

**Fort Dearborn Company and District Council Four,  
Graphic Communications Conference of the In-  
ternational Brotherhood of Teamsters.** Case 13-  
CA-046331

September 28, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES  
AND BLOCK

On November 30, 2011, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel and the Charging Party filed answering briefs, and the Respondent filed reply briefs. The Acting General Counsel and the Charging Party filed cross-exceptions and supporting briefs, the Respondent filed answering briefs, and the Charging Party filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,<sup>1</sup> findings,<sup>2</sup> and conclusions only to the extent consistent with this Decision and Order.<sup>3</sup>

<sup>1</sup> The Respondent has excepted to the judge's denial of its motion to dismiss the complaint. We find the judge did not err in denying the motion. The Respondent contends that the Region improperly resumed these proceedings after the Respondent withdrew from an arbitral proceeding due to the Union's alleged insistence that the arbitrator decide not only whether the Respondent breached the collective-bargaining agreement but also whether it violated the Act by its discharge of Union Chief Steward Marcus Hedger. In affirming the judge's denial of the motion to dismiss, we note in particular that the Union was prepared to go forward with the arbitral proceeding even if the arbitrator concluded that his authority was limited to deciding the contract-breach issue. In these circumstances, the Region properly resumed these proceedings after the Respondent withdrew from arbitration.

<sup>2</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

<sup>3</sup> We have modified the judge's recommended Order consistent with this decision and to comport with the Board's standard remedial provisions. The remedy section of the judge's decision includes tax-compensation and Social Security documentation remedies. Because the relief imposed by the judge would involve a change in Board law, however, we believe that the appropriateness of these proposed remedies should be resolved after full briefing by the affected parties, and

1. *Threats Against Marcus Hedger.* In 2010,<sup>4</sup> the Respondent and the Charging Party Union were negotiating for a successor collective-bargaining agreement. On June 3, the unit employees voted to reject the Respondent's contract proposal, consistent with their bargaining committee's recommendation. The next day, the Respondent's representatives met with the union bargaining committee, which included Chief Steward Hedger, to continue negotiations for a successor agreement. During the meeting, the Respondent's senior vice president for operations, William Johnstone, repeatedly accused the Union of misconduct, i.e., the use of company copy machines to produce a flyer urging unit employees to reject the Respondent's proposal, and the presence of union agents putting flyers on car windshields in the Respondent's parking lot. Johnstone told Hedger that he was tired of the "union circus" and that "we're watching you, we are going to catch you, and we are going to fire you."

The judge found no violation because it was not clear whether Johnstone was referring to catching and firing Hedger for unprotected activity or for protected activity. We think the judge missed the point. Johnstone's general frustration with the Union was apparent to all at the bargaining table. Immediately after communicating his aggravation with the "union circus," Johnstone made an undisputed threat to watch, catch, and discharge Hedger. Johnstone appeared to be saying that the Respondent would watch Hedger more closely and find a reason to discharge him *because* of his protected union activity. Viewed in this light, the statement reasonably tended to interfere with Hedger's exercise of his Section 7 rights. See *American Freightways Co.*, 124 NLRB 146, 147 (1959). Accordingly, we reverse the judge's decision in relevant part and find that the Respondent threatened Hedger with closer scrutiny and discharge in violation of Section 8(a)(1).

2. *Hedger's Suspension and Discharge.* About 2 months later, the Respondent followed through on its threat by suspending and then discharging Hedger, ostensibly for allowing an unauthorized visitor to access the production area of the plant and for not truthfully answering questions during the Respondent's ensuing investigation of the incident. We agree with the judge that Hedger's discharge violated Section 8(a)(3) and (1) of the Act.<sup>5</sup> Despite finding that Hedger's discharge was

there has been no such briefing in this case. Accordingly, we decline to order this relief at this time. See, e.g., *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 176 (2001), *enfd.* 354 F.3d 534 (6th Cir. 2004), and cases cited therein.

<sup>4</sup> All subsequent dates are in 2010, unless otherwise specified.

<sup>5</sup> In affirming the judge's finding that the Acting General Counsel proved union animus was a motivating factor in Hedger's discharge, we

unlawful, the judge found, without explanation, that Hedger's suspension was lawful. Inasmuch as the suspension was one of the steps taken as part of the Respondent's unlawfully motivated efforts to discharge Hedger, we find that the suspension also violated Section 8(a)(3) and (1) of the Act. See *Beverly California Corp.*, 326 NLRB 153, 154 (1998), *enfd.* in relevant part 227 F.3d 817 (7th Cir. 2000).

#### ORDER

The Respondent, Fort Dearborn Company, Niles, Illinois, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

additionally rely on the above finding that Johnstone unlawfully threatened to watch, catch, and fire Hedger in retaliation for his union activity. Unlike the judge, we find it unnecessary to rely on the following as evidence of animus: (1) Plant Manager Robert Kester's statements to Hedger that "if we keep making big issues over little things, management isn't going to continue to deal with it" and "you're punching management in the face, and you're going to cause the place to close [if] you keep punching us in the face"; (2) Kester's statements to Hedger, during a conversation about the death of a coworker's husband, that "we don't see eye to eye on everything, but this really puts things in perspective," and that "[l]ife is way too short for the bickering between you and I," which the judge found conveyed a veiled threat of discharge; (3) Kester's testimony that he had spoken to Hedger regarding Hedger's "aggressive behavior" towards management; and (4) Kester's testimony as to how long Hedger and the unauthorized visitor were together in the plant.

In light of our finding that the Acting General Counsel established that union animus was a motivating factor in Hedger's discharge, we find it unnecessary to pass on his and the Charging Party's additional exceptions contending that the judge failed to rely on other statements that the Respondent made throughout 2009–2010 as evidence of animus.

As noted above, the Respondent stated that it discharged Hedger because he let an unauthorized person into the plant. For the reasons given by the judge, we find this justification to be pretextual. In so finding, however, we do not rely on the judge's observation that the Respondent failed to discipline three leadmen who saw Hedger and the unauthorized visitor walking through the facility.

Finally, we agree with the judge that the Respondent's assertion that it discharged Hedger because he was not forthcoming during the disciplinary process was also pretextual. Even assuming that Hedger's failure to cooperate could have constituted a legitimate basis for discipline, the Respondent failed to show that it actually would have disciplined Hedger for this reason in the absence of protected conduct. Notably, the Respondent took no disciplinary action against other employees who refused to cooperate with the investigation. In adopting the judge's finding, we do not rely on his rationale that the Respondent already had all of the information it needed to investigate the matter.

Member Hayes disagrees that Hedger's untruthfulness during the investigation preceding his discharge was pretextually asserted as a reason for the discharge. Member Hayes finds, however, in agreement with the judge and his colleagues, that the Respondent's claim to have discharged Hedger for letting an unauthorized visitor into the plant was pretextual. And as the Respondent does not contend that it would have discharged Hedger for untruthfulness alone, its pretextual claim precludes the Respondent from establishing a *Wright Line* defense. Accordingly, he concurs in finding that the Respondent violated Sec. 8(a)(3) by suspending and discharging Marcus Hedger.

(a) Threatening employees with closer scrutiny if they engage in activities on behalf of the Union.

(b) Threatening employees with discharge if they engage in activities on behalf of the Union.

(c) Suspending employees because of their support for and activities on behalf of the Union.

(d) Discharging or otherwise discriminating against employees for supporting District Council Four, Graphic Communications Conference of the International Brotherhood of Teamsters, or any other labor organization.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Marcus Hedger full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Marcus Hedger whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge, and within 3 days thereafter, notify the employee in writing that this has been done and that the suspension and discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Niles, Illinois facility copies of the attached notice marked "Appendix."<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 13, after

<sup>6</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.<sup>7</sup> Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 4, 2010.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 13 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with closer scrutiny because you engage in activities on behalf of the Union.

WE WILL NOT threaten you with discharge because you engage in activities on behalf of the Union.

WE WILL NOT suspend, discharge, or otherwise discriminate against any of you for supporting District Council Four, Graphic Communications Conference of

<sup>7</sup> For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB 11 (2010), Member Hayes would not require electronic distribution of the notice.

the International Brotherhood of Teamsters, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Marcus Hedger full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Marcus Hedger whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Marcus Hedger, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

#### FORT DEARBORN COMPANY

*Helen Gutierrez, Esq.*, for the General Counsel.

*Richard L. Marcus, Esq. (SNR Denton US, LLP)*, of Chicago, Illinois, for the Respondent.

*Thomas D. Allison, Esq. (Allison, Slutsky & Kennedy, P.C.)*, of Chicago, Illinois, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Chicago, Illinois, on October 13–14, 2011. District Council Four, Graphic Communications Conference of the International Brotherhood of Teamsters (the Union) filed the initial charge on September 30, 2010, and the General Counsel issued the complaint on December 10, 2010. The principal issue here is whether Respondent violated the Act by suspending and then, on September 14, 2010, terminating the employment of employee and Chief Union Steward Marcus Hedger.

##### The Deferral Issue

On January 18, 2011, the Region deferred this case to the grievance/arbitration procedures of the collective-bargaining agreement between Respondent and the Union. On July 11, 2011, Respondent withdrew from the arbitration. The Region revoked the deferral and issued a new complaint on August 8, 2011.

Respondent asserts that the Region improperly ordered the resumption of the processing of this matter and that the complaint should be dismissed. The Company has not cited any binding authority for this proposition.<sup>1</sup> Respondent asserts that

<sup>1</sup> At pp. 8–9 of its brief, it is not clear whether Respondent's reference to "the cited case" is to *United Technologies Corp.*, 268 NLRB 557 (1984), or an Advice Memo in *Veolia Water*. Assuming it is the latter, a General Counsel's Advice Memo is not binding on an adminis-

it withdrew from the arbitration due to the Union's insistence that the arbitrator decide whether it violated the Act, as opposed to simply determining whether Respondent violated the collective-bargaining agreement.

The Union, by Hedger, filed two grievances regarding his termination (GC Exhs. 17, 18). Respondent denied both. The Union's grievances came before Arbitrator Martin H. Malin, Professor of Law at Chicago-Kent Law School on June 13, 2011 (R. Exh. 2). The Union contended that Arbitrator Malin should consider whether the Hedger discharge violated the Act, in addition to whether it violated the parties' collective-bargaining agreement. Respondent refused to proceed with the arbitration if Professor Malin also addressed the statutory issue.

I find that this case is properly before me. Given Respondent's refusal to proceed with the arbitration, it is unclear what standard Arbitrator Malin would have applied to the contractual issue. Since the case on its face involves a claim of employer animosity to Hedger's exercise of protected rights, deferral to arbitration would only have been appropriate if the arbitrator would have determined whether Hedger would have been discharged in the absence of his activities as union steward.<sup>2</sup>

On the entire record,<sup>3</sup> including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and the Charging Party, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent, Fort Dearborn Company, a corporation, prints labels for food and other product containers and at its facility in Niles, Illinois, where it annually purchases and receives goods valued in excess of \$50,000 from outside of the State of Illinois. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act) and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) by suspending employee Marcus Hedger on

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trative law judge. On the other hand, *United Technologies* is completely irrelevant to the instant case. There the union refused to go to arbitration. I would also note that the Board in *United Technologies* dismissed the complaint *provided* that the matter either be resolved or be submitted to an arbitrator. Thus, to dismiss this case and send it back to the arbitrator would, at a minimum, unduly delay resolution of the merits of this case.

<sup>2</sup> It strikes me that the arbitrator could have made such a determination by reference to art. 26.2 of the parties' collective-bargaining agreement, GC Exh. 6, which forbids disciplinary action against a shop steward for performing his normal duties. However, one cannot determine whether the arbitrator would have applied the standards applied by the Board in deciding an 8(a)(3) case due to Respondent's refusal to go forward with the arbitration.

<sup>3</sup> Tr. 216, L. 24 should read: "Feeder was Tony Sass."

The parties' November 22, 2011 joint motion to substitute a correct copy of GC Exh. 1(j), the January 18, 2011 deferral letter signed by the Regional Director, is granted.

August 18, 2010, and then discharging him on September 14, 2010. He also alleges that Respondent, by William Johnstone, senior vice president for operations, violated Section 8(a)(1) of the Act by threatening Hedger with closer scrutiny and termination during contract negotiations on June 4, 2010.

Hedger worked for Respondent as a pressman for 9 years. At the time of his termination Hedger was working on the second shift, 3 to 11 p.m. Hedger had been a union steward for 6 years at the time of his termination and chief steward for two of the three bargaining units; the lithography unit and bindery (finishing), shipping and sheeting unit, for about 1 year.<sup>4</sup> In this capacity, Hedger filed and processed grievances and participated in collective-bargaining negotiations.

At the time of Hedger's termination, there were usually no management personnel present for the second half of the second shift. Pressroom Manager Thomas Vlahos usually left work between 6 and 7 p.m. After Vlahos left, the ranking employee at the plant was Robert Schmitt, a "working foreman" and bargaining unit member.

#### The 8(a)(1) Allegations

On June 4, 2010, Respondent and the Union met to negotiate a successor collective-bargaining agreement. This was the first negotiating session after employees in the "litho" unit had voted against accepting Respondent's contract proposal by a vote of 41–19. At this meeting, Respondent's vice president, Johnstone, held up a union flyer and asked who had been using Respondent's copying equipment for noncompany business. According to Hedger, he denied the flyer had been copied on company equipment. Then Hedger testified that Johnstone said, "[W]e're watching you, we are going to catch you and we are going to fire you." Hedger's testimony was corroborated by David Ishac, who still works for Respondent.

Johnstone denied telling Hedger that Respondent was going to watch him, catch him, and fire him, or anything similar. Johnstone testified that he threatened to discipline any employee using company property for noncompany business.

The Board gives great weight to the fact that current employees who testify adversely to their employer do so at considerable risk of economic reprisal. This plus the fact that Respondent terminated Hedger 2 months later under very questionable grounds, leads me to credit Hedger and Ishac. However, as Respondent argues in its brief, it is not clear whether or not Johnstone was referring to catching Hedger using company copying equipment, as opposed to conduct that is protected. Therefore, I dismiss complaint paragraph V.

#### The Events of August 12, 2010, which Led to Hedger's Termination

Some time after 8 p.m. on August 12, 2010, an employee in Respondent's warehouse paged Hedger. Hedger ignored the page until he was finished with the task on which he was working, the washup after a production run. Kis Kako, the leadman in the shipping/warehouse department, apparently sent employ-

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<sup>4</sup> The terms bindery and finishing are used interchangeably, Tr. 242. The third unit was the cutting unit, Tr. 73.

ee Daniel Nevins to get Hedger (Tr. 179).<sup>5</sup> Hedger then left his press at about 8:40 p.m. and went to the warehouse/shipping department. A friend of Hedger's, Peter Schmidt, who is also a member of the Union, was waiting for Hedger in the shipping department. Peter Schmidt had a bicycle (not a motorbike) with him.

Hedger and Schmidt walked through the plant. Schmidt walked with his bicycle; he did not ride it inside the plant. At some point they encountered Leadman Robert Schmitt. Hedger and Schmitt testified at hearing that Robert Schmitt gave Hedger permission to walk Peter Schmidt through the plant. However, Robert Schmitt denied this when interrogated by management 2 weeks after the incident.<sup>6</sup> The leadman in the finishing department, Marcin Golifit, also saw Hedger and Peter Schmidt. Golifit told management that Hedger and Peter Schmidt looked into the finishing room and then proceeded out of the plant.

The preponderance of the evidence is that Hedger and Peter Schmidt spent no more than 11 minutes in the plant from the time Hedger met Schmidt in the shipping department until Schmidt left the plant.<sup>7</sup> Peter Schmidt left the plant at 8:51 p.m. None of the three leadmen at the plant on the second shift on August 12, Robert Schmitt, Marcin Golifit, and Kis Kako objected to Hedger's walking Peter Schmidt through the plant or reported it to management.<sup>8</sup>

On August 17, 2010, Plant Manager Robert Kester reviewed a videotape which showed Peter Schmidt leaving the plant with his bicycle on August 12. Hedger was with Peter Schmidt when he exited from the plant. Kester met with Pressroom Manager Thomas Vlahos, who apparently was unaware of this incident. Kester and Vlahos then interviewed Robert Schmitt, Marcin Golifit, and several other employees. One of the employees, Robert Hayden, told Kester that the individual who walked through the plant with Hedger was Peter Schmidt and that Peter Schmidt was a member of the Union.

Kester then contacted Vice President William Johnstone and Corporate Human Resources Director William Samuels. On August 18, Kester summoned Hedger to a meeting with himself, Samuels, and Evelyn Vasquez, the human resource director for the Niles plant. At the start of the meeting, Kester warned Hedger that he could be terminated if he did not coop-

<sup>5</sup> Kako, Nevins, and Marcin Golifit, the leadman in the bindery/finishing department, did not testify at this hearing. Thus, all testimony as to the truth of what they said is hearsay.

<sup>6</sup> I find that whether Robert Schmitt gave Hedger permission to take Peter Schmidt through the plant makes no difference to the outcome of this case. However, I would note that at the start of its interrogation, Respondent advised Robert Schmitt, who was close to retirement, that he could be discharged on the basis of the answers to its questions. Thus, it would not be surprising if Schmitt denied giving Hedger permission even if he did so.

<sup>7</sup> Plant Manger Robert Kester estimated that Hedger and Peter Schmidt walked through the plant for about 50 minutes, however, there is no support in the record for this testimony. Kester was not present at the plant on August 12 and his investigation, if anything, corroborates Hedger's testimony as to the brevity of the incident.

<sup>8</sup> While Kako was aware that somebody came to the warehouse door to see Hedger, it is not clear that he was aware that Hedger walked Peter Schmidt through the plant.

erate in the investigation. There was a discussion as to who would be an acceptable union representative for the meeting. Hedger insisted that Frank Golden, a union business agent, serve as his representative. When Golden was contacted by telephone, he asked that the meeting be postponed until he could participate in person; Respondent refused. Golden participated in the interview via speakerphone.

William Samuels interrogated Hedger from a prepared text. He asked Hedger if he brought somebody into the plant on August 12, the name of the person who was with him in the plant on August 12, and whether he knew Martin Fletcher<sup>9</sup> or Peter Schmidt. Hedger replied that he did not recall to all of these questions. After the interview, Kester sent Hedger home. Hedger has not worked for Respondent since August 18, although he was paid through September 14, when he was terminated.

Kester and Samuels met again with Hedger on August 23. Frank Golden, the union business agent, attended this meeting in person. Samuels again threatened to discipline or discharge Hedger if he failed to cooperate with the inquiry. This time Hedger acknowledged that a man with a bicycle came to see him. He recounted that he had been paged and that later an employee from the shipping department came to get him.

Samuels asked Hedger if he knew Martin Fletcher. Hedger responded that he did not. Then Samuels asked for the name of the person who was with him on August 12. Golden objected to the relevance of the question and directed Hedger not to answer. Samuels asked if the person was Peter Schmidt. Golden again directed Hedger not to answer. Samuels asked if the man was a union member; Hedger said that he was. Samuels asked if the person was a union official and Hedger answered that he was not. Golden corrected Hedger and stated that the visitor held a union position<sup>10</sup> and was unemployed on August 12. Respondent concedes that on August 23, Hedger answered all of its questions except identifying Peter Schmidt.

Respondent never asked the Union for permission to interview Peter Schmidt and made no attempt to do so. It apparently made no other effort to determine why Peter Schmidt came to the plant and walked through it on August 12. Respondent never asked the Union where Peter Schmidt had worked in the past.

On September 7, 2010, Kester called Hedger to inform him that he was being terminated effective September 14. The same day Kester sent Hedger a letter informing him that he was being terminated because "you brought an unauthorized person into the plant on August 12, 2010, and that you did not respond truthfully to the Company's questions regarding events on that date of which you were fully aware" (GC Exh. 16).

The record does not establish who made the decision to terminate Marcus Hedger or why he was terminated as opposed to being given a lesser penalty pursuant to Respondent's progressive discipline policy. Robert Kester testified that he was "involved" in the decision to terminate Hedger, that he recommended termination and that he consulted with Johnstone and

<sup>9</sup> Warehouse Leadman Kis Kako told Kester that Peter Schmidt told Kako that his name was Martin Fletcher.

<sup>10</sup> Peter Schmidt is the Union's sergeant at arms.

Samuels (Tr. 307). There is no evidence as to the nature of these deliberations. For example, there is no evidence as to whether any of those involved in the decision knew or considered the fact that Hedger had no disciplinary record in his 9 years as an employee, other than perhaps a verbal warning for being tardy on one occasion.

#### Analysis

In order to establish a violation of Section 8(a)(3) and (1), the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a "motivating factor" in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 889 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983); *American Gardens Management Co.*, 338 NLRB 644 (2002).

The General Counsel's initial showing usually requires him to prove that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) that animus towards the protected activity was a substantial or motivating reason for the employer's action. The National Labor Relations Board (the Board) may infer discriminatory motive from the record as a whole and under certain circumstances, indeed not uncommonly, infers discrimination in the absence of direct evidence.

Marcus Hedger engaged in activity protected by Section 7 of the Act in his capacity as union steward. As the Board stated in *Tillford Contractors*, 317 NLRB 68 (1995):

When an employee makes an attempt to enforce a collective bargaining agreement, he is acting in the interest of all employees covered by the contract. It has long been held that such activity is concerted and protected under the Act, *Interboro Contractors*, 157 NLRB 1295 (1966). An employee making such a complaint need not specifically refer to the collective-bargaining agreement. As long as the nature of the complaint is reasonably clear to the person to whom it is communicated, and the complaint does, in fact, refer to a reasonably perceived violation of the collective-bargaining agreement, the complaining employee is engaged in the process of enforcing that agreement. *Bechtel Power Corp.*, 277 NLRB 882, 884 (1985); *Roadway Express*, 217 NLRB 278, 279 (1975); *NLRB v. City Disposal Systems*, 465 U.S. 822, 840 (1984).

There is no question that Respondent was aware of Hedger's activities as union steward. Moreover, the record is replete with evidence that establishes substantial animus on the part of management towards those activities. Respondent in its brief argues that the record establishes that it does not have animus towards the Union and that there is no evidence of any animus tied to any particular protected act engaged in by Hedger. Nevertheless, the record does establish substantial animus towards Hedger's activities in general as a union steward.

In mid-2008, Respondent attempted to unilaterally forbid smoking at the Niles plant. Hedger requested a meeting between management and employees who smoked. At this meeting Hedger told Kester that management could not unilaterally change the policy. As a result the policy did not change as it did at another of Respondent's facilities. At this meeting, Kester testified:

I said something as simple as a smoking policy we can't even come to an agreement on? I thought it was kind of ridiculous. It was a very small issue. We were trying to comply with the state new regulation. The company was changing a policy. I explained that if we keep making big issues over little things, management isn't going to continue to deal with it. That's what I said.

(Tr. 226–227.)

Employee David Ishac recalled Kester saying, "Marcus, 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." (Tr. 100–101.)

Also in 2010, Kester went to Hedger's machine to inform him that the husband of employee Linda Gonzalez, a friend of Hedger's, had died suddenly. Kester testified:

... my comment to Marcus was we don't see eye to eye on everything, but this really puts things in perspective. Life is way too short for the bickering between he and I. And that's all I said. And I turned around and went back to my office.

(Tr. 233.)<sup>11</sup>

The Union's counsel asked Kester if he was aware of any other discipline that Hedger had 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.

(Tr. 263.)

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 union steward.<sup>12</sup>

<sup>11</sup> Hedger's testimony is that Kester took this opportunity to convey a veiled threat that he could be terminated suddenly and without warning, just as Gonzalez' husband had died suddenly, Tr. 33–35. I credit Kester's account of the conversation.

<sup>12</sup> Respondent relies heavily on Robert Schmitt's testimony that he first saw Hedger and Peter Schmidt "a little bit after 8:00 o'clock," Tr. 119, 144. I do not view this as an attempt by Schmitt to pin point the time in question and do not see it as inconsistent with Hedger's testimony.

Respondent continues to argue that Hedger was away from his press for between 50 minutes to over an hour, R. Br. at pp. 23–24; Tr. 191. It has no credible evidence to support this assertion, see, e.g., Tr. 289. None of the employees, including Robert Hayden, who clearly disliked Hedger, indicated that this was so. Respondent never even bothered to ask Michael Naylor and Tony Sass, the other members of Hedger's crew, as to how long Hedger was gone, Tr. 244–247. The timesheet filled out by Naylor, R. Exh. 10, is consistent with Hedger's testimony at Tr. 47. Hedger testified he left his press after finishing the "washup"

When the Respondent's stated reasons for its actions are found to be false (i.e., "pretextual reasons"), discriminatory motive may be inferred. In turn, "pretext" is sometimes, if not often, inferred from a blatant disparity in the manner in which an alleged discriminatee is treated as compared with similarly situated employees with no known union sympathies or activities (i.e., disparate treatment), *New Otani Hotel & Garden*, 325 NLRB 928 fn. 2 (1998); *Fluor Daniel, Inc.*, 304 NLRB 970 (1991); *Citizens Investment Services Corp.*, 342 NLRB 316, 330-331 (2004). I conclude that Respondent's stated reasons for Hedger's discharge are pretextual and on this basis conclude that Hedger's termination was discriminatorily motivated and violates the Act.

First of all, to the extent Respondent relies on Hedger's violation of company policy, it is clear that policy was not enforced on the second and third shifts. Secondly, Respondent has utterly failed to show that it did not apply its progressive discipline policy to Hedger for violating a policy that was not enforced. Respondent's reliance on its assertion that Hedger was away from his press for over an hour and its failure to adequately investigate this concern is another factor on which I rely in concluding that the stated reasons for discharge are pretextual. Finally, Respondent's disparate treatment of Hedger is an additional basis upon which I infer discriminatory motive.

Respondent fired Hedger, but imposed no discipline on three leadmen, who failed to report Hedger's alleged violation of its policy prohibiting unescorted nonemployees through the plant. Moreover, after Hedger's termination, employees who allowed a former employee into the plant, after being told this was prohibited, were suspended for 1 day, not terminated as was Hedger (Tr. 109-113, 264).

I conclude that this evidence is sufficient to shift the burden to Respondent to prove that it would have discharged Hedger in the absence of his protected activities as union steward. This involves scrutiny of the stated reasons for Hedger's termination.

#### Respondent's Affirmative Defenses

The termination letter Respondent sent to Marcus Hedger states two reasons for his discharge: (1) bringing an unauthorized person into the plant; (2) not responding truthfully to Respondent's inquiries (GC Exh. 16). As this record shows, unauthorized persons often came into the Niles plant after 6 p.m. due to the laxity or nonexistence of Respondent's security measures. Hedger certainly displayed a lack of candor when

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which according to R. Exh. 10 took place between 7:45 and 8:40 p.m.. Respondent's video shows that Peter Schmidt left the plant at 8:51 p.m., 11 minutes after Hedger left his press. To contradict this testimony, Respondent relies on Kester's notes of his interview of Hedger on August 23, CP Exh. 1. I credit Hedger that he left the press when the washup phase ended at 8:40 p.m..

Robert Kester testified that Tony Sass didn't want to get involved, Tr. 246-247. However, Respondent could have threatened Sass with discharge if he did not answer its questions truthfully, just as did with Hedger and Schmitt. Finally, the record clearly shows that Schmidt came to the warehouse door sometime before Hedger went to meet him. Thus, the timeframes of how long Schmidt was in the facility and how long Hedger was with him are different.

Respondent interviewed him on August 18, 2010. However, he truthfully answered all the Company's questions on August 23—other than the name of his visitor. Moreover, he had been directed not to answer this question (the answer to which Respondent already knew) at the direction of the Union.

I conclude that Respondent has not proved its affirmative defense that it would have fired Hedger in the absence of its animus towards his activities as a union steward. Thus, I find that Respondent violated Section 8(a)(3) in discharging him, although not in suspending him with pay during its investigation. Respondent has not satisfactorily established that its failure to apply its progressive discipline policy under the circumstances was nondiscriminatory.

While Hedger's lack of cooperation during the August 18 interview strikes me as foolish and unnecessary, Respondent had all the information it needed to investigate whether its confidential business information had been compromised. Respondent knew that Hedger had walked through the plant with Peter Schmidt, a member of the Union. Through its interviews with the employees present on August 12, it had the means to determine where Schmidt went in the plant and how long he was there. Respondent already had information sufficient to determine whether Peter Schmidt gained access to confidential business information.

I also find the Union's resistance to identifying Peter Schmidt to be unwise and unnecessary. However, Robert Hayden had already identified Schmidt to management as the person walking through the plant on August 12. Respondent's failure to followup on the reasons for Peter Schmidt's visit in conjunction with the lack of security, leads me to believe that it did not discharge Hedger for compromising confidential business information.

Respondent also contends that one of the valid nondiscriminatory reasons it terminated Marcus Hedger was that he violated its confidentiality policy by walking Peter Schmidt through the Niles plant. Respondent's confidentiality policy which was adopted in 2006 states that all knowledge and information acquired by an employee, such as policies, procedures, designs, know-how, trade secrets, and technical information shall be regarded as strictly confidential and held in trust (R. Exhs. 7, 8).

It is unclear how this policy is relevant to Hedger's conduct on August 12, 2010. Insofar as Respondent relies on Hedger's purported violation of policy regarding unauthorized visitors, this policy was not enforced on the second and third shifts.

Robert Kester testified as to the uniqueness of Respondent's processes and its concern that these not become known to its competitors, particularly the two to three competitors in the Chicago area. The difficulty with Respondent's argument in this regard is that it did absolutely nothing to prevent anyone from walking into its plant after 6 p.m. Prior to 6 p.m. visitors were required to sign in at the front desk and be escorted. However, after 6 p.m. the desk was unmanned. There was no gate around the Niles plant, no security and the doors to the facility were often open. Virtually anyone could walk into the plant.

I would note in this regard that there is no evidence that anyone in authority made any attempt to prevent Peter Schmidt

from walking through the plant. This includes all three leadmen, Schmitt, Golifit, and Kis Kako.<sup>13</sup>

Moreover, the record establishes that many people came into the plant after 6 p.m. when the front desk was not manned. These included food delivery people, former employees, and truckdrivers.<sup>14</sup> Individuals delivering food were free to walk through the plant and deliver food to employees at their workstation and they did so. Nonemployee truckdrivers had been observed by management at vending machines located in the interior of the plant (Tr. 260, 328). Unlike Peter Schmidt, who was escorted through the facility by Hedger, these individuals walked into the interior of the plant unescorted. No employee, prior to Marcus Hedger, had ever been disciplined for allowing unauthorized persons into the plant.

It is also unclear as to what Peter Schmidt could have learned from his walk through the plant. Respondent made no attempt to talk to Peter Schmidt to determine what he was doing at the plant. It appears that the most unique aspects of Respondent's production process are its layout for the labels and cutting equipment (Tr. 161–162), Respondent's brief at pages 2–3. There is nothing in the record to indicate that Schmidt observed or learned anything pertaining to layout or cutting.<sup>15</sup>

Respondent attempts to draw a distinction between the unauthorized presence in the Niles facility of Peter Schmidt, who had experience in the printing business, and other unauthorized visitors (R. Br. at pp. 19–20). However, Respondent had no way of knowing whether other unauthorized visitors also had such experience. If Respondent's confidential business processes are as valuable as it asserts, it would not take much imagination for a competitor to get a person knowledgeable about the printing process inside the plant on the second and third shift, knowing that the plant had no security after 6 p.m.

Management's discussion with employees who were present on the evening on August 12, confirmed that Schmidt was in the plant for a very brief time. Marcin Golifit, the leadman in

<sup>13</sup> Since Kako did not testify it is unclear whether he knew that Schmidt walked through the plant or what he said to Schmidt. Kester's hearsay testimony at Tr. 179–180 as to what Kako told him is very implausible. According to this account Kako told Schmidt he had to wait outside but then sent Daniel Nevins to get Hedger. Afterwards, Hedger and Schmidt walked through the plant without any interference from Kako or Nevins.

<sup>14</sup> Thomas Vlahos testified that pizza delivery people do not enter the plant. However, since he normally leaves by 6 or 7 p.m., he has no basis for testifying as to what occurs after he leaves. I therefore credit the testimony of employees who are in the plant the entire second shift that it was not uncommon for food delivery people to come to the machines. This is all the more likely since the press crews do not get a lunch break and eat at their machines, Tr. 336–338.

<sup>15</sup> Respondent interviewed Mike Kuznierz, a cutter, and Nina Abo, a die cutter, Tr. 177–178. Neither of these individuals testified at the hearing. However, neither the testimony of Robert Kester about his discussions with Kuznierz and Abo, nor Tom Vlahos' notes of his discussion with Abo, GC Exh. 3, suggests that Peter Schmidt observed Respondent's confidential information regarding its cutting techniques.

bindery/finishing, apparently told Kester that Schmidt and Hedger “looked around and proceeded out of the building” (Tr. 176). Robert Hayden, a pressman known by management to be unfriendly to Hedger, told management nothing other than the visitor's name was Peter Schmidt and that he was a member of the Union. Hayden did not indicate that Peter Schmidt lingered anywhere in the interior of plant (Tr. 272).

Robert Schmitt, who had been advised that his job depended on his answers, told management that Peter Schmidt had been in the plant for 10 minutes (Tr. 362). It is doubtful that Schmitt would lie to Respondent under the circumstances given that, if contradicted, he could have been fired. I infer that Respondent knew that Robert Schmitt's answer to this question was truthful.

According to Kester's hearsay testimony, Mike Kuznierz told him that Schmidt and Hedger spent a couple of minutes in the finishing department. However, his notes and/or memorandum dated August 18, 2010, state that Kuznierz recalled seeing Hedger stop at the bindery entrance with a man with a bicycle (GC Exh. 4). This is consistent with Hedger's testimony that they did not enter the bindery or sheeting department (Tr. 50–51).

In summary, Respondent's lack of security after 6 p.m. belies its stated degree of concern concerning the presence of unauthorized individuals in its facility and visual observation of its equipment and processes. It had left itself wide open to potential industrial espionage. This was patently obvious after it investigated the August 12 incident, which also failed to disclose any evidence that Peter Schmidt was in the Niles facility to acquire information about Respondent's confidential processes. This contributes to my conclusion that Respondent would not have ignored its progressive discipline policy and fired Marcus Hedger in the absence of its animus towards his activities as union steward. The same hold true for his lack of candor during the August 18, 2010 interview. Candid and truthful answers by Hedger on August 18 would not have provided Respondent with any information of which it was not already aware (Tr. 199–201 CP Exh. 2).

#### CONCLUSION OF LAW

Respondent violated Section 8(a)(3) and (1) by terminating Marcus Hedger's employment on September 14, 2010.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Marcus Hedger, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest compounded daily, *Kentucky River Medical Center*, 356 NLRB 6 (2010), as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent shall reimburse Marcus Hedger in amounts equal to the difference in taxes owed upon receipt of a lump-sum backpay award and taxes that would have been owed had there been no discrimination. Respondent shall also take whatever steps are necessary to insure that the Social Security Ad-

ministration credits Marcus Hedger's backpay to the proper quarters on his Social Security earnings record.

[Recommended Order omitted from publication.]