side of the plant, and went to the shipping department where he met a visitor, a friend of his by the name of Peter Schmidt. Schmidt was walking his bicycle. (Tr. 48-49, 50) Hedger proceeded to walk with his friend and the latter's bicycle through the entire plant. (Tr. 50) The plant was in full operation at the time of this walkthrough. (Tr. 173, 187, 189, 190) At 8:51pm, Hedger and Schmidt emerged from a door facing the alley abutting the East side of the plant where they shook hands and parted. The visitor then rode away in the alley on his bicycle. (Tr. 51, 170-172, 191)

On August 18, 2011, Hedger attended a meeting in a conference room at the Niles plant attended by Kester, William Samuels, Fort Dearborn's corporate Human Resources Director (Tr. 357), and Evelyn Vasquez, Human Resources Manager for the Nile plant. At Hedger's request, Union business agent Frank Golden also participated in this meeting via a speakerphone. (Tr.

⁵ The estimate of 50 or more during the last 9 years offered by General Manager of the Niles plant, Robert Kester, is un rebutted. (Tr. 151)

⁶ The facts set forth in this section are taken either from Hedger's own testimony, or from testimony of Company witnesses that was neither rebutted nor otherwise challenged by any of General Counsel's or the Union's witnesses.

197) 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 said, *inter alia*, that he did not remember bringing anyone into the Niles plant (Tr. 56), did not remember bringing someone into the building wheeling a bicycle, (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, 200)

On August 23, 2011, Hedger attended another meeting at the Niles plant with Kester, Samuels and Golden, this time in person rather than on the phone. (Tr. 59) At this meeting, Hedger admitted that he had a visitor on the evening in question whom he walked through the plant. (Tr. 62) However, despite repeated warnings that failure to answer the Company's questions could lead to discipline up to and including termination of employment, Hedger, on instructions from Golden twice declined to disclose the name of the visitor. (Tr. 61)

On September 7, 2011, Hedger was advised by telephone that his employment with Fort Dearborn was being terminated, effective September 14. A letter signed by Kester and dated the same day of that conversation confirmed his termination, effective September 14 and advised that "We have taken this action because we have concluded, after investigation, that you brought an unauthorized person into the plant on August 12, 2010 and that you did not respond truthfully to the Company's questions regarding events on that date of which you were fully aware." (GC 16)

Wright Line Analysis

The ALJ acknowledged at the outset of his *Analysis* that the legitimacy of Hedger's discharge must be determined in accordance with the standards established in *Wright Line*, 251

NLRB 1083 (1980) and subsequent cases interpreting them. (ALJ 6) As noted by the Board in *Faurecia Exhaust*, 353 NLRB No. 34 (2008):

“Under *Wright Line*, the General Counsel must first show by a preponderance of the evidence that protected activity was a motivating factor in the employer’s adverse action. If this is established, the burden shifts to the employer to show it would have taken the same adverse action even in the absence of the protected activity.

General Counsel’s Failure to Establish a Prima Facie Case Under *Wright Line*

General Counsel’s initial burden under *Wright Line* is to “prove the existence of protected activity, employer knowledge of that activity, and employer animus toward that activity.” *Rood Trucking Co, Inc.*, 342 NLRB No. 88 (2004) The ALJ’s own findings refute his conclusion that General Counsel sustained that burden.

The ALJ starts by stating the undisputed fact that Hedger was a union steward. He then cites hoary NLRB authority for the proposition that a steward’s activity in attempting to enforce a collective bargaining agreement is concerted activity protected by the Act.. And he ends with the factual assertion that Respondent was aware of his activities as a union steward. So far, so good. But the ALJ then makes a declaration that neither the record nor his own reading of it can sustain: that “the record is replete with evidence that establishes substantial animus on the part of management towards those activities.” (ALJ 6, lines 41-42)

The sum total of the evidence of management’s animus toward Hedger’s protected activity appears on page 7 of his Decision. The supposed plethora of evidence with which the record is replete consists of:

- (1) An incident described by the ALJ as having occurred “[i]n mid-2009 [when] Respondent attempted to unilaterally forbid smoking at the Niles plant;”

(2) Comments made in 2009 by Kester to Hedger during their discussion of news that the husband of another employee had died at a young age that “I know we don’t see eye to eye on everything” and “life is way too short for the bickering between he and I;” and

(3) Kester’s testimony that “I know I’ve had several conversations with Marcus regarding aggressive behavior towards management and other associates.”

Respondent submits that this evidence does not come close to establishing the requisite proof of employer animus toward protected activity required by *Wright Line* and its progeny.

According to Hedger himself, incident (1) was triggered by Respondent’s establishment of a no-smoking policy “in accordance with State law.” According to Hedger himself, it did not take place in 2009, but in 2008, “when the law changed,” at least two and one-half years before the events leading to his discharge. (Tr. 44, 45) Given the fact that the law in question, the *Smoke Free Illinois Act*, 410 ILCS 82/1 et seq. (effective January 1, 2008) mandated the prohibition of smoking inside Respondent’s plant *and* specifically vested Respondent with full authority to designate any outdoor area of its premises “as an area where smoking is also prohibited,” 410 ILCS 82/30, it is by no means certain that Hedger was engaged in protected activity when he “instructed” Kester that the Company had no legal right to implement its no-smoking policy without a prior vote of approval by the Union’s membership. (Tr. 226) Furthermore, even if his opposition was protected, the fact that the incident provoking Kester’s alleged expression of animus occurred more than 2 years before the incidents giving rise to his discharge negates any possible argument that the 2008 incident was a proximate motivating reason for the Respondent’s action in discharging him. *Meco Corp. v. NLRB*, 986 F.2d 1434, 1437 (DC Cir. 1993)(8 month gap between concerted activity and discharge); *NLRB v.*

Brookshire Grocery Co., 837 F.2d 1336, 1341 (5th Cir. 1988)(6 months); *NLRB v. Esco Elevators, Inc.*, 736 F.2d 295, 299 (5th Cir. 1984)(6 months); *Irving Tanning Co.*, 273 NLRB 6, 8 (1984)(5 months); *Thom Brown Shoes, Inc.*, 257 NLRB 264, 268 (1981)(6 months); *S.S. Kresge Co.*, 234 NLRB 530 (1978)(8 months); *Qualitex, Inc.*, 237 NLRB 1341, 1344 (1978)(4 months).

As for incidents (2) and (3), the ALJ's conclusion that Kester's comments reflected animosity toward Hedger's protected activity is pure conjecture. There is not a scintilla of evidence in the record to support it. There is nothing in the record remotely suggesting that the failure to "see eye to eye" and the "bickering" mentioned by Kester in 2009⁷ were attributable or related in any way shape or form to Hedger's protected activities. And, for all the record shows, Kester's "several conversations with Marcus regarding aggressive behavior towards management and other associates" may well have occurred prior to the time Hedger became a steward.

Any assertion that Hedger's status as a steward itself roused the Company's abiding animus and caused it to engineer his discharge makes little sense in the face of the additional uncontroverted facts that Fort Dearborn and the Union have a long-standing relationship beginning many years before Hedger became an employee at the Niles plant; that there have been many, many contract negotiations involving successive individual contracts covering three individual bargaining units represented by the Union; that while the negotiations have regularly involved multiple negative ratification votes, none has ever led to a strike; that all of the gripes, disagreements, and disputes that have lead to the filing of grievances have been amicably resolved, without need for arbitration; that at the time of the events in this case, Fort Dearborn had the President of the Union as well as a member of the Union's Executive Board in its employ

⁷ The substantial time lapse between this conversation and Hedger's discharge further negates its effect as proof of animus.

(Tr. 196); that the record is devoid of evidence that Fort Dearborn had ever previously been charged with, much less found guilty of, any activity claimed to be in violation of the Act; and that, for three straight years after Hedger became a steward, the Company had accommodated his weekly scheduled absences to attend steward training courses by adjusting work schedules that required the Company to incur overtime expenses. (Tr. 23, 228) Given all of these facts, it strains credulity to assert that the Company was motivated to get rid of Hedger because he filed grievances or may occasionally have taken positions in opposition to the Company, much less that it was out to get him just because he was a steward.

In a last desperate attempt to help General Counsel overcome her *Wright Line* initial proof obligation, the ALJ found that “Kester’s testimony as to how long Peter Schmidt and Hedger were together inside the plant, for which there is no foundation, is also indicative of Kester’s animus towards Hedger as a result of his activities as union steward.” (ALJ, p. 7) This unabashedly contrived bootstrap finding is totally specious because there is, in fact, more than ample foundation in the record for Kester’s calculation that Hedger and his visitor Peter Schmidt were together inside the plant on August 12, 2010 for a period of time ranging from 50 minutes to over one hour. Kester testified without contradiction from Hedger or anyone else⁸ that, in the meeting held on August 23, 2010, Hedger told Kester and other Company representatives that on August 12, 2010 he went to meet Schmidt at the entrance to the plant’s shipping department after his crew “had just finished [a] job and they were going into wash-up.” (Tr. 285) Kester’s minutes of the meeting that he himself prepared on the same day it occurred fully support that

⁸ Though present at the hearing, Union representative Golden who was present at the August 23rd meeting was not called to testify. (Tr. 11)

testimony. (CP Ex 1; Tr. 266)⁹ The record establishes beyond doubt that the crew on which Hedger was working finished the job which was already progress when their shift commenced and began wash-up at 7:45pm. (Tr. 219; R Ex 10) Accordingly, it is hardly unreasonable to suggest or for Kester to have concluded that Hedger first met his visitor sometime between 7:45 and 8:00 that evening. Furthermore, given the uncontroverted evidence in the record that Hedger ushered his visitor out of the plant through a door at the opposite end of the plant from where Hedger had retrieved him at 8:51pm. (Tr. 170-172), the record establishes a solid foundation indeed for the proposition -- and Kester's conclusion -- that Hedger spent between 50 minutes to over an hour with Peter Schmidt in Respondent's plant on the evening of August 12, 2010.

Former non-supervisory foreman Robert Schmitt swore in an affidavit taken by the Board agent investigating the charges that he first saw Hedger and his visitor in the plant on the night of August 12, 2010 at "about 8:00 o'clock." (Tr. 144) At the hearing, Schmitt testified that he first saw them "a little bit after 8:00 o'clock" while he was getting coffee and pop from vending machines located inside the plant and that Hedger and his visitor confronted him at that location. (Tr. 119) Kester testified without contradiction that Schmitt had told the Company he had first seen Hedger and his visitor "at 8:00." (Tr. 289) The ALJ disregards all of this evidence because "I do not view this as an attempt by Schmitt to pin point the time in question." (ALJ p. 7, footnote 12) See, *Alice's Adventures in Wonderland*, L. Carroll, Chapter 6, Humpty Dumpty ("When I use a word it means just what I choose it to mean -- neither more nor less.") Nevertheless, he credits what he characterizes as Schmitt's testimony that he "told management that Peter Schmidt had been in the plant for 10 minutes" and infers, from this, that "Respondent

⁹ At the hearing, the ALJ noted that "Nobody's disputing the accuracy of his [Kester's] minutes." (Tr. 260)

knew that [this representation] was truthful.” (ALJ, p. 11) The problem with the ALJ’s construct is that Schmitt himself does not support it. Schmitt never testified that he “told management that Peter Schmidt had been in the plant for 10 minutes.” On the contrary, he testified that during the investigative interview by the Company on August 30, 2010: “They asked me how long I thought he was in there. I wasn’t sure, but I *thought* it was like between 10 and 15 minutes.” (Tr. 129, emphasis added) And he also testified that after he met Hedger and Schmidt at the vending machines, “I finished getting my drinks and went back to my press and I didn’t see anyone after that” (Tr. 129), “after that” being the entire period during which Hedger gave Schmidt a tour of the plant in areas completely removed from Schmitt’s press. And, fully consistent with that scenario, he swore in an affidavit taken by a Board agent on October 26, 2010 that “I told [the Company] that I didn’t know, that is, how long he was there because I went directly back to my press after I told Marcus it was okay for him to walk the visitor through the pressroom.” (Tr. 144)

Respondent’s Proof of Justification for Hedger’s Discharge

Even assuming, *arguendo*, that counsel for General Counsel sustained her *Wright Line* burden, Respondent submits that it proved that its proffered reasons for discharging Hedger were not pretextual and that it would have taken the same action had Hedger not engaged in any protected activity (proven or otherwise).. Ironically, while the ALJ supported the Union’s refusal to submit the contractual grievance protesting that discharge to arbitration, the ALJ quite obviously chose to act as an arbitrator and decide whether Respondent had “just cause” for discharging Hedger rather than as an Administrative Law Judge determining whether Respondent bore its *Wright Line* burden of proof.

There are several issues that lie at the heart of these matters. The first is the significance the Company attributed to the walkthrough engineered by Hedger on August 12, 2010. As discussed above, the significant value to the Company of the proprietary information on display throughout the Niles plant on that evening is unrefuted. The threat to the Company's privity of that information if shown to someone with experience in the printing business is equally unchallenged. (Tr. 205, 258)¹⁰ The ALJ concluded, however, that because there is evidence in the record showing that the Company did not, in practice, strictly enforce its policy of privacy and that, as a result, from time to time food delivery people, truck drivers, retired Fort Dearborn employees and current Fort Dearborn employees' family members found their way into the plant, the Company's alleged concerns were, by definition, pretextual. The fact, however, is that there is credible evidence in the record that the visits by delivery people, etc., were nowhere near as pervasive as the ALJ found them to be or that the Company was even aware of those visits that did take place (Tr. 259, 260, 332, 337-338); and there is absolutely no credible evidence in the record that anyone in the Company ever tolerated or condoned a single visit by someone like Peter Schmidt who had never been employed by and never had any business relationship with Fort Dearborn Company but who clearly had experience in the printing business.

The second issue involves the question of the importance Respondent attributed to Hedger's refusal to divulge information and what the Company perceived to be the false answers to the questions posed to him. Here the ALJ simply ignored the evidence or brushed it aside as meaningless. Hedger admitted at the hearing that he lied in response to some of the questions

¹⁰ Hedger himself apparently recognized this fact when he testified that he Peter Schmidt that he could not go into the bindery area of the plant "because that's a production area." (Tr. 50) He did not bother to explain, however, why he believed it was alright for Schmidt to walk through all of the other production areas of the plant.

put to him by the Company during the course of its investigation, and that he did not answer others. (Tr. 87) As will be shown, he lied far more than he admits about matters that were critical to the Company's investigation. Despite these facts, the ALJ decided that Respondent's concern over Hedger's lying and failure to cooperate was pretextual. There is not a shred of evidence even hinting that Respondent ever tolerated, condoned, excused or downplayed any other employee's failure or refusal to fully cooperate or respond untruthfully to questions posed in the course of any investigation. Given this fact, the ALJ's finding that it was Respondent's obligation to excuse Hedger's deceptions cannot stand:

"It is also obvious that, at a bare minimum, companies must be able to trust their employees....It is also obvious that companies must be able to discharge a thief or an untruthful employee. In fact,

[f]alse statements impair the employer's ability to make sound judgments that may be important to the employer's legal, ethical and economic well-being. So an employer is entitled to expect and to require truthfulness and accuracy from its employees in an internal investigation that is exploring possibly improper conduct in the business's own workplace....Therefore, an employer, in these situations, is entitled to rely on its good faith belief about falsity, concealment, and so forth." 6 *West Limited Corp. v. NLRB*, 237 F.3d 767, 778 (7th Cir. 2001) quoting *EEOC v. Total System Services, Inc.*, 221 F.3d 1171, 1176 (11th Cir. 2000).

As discussed above, 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

Schmidt¹¹ 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 posed 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 that he was repeatedly lying when he said “I don’t remember.” Notably, the ALJ admits as much but brushes aside Hedger’s lying as a euphemistic “lack of cooperation [that] strikes me as foolish and unnecessary.” (ALJ, p. 9)

The record shows, and neither Hedger nor Golden denied, that on August 23, 2010 Hedger was warned at the outset and repeatedly during the course of the Company’s investigatory interview that his failure to answer questions completely and truthfully could lead to discipline up to and including termination. (Tr. 203, 265-267; CP Ex 1) The record also shows that he was asked if the name of the person whom he walked through the plant was Peter Schmidt, that Golden asked for the relevance of that information, and that Kester explained that the Company wanted to understand who the person was because of its concerns for security and confidentiality. Golden said the information was not relevant and instructed Hedger not to answer the question. (Tr. 204) The Company asked again if the person was Peter Schmidt and again Golden objected on grounds of relevance and advised Hedger not to answer the question. On neither occasion did Hedger answer the question. The ALJ accepts this account as fact, but again brushes aside Hedger’s failure to cooperate as “unwise and unnecessary” but of no importance or significance. (ALJ, p. 9)

¹¹ In his earlier testimony, Hedger had twice acknowledged that Schmidt was a friend of his. (Tr. 48, 49)

In concluding that Hedger “truthfully answered all the company’s questions on August 23 other than the name of his visitor” (ALJ, p. 9), the ALJ conveniently ignored what Kester quite reasonably regarded as Hedger’s lack of truthfulness in response to other questions. Hedger’s proffered rationale for bringing Schmidt through the plant -- because Schmidt “wanted to know the quickest way to get to Lehigh” Avenue (CP Res 1) -- was clearly not true. Even if, as Hedger also misrepresented to the Company, they simply “went in one door and out the other door” (CP Res 1), the record establishes, it was nowhere near the quickest way.¹² And, given Hedger’s admission at the hearing that Schmidt “didn’t live very far from the area” of the plant, his representation to the Company that Schmidt was inquiring as to the quickest way to get to a major artery less than half a block away was also obviously false. (Tr. 77, 182-183, 214, 307)

Significantly, Hedger was also clearly not telling the truth when he told the Company on August 23 that he spent less than 2 minutes with Schmidt in the plant. (Tr. 214)¹³ As Kester demonstrated, it would have been impossible for the two men to walk through the plant using the route they took in that brief period of time. (Tr. 181-191, 214-215; R 9) Moreover, as discussed *supra*, given the account Hedger provided to the Company on August 23, the period of time between the moment he left his work station to meet Schmidt and the moment he left Schmidt in the alley on the East side of the plant would have been somewhere between 50 minutes and more than one full hour in length. Notably, the ALJ flatly rejected these facts as “without foundation.” The reason for his conclusion is that he credited Hedger’s testimony at the hearing

¹² The quickest way, by far, was via the illuminated sidewalk on Gross Point Road, a major thoroughfare abutting the North side of the plant that dead ends into Lehigh Road, half a block away. (Tr, 214)

¹³ Kester’s testimony that Hedger specifically told the Company the walkthrough took less than two minutes was not denied by Hedger and was confirmed by Kester’s notes of the meeting. (CP Ex 1)

that he did not leave his work station to meet his visitor until the job his crew was working on had been completed and he had finished the duties he was required to perform during the ensuing wash up. (ALJ, p. 8, footnote 11) But, in rejecting Kester's undisputed account of what Hedger told the Company on August 23, 2010 and relying instead on Hedger's account of October 13, 2011 the ALJ clearly erred: part 2 of the *Wright Line* analysis required Respondent to demonstrate a legitimate basis for its action -- in this case, establish a reasonable basis for concluding that Hedger was lying to the Company on August 23, 2010. It did *not* require Respondent to disprove Hedger's radically different account, voiced more than a year later, of what actually happened on August 12, 2010. Hedger did *not* testify that he told the Company on August 23, 2010 that he left his work station after the job was completed and he had finished his wash up duties. Kester's testimony and contemporaneous notes establishing that he told the Company on August 23rd that he left much earlier are uncontradicted.¹⁴

Schmitt's testimony and that of Company representatives regarding Schmitt's August 17, 2010 conversation with Kester and pressroom manager Tom Vlahos and Schmitt's August 30, 2010 meeting with Kester and Samuels are at direct odds. Schmitt testified that Kester and Vlahos asked him if he had given Hedger permission to walk through the pressroom with Schmidt on the 12th and that he replied "yes," while Vlahos testified that he and Kester never asked Schmitt that question but asked him only if "he had seen a guy with a bicycle" in the plant and that Schmitt told him that he had seen Hedger accompanying a man with a bicycle in the plant while he, Schmitt, was working at his press and that Schmitt said he "thought it was kind of

¹⁴ As Kester's testimony makes abundantly clear, those duties had not, in fact, been completed even at the time Hedger now claims he left. (Tr. 288)

weird.”¹⁵ (Tr. 330) Kester’s testimony fully corroborates that of Vlahos. (Tr. 175) Similarly, Schmidt’s testimony that he responded in the affirmative to questions posed by Kester and Samuels on August 30 regarding whether Hedger had asked him for permission to walk Schmidt through the plant and whether he, Schmitt, had granted that permission was categorically denied by Kester.

The ALJ made no attempt to resolve the issue of credibility raised by these differing accounts. It is worth noting that uncontroverted testimony in the record establishes that Schmitt had reason to be supportive of Hedger, the Chief Steward who, according to his own account (Tr. 22), was a significant force in the Union: at the time of these events, Schmitt was planning to retire and told Vlahos “that he was getting numbers from the Union to see if it would work out.” (Tr. 319)¹⁶ It should also be noted that, if Schmitt’s testimony regarding what he told Vlahos and Kester on August 17 were true and the ALJ’s belief that Respondent was conniving to get rid of Hester were also true, it is inconceivable that Kester would have asked him on August 30 the questions regarding permission being sought and given, knowing that Schmitt’s answers would significantly undermine what the ALJ believes was the Company’s campaign to concoct a plausible reason to get rid of Hedger.

There are numerous other indications that the ALJ decided not to scrutinize Respondent’s actions in accordance with *Wright Line* principles, but instead tried this case improperly as an arbitrator hearing a just cause discharge case where the employer always bears a substantial burden of proof. Thus, he says that the Company did not have to ask Hedger who the visitor was

¹⁵ Vlahos said they never asked Schmitt if he had given Hedger permission to bring Schmidt through the plant. “It would never occur to me to do that. He would not do that.” “All the foremen know better than that.” (Tr. 330)

¹⁶ Schmitt retired after 36 years with the Company on June 1, 2011. (Tr, 116)

because it already knew from employee Robert Hayden that it was Peter Schmidt -- despite the unrefuted testimony that the ALJ himself recites establishing that Hayden “clearly disliked Hedger” (and might therefore presumably try to frame him by giving a phony name) and that when asked by leadman Kis Kakoh to identify himself at the entrance to the plant, Peter Schmidt gave Kako the false name “Martin Fletcher.” (ALJ, p. 5, footnote 9) He also attaches great significance to the “facts” that Respondent did not need to get information from Hedger at all because other employees could have provided it with a full account of what occurred on August 12, 2010. And, he goes so far as to declare that it was incumbent on Respondent to “attempt to talk to Peter Schmidt to determine what he was doing at the plant” (ALJ, p. 10) and threaten other employees who had initially asked not to get involved with discharge for failing to cooperate. (ALJ, p. 8, footnote 12) And he attaches weight to the “fact” that, although the uncontroverted testimony shows that the Company’s proprietary equipment, techniques and products were on full display the evening of August 12, 2010, “there is nothing in the record (ALJ, p.8, footnote 12) to indicate that Schmidt observed or learned anything pertaining to lay-out or cutting.” (ALJ, p. 10)

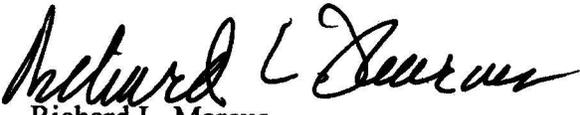
Read as a whole, the ALJ took pains to provide Hedger with “an impenetrable shield against discharge.” *NLRB v Loy Food Stores, Inc.*, 697 F.2d 798, 801 (7th Cir. 1983) His findings of violation should not be sustained.

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

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SNR DENTON US, LLP
233 S. Wacker Drive
Chicago, IL 60606
Telephone: (312) 876-8177
Fax: (312) 876-7934

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that true and correct copies of the Post-Hearing Brief of Respondent have been served electronically this 11th day of January, 2012 upon the following parties:

Helen Gutierrez, Esq.
209 S. LaSalle St.
Chicago, IL 60604
Helen.Gutierrez@nlrb.gov

Thomas D. Allison, Esq.
Allison, Slutsky & Kennedy, P.C.
230 W. Monroe St., Suite 2600
Chicago, IL 60606
allison@ask-attorneys.com

A handwritten signature in black ink, appearing to read "Richard L. Marcus", written over a horizontal line.

Richard L. Marcus