UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HOWARD INDUSTRIES, INC., TRANSFORMER DIVISION,	)	
Respondent,	)	
and	)	**Case No.: 15-CA-018637**
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 1317,	)	
Charging Party.	)	

RESPONDENT'S MEMORANDUM IN SUPPORT OF MOTION TO STRIKE GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION

COMES NOW the Respondent, Howard Industries, Inc., Transformer Division, through the undersigned, who files this Memorandum in Support of its Motion to Strike General Counsel's Exceptions to the Administrative Law Judge's Supplemental Decision.

I. PROCEDURAL HISTORY

The procedural history of this matter is accurately described in the General Counsel's Memorandum in Support of the Exceptions to the Administrative Law Judge's Supplemental Decision (hereinafter "GC's Memorandum"), and will not be repeated herein.

II. THE RELEVANT UNFAIR LABOR PRACTICE ALLEGATION

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

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

III. RELEVANT FACTS [1] [2]

On April 7, 2008, Union Vice President and Senior Steward James Chancellor ("Chancellor") met with an employee named Dasmeon Caraway ("Caraway") in preparation for an investigatory interview with Human Resources Generalist Brant Stringer ("Stringer"). Chancellor's participation had been specifically requested by Caraway when he was told of the interview. Chancellor and Caraway conferred for 20-25 minutes during which time they presumably discussed matters related to conduct that might result in Caraway's discipline. During this conference, Caraway apparently told Chancellor that he had not been properly trained for a particular job.

Following this conversation, Chancellor, Caraway and Stringer met in Stringer's office. Also present was a supervisor named Rufus McGill ("McGill"). Stringer asked Caraway a number of questions which he answered on his own. Late in the meeting, Chancellor tapped a notebook that he was holding and appeared to direct Caraway's attention to something that was written in the notebook. Caraway then began to read out loud the following message from the notebook: "I never was actually trained to do that job. I only filled in when he needed me. I am actually a pay rate 17-painter."

Stringer then asked Chancellor to allow Caraway the opportunity to tell him in his own words what had occurred, asking Chancellor to lower the notebook. Chancellor refused. In response, Stringer then told Chancellor to close the notebook or he would be suspended. Stringer then told Chancellor to remove the notebook from the room, which he did. The interview continued for a few more minutes.

[1] The ALJ made such fact determinations either in his Decision or Supplemental Decision. Cites to the Decision will be noted as "Dec. p. #, ln. #," and cites to the Supplemental Decision will be noted as "Supp. Dec. p. #, ln. #."
[2] Cites to the transcript will be noted as "Tr. #."

Several minutes after the investigatory meeting ended, Stringer met with Chancellor, told him that he did not mind him having a notebook, but that he did not want employees to use it as a script. Chancellor has had other investigatory meetings with Stringer both before and after April 7, 2008, and has never been prohibited from using his notebook.

GC's Memorandum mischaracterizes several matters that were not a part of the Administrative Law Judge's Decision or Supplemental Decision. For example, on page 6, the Memorandum states "during the discussion, Caraway said that he had not been trained to perform that procedure, and steward Chancellor wrote Caraway's comments in his notebook: 'I never was actually trained to do that job. I only filled in when he needed me. I am actually a pay rate 17 painter.'" It is true that the Administrative Law Judge ("ALJ") included this quote in both his Decision and Supplemental Decision. Dec. p. 2, ln. 15; Supp. Dec. p. 2, ln. 5. However, immediately following both entries, the ALJ stated "Whether the foregoing is true is immaterial." Dec. p. 2, ln. 17; Supp. Dec. p. 2, ln. 6. That falls far short of being a finding of fact. Furthermore, there was no evidence that this quotation came from Caraway. To the contrary, it is what Chancellor wrote in his notebook.

Further down on page 6 of the GC's Memorandum, it is alleged that the notebook page contained only the above-referenced three (3) sentences, and no other entries. While this is technically true, it implies that the notebook itself contained no other entries, which in fact is unknown, because the General Counsel did not enter the notebook into the record. In addition, on page 7, GC's Memorandum states the following: "<u>After</u> Caraway finished answering HR Stringer's questions, Steward Chancellor tried to remind Caraway to state that he had not been trained" [emphasis added]. There is no such finding in either the ALJ Decision or Supplemental

Decision. To the contrary, the record clearly shows that after Chancellor removed the notebook, the interview continued for a few more minutes. Tr. 29, 81.

Finally, on page 17 of the Memorandum, the General Counsel asserts that Stringer told Chancellor [misidentified as Stringer]: "To *remove the notebook* from the room or be suspended." As will be discussed below, that assertion is contrary both to Chancellor's testimony, as well as to the findings of the ALJ.

IV. THE RELEVANT FINDINGS OF THE ADMINISTRATIVE LAW JUDGE

The ALJ dismissed paragraph 7 of the Consolidated Complaint concluding that Respondent did not violate the Act. The ALJ noted that the alleged violation occurred during an investigatory interview, as opposed to a grievance meeting. Supp. Dec. p. 3, ln. 9. Accordingly, the ALJ held that Respondent was free to insist that the employee provide his own account of the matter under investigation. Supp. Dec. p. 3, ln. 11. The ALJ concluded that this right included the right to prohibit the employee from reading from a prepared script that was written down in Chancellor's notebook, and that Respondent was within its rights to threaten to discipline Chancellor after he refused to quit showing the contents of his notebook to the employee. Supp. Dec. p. 3, ln. 40. The ALJ's findings of fact are supported by the record, and his conclusions of law are both accurate and consistent with the record evidence.

V. ARGUMENT

A. The ALJ's Decision and Supplemental Decision are both consistent with the holding in Weingarten

The role of a union representative during an investigatory interview is to assist the employee and attempt to clarify facts or suggest other employees who may have knowledge of them. NLRB v. Weingarten, Inc., 420 U.S. 251, 259-260 (1975). Chancellor was afforded the opportunity to do all of this, and more.

According to Chancellor's own testimony, the only restraint placed on stewards' conduct during investigatory interviews is that they are not to interact with the manager(s) who is conducting the interview. Tr. 29. Further, stewards are allowed to interact with employees without limitation. Tr. 29-30. According to all three witnesses who testified at the hearing, the interview was progressing in a normal fashion until Chancellor showed the scripted page to Caraway. In short, both before and after being instructed to close his notebook, Chancellor assisted Caraway without restriction.[3]

The right of an employer to insist that an employee provide his own account of the matter under investigation is undisputed. Id. Reading from a script prepared by someone else certainly can interfere with an investigation. And, there is no question but that this was exactly what took place during the interview. Mr. Caraway's precise testimony was "And then Mr. James [Chancellor] opened the notebook, and I started reading off of it." Tr. 46.

Furthermore, Stringer had no way of knowing how much more of Caraway's responses were scripted, because he could not see the contents of Chancellor's notebook. For all Stringer knew, there could have been many more pages of scripted dialogue. In fact, for all we know, there could have been many more pages of scripted dialogue, because the General Counsel did not enter the notebook into the record, nor did Chancellor testify about its contents. The General Counsel's suggestion that Chancellor would have shared the contents of his notebook with Stringer had Stringer requested that he do so is illogical. It is inconceivable that Chancellor would refuse to close his notebook, but then willingly share its contents with Stringer.

The ALJ correctly concluded that Caraway was improperly reading from a script prepared by someone else, and that Stringer was within his rights to demand that Chancellor stop

[3] The General Counsel relies heavily on the holding in Southeastern Bell Telephone Company, 251 NLRB 612 (1980), despite the fact that the Fifth Circuit denied enforcement of this decision. More importantly, unlike the facts in that case, Chancellor was not instructed to remain silent and actively represented Caraway during the interviews.

showing the script to Caraway. This interaction occurred near the end of the interview, after Mr. Caraway had responded to most of Stringer's questions. After this, Caraway answered a few more questions and was free to add whatever else he or Chancellor felt he needed to add. Chancellor's representation of Caraway was not restricted in any way, other than by prohibiting him from continuing to show Caraway a scripted response.[4]

B. Respondent did not commit the allegation contained in Paragraph 7 of the Complaint

As noted above, paragraph 7 of the Complaint alleges that Chancellor was threatened with discipline "for using notes while representing other employees." According to the General Counsel, a notebook "has only two uses, taking and reviewing notes." GC Memorandum p. 17. If that were true, then the General Counsel has no case since it is undisputed that Chancellor was permitted to take and review notes, and was not threatened for doing so. Supp. Dec. p. 3, ln. 30.

Clearly, a notebook can have more than these two purposes, including being the source of a written script. Chancellor was not threatened with discipline for taking and reviewing notes. He was not even threatened with discipline when he showed the script to Caraway and Caraway read the script. Chancellor was only threatened with discipline when he refused to quit showing the script to Caraway.

C. The script was not Caraway's own account of the matter

General Counsel contends that the scripted language was Caraway's own account of the matter. GC Memorandum p. 16. Significantly, neither Messrs. Caraway nor Chancellor testified that this was Caraway's "own account" of the matter. Caraway did not testify that he even mentioned a lack of training during the preliminary meeting, and all Chancellor testified about on this issue was that Caraway told him that "he had not been properly trained." Tr. 27.

[4] Rather than having Caraway read from a script, Chancellor should have asked him to explain why he was not properly trained for the particular job.

When Caraway's testimony in this case is compared to the articulate statement that he read during the interview, it was obvious that it was not his "own account" of the matter. In fact, in all due respect to Mr. Caraway, the union's own attorney stated that Mr. Caraway was not as "articulate as I would have liked him to be." Tr. 123. The simple fact is that this was a script prepared by Chancellor and read by Caraway.

General Counsel contends that Chancellor's behavior was "trifling" and comparable to that committed by the union steward in U.S. Postal Service, 351 NLRB 1226 (2007). GC Memorandum pp. 8, 14. General Counsel characterizes the holding in U.S. Postal Service to be that a union steward who stopped an employee from answering a question did not overstep his bounds. GC Memorandum p. 10. Hence, if an employer could not prevent a steward from interfering with an investigation by instructing an employee to remain silent, then Respondent certainly could not contend that reading from a prepared script interfered with its investigation.

Of course, the holding in U.S. Postal Service rested on the nature of the question that was being asked, not on the broader right of whether a steward could instruct an employee to not answer questions. There, the interviewer acknowledged that if the employee had answered the specific question in the affirmative, he would have been discharged. Thus, the steward was within his right to object to the question. This behavior is in no way comparable to that engaged in by Chancellor.

Stringer had no option other than to threaten Chancellor with disciplinary action if he refused to quit showing the notebook to Caraway. Again, Chancellor was requested to close the notebook and refused to do so. Stringer was then left with two options: (1) allow Caraway to continue to read from a script, or (2) take appropriate action to stop Caraway from reading from a script. Weingarten and its progeny clearly allow an employer to take the necessary steps to

obtain an employee's own account of a matter, even if it is forced to threaten disciplinary action in order to do so.

D. Stringer did not threaten Chancellor with suspension unless he removed the notebook from the room

General Counsel's argument that Stringer overreacted is based on his apparent misunderstanding of the facts. According to the General Counsel, Stringer told Chancellor [misidentified as Stringer] "to *remove the notebook* from the room or be suspended." GC Memorandum p. 17.

In fact, the ALJ adopted Chancellor's own testimony on this matter, which included the following: "According to Chancellor, Generalist Stringer told him to close the notebook or he would be suspended. Chancellor refused to close the notebook, stating that he needed the notebook 'as a tool' to represent the employee. Upon Chancellor's refusal, Stringer repeated his directive that he close the notebook or he would be suspended. He then told Chancellor to place the notebook outside of the office, and Chancellor did so." Supp. Dec. p. 2, ln. 18. Thus, at no time was Chancellor threatened with suspension if he did not remove the notebook from the meeting room.

CONCLUSION

The ALJ's Supplemental Decision should be affirmed. He correctly found that Chancellor was afforded a full opportunity to represent Caraway during the investigatory interview. The ALJ also correctly recognized that having an employee read a statement from a prepared script is different from having that employee provide his own account of the matter. Finally, the ALJ correctly concluded that Stringer had the right to threaten Chancellor with suspension, unless he stopped showing the scripted statement to Caraway. In short, the ALJ

correctly held that Respondent did not violate the Act. Accordingly, the General Counsel's exceptions should be struck.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 16th day of October, 2012, caused a copy of the above and foregoing pleading to be served via E-Mail, upon the following:

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