

**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  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE  
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46 of the Board's Rules and Regulations, the Acting General Counsel, through its attorney Helen I. Gutierrez provides this Answering Brief to Respondent's Exceptions to the Administrative Law Judge.<sup>1</sup> This brief is organized into three sections. The first section provides an overview of the underlying facts as contained in the record, and brief background of the case. The second section discusses the deferral issues in the case. The third section examines Judge Amchan's reasoned findings of fact, analyses and conclusions, addresses why Respondent's Exceptions to those conclusions are without merit and refutes Respondent's contentions on appeal that

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<sup>1</sup> In this Answering Brief, the Administrative Law Judge will be referred to as "the ALJ"; Fort Dearborn will be referred to as "Respondent"; Graphic Communication Conference, District Council Four, International Brotherhood of Teamsters will be referred to as "the Union" or "the Charging Party"; and the National Labor Relations Board will be referred to as "the Board". Citations to the ALJ's Decision will be referred to as "ALJD" followed by the page and line numbers specifically referenced. With respect to the record developed in this case, citations to pages in the transcript will be designated as "Tr." followed by the page number. The General Counsel's exhibits will be designated as "GC" followed by the exhibit number. Respondent's exhibits will be designated as "R" followed by the exhibit number. Respondent's Exceptions will be referred to as "Resp. Ex." followed by the specific number of the exception.

its reasons for discharging Marcus Hedger were not pretextual. For each section or subsection, the Exception addressed therein is listed in the title.

**I. BACKGROUND AND FACTUAL SUMMARY**

As the underlying record clearly demonstrates, on the night of August 12, 2011, Peter Schmidt, bicycle in tow, dropped by Respondent's facility to see his friend Marcus Hedger.<sup>2</sup> Sometime after 8 p.m., Hedger was paged to shipping but ignored the page as he was busy with doing a clean up of the print job he and his co-workers had been running on his press that night.<sup>3</sup> After a while an employee was sent to find him.<sup>4</sup> Hedger finished the project he had been working on and went to shipping to see why they were looking for him.<sup>5</sup> Hedger saw his friend, told him he was busy and could not talk. At his friend's request Hedger walked him through the plant and out through a side door at 8:51 p.m.<sup>6</sup> Along the way Hedger stopped and introduced his friend to his foreman and asked for and obtained his permission to walk him through the building<sup>7</sup>. This event took no more than 11 minutes.<sup>8</sup> Five days later, plant manager Bob Kester learned that Hedger had walked a visitor with a bicycle through the plant and saw it as the perfect opportunity to be rid of the union steward that had been a thorn on his side for years. Thus, as detailed in the record and Administrative Law Judge Arthur J. Amchan's decision, Respondent discharged Hedger for violating a company policy that had never before been enforced and was not followed on second or third shifts.

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<sup>2</sup> ALJD P 4 L 7-9

<sup>3</sup> ALJD P 4 L 2-4

<sup>4</sup> ALJD P 4 L 5-6

<sup>5</sup> ALJD P 4 L 6-7

<sup>6</sup> ALD P 4 L 21

<sup>7</sup> ALJD P 4 L 12-14

<sup>8</sup> ALJD P 4 L 19-21

The Union immediately filed a grievance over Hedger's discharge and a few weeks later filed the underlying unfair labor practice charge with the Board. Although the charge was originally deferred to the grievance procedure, Respondent withdrew from the subsequent arbitration causing the Region to revoke the deferral and issue Complaint. Based thereon, the case was heard by Administrative Law Judge Arthur J. Amchan on October 13-14, 2011. At hearing Respondent objected to the Region's revocation of deferral and argued that the case should be dismissed. Judge Amchan considered the record evidence, applied the pertinent Board law and concluded that the case was properly before him and that Respondent's discharge of Hedger violated Section 8(a)(1) and 8(a)(3) of the Act.

In its Exceptions Respondent continues to assert that the case should be dismissed because revocation of deferral was improper inasmuch as the union allegedly refused to arbitrate the underlying grievance. Respondent further excepts to Judge Amchan's conclusion that Respondent unlawfully discharged Mr. Hedger. As further discussed below, Respondent's Exceptions are based primarily upon disagreements with Judge Amchan's credibility determinations and/or on its mischaracterization of the facts in the record. Accordingly, Counsel for the Acting General Counsel submits that Respondent's Exceptions be rejected in their entirety and respectfully requests the Board adopt Judge Amchan's conclusions that in fact, the matter was properly before him and that Respondent unlawfully discharged Marcus Hedger in violation of Section 8(a)(3) of the Act.

**II. THE ALJ'S DENIAL OF RESPONDENT'S MOTION TO DISMISS  
BASED UPON THE REGION'S REVOCATION OF DEFERRAL WAS  
PROPER. (Respondent's exceptions 1 and 2)**

At the start of the hearing Respondent moved for Summary Judgment<sup>9</sup> and dismissal of the case. Respondent argued that the hearing was inappropriately being held because there had been a deferral to arbitration and the cancellation of the arbitration was “owing to the fact that the Union refused to proceed with the true issues that were supposed to be resolved before the arbitrator instead of other issues being resolved”.<sup>10</sup> Respondent’s argument at hearing ignored the fact that his own exhibits clearly showed that it was Respondent that withdrew from the arbitration. Due to Respondent withdrawal from the arbitration, the Region revoked its deferral and continued processing the case.<sup>11</sup> The Region’s revocation of its deferral was premised upon Respondent’s withdrawal from the arbitration. Judge Amchan saw through Respondent’s game of smoke and mirrors and determined to take the matter under advisement and hear the case. Regarding the deferral issue, evidence presented at hearing demonstrated that immediately after Chief Union Steward Marcus Hedger was notified by Respondent’s letter of September 7, 2010 that he was being terminated effective September 14, 2010 the Union filed a grievance<sup>12</sup> alleging that Hedger was wrongfully terminated and that Respondent failed to follow progressive discipline. On September 10, 2010 the Union filed an amended grievance<sup>13</sup> alleging that Hedger was wrongfully terminated without just cause, without progressive discipline and because of protected activity as a union officer and requested the termination be reversed and Hedger be made whole. On September 30, 2010 the Union filed an unfair labor practice charge with the Labor Board

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<sup>9</sup> Tr. 7 L 23-24

<sup>10</sup> Tr. 6 L 3-9

<sup>11</sup> GC Ex. No. 1(I)

<sup>12</sup> GC Ex. No. 17

<sup>13</sup> GC Ex, No. 18

in Case 13-CA-46331<sup>14</sup> which alleged violations of Sections 8(a)(5), (3) and (1). On December 10, 2010 Regional Director Joseph A Barker issued a Complaint and Notice of Hearing which alleged violations of Section 8(a)(1), (3) and (5) of the Act and set the Hearing for January 31, 2011.<sup>15</sup> On January 14, 2011, Regional Director Barker issued an Order Approving Partial Withdrawal of Charge, Deferral of Remaining Allegations, Dismissal of Complaint and Withdrawal of Notice of Hearing.<sup>16</sup> On January 18, 2011, the Region issued a letter<sup>17</sup> which deferred the remaining allegations to the parties' grievance and arbitration procedure. The allegations to be deferred were threats made by Bill Johnstone on June 4, 2011, while at the bargaining table, to terminate employees and threats to watch employees with closer scrutiny because they engaged in union activity and the suspension and discharge of Marcus Hedger.<sup>18</sup>

The arbitration on the grievance was scheduled to be conducted before Arbitrator Joseph A. Malin on June 13, 2011. However, no arbitration actually took place as Respondent ultimately withdrew from the proceedings.<sup>19</sup> In light of the Respondent's withdrawal from the arbitration, the Region revoked<sup>20</sup> its deferral and ordered that normal processing of the case be resumed which resulted in issuance of the underlying Complaint and resultant hearing before Judge Amchan.

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<sup>14</sup> GC Ex. No. 1(a)

<sup>15</sup> GC Ex. No. 1(e)

<sup>16</sup> GC Ex. No. 1(h)

<sup>17</sup> GC Ex. No. 1(j)

<sup>18</sup> Id.

<sup>19</sup> Resp. Ex. No. 3

<sup>20</sup> GC Ex. No. 1(l)

In its post-hearing brief Respondent renewed its arguments for dismissal based upon the deferral revocation. Ultimately Judge Amchan found that the case was properly before him “given Respondent’s refusal to proceed with the arbitration”.<sup>21</sup> Respondent now seeks a third bite at the apple. In so doing, Respondent continues to misstate the facts and argue that the case should be dismissed because the Union “declined to have the grievances arbitrated”. Contrary to Respondent’s contentions, Respondent’s own exhibits establish that it was Respondent who withdrew from the arbitration after the parties had agreed to brief the arbitrator’s authority to rule on the disputed issues. A deferral to the parties’ grievance procedure is premised on several factors, one of which is the employer’s assertion of its willingness to resort to arbitration.<sup>22</sup> Respondent’s conduct relating to the arbitration establishes without a doubt its unwillingness to participate in the arbitration. Respondent’s letter withdrawing from the arbitration clearly states that Respondent was withdrawing from the arbitration because it had learned that a “recent decision” on the issue of the arbitrator’s jurisdiction could impact their right to legally contest the arbitrator’s decision. Counsel for the Acting General Counsel urges the Board to reject Respondent’s exceptions 1 and 2 and uphold Judge Amchan’s determination that the case was properly before him.

**III. JUDGE AMACHAN’S CONCLUSION THAT COUNSEL FOR THE ACTING COUNSEL ESTABLISHED A PRIMA FACIE CASE UNDER WRIGHT LINE IS FULLY SUPPORTED BY THE RECORD.**

In its Exceptions Respondent maintains that Counsel for the Acting General Counsel failed to establish a prima facie case under *Wright Line* specifically excepting to

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<sup>21</sup> ALJD P 2, L 12-14

<sup>22</sup> *United Technologies Corp.*, 268 NLRB 557, 558 (1984); see *Collyer Insulated Wire*, 192 NLRB 837, 842 (1971).

Judge Amchan's conclusions that the record was "replete" with evidence of Respondent's anti-union animus (Respondent Exceptions 5, 6 and 11), and that Respondent's reasons for terminating Mr. Hedger were pretextual (Respondent's Exceptions 3-4, 7-10, 12-15). Contrary to Respondent's assertions, Judge Amchan's conclusions were fully supported by the record and well-established Board law and should therefore be affirmed by the Board.

**a. Judge Amchan properly found substantial anti-union animus by Respondent.(Exception 5, 6 and 11)**

In his Decision Judge Amchan properly found that the record established "substantial animus towards Hedger's activities in general as a union steward".<sup>23</sup> In so finding Judge Amchan noted several examples in which Respondent exhibited animus towards Mr. Hedger because of his activities as a union steward.<sup>24</sup> Specifically Judge Amchan highlights an issue between Hedger and Kester involving a unilateral change by Respondent in its smoking policy; Kester's statement to Hedger that "you're punching the management in the face, and you're going to cause the place to close (if) you keep punching us in the face"; an incident involving the death of the husband of one of Hedger's coworkers; Respondent's fabrication and exaggeration of Hedger's disciplinary record; and Respondent's unsupported accusation of the amount of time Hedger spent away from his machine on August 12 which Respondent used as a pretext for Hedger's termination.<sup>25</sup>

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<sup>23</sup> ALJD. P. 6 lines 44-45

<sup>24</sup> ALJD P. 7 L 1-3

<sup>25</sup> As set forth in Counsel for the Acting General Counsel's cross-exceptions, Respondent's statements to Hedger at the bargaining table on June 4, 2010 that Respondent threatened Hedger stating that Respondent "was tired of the union circus and we're watching you, we are going to catch you and we are going to fire you." (ALJD P 3, L 30; Tr. 15-17, P 99 L 4-5) constitute additional evidence of Respondent's anti-union animus further bolstering Counsel for the Acting General Counsel's prima facie case.

In its Exceptions Respondent argues that the incident involving a change in smoking policy did not show animus on its part. In support Respondent rehashes many of the arguments raised in its post-hearing brief which Judge Amchan properly found unpersuasive. In its Exceptions Respondent argues that statements Kester may have made to Hedger during a meeting regarding a change to the smoking policy were too far removed in time to have been a proximate motivating factor in discharging him. It is undisputed that Hedger along with David Ishac and several employees met with Kester to discuss a change to the smoking policy. Respondent asserts that contrary to the Judge's finding that the meeting took place in 2009, the meeting actually took place in 2008 shortly after the new smoking laws in Illinois were enacted. Whether this threat was made in a meeting that took place in 2009 as testified to by Kester and Ishac or in 2008 as Hedger testified is irrelevant inasmuch as Judge Amchan did not find that a single incident, such as this example, led to Hedger's discharge but rather that the record established substantial animus in general towards Hedger's activities as union steward.

Respondent further argues that it is unclear whether Hedger was engaged in protected activity when he demanded the company bargain with the union over the proposed changes to the smoking policy, as Respondent was merely trying to comply with the new State laws which banned smoking in the workplace and gave employers the right to designate any outside area as a non-smoking area. In its brief in support of Exceptions, Respondent grossly misstates record testimony to suit its spurious position.

Contrary to Respondent's mischaracterizations, record testimony clearly demonstrated that Hedger was engaged in protected activity when he sought bargaining with Respondent over its unilateral change in smoking policy. Thus, at hearing Kester

testified that the State had changed the smoking requirement in terms of how close smokers could stand next to the doors. Because of this, Respondent decided to make all of its facilities non-smoking. Marcus objected to the change in company policy and instructed Respondent that the overall change was “something that had to be voted on, that the company could not just change a policy”.<sup>26</sup> Clearly, by Kester’s own testimony, Hedger was engaged in protected activity when he sought to discuss Respondent’s unilateral change to employees’ working conditions. Likewise Hedger testified that the reason he attempted to meet with Respondent on this occasion was to negotiate Respondent’s unilateral change. In this regard, Hedger’s testimony clearly demonstrated that he did not seek bargaining when Respondent first took action to comply with the State laws requiring smokers to stand 15 feet away from the door. Rather, “Three or four weeks later, the company came out with another policy change, a more stricter one, saying that there couldn’t be any smoking on the company property, in the parking lot anywhere. And because it was a unilateral change, we requested to negotiate this”.<sup>27</sup> Hedger went on to testify that Kester was very upset and told the group “I can’t tell corporate that we’ve got to vote on this”<sup>28</sup> and, “if Marcus keeps poking management in the ribs like this and punching them in the mouth, we might close the company down because of him”.<sup>29</sup> The later statement was corroborated by David Ishac, a current employee.<sup>30</sup> At trial Kester himself admitted that he “explained that if we keep making big issues over little things, management isn’t going to continue to deal with it”.<sup>31</sup>

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<sup>26</sup> Tr. 226 L 11-13

<sup>27</sup> Tr. 45 L 10-18

<sup>28</sup> Tr. 45 L 21-22

<sup>29</sup> Tr. 45 L 23-25 and P 46 L 1

<sup>30</sup> Tr. 101 L 2-4

<sup>31</sup> Tr. 227, L 11-1

Clearly Hedger was engaged in protected activities, Hedger was not protesting the changes the company made to comply with the new state law, as the changes had all ready been made. As is readily apparent, Hedger was protesting the additional changes the employer was attempting to make weeks later. These changes were not prompted by a change in State law but by Respondent's desire to make all of its facilities smoke free. As the record clearly demonstrated, Hedger's demand to bargain was met by a threat of plant closure by the highest ranking company officer at the Niles plant further evincing Respondent's strong feelings of anti-union animus. Judge Amchan's conclusion that this testimony demonstrated Respondent's anti-union animus is thus fully supported by the record.

Respondent further excepts to Judge Amchan's finding that comments made by Kester to Hedger<sup>32</sup> during their conversation about the death of the husband of one of Hedger's coworkers constituted animus; specifically, Kester's comment to Hedger that "we don't see eye to eye on everything, but this puts everything in perspective. Life is way too short for bickering between he and I."<sup>33</sup> Respondent's contention that these statements fail to demonstrate any animosity from Kester towards Hedger are wholly without merit. Kester's comments must be viewed in light of the surrounding circumstances. These comments were made just days after a heated contract negotiations session, the first negotiation session after the bargaining unit had voted down the Respondent's first contract offer. Just a few hours prior to Kester's statements, Hedger filed two separate grievances which alleged harassment at the hands of company

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<sup>32</sup> As demonstrated by documents in the record, these comments actually occurred in 2010 around the time of heated contract negotiations between Respondent and the Union. Counsel for the Acting General Counsel has filed cross-exceptions to correct Judge Amchan's inadvertent error in the date.

<sup>33</sup> ALJD P 7 L 22-23; Tr. 233 L 19-21

officials. The first grievance alleged harassment by Bob Kester and Tom Vlahos for knowingly allowing a posting naming and ridiculing Hedger, to be posted on the company's bulletin Board and failing to take it down<sup>34</sup>. Against this background, Judge Amchan properly found that Kester's comments about bickering and not seeing eye to eye constituted evidence of animus.<sup>35</sup>

Respondent further excepts to Judge Amchan's finding that Respondent's animus was demonstrated by Kester's testimony at hearing in which, in response to a question by the Union about whether Kester was aware of any discipline that Hedger received other than a verbal warning for tardiness Kester responded "I know that I've had several conversations with Marcus regarding aggressive behavior towards management and other associates".<sup>36</sup> Respondent argues that Kester's testimony does not reflect animosity toward Hedger as these statements could have happened well before the time Hedger became a steward. Once again, Respondent's arguments are as unfounded as Kester's statement. Kester's testimony at hearing was nothing more than a transparent attempt to mar Hedger's disciplinary record. Thus, Kester initially testified that he was aware of Hedger's disciplinary file at the time of his termination, and that "other than a few altercations with various people it was very good."<sup>37</sup> Kester was then asked "if one looks at this disciplinary file, do you find anything in there, to your knowledge, other than one

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<sup>34</sup> GC Ex. No. 10

<sup>35</sup> Although the ALJ found that Kester's comments were made in 2009, the grievances and Hedger's testimony establish that Kester's comments were actually made on June 11, 2010. The second grievance alleged that during the June 4, 2010 negotiations session, Bill Johnstone had threatened to terminate Hedger in order to harass and intimidate Hedger and the union's negotiations committee (GC. Ex. No. 9). Johnstone's threats have been alleged as independent 8(a)(1) violations and Counsel for the Acting General Counsel has taken Cross Exceptions to their dismissal.

<sup>36</sup> ALJD p. 7 lines 28-32, Tr. 263 L 4-6

<sup>37</sup> Tr. 262 L 18-19

verbal warning for tardiness in his nine year with the company, if you know.”<sup>38</sup> In response, Kester admits that he did not know.<sup>39</sup> Kester is next asked if he was aware of any other discipline that he received other than a verbal warning for tardiness<sup>40</sup> and Kester replied “I know that I’ve had several conversations with Marcus regarding aggressive behavior towards management and other associates”<sup>41</sup> and then admits that to his knowledge nothing in Marcus’ file reflects those conversations.<sup>42</sup> Respondent failed to produce any evidence that would support Kester’s allegations of Hedger’s “aggressive behavior”. Respondent would have us believe that its plant manager would have numerous conversations with an employee regarding aggressive behavior and altercations with other employees and members of management and would not document it. This is an incredulous contention in light of the fact the Article 19.3 of the parties’ collective bargaining agreement classifies fighting in the shop as cause for dismissal<sup>43</sup>. Because Hedger’s disciplinary record was utterly void of any sort of disciplinary warnings or counseling for insubordination or aggressive behavior towards co-workers, the logical inference is that Kester was describing his feelings towards Hedger because of Hedger’s active role as a union steward. As such Judge Amchan properly found these statements to evince Respondent’s animus towards Hedger because of his activities as union steward.

Finally, Respondent excepts to Judge Amchan’s finding that Kester’s time estimate of how long Hedger and Schmidt were together inside the plant was not

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<sup>38</sup> Id. at L 22-25

<sup>39</sup> Tr. 263 L 1

<sup>40</sup> Tr. 263 L 2-3

<sup>41</sup> Tr. 263 L 4-6

<sup>42</sup> Tr. 263 L 9

<sup>43</sup> GC Ex. No. 19

supported by the facts and therefore indicative of Respondent's animus towards Hedger. Respondent's assertions as to how long Schmidt and Hedger were inside the plant together are based on pure speculation and conjecture by Kester. The evidence simply does not support Kester's assertions that Hedger was away from his machine for nearly an hour. Respondent's erroneous timeline is based on an alleged statement made to Respondent by Schmitt, the timesheet for Hedger's press and the questionable results of Respondent's own investigation. However, as detailed below, during Respondent's investigation of the incident on August 12, Schmitt was never asked, nor did he state the specific time he first observed Hedger on that evening, thus Respondent would have had no basis for disciplining Hedger due to being away from production for an extended period of time. Moreover, Hedger's machine's timesheet does not corroborate Respondent's assertions that Hedger was away from his machine for an extended period. Finally, record evidence clearly demonstrated that Respondent never asked the other pressman who worked with Hedger on Hedger's machine at the time in question how long Hedger had been away from his machine.

In its Exceptions Respondent argues that Kester testified "without contradiction" that Schmitt told Respondent that he had first seen Hedger and his visitor "at 8:00" and cites page 289 of the transcript in support of this contention. However, Respondent must be reading from a different transcript as no such statement can be found on page 289 or the pages preceding or following it. In fact a careful review of the transcript establishes that Respondent never asked Schmitt at what time he first saw Hedger by the vending machines. Moreover, neither Kester's, Vlahos nor Samuels' testimony regarding the interviews they conducted with Schmitt show that the question was ever asked. In fact,

the investigation notes<sup>44</sup> taken by Tom Vlahos on August 17, 2010, establish that the question was not asked of anyone during the investigation. Nor does Kester's report of the investigation dated August 18, 2010<sup>45</sup> contain any reference to a specific time which Schmitt stated seeing Hedger at the vending machine. Similarly unresponsive of Respondent's position, Samuels testified that he prepared the script he used when he interviewed Schmitt and did not deviate from his scripted questions. Significantly, the script<sup>46</sup> does not contain a single question relating to the time Schmitt may have seen Hedger at the vending machine. Furthermore, Schmitt never testified that he told Respondent that he observed Hedger by the vending machine at a specific time. In view of this substantial evidence, Judge Amchan properly gave little weight to Schmitt's vague testimony at hearing that he first saw Hedger and Peter Schmidt "a little bit after 8:00 o'clock", noting that Schmitt's response was not an attempt by him to pin point the time in question<sup>47</sup>.

Respondent's argument that the time sheet established that Hedger's crew started the wash up at 7:45 p.m. and therefore it was reasonable for Kester to conclude that Hedger met his visitor between 7:45 and 8:00 p.m. is also without merit. Thus Hedger testified that he was initially paged "in the middle of the wash up, ignored the page and continued with the wash up and make ready because it was his job to install the printing plates for the next job and that he went to shipping after he was done installing the plates".<sup>48</sup> There is nothing on the time sheet that contradicts Hedger's testimony.

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<sup>44</sup> GC Ex. No. 3

<sup>45</sup> GC Ex. No. 4

<sup>46</sup> GC Ex. No. 2

<sup>47</sup> ALJD P 7 fn. 11

<sup>48</sup> Tr. 47 L 9-25

Finally, Respondent's own investigation, or more accurately, lack of investigation into the matter, failed to establish that Hedger was away from his machine for an hour or that his temporary absence from his machine caused a loss in production. To the contrary, at hearing Kester admitted that no one complained that Hedger's temporary absence caused a loss in production.<sup>49</sup> Kester also admitted that he never asked the members of Hedger's crew how long he was away from his machine.<sup>50</sup>

As is apparent, Respondent's claim that Hedger was inappropriately away from his machine for almost an hour was based on Schmitt's vague testimony about seeing Hedger some time after 8:00 and Respondent's erroneous interpretation of employee time sheets. Judge Amchan's conclusion 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 a steward"<sup>51</sup>, is fully supported by the Record and should therefore be upheld.

**b. Judge Amchan properly found that Respondent's reasons for terminating Hedger were pretextual, and therefore his termination was discriminatorily motivated and a violation of the Act. (Exceptions 3-4, 7-10, 12-15)**

Respondent vehemently asserts that its reasons for terminating Hedger were not pretextual and that it would have terminated Hedger even absent his union activity. Unlike Respondent's contentions, Judge Amchan's conclusion that Hedger's discharge was pre-textual was based on facts fully supported by the record. Specifically Judge Amchan found Respondent's pretextual reasons for terminating Hedger were demonstrated by: 1) Respondent's reliance on the violation of a company policy that was

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<sup>49</sup> Tr. 289 L 6-9

<sup>50</sup> Tr. 245 L 9, P 246 L 25

<sup>51</sup> ALJD P 7 L 36-38

not enforced on the second or third shift, 2) Respondent's failure 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 for over an hour and his failure to adequately investigate it and 4) Respondent's disparate treatment of Hedger.

Respondent brushes aside Judge Amchan's conclusions that Hedger was disciplined for violating a company policy that was never enforced on second or third shift by arguing that Respondent attributed great significance to the value of Respondent's proprietary information on display on the evening of August 12. However, there was no evidence in the record that Respondent was engaged in a production process that was different from the ones they ran on any other night that visitors walked freely throughout the plant.

Moreover, Respondent's purported concern for its "proprietary information" was belied by its own actions. Thus, Respondent's second shift manager Tom Vlahos testified that the foreman were in charge after he left the plant, that they were "his eyes and ears."<sup>52</sup> Vlahos admitted that their duties included the policing of who walked in and out of the building and that this was so because of their concerns for safety, because someone could get hurt and that a foreman would know not to let someone in the building.<sup>53</sup> However, undisputed record testimony clearly demonstrated that despite seeing a man with a bicycle in the plant on the evening of August 12, none of Respondent's foremen reported it or tried to prevent him from walking through the plant. Clearly, Respondent's concern for the protection of its proprietary process was not

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<sup>52</sup> Tr. 332 L 20-21

<sup>53</sup> Tr. 333 L 10-18

something that was shared with Respondent's second shift manager or the employees he relied on to run the shift when he left.

Respondent's alleged concerns about Schmidt's background in the printing industry raised in its Exceptions are similarly without merit. As Judge Amchan properly noted, Respondent made no attempt to talk to Peter Schmidt to determine what he was doing at the plant, and that record evidence failed to show that Schmidt observed or learned anything pertinent to the most unique aspects of Respondent's production process.<sup>54</sup> Moreover, the record clearly established that visitors were a normal sight on second shift, whether they were truck drivers, delivery people, former employees or family members, they walked in and out of the facility unchallenged by those tasked with being Respondent's eyes and ears. Respondent had no way of knowing the employment background or the printing knowledge of those visitors.

Finally, Respondent contends that Hedger lied during his interview on August 18, 2010 when he responded to Respondent's questions with "I don't remember" and refused to cooperate with the investigation, therefore Respondent was justified in terminating him. Even assuming this non-response constituted a "lie", record evidence clearly established Respondent tolerated employee non-cooperation in investigations in cases involving individuals other than the chief union steward. Thus as the record established, Respondent accepted Tony Sass' refusal to cooperate with Respondent's investigation without incident. Sass was the feeder on Hedger's press, would have had first-hand knowledge of how long Hedger had been away from the machine and whether or not his absence affected production. Kester admitted that he did not interview Sass<sup>55</sup> and that

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<sup>54</sup> ALJD P 10, lines 16 – 23

<sup>55</sup> Tr. 246, L 25

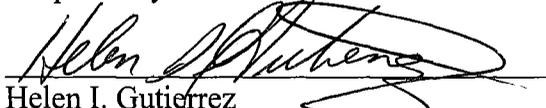
when Respondent asked Sass if he had seen Hedger, Sass stated he did not want to get involved.<sup>56</sup> Respondent's failure to challenge Sass' refusal to cooperate in the investigation, established that it did in fact tolerate and accept employee's refusal to participate in investigatory investigations. Respondent could have threatened Sass that failure to cooperate could result in discipline up to including discharge just as he had done with Hedger and Schmitt. The fact that it failed to do so further supports Judge Amchan's finding that Respondent's reasons for terminating Hedger were pre-textual and discriminatorily motivated in violation of Section 8(a)(3) of the Act.

#### **V. CONCLUSION AND REMEDY**

Counsel for the Acting General Counsel submits that Board law and supporting record evidence in this case thoroughly establishes that Respondent violated Section 8(a)(3) of the Act as Judge Amchan properly found. Based thereon, Counsel for the Acting General Counsel requests that the Board reject Respondent's Exceptions in their entirety.

Dated at Chicago, Illinois this 8<sup>th</sup> day of February, 2012

Respectfully submitted,

  
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<sup>56</sup> Tr. 247 L 5-6

**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 Answering Brief to Respondent's 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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