

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERTAPE POLYMER CORP.

and

UNITED STEEL, PAPER & FORESTRY, RUBBER,  
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL  
AND SERVICE WORKERS INTERNATIONAL  
UNION, AFL-CIO-CLC

Case Nos: 11-CA-077869  
11-CA-078827  
10-CA-080133  
11-RC-076776

**RESPONDENT'S ANSWERING BRIEF TO CHARGING PARTY'S  
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION**

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## **I. INTRODUCTION**

Administrative Law Judge Robert A. Ringler issued a Decision and Order in this case on February 20, 2013. On March 20, 2013, Respondent Intertape Polymer Corp. (IPG or the Company) and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC (the Union) filed their respective exceptions to the judge's findings. Pursuant to Section 102.46(d) of the Board's Rules and Regulations, IPG submits this answering brief to the Union's exceptions.

## **II. RESPONSE**

The Union filed exceptions to the judge's decision to dismiss the Acting General Counsel's allegations that IPG violated Section 8(a)(3) and (1) of the Act by discharging Johnnie Thames and denying overtime to Wilton "R.V." Dantzer. The Union's exceptions are meritless and should be rejected by the Board.

### **A. IPG DID NOT UNLAWFULLY DISCHARGE THAMES.**

The Union offers three principal arguments to support its exceptions to the judge's decision regarding Thames' termination. First, the Union argues that the judge failed to consider evidence that Javier Suarez, who worked for one of IPG's contractors, reportedly denied seeing Thames asleep when questioned about it by management. Second, the Union argues that the judge failed to consider that IPG purportedly did not conduct its investigation until the day after Thames was discharged. Finally, the Union argues that the judge failed to properly consider comparator evidence in the record.

## **1. Suarez's Report**

The Union's first argument is that the judge failed to fully and fairly consider Human Resources Manager Sandra Rivers' investigative report (GC Exh. 10), which indicates that Suarez denied seeing Thames asleep when questioned about it by management. This argument is based on a misreading of the judge's decision and a misunderstanding of what Suarez reportedly observed.

Suarez told Rivers and Converting Department Manager Tonya Moran that he did not see Thames asleep. (Tr. 363, 427). Suarez explained, however, that he was "in the other part of the area working" and "didn't see Mr. Thames the entire time." (Tr. 364). He added that "he did not see [Williams] come up . . . ." (Tr. 363). Thus, Rivers and Moran logically concluded that Suarez could neither confirm nor deny Thames' story.

When analyzing the efficacy of IPG's investigation, the judge considered the fact that Suarez reportedly did not see Thames asleep for what it was worth. Like Rivers and Moran, he found Suarez's report to be insignificant because "he was not present at all relevant times." (ALJD, p. 10, fn. 15). In other words, the judge plainly understood that Suarez's failure to see Thames asleep made it no more or less likely that he actually was.

Perhaps the Union's theory may have held water had Suarez told Rivers that he was working with and around Thames the entire time; that he saw Williams walk up the stairs; and that at no time was Thames asleep. Suarez, however, did not tell Rivers any of those things. Instead, Suarez told Rivers that he did not see Thames the entire time; he did not see Williams walk up the stairs; and he did not see Thames asleep. (Tr. 363-364). Accordingly, the judge did not err in discounting Suarez's report.

## **2. IPG's Investigation**

The Union next argues that IPG did not conduct a “full and fair” investigation because, it claims, IPG did not conduct its investigation until March 7, 2012,<sup>1</sup> the day after Thames was discharged. This is untrue and ultimately irrelevant.

### **a. March 6 investigation**

The Union's claim that IPG did not investigate the incident leading to Thames' termination until March 7 is patently false. Moran undeniably “investigated” the matter on March 6 as soon as Williams reported to her that he had just seen Thames asleep in the upstairs warehouse. The record also plainly establishes that Moran's findings supported her reasonable belief that Thames was guilty. See *J.J. Cassone Bakery, Inc.*, 350 NLRB 86, 87 (2007) (“In order to meet its burden under *Wright Line*, the Respondent must show that it had a reasonable belief that [the alleged discriminatee] actually [engaged in the misconduct], and that it acted on that belief when it discharged him.”) (citing *McKesson Drug Co.*, 337 NLRB 935, 937 fn. 7 (2002)).

First, Moran immediately went to the warehouse to confirm what Williams reportedly observed. Of course, she could have simply taken Williams' word for it and disciplined Thames without further inquiry. This alone would have been sufficient to demonstrate that Moran's belief was reasonable. See *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1324 (2006) (finding that because the alleged discriminatee's misconduct was directly observed by a supervisor, “it was unnecessary for the Respondent to investigate the incident further in order to ascertain whether the basis for the discipline had occurred”).

Second, although Moran did not see Thames asleep when she arrived, he “did not bother to get out of the chair or act like he was working or anything” and instead “stayed laid back in

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<sup>1</sup>All dates referenced herein are in 2012, unless otherwise indicated.

the chair.” (Tr. 417). On that basis then, Moran could have reasonably concluded that Williams was telling the truth about seeing Thames asleep moments earlier, and she could have immediately disciplined him with no questions asked. See *J.J. Cassone Bakery*, 350 NLRB at 88 (“[I]nterviewing the subject employees is not the sine qua non of an adequate investigation.”) (citing *Frierson Building Supply Co.*, 328 NLRB 1023, 1024 (1999)). Instead, Moran gave Thames multiple chances to explain his side of the story.

According to Thames’ own testimony, Moran asked him in the warehouse why he was sleeping, and he responded that he was not. (Tr. 258-259). After that, Moran, Thames, and Williams walked back to Moran’s office to “discuss the situation” further. (Tr. 419). In Moran’s office, Thames again denied that he was sleeping. (Tr. 259). He also accused Williams of lying and indicated that Suarez “might know something.” (Tr. 418, 421). Moran saw Suarez upstairs, but he was on the other side of the very large warehouse area and was not watching what was going on.<sup>2</sup> (Tr. 418-420). Thames offered no other explanation or defense to the charge at that time. (Tr. 419).

At that point, Moran and Williams discussed with Thames the fact that sleeping on the job was a Level II offense, and based on his prior discipline, it would result in his termination. (Tr. 421). Moran reminded Thames about his right to appeal the decision to the Human Resources Department. (Tr. 421). At some point that day, Moran also called Rivers and discussed the matter. (Tr. 360, 366, 425). Moran explained to Rivers that she felt Thames would be appealing the decision. (Tr. 425).

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<sup>2</sup>Moran spoke to Suarez later that day, and Suarez confirmed Moran’s suspicion (based on her own observation) that he was not in the area and had not seen anything. (Tr. 425). That Moran did not talk to Suarez prior to Thames’ leaving the facility does not undermine the legitimacy of Moran’s investigation. See *Chartwells, Compass Group, USA, Inc.*, 342 NLRB 1155, 1158 (2004) (“The fact that an employer does not pursue an investigation in some preferred manner before imposing discipline does not establish an unlawful motive for the discipline.”).

In short, Moran did precisely what any reasonable and prudent manager would do under these circumstances. This is not like a situation where money is missing or Company property is damaged. In those scenarios, it behooves management to identify and interview multiple witnesses to support accusations against an employee in the absence of direct evidence that the employee was the one responsible. Here, Williams, a supervisor who has worked at the facility for over thirty years (Tr. 681), provided direct evidence that Thames was asleep on the job.

Notwithstanding this direct evidence from a long-tenured supervisor, Moran did not jump to conclusions. She followed Williams to the warehouse to corroborate his report. She then gave Thames ample opportunity to explain his side of the story. She also discussed the matter with HR Manager Rivers. Only then did Moran decide to credit Williams over Thames. Accordingly, the record evidence establishes that Moran did indeed investigate the incident on March 6, and based on her findings, she reasonably believed Thames was guilty of sleeping on the job.

**b. March 7 investigation**

The Union can attack Moran's handling of the incident on March 6 as much as it wants, but it will not change the undeniable fact that another investigation was conducted on March 7, before Thames' termination was deemed final. This alone belies the Union's argument that IPG's reasons for terminating Thames were pretextual.

As Rivers explained, under IPG's discipline policy, before discharging anyone, the manager generally consults Rivers. (Tr. 405). Here, the record reflects that Moran called Rivers on March 6 and discussed terminating Thames based on the prior discipline in his file. (Tr. 360, 366, 425). That same day, Thames scheduled an appeals meeting with Rivers for the following day. (Tr. 425). During the appeals meeting, Rivers and Moran allowed Thames yet another

opportunity to tell his side of the story. Significantly, Thames told a different story than what he told Moran a day earlier.

For the first time, Thames reported that his blood sugar was low and he had given himself an insulin shot and sat down and put his hands behind his head to give it time to work. (Tr. 361, 458). The evidence reflects that, when initially confronted by Williams and Moran about sleeping on the job, Thames did not say anything about having taken an insulin shot; he only maintained that he was not asleep and that Williams was lying. (Tr. 418, 451, 687).

Further, after the initial meeting with Thames on March 7, Rivers and Moran called Suarez to confirm Thames' version of events before rendering a decision on his appeal. (Tr. 363, 426-427). Although Suarez denied seeing Thames asleep, both Rivers and Moran found this insignificant given that he reportedly did not see Williams come upstairs and did not see Thames the entire time. (Tr. 363-364, 427).

Clearly then, Thames was afforded a full and fair opportunity to defend himself against the charge that he was sleeping on the job. The matter was thoroughly investigated, and there is absolutely no evidence of pretext.

### **3. Comparators**

The Union's final argument to support its exceptions concerning Thames' termination is that the judge failed to properly consider comparator evidence in the record. According to the Union, the judge ignored evidence that at least two employees were issued two written warnings for sleeping on the job, while four others were issued final written counselings. The Union's argument is premised on a fundamental misunderstanding of IPG's discipline policy.

That two employees were issued two written warnings and four employees were issued final written counselings for sleeping on the job does not tell the whole story. The relevant

inquiry is whether the “sleeping on the job” offenses committed by those individuals were treated as a Level II discipline. The record plainly reflects that they were. (R. Exh. 2; Tr. 367-372).

IPG’s policy could not be more straightforward. There are three levels of work rules. (Tr. 24-25; GC Exh. 7). The degree of discipline imposed for violating one of those work rules depends on which level rule is violated *and whether there are other violations in the preceding one-year period*. In other words, for purposes of a disparate treatment analysis, it is not enough to only know what ultimate discipline employees received for sleeping on the job. One must also know what other disciplines those employees had in their file. The Union inexplicably ignores this key aspect of IPG’s discipline policy.

Consequently, the Union’s argument that the judge erroneously ignored evidence that other employees were treated differently for sleeping on the job can easily be rejected.

**B. IPG DID NOT UNLAWFULLY DENY DANTZLER OVERTIME.**

The Union offers two principal arguments to support its exceptions to the judge’s decision regarding Dantzler’s overtime. First, the Union argues that the judge erred by failing to consider lead operator Odell Harris’s testimony about an alleged rule prohibiting overtime in the mixing department unless two employees are absent. Second, the Union argues that the judge failed to consider documentary evidence that purportedly establishes that Dantzler was discriminatorily denied overtime after February 17.

**1. Harris’s Testimony**

The Union excepts to the judge’s finding that the Acting General Counsel relied solely on Dantzler’s uncorroborated and self-serving testimony that he was subject to a more rigorous overtime rule than his coworkers. In that regard, the Union claims the judge erroneously failed

to consider lead operator Harris's testimony that Supervisor Cam Dornauer told him (Harris) not to allow anyone to work overtime unless there were two people absent. The Union argues this "admission" by Harris corroborates Dantzler's testimony on the issue. The Union conflates and confuses the testimony.

Dantzler testified that Harris told him that "Dornauer said that I was to get absolutely no overtime unless two men were out." (Tr. 59-60). He further testified that after this alleged conversation with Harris, he asked Dornauer why he could not get more overtime in the mixing department, and Dornauer allegedly responded that "two people had to be out" in order for him to get overtime and that the rule "was for nobody else, just for [him]." (Tr. 60). Harris's testimony not only fails to corroborate Dantzler's testimony that he was told the rule was to be applied only to him, it directly contradicts it.

Harris testified that Dornauer told him (Harris) that he could not call anyone in to work overtime in the mixing department unless his regular crew of eight operators was short by two people and they still could not get the job done. (Tr. 608). Harris also testified that he told Dantzler that he did not need him for overtime unless there were two people out. (Tr. 609-610). Critically, Harris denied ever telling Dantzler that any restriction or limitation on overtime only applied to him. (Tr. 610). Thus, contrary to the Union's assertion, Harris's testimony contradicts, rather than supports, Dantzler's testimony on this key issue.

## **2. Documentary Evidence**

The Union next excepts to the judge's finding that the Acting General Counsel relied solely on Dantzler's uncorroborated and self-serving testimony that he lost overtime on certain dates. The Union argues that Respondent's Exhibit 17 refutes the judge's finding that there is no evidence to support Dantzler's claim that he was discriminatorily denied overtime in the mixing

department after February 17. Specifically, the Union contends that the exhibit demonstrates that William Roach worked overtime in the mixing department the week ending February 19 and that other employees worked overtime in the mixing department that week and other weeks through March. Again, the Union misreads the record.

First, page 8 of Respondent's Exhibit 17 (which is an overtime summary for the week ending Sunday, February 19) indicates: "2.25 hours – Billy Roach worked in Mixing last Sunday but OT charged to Coating at week end." (R. Exh. 17, p. 8). This document does not prove that Roach worked overtime in the mixing department on or after February 17, when Dantzler claims he began being denied overtime. In fact, when read in conjunction with Roach's time records, it confirms only that he worked 2.25 hours of overtime on Sunday, February 12. (R. Exh. 22, p. 51). There is no evidence that Roach worked overtime after February 12, which is consistent with Roach's testimony that he has not worked any overtime since Harris told him in February he could not work overtime unless two people were out. (Tr. 617-618).

Second, the mere fact that Respondent's Exhibit 17 indicates that overtime was worked in the mixing department through March proves nothing with respect to Dantzler's discrimination claim. The record makes clear that Dornauer instructed Harris on February 17 that he needed to stop bringing in individuals *from outside of the department* to work overtime in mixing. (Tr. 588). The record does not reflect that all overtime in the mixing department was eliminated. Thus, any mixing department overtime indicated on Respondent's Exhibit 17 can reasonably be assumed to have been worked by mixing department employees absent evidence to the contrary.

Accordingly, as the judge correctly recognized, the Acting General Counsel failed to present any documentary evidence to support its position that Dantzler received a less than proportional share of overtime opportunities in the mixing department after February 17.

### **III. CONCLUSION**

For the foregoing reasons, the judge should reject the Union's exceptions to the judge's decision and adopt the judge's decision as to the Section 8(a)(3) and (1) claims involving Thames and Dantzler.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Reyburn W. Lominack, III, do hereby certify that I have on this 3rd day of April, 2013, served a copy of Respondent's Answering Brief to Charging Party's Exceptions to Administrative Law Judge's Decision upon the following by email:

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