

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

**FORT DEARBORN COMPANY
Respondent**

and

**DISTRICT COUNCIL FOUR, GRAPHIC
COMMUNICATION CONFERENCE
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS**

Case 13-CA-46331

Charging Party

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT
OF ITS CROSS-EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

As set forth in paragraphs V (a) and (b) in the outstanding Complaint, Counsel for the Acting General Counsel submits that Respondent unlawfully threatened chief union steward Marcus Hedger with discharge and closer scrutiny when on June 4, 2010, Bill Johnstone, Respondent's vice president, while at the bargaining table, told Mr. Hedger that "we are watching you Marcus, we are going to catch you, and we are going to fire you."¹ Two months later, Johnstone made good on that threat by suspending and ultimately terminating Hedger for violating a rule that had never before been enforced. Despite crediting Counsel for the Acting General Counsel's witnesses who testified that Johnstone so threatened Mr. Hedger, Administrative Law Judge Arthur J. Amchan²

¹ Tr. 30, L 16-17, ALJD p. 3 L 30)

² In these Cross-Exceptions, the Administrative Law Judge will be referred to as the "ALJ," the National Labor Relations Board will be referred to as the "Board," the District Council Four, Graphic Communication Conference, International Brotherhood of Teamsters will be referred to as "the Union,"

failed to find that these statements constituted unlawful threats in violation of Section 8(a)(1) of the Act. In so doing, the ALJ's finding that it was "not clear whether or not Johnstone was referring to catching Hedger using company copying equipment, as opposed to conduct that was protected", ignored the very testimony he credited.³

The ALJ further failed to find that Respondent unlawfully suspended Mr. Hedger in violation of Section 8(a) (3) of the Act as alleged in paragraph VI(a) of the outstanding Complaint despite concluding that Respondent's discharge of Mr. Hedger, which was an outgrowth of the suspension and was premised on the identical facts and rationale the ALJ found to be pretextual, "was discriminatorily motivated"⁴ and a violation of Section 8(a) (3) of the Act⁵. Thus, pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the Acting General Counsel, through its attorney Helen I. Gutierrez files this Brief in Support of Its Cross Exceptions to the ALJ's decision.

This brief is organized into three sections. The first section addresses the factual and legal issues presented in Counsel for the Acting General Counsel's Exceptions to the ALJ's failure to find that Respondent's threats at the bargaining table violated Section 8(a)(1) of the Act and further establish animus towards Hedger's protected activities. (Exceptions 1-3) Section II addresses how the suspension of Marcus Hedger was part and parcel of Respondent's unlawful conduct in terminating him and therefore a violation of Section 8(a)(3) of the Act. (Exception 4) Section III addresses the ALJ's erroneous finding that statements made to Hedger by Kester regarding the death of coworker occurred in 2009. (Exception 5)

and Fort Dearborn Company will be referred to as "Respondent." Citations to the ALJ's Decision will be referred to as "ALJD" followed by the specific page(s) and line(s) referenced.

³ ALJD p. 3 line 40

⁴ ALJD p. 8, line 8

⁵ ALJD p. 11, line 35

I. **The ALJ erred in failing to find that Respondent's threats at the bargaining table constituted unlawful 8(a) (1) conduct. (Exceptions 1-3)**

In his decision the ALJ dismissed paragraph V of the Complaint finding 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” when Johnstone threatened Hedger that Respondent was going to “watch him, catch him and fire him.”⁶ In so doing, the ALJ failed to fully consider the complete testimony of Mr. Hedger and fellow employee David Ishac regarding this incident, despite crediting their testimony over Respondent's version of these events.⁷ Nor did the ALJ articulate why the credited account of the facts leading to Respondent's threats was “unclear” as to its meaning. Contrary to the ALJ's finding, the totality of the testimony the ALJ credited prior to making his erroneous conclusion clearly demonstrates that Respondent's threats were made to Hedger in response to Hedger's protected activity.

Thus, Hedger and Ishac credibly testified that on June 4, 2010, the Respondent and the union met to continue negotiating a successor contract in the “litho” unit. This was the first meeting after the membership had voted down the company's initial contract proposal.⁸ Hedger testified that towards the end of the June 4th meeting Johnstone held up a copy of a newsletter that the Union had distributed to unit members urging them to vote down the Respondent's proposed contract and asked Hedger to identify who had been using the company's copier, inferring that either Hedger or someone who supported the Union had used the Respondent's equipment.⁹ Hedger testified that the newsletter

⁶ ALJD p. 3, lines 40 - 42

⁷ ALJD p. 3 lines 37 - 40

⁸ ALJD p. 3 lines 24-26

⁹ Tr. 29, L 23-25; page 30 L 1; ALJD p. 3 lines 27-28

that Johnstone held in his hand had “been altered with a cartoon on it to poke fun at it, that he had no knowledge of it, and that it was not the one the Union had distributed to members¹⁰.” Hedger voluntarily acknowledged the Respondent’s copy machine policy stating that he knew that anything the Union reproduced “was not allowed to be done on company machines.”¹¹ Hedger further testified that immediately thereafter Johnstone produced another flyer that allegedly had been put on employee windshields in the parking lot and asked Hedger “what’s your buddy Frank Golden going to do when we show him a picture of him putting this on people’s car windshields in the parking lot?”¹² Hedger responded that “I thought there were no cameras in the parking lot, and if (Johnstone) had a picture of Frank Golden doing something he should produce it”.¹³ Hedger testified that Johnstone “got very angry¹⁴” and responded that “he was tired of the union circus and (Johnstone) said we’re watching you, Marcus and we are going to catch you and we’re going to fire you, and many people are going to laugh at you.” Johnstone further stated “tell your friend Frank Golden if we catch him in the parking lot again we are going to send him to jail.”¹⁵ In crediting both Hedger and employee David Ishac’s version of these events over Respondent’s self serving denial, the ALJ noted that:

“The Board gives great weight to the fact that current employees who testify adversely to their employer do so at considerable risk of economic reprisal. This plus the fact that Respondent terminated Hedger two months later under very questionable grounds, leads me to credit Hedger and Ishac.¹⁶”

¹⁰ Tr. 29, L 23-25

¹¹ Tr. 30, L 1-4

¹² Tr. 30, L 6-10

¹³ Tr. 30, L 11-14

¹⁴ Tr. 30, L 15

¹⁵ Tr. 30 L 16-20

¹⁶ ALJD p. 3, lines 37 – 40

When viewed in their entirety, the facts leading to Respondent's threats clearly demonstrate that Respondent's heated response was an outgrowth of Respondent's frustration with the fact that Mr. Hedger and the Union had successfully rallied the bargaining unit to oppose Respondent's contract proposal, i.e., the "union circus" and were not linked to Respondent's unfounded accusations about the use of the copy machine.

An employer violates Section 8(a) (1) of the Act by actions and statements reasonably tending to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. The Board employs a totality of circumstances standard to distinguish between employer statements that violate Section 8(a)(1) by explicitly or implicitly threatening employees with loss of benefits or other negative consequences because of their union activities, and employer statements protected by Section 8(c)¹⁷. The test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction."¹⁸ A threat of termination in retaliation for engaging in protected concerted activity is the ultimate threat an employer can convey to an employee.¹⁹ As set forth above, the testimony properly credited by Judge Amchan clearly established that Johnstone's threat to Hedger while at the bargaining table to "watch him, catch him and fire him" was made in response to Respondent's frustration with "the union circus", i.e., the Union's success in rallying the bargaining unit to oppose the Respondent's contract proposal which was obviously less than satisfactory to the interests of the bargaining unit, and in conjunction

¹⁷ *Empire State Weeklies, Inc.*, 354 NLRB No. 91, slip op. at p. 3 (2009).

¹⁸ *Double D Construction Group*, 339 NLRB 303 (2003).

¹⁹ *Bestway Trucking, Inc.*, 310 NLRB 651, 671 (1993); *Central Valley Meat Co.* 346 NLRB 1078, 1086 (2006)

with Respondent's threats to have Union Business Agent Frank Golden thrown in jail for distributing union literature to employees. As such, Respondent's threats clearly were made to coerce and intimidate Hedger from engaging in further protected activity.²⁰

Accordingly, Counsel for the Acting General Counsel respectfully submits that the ALJ's failure to find that Respondent's statements constituted unlawful threats in violation of Section 8(a)(1) of the Act was in error and such conclusion should be reversed.

Moreover, Johnstone's threats to Hedger at the bargaining table constitute additional evidence of Respondent's animus towards Hedger's activities as union steward and further support the ALJ's findings that Respondent discharged Hedger in violation of Section 8(a)(3). Likewise these unlawful statements bolster Counsel for the Acting General Counsel's argument that Hedger's suspension was also a violation of Section 8(a)(3) as will be fully discussed below.

II. The ALJ erred in failing to find that Respondent's suspension of Marcus Hedger violated Section 8(a) (3) of the Act.(Exception 4)

Despite finding that Respondent unlawfully terminated Mr. Hedger in violation of Section 8(a)(3) of the Act, the ALJ failed to find that Respondent's suspension of him which preceded his termination and stemmed from the identical circumstances as his unlawful termination, likewise violated the Act. In so doing, the ALJ did not articulate any rationale for distinguishing why in his view the termination, but not the suspension violated the Act.

As was Mr. Hedger's discharge, the question of whether Respondent unlawfully suspended Hedger is governed by *Wright Line*²¹. In his decision, the ALJ thoroughly

²⁰ Id.

²¹ *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980) enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982)

analyzed Mr. Hedger's discharge under *Wright Line* and properly found that Mr. Hedger engaged in activity protected by Section 7 of the Act in his capacity as union steward²²; Respondent was fully aware of those activities²³; Respondent harbored "substantial" animus towards those activities²⁴; Respondent's stated reasons for Hedger's discharge were pretextual²⁵; and that Mr. Hedger's termination was discriminatorily motivated and violated the Act²⁶. The ALJ further correctly found that Respondent failed to meet its burden that it would have discharged Mr. Hedger even absent his protected activities as union steward.²⁷

As clearly set forth in the record, Mr. Hedger's suspension was based on the identical set of facts as his discharge and was merely an interceding development in his ultimate discharge by Respondent. Thus, as the ALJ found, the operating events leading up to Hedger's suspension and discharge were as follows:

On August 12, 2010, sometime after 8 p.m. Hedger was paged to the warehouse. Hedger ignored the page and continued working on the wash-up after a production run. The leadman in the shipping/warehouse sent an employee to find Hedger. Hedger left his press at about 8:40 p.m. and went to the warehouse/shipping department. Hedger found his friend Peter Schmidt, waiting for him in the shipping/warehouse department. Schmidt had a bicycle with him. Hedger and Schmidt walked though the warehouse with the bicycle to a side door and Schmidt exited at 8:51 p.m. Along the way Hedger obtained permission from leadman Robert Schmitt to walk Peter Schmidt through the plant. The

²² ALJD p. 6 lines 26 – 40

²³ ALJD p. 6 line 40

²⁴ ALJD p. 6 lines 42 – 45

²⁵ ALJD p. 8 lines 7 -8

²⁶ ALJD p. 9 lines 8 – 9

²⁷ ALJD p. 8 lines 26 – 28

three leadmen that were on second shift did not object to Hedger walking Schmitt through the plant and did not report it to management.

On August 17, plant manager Bob Kester reviewed a video tape which showed Schmidt exiting the plant with his bicycle on August 12 and Hedger with him. Kester immediately spoke to the pressroom manager who was unaware of the incident and the two began questioning employees as to whether they had seen Hedger and his visitor. Robert Hayden, the union president, identified the visitor to Kester as Peter Schmidt. Kester then contacted Vice President William Johnstone and Corporate Human Resources Director William Samuels to determine how to proceed.

On August 18, 2010, Hedger was called to a meeting with Kester, Samuels and Evelyn Vasquez, the Human Resources director for the Niles Plant. Hedger was warned that he could be terminated if he didn't cooperate in the investigation. After a lengthy discussion as to who would represent Hedger during the interview, it was decided at Hedger's request that Frank Golden, the business agent would represent him via speakerphone. Respondent refused Golden's request that the meeting be postponed until he could attend in person and continued the interview. Samuels then interrogated Hedger from a prepared script. Samuel asked Hedger whether he brought a visitor to the plant on August 12, the name of the visitor and whether the visitor was Martin Fletcher or Peter Schmidt. Hedger answered that he could not recall to all the questions. Kester immediately suspended Hedger after the interview. Hedger's suspension culminated in his unlawful termination effective September 14, 2010.²⁸

During the pendency of his suspension, on September 23, 2010, Hedger attended another interview with Respondent. Frank Golden accompanied Hedger to this meeting.

²⁸ ALJD pgs. 4 – 5 line 14

Once again Hedger was asked questions regarding the events on August 12, 2010. The ALJ found that Respondent conceded that on August 23, 2010, Hedger answered all questions posed by Respondent except identifying Peter Schmidt. Thereafter Hedger was discharged effective September 14, 2010. Hedger's termination letter noted that he was being discharged because Hedger "brought an unauthorized visitor into the plant on August 12, 2010" and he "did not respond truthfully to the Company's questions regarding events on the date of which you were fully aware."²⁹

Unlike the numerous reasons proffered by Respondent for Hedger's termination, it provided no real reason as to why it suspended Hedger immediately on August 18 until his termination 27 days later.³⁰ Respondent merely testified that after interviewing Hedger on August 18, 2010, Kester concluded that it would be best if he "sent Marcus home for the day until we concluded the investigation" (Tr. 201).

The ALJ's conclusions as to Respondent's discriminatory and unlawful discharge of Hedger fully support a finding that Respondent would not have suspended Hedger for 27 days absent its animus towards his activities as union steward. Thus the ALJ's determination that Respondent unlawfully terminated Hedger was based in part, on his conclusions that 1) Respondent relied on Hedger's violation of a company policy that had not been enforced on second or third shift; 2) that Respondent failed to show why it did not apply its progressive discipline policy to Hedger for violating a policy that was not enforced; 3) Respondent's reliance on its assertion that Hedger was away from his press

²⁹ ALJD p. 5 lines 28-29

³⁰ Although Hedger was suspended with pay, the suspension still constitutes an adverse employment action by Respondent which would not have occurred but for Mr. Hedger's engaging in union activities. As such, a remedial order requiring Respondent to rescind the suspension by removing any reference to it contained in Mr. Hedger's personnel file and assurances that the suspension will not be used against Mr. Hedger as part of Respondent's progressive disciplinary policy in the future is necessary to restore the status quo and fully remedy Respondent's unlawful conduct.

for over an hour and its failure to adequately investigate this assertion; and 4) Respondent's disparate treatment of Hedger by not disciplining the three leadmen who failed to report Hedger's violation of the visitor's policy.³¹ Similarly, inasmuch as Mr. Hedger's suspension was an outgrowth of these facts, the suspension was likewise unlawful

In finding that Respondent unlawfully discharged Mr. Hedger the ALJ concluded that while Mr. Hedger's lack of full cooperation during the August 18 pre-suspension interview, was perhaps "foolish and unnecessary"; the ALJ found that Respondent already had at that time all the information that it needed to investigate what had transpired during the evening of August 12 and whether its confidential business information had been compromised. Therefore any such lack of candor on the part of Mr. Hedger during the August 12 meeting did not obviate the unlawfulness of his discharge by Respondent.³² Nor should it obviate the unlawfulness of his suspension inasmuch as, but for Mr. Hedger's substantial union activities noted by the ALJ, Respondent would not have embarked on the path of ridding itself of this meddlesome union steward by concocting the pretextual scenario which served as the basis for his suspension and subsequent discharge. Because Mr. Hedger's suspension was inextricably intertwined with Respondent's unlawful scheme, it too was a violation of Section 8(a) (3). Counsel for the Acting General Counsel respectfully submits therefore, that the ALJ's failure to find that Respondent's suspension of Mr. Hedger violated the Act was in error and such conclusion be reversed.

³¹ ALJD p. 8 lines 11 – 22

³² ALJD p. 9 lines 17 – 25

III. The ALJ erred in finding that statements made by Kester to Hedger in regards to the death of a coworker's husband occurred in 2009.
(Exception 5)

The ALJ found that Kester's statements to Hedger that "we don't see eye to eye on everything, but this really puts things in perspective. Life is too short for the bickering between he and I" ³³ occurred in 2009. ³⁴ The ALJ appears to have credited Kester's testimony that he made the statement in 2009. However, the record established that this statement was actually made on June 11, 2010. Specifically, Hedger testified that a few days after being threatened at the bargaining table he filed two grievances. ³⁵ One grievance was over the threats that were made by Johnstone at the bargaining table ³⁶, the other accused Kester of harassment. ³⁷ Hedger further testified that a few hours after filing the grievances Kester approached him and talked to him about the death of his coworker's husband. ³⁸ The grievances were filed on June 11, 2010. Thus the record evidence establishes that the statements were made on June 11, 2010. Counsel for the Acting General Counsel requests that the ALJ's inadvertent error in dating this event be corrected.

IV. Conclusion and Remedy

Based upon the foregoing, Counsel for the Acting General Counsel respectfully requests that the Board find merit to its Cross-Exceptions to the Decision of Administrative Law Judge Arthur J. Amchan in this case.

DATED at Chicago, Illinois, this __ day of February, 2012

³³ Tr. 233 L 19-21

³⁴ ALJD P 7 L 19-24

³⁵ Tr. 31 L 23

³⁶ GC Ex No. 10

³⁷ GC Ex No. 11

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Helen I. Gutierrez", is written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned Counsel for the General Counsel hereby certifies that true and correct copies of Counsel for the Acting General Counsel's Brief in Support of its Cross-Exceptions to the Decision of the Administrative Law Judge has been electronically filed on February 8, 2012. Pursuant to Section 102.114, revised on January 23, 2009, true and correct copies of that document have also been served on the same date upon the following parties of record via electronic mail and U.S. regular mail as set forth below:

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