UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15

HOWARD INDUSTRIES, INC.,	)		
Respondent,	)		
	)		
and	)	**Case Nos:**	**15-CA-070830**
	)		**15-CA-081543**
INTERNATIONAL BROTHERHOOD	)		**15-CA-085642**
OF ELECTRICAL WORKERS,	)		
LOCAL UNION 1317,	)		
Union.	)		

RESPONDENT'S MEMORANDUM IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

NOW COMES the Respondent, Howard Industries, Inc. ("Howard"), through undersigned counsel, who files this Memorandum in Support of its Exceptions to the Decision of the Administrative Law Judge in the matter noted above.

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INTRODUCTION

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("Board"), Respondent submits this Brief in Support of its Exceptions to Administrative Law Judge ("ALJ") Keltner Locke's Decision in the above-captioned matters. In his decision, ALJ Locke found that Respondent violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act ("Act") by failing and refusing to furnish to the Union confidential and proprietary trade secrets regarding production standards. ALJ's Locke's decision is contrary to the principles explained by the Supreme Court of the United States in Detroit Edison v. NLRB, 440 U.S. 301 (1979). Moreover, ALJ Locke's factual conclusions throughout his decision are entirely inconsistent with the testimony of the witnesses and exhibits presented at trial. Accordingly, Respondent respectfully requests that the Board refuse to adopt ALJ Locke's recommended remedy and order with respect to it, and instead dismiss the Consolidated Complaint in its entirety.

STATEMENT OF THE CASE

I. Procedural History.

On September 17, 2012, the Acting General Counsel of the Board, by the Acting Regional Director for Region 15, issued a Consolidated Complaint in the instant matter. (Dec. p. 8, ln. 38-40.)[1] After further consolidation and severance of certain allegations, on April 3 and 4, 2013, a hearing on the matter was held before Administrative Law Judge Keltner W. Locke, in Ellisville, Mississippi. (Dec. p. 8, ln. 40 - p. 30, ln. 33.) On May 3, 2013, after hearing the evidence and oral argument, ALJ Locke issued a bench decision found at pages 292 through 316

[1] Cites to the ALJ's Decision will be noted as "Dec. p. #, ln. #."

of the transcript.[2] On June 13, 2013, ALJ Locke issued his formal Decision transferring the case to the Board. (Dec. p. 1-20.)

II. Relevant Facts.

A. Howard Industries.

Howard is one of the nation's leading manufacturers of transformers. The "heart" of a transformer is a device called a coil. In its Laurel, Mississippi facility, Howard employs hundreds of employees, called coil winders, that wind coils for Howard's transformers. (See Tr. p. 209, ln. 10-p. 210, ln. 22.)

Unlike its competitors, Howard has developed the ability to manufacture a massive variety of coils. This is accomplished through a sophisticated and proprietary software system that designs the optimum coil for any given situation. This proprietary software system enables Howard to have a significant market advantage over its competitors. Other transformer manufacturers apply restraints or standardizations in their design optimizations. By comparison, Howard has an almost infinite capability to design different types of coils. This is the very reason that Howard holds 40% of the market share for transformers, which is twice as much as its closest competitor. (Tr. p. 152, ln. 24-p. 154, ln. 18; p. 209, ln. 15-p. 211, ln. 21; p. 217, ln. 14-p. 220, ln. 8.)

This proprietary software system was wholly designed by Howard over a four decade period. Howard has spent tens of millions of dollars developing this system, and it would likely sell for far more than that amount were it made available in the marketplace.

The software system contains thousands of "elements." One example of an element would be connecting a specific length, gauge, and type of wire to a specific type of connector. Whenever a customer brings a potential order to Howard, the customer's specifications are

[2] Cites to the transcript will be noted as "Tr. p. #, ln. #."

entered into the aforementioned software system, which in turn selects the combination of elements that will result in the optimum coil design at the lowest cost. In a typical year, the company will produce 200,000-300,000 different types of coils. (Tr. p. 209, ln. 15-p. 211, ln. 21; p. 217, ln. 14-p. 220, ln. 8.)

B. The Development of a Time Report, the Records at Issue.

Time studies are not conducted on the coils themselves, but rather on the elements that make up a coil. All the elements in the software system have been evaluated and assigned a designated time. Once the coil has been designed, the average time to manufacture it can be calculated by adding up the time required to build each element of the coil. (Tr. p. 210, ln. 5-p. 212, ln. 10; p. 243, ln. 18-24.)

The coil time report, also referred to by the parties as a "bill of labor," "bill of material," or "time-study"[3] is a detailed listing of all of the elements that make up the coil. If a competitor of Howard obtained this report, it would be able to duplicate the design of the coil. This in turn would enable the competitor to better compete against Howard by increasing the number of different types of coils that it could manufacture. (Tr. p. 217, ln. 14-p. 220, ln. 8.)

This concern is magnified by the scope of the ALJ's order and recommendation, which is for Howard to produce all time reports on all coils manufactured by Howard. This would make available the designs of all coils. It would be devastating to the competitive advantage that Howard currently enjoys.

The release of this information would also enable competitors to develop a software system similar to that used by Howard. By studying a variety of coil designs, an experienced engineer could potentially identify the computer logic that underlines the designs, and then

[3] During the hearing, the parties referred to the documents requested by the Union as time-studies. During Delk's testimony, he clarified that the actual name of the requested documents is the bill of labor. (Tr. p. 218, ln. 12-22.) Both terms will be used in this Memorandum.

develop a similar system. Howard has spent decades and tens of millions of dollars developing this software program. (Tr. p. 217, ln. 14-p. 220, ln. 8; p. 228, ln. 16-p. 231, ln. 6.)

C. The Requested Reports are only One Factor in Determining the Target Time.

The time report produces the base time for building any particular coil; however, that is only a starting point for determining the amount of time a coil winder should take to manufacture the particular coil. That base time is adjusted based on the following factors:

A. Down time.

B. Adding materials to the process, such as paper, aluminum, metal, wires, etc. whenever they run out.

C. Changing mandrels.

D. Changing types of coils.

E. Whether the coil winder is training a new employee.

F. The experience of the coil winder.

Once all of these adjustments are made, a target time is established. That time is then adjusted depending on the experience of the coil winder. Fully trained coil winders are expected to average ninety percent (90%) efficiency. Less experienced coil winders are held to a lower standard. (Tr. p. 154, ln. 19-p. 155, ln. 14; p. 158, ln. 19-p. 159, ln. 9; p. 211, ln. 22-p. 217, ln. 13.)

1. Employees Wind Many Different Types of Coils.

In addition to the above-cited factors, a further complication involves the fact that coil winders wind many different types of coils over the period during which their production is evaluated. Production efficiency is evaluated over a 4-week period. During that time period, a typical coil winder will wind dozens of *different* types of coils containing thousands of different elements. If an employee fails to meet the efficiency standards over that 4-week period of time,

he or she is given a disciplinary warning. Typically this takes a week or more to process, and the next 4-week evaluation cycle does not start until the employee has received the disciplinary warning. (Tr. p. 154, ln. 19-p. 155, ln. 14; p. 158, ln. 19-p. 161, ln. 4; p. 174, ln. 15-p. 175, ln. 15; p. 187, ln. 7-p. 188, ln. 14.)

At the end of the next four weeks, the same evaluation takes place. At this point, the company begins to look for trends. An employee who is below the efficiency requirements may not receive an additional disciplinary warning if the employee's production is trending upward. However, if the employee is not showing improvement, then he or she will receive a second disciplinary warning. (Tr. p. 91, ln. 22-p. 92, ln. 13; 154, ln. 19-p. 155, ln. 14; p. 158, ln. 19-p. 161, ln. 4; p. 164, ln. 9-p. 165, ln. 8; p. 174, ln. 15-p. 175, ln. 15; p. 187, ln. 7-p. 188, ln. 14.)

No significant disciplinary action occurs until an employee has received what would be a fourth warning within a 6-month period. At that point, the employee would either be demoted or terminated, depending upon the employee's seniority and work record. During that lengthy time period, an employee would typically run anywhere from twenty-five (25) to one hundred (100) different types of coils, all of which would have time adjustments based on the aforementioned factors. (Tr. p. 91, ln. 22-p. 92, ln. 13; 154, ln. 19-p. 155, ln. 14; p. 158, ln. 19-p. 161, ln. 4; p. 164, ln. 9-p. 165, ln. 8; p. 174, ln. 15-p. 175, ln. 15; p. 187, ln. 7-p. 188, ln. 14.)

ALJ Locke concluded that it is at this stage that the time reports are relevant so that the Union can effectively prosecute arbitrations over a demotion or discharge. This would involve the herculean task of identifying each and every coil wound during the 6-month period, the base rate for each coil, and the adjusted rate on any given day for any particular coil. The time report itself would be of little value in this analysis.

2. The Only Relevant Information is Contained in the Daily Coil Winder Reports and the Weekly Coil Winder Efficiency Reports.

At the beginning of each shift, a coil winder is provided with the work standard for the coil(s) that he or she is expected to wind. At the end of the shift, the employee turns in a Coil Winding Report showing how many coils the employee completed, and whether there were change-outs, mandrel changes, or other types of downtime. The employee actually has input into the adjusted time because he or she is asked to provide the supervisor with an estimate of the amount of downtime. Unless the estimate is out of line, the time required to produce the coil will be adjusted accordingly. (Tr. p. 154, ln. 19-p. 155, ln. 14; p. 158, ln. 19-p. 159, ln. 9; p. 211, ln. 22-p. 217, ln. 13.)

At the end of each week, every coil winder is provided with an Efficiency Report which in significant detail provides information to the coil winder concerning his or her performance during that week as well as in prior weeks. This information includes a breakdown for the current and preceding eleven weeks indicating such things as the base time, repair time, maintenance time, mandrel change-over time, and so forth. It also contains the averages for these factors over a four week, twelve week, and fifty-two week period. (Tr. p. 154, ln. 19-p. 155, ln. 14; p. 158, ln. 19-p. 159, ln. 9; p. 211, ln. 22-p. 217, ln. 13.)

In summary, on a daily basis, the coil winding time report would be of marginal value to the Union, at best. It would have even less value over a weekly period, and almost no value over the multiple weekly periods that lead to disciplinary actions.

D. Facts Leading To This Complaint.

Howard uses a set of production standards to gauge the efficiency of the bargaining unit employees who manufacture the coils. (Dec. p. 11, ln. 10-12.) The production standards are

preliminarily based on the raw data of the bill of labor, but the bill of labor times are adjusted based on "real life" operations.

For example, in 2010, after confirming that many of the coil winders were greatly exceeding the set efficiency rating, Howard concluded that the production standards were out of date based on improvements in technology. (Dec. p. 11, ln. 15-19.) On July 26, 2010, Howard notified its employees of new standards that would be effective on October 1, 2010. (Dec. p. 11, ln. 23-34.) Howard never implemented these new standards. (Tr. p. 151, ln. 14-16 (Koski confirming the new standards were not implemented); Tr. p. 94, ln. 16-24 (Larkin acknowledging that he does not know if the new standards were implemented)).

After Howard announced its intent to adjust the production standards for coil winders, the Union inquired regarding the efficiency standards for coil winders. (Joint Exhibit 2.) In response, Loren Koski ("Koski") notified the Union that the efficiency standard is 100% of the daily quota, but that Howard does not discipline employees until the employee falls below the 90% efficiency average. (Joint Exhibit 3.)

After this initial correspondence, the Union requested a copy of the "method being used to determine how many coils that a coil winder is suppose to wind within a regularly work day of eight (8) hours…." (Joint Exhibit 4.) In response, on September 2, 2010, Koski alerted the Union that the "methods and standards are proprietary information that we secure and cannot have released to anyone as it ensures competitive advantage in the market. These secrets are trade secrets and must be protected." (Joint Exhibit 5.)

After being notified that the records requested were confidential, the Union continued to request the information. At no point in time, however, did the Union request any records other than the confidential time studies. For example, in a May 10, 2012 letter, the Union requested

"production standards." (Joint Exhibit 18.) Koski responded by asking what the Union meant by "production standards" (Joint Exhibit 19), and the Union responded explaining that the "production standards" were the time-studies, the information that it had previously requested. (Joint Exhibit 20.) Further, the Union testified at the hearing that the only documents requested were the time studies. (Tr. p. 89, ln. 14-23.)

In addition to objecting to the production of the confidential and proprietary information, Koski also sought an accommodation to the production of the records. Koski initially invited the Union to accompany him in the plant to monitor the manufacturing process. (Tr. p. 51 ln. 7-p. 52, ln. 5.) The purpose of this invitation was for both Koski and Union President Larkin to jointly look at the process, understand it, and hopefully identify non-proprietary information that could be an accommodation to the Union's requested proprietary information. (Tr. p. 163, ln. 5-15.) Koski repeatedly notified the Union that this option was available, but the Union repeatedly refused to entertain Howard's offer.

E. The Sample Bill of Labor.

During trial, Howard admitted into evidence a sample bill of labor. Howard did so to provide a specific example of what Howard intended to protect. Jack Delk ("Delk"), Howard's Vice-President of the Single-Phase Pad Division, testified regarding the bill of labor:

> Q. All right. And what you have referred to as a bill of labor, we have been calling a time study, because we're not engineers. But I'd like to hand you what we've marked as Employer's – I'm sorry – as Respondent's 6.
>
> A. Okay.
>
> (Document marked as R-6.)
>
> Q. By Mr. White: Is that a bill of labor, Mr. Delk?
>
> A. Well, the first page is the ***engineering information***.

Q. All right. And by that, you meant that's the coil design. Correct?

A. ***That is the coil design for this particular coil.*** It's a – and some description's in there, too, because this particular one is a hundred KVA, 7,200/2,400 volts. It has, you know, two series multiples in it. The conductor thickness is .05. If you look down through here, low voltage length, maybe one of those; lead material – all these are codes for different things that go into the coil. High voltage conductor is .118.

* * * * *

Q. So the second and third page, are those step by step the procedures used to build the coil?

A. ***That's right. They're the elements to build a coil.***

* * * * *

Q. Now, as an experienced engineer in this field, if you were handed this document, could you replicate this design?

A. Uh-huh. Yes. It'd be pretty easy. You'd work backwards and build this coil just – if you was a transformer design engineer.

Q. And so if one of your competitors were to get this document, they could do the same thing. Is that correct?

A. ***Yes. Basically they could.***

(Tr. p. 208, p. 208, 18-25; 218, ln. 12-p. 220, ln. 8.)

LAW AND ANALYSIS

The ultimate issue in this matter is the proper interpretation and application of the Supreme Court's opinion in Detroit Edison. Pursuant to Detroit Edison, an employer is not automatically obligated to disclose all information requested by the union, even if the requested

information is relevant to some conceivable legitimate purpose. Detroit Edison, 440 U.S. at 314; NLRB v. U.S. Postal Service, 660 F.3d 65, 69 (2d Cir. 2011). Instead, a union's request for information must yield, in certain circumstances, to an employer's legitimate confidentiality or business interest in the protection of the requested information. Id. at 318 (noting that there is no "automatic rule" that a union's need for relevant information must always trump all other interests, including an employer's interest in protected confidential and proprietary trade secrets).

Pursuant to Detroit Edison and subsequent Board precedent, Howard, as the party attempting to protect its confidential information, must show a legitimate and substantial confidentiality interest in the information sought. See Northern Indiana Public Service Co., 347 NLRB 210 (2006). Then, after that showing, the Board must weigh Howard's interest in confidentiality against the Union's need for the information, and the balance must favor Howard. See id. (citing Detroit Edison, 440 U.S. 301). If the balance favors Howard, then the Board must consider whether Howard sought an accommodation that would allow the Union to obtain the information it needs while protecting the party's interest in confidentiality. Id. In ALJ Locke's decision, he recited the appropriate legal analysis (Dec. p. 3, ln. 10-30), but grossly misapplied these legal principles to the record evidence.

Exception No. 1: ALJ Locke Erred by Concluding Howard's Bill of Labor is not Proprietary and Confidential under Detroit Edison.

ALJ Locke recognized Howard's confidentiality concern: "The *record* indicates that Respondent was concerned that disclosing records showing the steps of a manufacturing process and how much time it should take to complete each step would allow its competitors to reconstruct the process and duplicate it." (Dec. p. 3, ln. 37-39 (emphasis added)). ALJ Locke further concluded that "[i]t is true that the records in question also show the sequence of steps in assembling a particular transformer." (Dec. p. 4, ln. 31-32.) Additionally, ALJ Locke concluded

that Howard's confidentiality concern is the "typical" trade secret case in that the "information concerns something a competitor would need to know to duplicate the product or make its manufacture more efficient." (Dec. p. 13, ln. 8-10). Importantly, the evidence – by way of the trial testimony of Delk (quoted in material part supra) – supports the conclusion that Howard has a legitimate confidentiality interest in protecting the time studies. (Tr. p. 218, ln. 12-p. 220, ln. 8.)

Despite recognizing that Howard's confidentiality concerns are legitimate and receiving evidence supporting Howard's confidentiality concerns, ALJ Locke still concluded that Howard lacked some "distinctive proprietary process that it is trying to shield from other manufacturers." (Dec. p. 3, ln. 44-45.) ALJ Locke apparently bases his conclusion on his finding that (1) winding more than one coil at a time is not a trade secret, and (2) Howard's process does not depart from the general practices in the industry.

1. Howard's Confidentiality Concern Is Not Based On Its Machines Winding More than One Coil at A Time.

Koski and Delk testified that Howard designed and created its own machinery and that the machinery is capable of winding more than one coil at a time. But this is simply an *example* of Howard's process that departs from industry standards. In fact, Delk testified that it would *not* be a trade secret that Howard used coil-winding machines or that it's coil-winding machines worked at variable speeds. (Tr. p. 223, ln. 10-16.)

Further, there is no logical reason why testimony regarding the capability of Howard's machinery devalues or negates Delk's testimony regarding Howard's confidentiality interest in the *process* of winding the coils. Thus, ALJ Locke's focus on the uniqueness of Howard's machinery is immaterial in determining whether requested documents – which "show the

sequence of steps in assembling a [Howard] transformer" (Dec. p. 4, ln. 31-32) – constitutes confidential information.

2. Howard Certainly Departs from the General Practice in the Industry.

ALJ Locke's conclusion that Howard does not depart from the general practice in the industry ignores a substantial amount of evidence in the record, and should be reversed. See Wye Elec. Co., 348 N.L.R.B 61, 62-63 (2006) (reversing ALJ's findings of fact where it was unsupported by the evidence). For example, Delk testified that:

- *Howard* developed a software package that calculates the method to build different types of coils based upon customer demand. (Tr. p. 228, ln. 12-p. 229, ln.4; p. 237, ln. 13-22.)
- Because of the flexibility of *Howard's* software package, Howard manufactures between 200,000 and 300,000 of *different* types of coils each year. (Tr. p. 211, ln. 5-21.)
- Based on the bill of labor created by Howard's software package, a competitor could learn what Howard is doing *differently* than the competitors which results in Howard providing a similar transformer for less costs. (Tr. 230, ln. 16-24.)

Further, Koski testified that:

- Howard manufactures its own machinery and designs its own coil winding process. (Tr. p. 152, ln. 21-154:18.)
- Based on Howard's machinery and process, competitors cannot compete with Howard's coil winding production. (Tr. p. 152, ln. 21-154:18.)
- Because of Howard's process, Howard has 40% of the United States market. (Tr. p. 152, ln. 21-154:18.)

ALJ Locke does not provide any analysis, reasoning, or facts supporting his conclusion that Howard does not depart from the general practice in the industry.

In sum, ALJ Locke's focus on Howard's machinery and his conclusion that Howard does not depart from the general practice of the industry are erroneous and contrary to the weight of the evidence. Thus, the Board should not adopt ALJ Locke's conclusion that the requested documents are not confidential.

Exception No. 2: ALJ Locke's Characterization of Delk's Testimony is Clearly Contrary to the Record Evidence.[4]

ALJ Locke concluded that "[Delk] did not explain how a competitor could infer the manufacturing process or the design of the Respondent's machinery from the times allotted to complete various steps of the process." (Dec. p. 17, ln. 23-27.) ALJ Locke concluded that "Delk's testimony boiled down to a claim that if a competitor knew how quickly Respondent could build coils, it would realize that it had to speed up its own operations." (Dec. p. 17, ln. 28-29.) ALJ Locke's conclusion wholly ignores Delk's testimony that the bill of labor contains ***all of the elements required to build the coil and step-by-step instructions on the construction of the coil.*** (Tr. p. 218, ln. 12-p. 220, ln. 8.) At no point did Delk testify that Howard's only concern was that competitors would speed up their operations. Instead, Delk testified that Howard's concern is providing its competitors ***step-by-step instructions on how to catch Howard in the market.*** Such an interest fits squarely within even ALJ Locke's definition of a trade secret. (See Dec. p. 13, ln. 8-12 ("information concerns something a competitor would need to know to duplicate the product or *make its manufacture more efficient*.")

[4] Howard does note that ALJ Locke characterized Howard's evidence as "pixie dust," which cannot, "when scattered about, make a space magical and beyond the usual principles of logic." (Dec. p. 17, ln. 39-42.) Because ALJ Locke failed to cite to the "pixie dust" testimony, Howard assumes that it references the testimony as a whole, including Delk's testimony. Howard does not understand how Delk's testimony (including the quoted portions on p. 9-10, supra, regarding the confidential nature of these documents, could somehow be construed as "pixie dust." ALJ Locke's characterization of this evidence is entirely misplaced and merely confirms that he failed to understand the confidential nature of the time studies.

ALJ Locke's mischaracterization of Delk's testimony is erroneous and directly contrary to Delk's unambiguous testimony regarding Howard's confidentiality concerns.

Exception No. 3: ALJ Locke's Conclusion that the Union Requested Anything Other than the Confidential Bill of Labor Is Unsupported.

On page 13 of ALJ Locke's Bench Decision, he stated:

> . . . However, in this instance, the Union did not request information about the manufacturing process. Rather, the Union sought information about the method used to set the production standards.
>
> Stated another way, the Union did not say to Respondent, "Tell us how you make coils." If the Union had made such a request, the Respondent's claim of trade secret would be consistent with the typical pattern. Respondent would be saying, in effect, "if we tell you how we make coils and the information falls into a competitor's hands, the competitor might be able to make its coils faster or more efficiently or more cheaply and take business away from us."
>
> Instead of seeking information about making coils, the Union requested information about another process, the process of setting standards to judge employee performance.

(Dec. p. 13, ln. 17-24.) ALJ Locke's conclusion is entirely unsupported by the record evidence. More specifically, ALJ Locke's conclusion presumes that the request for the "manufacturing process" is different from the request for "production standards," which it is not. (Tr. p. 89, ln. 14-21.)[5]

Moreover, as demonstrated by the joint exhibits and the Union's trial testimony, it is clear that the only documents at issue are the confidential time records sought by the Union. In fact, on one occasion (the correspondence cited by ALJ Locke in his decision (Dec. p. 14, ln. 31-36)), the Union used a different term to reference the time studies, but in subsequent correspondence (after inquiry from Koski), the *Union confirmed that the requested information was the time*

[5] ALJ Locke even agrees that "information about the method used to determine when an employee should be disciplined for unsatisfactory production arguably might reveal proprietary details of the manufacturing process itself." (Dec. p. 13, ln. 39-42.) Because ALJ Locke concludes the information is not confidential, ALJ Locke fails to provide any analysis regarding this issue.

studies. (See Joint Exhibit 18, 20.) During trial, the Union confirmed that the only requested information was the time studies. (Tr. p. 89, ln. 14-21.)

Further, ALJ Locke's conclusion is completely contrary to the Complaint wherein the Union clearly insists upon the time studies, which do far more than tell how to determine the number of coils which an employee is expected to wind in an 8-hour day.

Thus, ALJ Locke's conclusion that the Union requested anything other than the confidential time studies is erroneous and contrary to the weight of the evidence. Thus, the Board should not adopt ALJ Locke's factual finding as it is unsupported by the record evidence.

Exception No. 4: To the Extent ALJ Locke Relied Upon Koski's Testimony about Time Studies Instead of Delk's, ALJ Locke Erred.

ALJ Locke leads his discussion regarding Howard's trade secret argument with testimony from Koski, Howard's HR Representative, not Delk, an engineer with responsibility for winding operations. (Dec. p. 15, ln. 14- p. 17, ln. 15.) Indeed, the quoted segment of Koski's testimony begins with "first of all, let me just again preface, I am not an engineer. I'm not an engineer. I'm not intimately familiar with the factors." (See Dec. p. 15, ln. 14-p. 15, ln. 16; see also Tr. p. 150, ln. 22-24.)[6] Nevertheless, in response to questioning from ALJ Locke wherein the ALJ Locke admits that he does not understand the confidential nature of the records (Tr. p. 198, ln. 21-199:1), Koski attempts to help ALJ Locke by providing an example relating to Howard's equipment. (Dec. p. 15, ln. 20-p.. 17, ln. 15.) ALJ Locke concluded that Koski's response to his questions were "too vague to be much of assistance." (Dec. p. 17, ln. 16.) Nevertheless, Koski's "vague" testimony clearly influenced ALJ Locke because, as noted supra, ALJ Locke focused on Howard's machinery (the subject of Koski's testimony) rather than the ultimate issue, Howard's process (the subject of Delk's testimony).

[6] Even though Koski is a Vice-President of the Company, Koski does not have access to the confidential time studies. (Tr. p. 168, ln. 25-p.169, ln. 2; 172, ln. 4-11.)

Exception No. 5: ALJ Locke Substantially Understates the Value of Howard's Process.

ALJ Locke's erroneous conclusion that the manufacturing process is not confidential permeates throughout the Bench Decision. Two points from ALJ Locke's decision clearly demonstrate this error.

Apparently, under ALJ Locke's rule, Detroit Edison requires evidence that the disclosure of the confidential information would place the employer at a ***significant competitive disadvantage***. (Dec. p. 4, ln. 26-28 ("Even if the exact amount of time the Respondent took to manufacture a particular coil is secret, the record does not establish that disclosure of this information would place Respondent at a ***significant competitive disadvantage***.")) This rule is not supported by the principles articulated by the Supreme Court in Detroit Edison. Further, ALJ Locke's new rule further confirms that he does not understand Howard's position. Indeed, Howard is not attempting to avoid a competitive disadvantage;[7] instead, Howard already has the competitive advantage. (See e.g., Tr. p. 217, ln. 18-p. 220, ln. 8.) Howard resists disclosing this confidential information to the Union because it is *protecting its competitive advantage* that it earned by devoting substantial time and resources in developing this software design process. This is entirely a legitimate confidential interest based on Detroit Edison, and ALJ Locke's conclusion that Howard must prove a "significant competitive disadvantage" is entirely incorrect and unsupported by the law.

Second, ALJ Locke finally addressed the dispositive issue: "It is ***true*** that the records in question also show the sequence of steps in assembling a particular transformer." (Dec. p. 4, ln. 31-32.) Prior to moving forward to the next sentence, it is important to emphasize that ALJ

[7] ALJ Locke's inclusion of *significant* competitive advantage is alarming. Based on ALJ Locke's conclusion, is an employer's confidential information due to be disclosed only because it causes a competitive disadvantage as opposed to a *significant* competitive disadvantage?

Locke finds that ***it is true that the records in question also show the sequence of steps in assembling a particular transformer.*** (Id.) ALJ Locke's entire Bench Decision prior to this sentence is that Howard failed to identify the alleged trade secret. Here, however, ALJ Locke recognizes that the requested records contain the step-by step sequence of developing a Howard transformer – the very sequence that sets Howard apart from its competitors. (See e.g., Tr. p. 217, ln. 18-p. 220, ln. 8.)

ALJ Locke still concludes that Howard's confidentiality interest is "not particularly high" because "***bargaining unit employees already are aware of these steps because they perform them.***" (Dec. p. 4, ln. 32-34.) ALJ Locke's conclusion relies on the assumption that Howard's coil winders can memorize thousands of different coil designs simply by winding the coil. Such a conclusion is unbelievable. Howard's coil winders wind hundreds of different coils that contain thousands of different coil designs. ALJ Locke's belief that the coil winders could memorize the coil design and manufacturing sequence is entirely unsupported by the evidence and contrary to common sense.

Further, based on ALJ Locke's reasoning, Howard's process that it developed, researched, fine-tuned, and protected is no longer confidential because Howard hired employees to utilize the process developed by the trade secret. In other words, according to ALJ Locke, if an employer creates a unique process to develop a product, that unique process (and the unique software program that created the process) is not a trade secret if the employees follow the process to develop a product. For example, because Coca-Cola employees are aware of the process of making Cokes, the Coca-Cola formula that is a part of that process is no longer a trade secret. Or, because a wind-farm manufacturer's employees build the wind turbines, the steps to build the wind turbine are no longer a trade secret.

ALJ Locke's conclusion and decision is not supported by the evidence and wholly incompatible with the principles of Detroit Edison. Thus, the Board should refuse to adopt ALJ Locke's conclusion.

Exception No. 6: ALJ Locke's Conclusion that the Union's Need for the Information "Weighs Heavy" is Incorrect.

ALJ Locke incorrectly concludes that the Union's need for this confidential information "weighs heavy." (Dec. p. 4, ln. 36-38.) The basis for ALJ Locke's decision is that "the Union has little or no basis to argue to an arbitrator that the disciplinary action was not for 'just cause' because it was based on a failure to meet an unrealistic standard." This conclusion is erroneous. First, the time study represents the "raw" time to complete a certain task in winding a coil. (Coil Winding Report, Respondent's Exhibit 4.) The raw time is substantially adjusted to accommodate "real-life" manufacturing issues, such as machine breakdowns, down-time, supply issues, etc.

The record evidence demonstrates that at the beginning of each shift a coil winder is provided with the work standard for the coil(s) that he or she is expected to wind. At the end of the shift, the employee turns in a Coil Winding Report showing how many coils the employee completed, whether there were change-outs, mandrel changes, or other types of downtime. The employee actually has input into the adjusted time because he or she is asked to provide the supervisor with an estimate of the amount of downtime. Unless the estimate is out of line, the time required to produce the coil will be adjusted accordingly. (Tr. p. 214, ln. 18-p. 217, ln. 7; p. 232, ln. 9-p. 234, ln. 17.)

At the end of each week, every coil winder is provided with an Efficiency Report which in significant detail provides information to the coil winder concerning his or her performance during that week as well as in prior weeks. (Efficiency Report, Respondent's Exhibit 5.) This

information includes a breakdown for the current and preceding eleven weeks indicating such things as the base time, repair time, maintenance time, mandrel change-over time, and so forth. It also contains the averages for these factors over a four week, twelve week, and fifty-two week period. Thus, because of the substantial adjustment made to the raw assembly time and the variety of coils being built, the time study is of little value to the Union. (Tr. p. 154, ln. 19-p. 155, ln. 14; p. 158, ln. 19-p. 159, ln. 9; p. 211, ln. 22-p. 217, ln. 13.)

Further, ALJ Locke's conclusion is based on the consideration of a single bargaining unit employee in isolation. Howard employs *hundreds* of coil winders. (See Tr. p. 25, ln. 4-7.) Of course, if only one employee out of hundreds of employees fails to meet production quota, it is hardly a persuasive argument that the production standards are unreasonable when the overwhelming majority of the employees satisfactorily meet the production standards. (See Tr. p. 160, ln. 1-8.)

In summary, on a daily basis, the requested records would be of marginal value to the Union, at best. They would have even less value over a weekly period, and almost no value over the multiple weekly periods that lead to disciplinary actions.

Exception No. 7: The ALJ's Conclusion that Howard Did Not Offer a Reasonable Accommodation is Erroneous.

Almost immediately after the Union's request for the confidential records, Koski offered an accommodation to the Union. Koski's initial offer was for the Union to accompany Koski to review and monitor the daily work of a coil winder with the intent to hopefully narrow the requested information. Koski repeatedly testified that this was the *start* of his attempt to accommodate the Union's request. (Tr. p. 163, ln. 5-p. 164, ln. 8.) But, the Union refused Koski's attempt to initiate discussions regarding an appropriate accommodation. Despite the

Union's refusal, Koski repeatedly offered the Union access to the facility to review the coil winding process with the intent to find an accommodation that would work for both parties.

ALJ Locke's conclusion that Koski's effort was "non-responsive and essentially irrelevant," ignores Koski's testimony that the offer was the start of the accommodation process. (See Dec. p. 5, ln. 1-20.) Notably, at the time Koski was interacting with the Union, Koski had never seen a bill of labor (i.e., time study), and thus, did not have any basis to conclude that redaction[8] or a confidentiality order could be accomplished. Instead, Koski made efforts to help understand what exactly the Union desired, but the Union rejected Koski's efforts. Because the Union repeatedly rejected Howard's attempts to develop an accommodation, ALJ Locke's conclusion that Howard failed to offer an accommodation is erroneous.

Exception 8: ALJ Locke's Conclusion about Respondent's Alleged Plot to Control The Union is Unsupported.

During his testimony, Koski provided a myriad of alternatives to providing the time studies. He described these options – alternatives he hoped to discuss with the Union during the tour of the facility – as *potential* alternatives to reach a resolution. In ALJ Locke's Bench Decision, ALJ Locke describes Koski's potential alternatives as Koski's efforts to control the Union's litigation tactics and strategy. (Dec. p. 17, ln. 43-p. 20, ln 44.) ALJ Locke's conclusion is contrary to Koski's testimony, unsupported by the evidence, and should be disregarded.

CONCLUSION

ALJ Locke erred in his decision. Howard established that the bill of labor contained confidential and proprietary information, including the step-by-step instruction to build a Howard coil, which, if produced, would eliminate Howard's competitive advantage in the marketplace. ALJ Locke ignored Howard's evidence and instead concluded that Howard's

[8] Based on the sample bill of labor, redaction is not a potential alternative. If the confidential information is redacted, the bill of labor would only contain times unconnected to the elements.

confidentiality interest is "not particularly high." This conclusion, combined with ALJ Locke's erroneous conclusion that the Union's need for the confidential information "weighs heavy," caused ALJ Locke to wrongly apply the principles of Detroit Edison and find that Howard violated Section 8(a)(1) and 8(a)(5). Thus, the Board should refuse to adopt ALJ Locke's recommended remedy and order with respect to it, and instead dismiss the consolidated complaint in its entirety.

Respectfully submitted this the 10th day of July, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 10th day of July, 2013, caused a copy of the above and foregoing pleading to be served upon the following:

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