

**Nos. 14-1263, 15-1007**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**FORT DEARBORN COMPANY**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**DISTRICT COUNCIL FOUR, GRAPHIC COMMUNICATIONS  
CONFERENCE OF THE INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS**

**Intervenor**

---

**ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Rule 28(a)(1) of the Rules of this Court, counsel for the National Labor Relations Board certify the following:

- A. *Parties and Amici*: Fort Dearborn Company was the respondent before the National Labor Relations Board and is the petitioner/cross-respondent before the Court. District Council Four, Graphic Communications Conference of the International Brotherhood of Teamsters

was the charging party before the Board. The Board's General Counsel was a party before the Board.

B. ***Rulings Under Review:*** The case under review is a decision and order of the Board issued on November 18, 2014, and reported at 361 NLRB No. 109.

C. ***Related Cases:*** This case has not previously been before this Court. The Board is not aware of any related cases pending or about to be presented to this Court or any other court.

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Dated at Washington, DC  
this 4th day of June, 2015

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**BRIEF FOR  
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**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of Fort Dearborn Company (“the Company”) to review, and the cross-application of the National Labor

Relations Board (“the Board”) to enforce, the Board’s Order issued against the Company. The Board had subject matter jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”) (29 U.S.C. §§ 151, 160(a)), which empowers the Board to prevent unfair labor practices affecting commerce.

The Board’s Decision and Order issued on November 18, 2014, and is reported at 361 NLRB No. 109.<sup>1</sup> The Order is final with respect to all parties. The Company petitioned for review of the Board’s Order on November 26, 2014, and the Board cross-applied for enforcement of the Order on January 15, 2015. The Court has jurisdiction over the Company’s petition and the Board’s cross-application pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), which provides that petitions for review of Board orders may be filed in this Court. Both filings were timely because the Act imposes no time limit on the initiation of review or enforcement proceedings.

### **STATEMENT OF THE ISSUES**

1. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act by threatening chief union steward

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<sup>1</sup> “A.” references are to the parties’ joint appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

Marcus Hedger with closer scrutiny and discharge for engaging in union activity protected by Section 7 of the Act.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by suspending and discharging chief union steward Marcus Hedger because of his union activity.

### **RELEVANT STATUTES AND REGULATIONS**

The relevant statutory provisions are contained in an addendum to this brief.

### **STATEMENT OF THE CASE**

Acting on charges filed by District Council Four, Graphic Communications Conference of the International Brotherhood of Teamsters ("the Union"), the Board's General Counsel issued a complaint alleging that the Company committed several unfair labor practices by threatening, suspending, and terminating union steward Marcus Hedger, in violation of Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), and Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1).

Following a hearing, the administrative law judge credited Hedger's account that during a contract negotiation session the Company's vice president for operations told Hedger that "we're watching you, we are going to catch you, and we are going to fire you," but found the statement did not violate Section 8(a)(1) of the Act.

However, the judge found that the Company violated Section 8(a)(3) and (1) of the

Act by discharging Hedger because of his union activity. The parties filed exceptions to the judge's decision with the Board.

On September 28, 2012, a three-member panel of the Board (Chairman Pearce and Members Hayes and Block) affirmed the judge's conclusion that the Company violated Section 8(a)(3) and (1) by terminating Hedger. In addition, unlike the judge, the Board found that the Company's threat to watch, catch, and fire Hedger, viewed in the context of a difficult negotiating session, was a threat in violation of Section 8(a)(1). The Board found that the Company's suspension of Hedger was one of the steps taken as part of the Company's unlawfully motivated efforts to discharge Hedger and also violated Section 8(a)(3) and (1). *See Fort Dearborn Co.*, 359 NLRB No. 11, 2012 WL 4613700. The Company petitioned this Court for review of the 2012 Decision and Order (D.C. Cir. No. 12-1430) and the Board filed a cross-application for enforcement (D.C. Cir. No. 12-1438). The Court sua sponte issued an order placing the case in abeyance in view of its opinion and judgment in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013).

On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which held three recess appointments to the Board in January 2012 invalid under the Recess Appointments Clause, including the appointments of Members Hayes and Block. On August 1, 2014, on the Board's motion, the Court dismissed and remanded the case. Subsequently, the

Board exercised its authority under Section 10(d) of the Act, 29 U.S.C. § 160(d), and set aside the 2012 Decision and Order. On November 18, 2014, a properly constituted Board panel (Chairman Pearce and Members Miscimara and Schiffer) issued the Decision and Order now before the Court, which incorporates by reference the prior 2012 Decision and Order. *See Fort Dearborn Co.*, 361 NLRB No. 109, 2014 WL 6472006.

## **I. THE BOARD'S FINDINGS OF FACT**

### **A. The Company's Operations; the Union Represents Company Employees**

The Company prints labels for food and other product containers at its facility in Niles, Illinois. (A. 354.) The Company's employees work in three different shifts. During the second shift, 3:00 p.m. to 11:00 p.m., there were usually no management personnel present for the second half of the shift because the pressroom manager usually left work between 6:00 p.m. and 7:00 p.m. (A. 354; 215.) After the pressroom manager left, the highest ranking employee at the plant was Robert Schmitt, a "working foreman" and bargaining unit member. (A. 354; 5, 81.)

Since at least 2000, the Union has represented a unit of the Company's pre-press, imprint, and press department. (A. 278-79.) The bargaining unit is also referred to as the lithography unit. (A. 354; 6-7.)

**B. The Company's Visitor and Confidentiality Policies**

Prior to 6:00 p.m., visitors to the Niles facility were required to sign in at the front desk and be escorted while in the facility. (A. 358; 40.) After 6:00 p.m., however, the desk was unattended and the policy was not enforced. (A. 358; 41.) There was no gate around the plant, no security, and doors to the facility were routinely left open. (A. 358; 42, 44.) As such, many people came into the plant after 6:00 p.m. when the front desk was unattended. (A. 358; 41.) These included food delivery people, former employees, friends and family of employees, and truck drivers. (A. 358; 42-44, 69-70, 86, 89, 221-23.) Because the second-shift press crews did not get a lunch break and ate at their machines, individuals delivering food were free to walk through the plant to meet employees at their workstations and they frequently did so. (A. 358 n.14; 42-44, 221-23.) In addition, visitors had also been observed by management, including the plant manager, at vending machines located in the interior of the plant. (A. 358; 187, 216.)

The Company's confidentiality policy provides 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. (A. 358; 249-53.)

**C. Chief Union Steward Marcus Hedger Represents Employees in the Contract Negotiations; After the Membership Votes Against the Proposed Contract, the Company Threatens Hedger with Closer Scrutiny and Discharge**

Marcus Hedger worked as a pressman for the Company for nine years and had a nearly perfect record, with only a single verbal warning for tardiness. (A. 354; 3, 189-90.) At the time of his discharge, Hedger worked the second shift and was a member of the press lithography (“litho”) bargaining unit. (A. 354; 3-5.) Hedger served as a union steward for six and a half years prior to his termination and was the chief union steward for the last five of those years. (A. 354; 8.) In this capacity, he represented employees at disciplinary meetings and grievances, policed the collective-bargaining agreement and was actively involved in contract negotiations. (A. 351, 354, 355; 9, 12-13, 227.)

Starting in early 2010,<sup>2</sup> the Company and the Union engaged in contract negotiations for a successor contract in the “litho” unit. (A. 354; 14, 61.) Hedger was one of the Union’s bargaining committee representatives in the negotiations; Senior Vice-President of Operations William Johnstone was one of the Company representatives. (A. 351, 354-55; 14, 46-48, 61-62, 224.) On June 3, the unit employees voted to reject the Company’s contract proposal on the recommendation of the Union’s bargaining committee. (A. 351, 355; 13, 63.)

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<sup>2</sup> All dates are in 2010, unless otherwise indicated.

The following day, June 4, the Company and the Union held another negotiating session to continue negotiations on the successor contract.<sup>3</sup> (A. 351, 354; 14.) During the meeting, the Company's Vice-President of Operations, William Johnstone, repeatedly accused the Union of misconduct. (A. 351, 354; 14-15, 63-65, 225, 242.) He held up a union flyer and accused the Union of using the Company's copy machines to duplicate a flyer urging employees to reject the Company's proposal and he claimed union agents had put flyers on car windshields in the Company's parking lot. (A. 351, 354; 14-15, 63, 224.) Johnstone's frustration was apparent to everyone at the bargaining table. (A. 351; 15, 63-65, 228-32, 240-42.) In response, Hedger denied the Union had used the Company's copying machines, acknowledged that the Union was not allowed to use company machines to reproduce union materials, and asked for proof that people put flyers on employees' cars. (A. 15, 63-65, 242.) Johnstone told Hedger that he was tired of the "union circus" and told Hedger "we're watching you, we are going to catch you and we are going to fire you." (A. 351, 355; 15, 64.)

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<sup>3</sup> Present for the Union were Hedger, Local Union Vice-President Paul Mancillas, Local Union President Robert Hayden, David Ishac, John Cavalier, Frank Posintino, Mike Zenka, and Jason Powell. Present for the Company were Johnstone, Corporate Human Resources Director Samuels, Niles Human Resources Director Evalyn Vasquez, and Niles Plant Manager Robert Kester. (A. 14, 46-48, 61-62.)

**D. Peter Schmidt Visits Hedger at the Plant**

On August 12, Hedger was working his usual second shift at the plant when Hedger heard his name being paged to come to the shipping department because he had a visitor. (A. 355; 20-21.) Because Hedger was not expecting a visitor and was busy doing clean up of the print job he and his co-workers were running on the press, he ignored the page. (A. 355; 20, 50-51.) When Hedger finished the clean up, he went to the shipping department to see who his visitor was. (A. 355; 21.) Hedger left his press station at about 8:40 p.m. (A. 357 n.12.)

Peter Schmidt, a friend of Hedger's and a union member, was waiting for Hedger. Schmidt had his bicycle with him. (A. 355; 21.) Schmidt asked Hedger for directions and Hedger concluded that the fastest way for Schmidt to get to his destination would be to walk through the plant. (A. 355; 21-22, 50-52, 57.) None of the three leadmen at the plant on the second shift objected to Hedger's walking Schmidt through the plant or reported it to management. (A. 355; 53, 84-85, 98-99.) Hedger escorted Schmidt out a side door at 8:51 p.m. (A. 357 n.12; 133.)

**E. The Company Begins an Investigation into Hedger and Contacts Corporate Representatives To Assist**

On August 17, Plant Manager Robert Kester was reviewing security camera footage for an unrelated incident that took place between 6:00 a.m. and 7:00 a.m. on Saturday, August 14. (A. 355; 130-33, 198-200.) Kester testified that in rewinding the video back to August 14, he somehow saw images from August 12

showing Hedger escorting a man out of the plant's side door at 8:51 p.m. (A. 355; 130-34, 198-200, 203.) Kester immediately met with Pressroom Manager Thomas Vlahos, who was unaware of the incident. (A. 357; 135.) Kester and Vlahos then interviewed foreman Robert Schmitt, second-shift finishing department leadman Marcin Golifit, and several other employees. (A. 355; 136-39.)

Based on the information obtained during the interviews, Kester contacted corporate representatives of the Company, including Vice-President of Operations William Johnstone, and Corporate Human Resources Director William Samuels, "to assist in a formal Company investigation . . . and to determine a plan of disciplinary action." (A. 355; 149-50, 236, 312-13.) The following day, Kester continued interviewing employees, this time with the Niles plant Human Resources Director, Evelyn Vasquez, and Corporate Human Resources Director William Samuels. (A. 355; 140-41.) Employee Robert Hayden told Kester that the individual who walked through the plant with Hedger was Peter Schmidt. (A. 355; 141.)

**F. The Company Interrogates Hedger; Hedger Is Suspended at the end of the Meeting**

On August 18, Kester summoned Hedger into a meeting with himself, Samuels, and Vasquez. (A. 355; 151.) Kester started the meeting by warning Hedger that he could be terminated for not cooperating with the Company's investigation. (A. 355; 25.) Hedger requested union representation and a

discussion ensued about who would be an appropriate representative. (A. 355; 24-29, 151-54.) Hedger requested that Frank Golden, a union business agent, be his union representative for the questioning. (A. 355; 25-26, 152.) Ultimately, when the Company permitted Hedger to contact Golden, Golden told Hedger that he was driving in traffic, that his cell reception was bad, and asked that the meeting be postponed until he could participate in person. The Company refused. (A. 355; 28.) Golden participated by speakerphone. (A. 355; 28, 154-55.)

Samuels conducted the interrogation, reading prepared questions off a paper regarding Hedger's visitor on August 12. (A. 355; 29-30, 155-57.) Hedger's responses were "I don't know" and "I don't remember." (A. 355; 30, 155-56.) Eventually, Hedger was told that he was not cooperating with the Company's investigation and Kester sent Hedger home. (A. 355; 30-31, 157.)

### **G. The Company Interrogates Hedger a Second Time**

On Friday, August 20, Kester called Hedger and told him that the Company wanted to meet with him at the facility on Monday, August 23. (A. 355; 32.) Hedger met with Samuels and Kester at the plant on August 23, with Golden present as Hedger's representative. (A. 355; 32, 158.) The Company again threatened to discharge or discipline Hedger if he failed to cooperate with the investigation. (A. 355; 158-59.) Once again, Samuels questioned Hedger regarding the events of August 12. This time, with his union representative in

attendance, Hedger answered all of the questions with one exception – on Golden’s advice he refused to identify Schmidt. (A. 356; 34, 160.)

Kester’s notes from the August 23 interview with Hedger provide:

**Bill Samuels:** Did your press . . . crew know you left your workstation?

**Marcus Hedger:** Yes.

**Bill Samuels:** Did you explain why you had to meet this person?

**Marcus Hedger:** No. It was a normal break. He was inside the building when I got there.

\*\*\*

**Marcus Hedger:** Let me tell you what happened. Pages while I was on the press. A friend of mine stopped by the building. I was really busy that night. He wanted to know the quickest way to get to Lehigh. We went in one door and out the other door. As we walked through the staging area I saw the foreman by the coffee machine. He said it was ok to give a brief tour.

**Bob Kester:** Did you get permission before the person came in or after?

**Marcus Hedger:** He was in the building already. He entered on the west side of the building and left out the east side of the building.

(A.260, 263-64.)

## **H. The Company Interrogates Robert Schmitt**

Robert Schmitt, Hedger’s supervisor, was on vacation the week of August 23 and was questioned on his return on August 30 by Samuels, Kester, and Vasquez. Schmitt was advised at the beginning of his interview that his job

depended on his answers and was asked if he wanted a union representative. (A. 358; 96, 169.) Schmitt told Samuels that he saw Hedger walk through the plant with a guest; that he did not know who let the guest into the plant; that he first saw the guest at the vending machines; and that the guest was in the plant about 10-15 minutes. (A. 96, 207, 237.) Schmitt testified that he told the Company that he had not given Hedger permission allow Schmidt entry into the plant, but had given Hedger permission to escort Schmidt through the plant. (A. 94-96, 98-99.) Kester testified that Schmitt denied giving Hedger permission to walk Schmidt through the plant.<sup>4</sup> (A. 171.)

### **I. The Company Discharges Hedger**

On September 7, Kester called Hedger to inform him that his employment was being terminated effective September 14. (A. 356; 37.) The same day, Kester sent Hedger a letter which stated that Hedger was being discharged because he “brought an unauthorized person into the plant on August 12, 2010, and that [he] did not respond truthfully to the Company’s questions regarding events on that date of which you were fully aware.” (A. 356; 315.)

### **II. THE BOARD’S CONCLUSIONS AND ORDER**

On November 18, 2014, the Board (Chairman Pearce and Members Miscimarra and Schiffer) issued its Decision and Order, which incorporates by

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<sup>4</sup> The Board found that whether Schmitt gave Hedger permission to take Schmidt through the plant “makes no difference to the outcome of this case.” (A. 355 n.6.)

reference the 2012 Decision and Order. The Board, in agreement with the 2012 Decision and Order, concluded that the Company violated Section 8(a)(1) of the Act by threatening Hedger with the statement “we’re watching you, we are going to catch you, and we are going to fire you.” In addition, the Board concluded that the Company violated Section 8(a)(3) and (1) by making good on that threat by suspending and ultimately discharging Hedger for violating a rule that had never before been enforced. (A. 362.)

To remedy the violations, the Board’s Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act, 29 U.S.C. § 157. Affirmatively, the Order requires the Company to reinstate Hedger to his former job, make Hedger whole for any loss of earnings, and post a remedial notice. (A. 362-63.)

### **SUMMARY OF THE ARGUMENT**

1. During a contract bargaining session that came the day after the union membership rejected the Company’s proposal, the Senior Vice-President of Operations threatened union representative Hedger that “we’re watching you, we are going to catch you, and we are going to fire you.” Ample evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act by threatening to scrutinize and fire Hedger because he had engaged in protected

union activities. Based on the language and context of the threat, Hedger would reasonably fear that his activities as a union negotiator and chief union steward placed him at risk of discipline and discharge. The Company's claims that Johnstone's statement is susceptible to a different meaning ignores the context in which it was made and the Board's well-established standard for evaluating workplace communications under Section 8(a)(1).

2. Substantial evidence supports the Board's findings that the Company violated Section 8(a)(3) and (1) of the Act by suspending and discharging Hedger because of his protected union activities. There is ample evidence to support the Board's finding that the Company's actions against Hedger were motivated by its union animus, as demonstrated by its threat to Hedger, the timing of the suspension and discharge, and the Company's pretextual justifications for its actions. For instance, although Hedger was discharged because he "brought an unauthorized person" into the plant, there was a widespread practice allowing unescorted friends, family members, former employees, food delivery people, truck drivers, and other visitors to walk throughout the plant during the second shift. No one had been disciplined for doing this prior to Hedger's discharge. Moreover, although the Company's second stated reason for discharging Hedger was for being uncooperative at his first interview, other employees who refused to participate in the Company's investigation were not subject to discipline, let alone suspension

and discharge. Finally, the Company failed to demonstrate in its defense that it would have suspended and discharged Hedger even in the absence of his protected union activity.

### STANDARD OF REVIEW

This Court “accords a very high degree of deference to administrative adjudications by the [Board].” *United Steelworkers of Am. v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993). The Court will affirm the findings of the Board unless they are “unsupported by substantial evidence in the record considered as a whole,” or unless the Board “acted arbitrarily or otherwise erred in applying established law to fact.” *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1282 (D.C. Cir. 1999). “Substantial evidence” for purposes of the Court’s review of factual findings, consists of “such relevant evidence as a reasonable mind might accept to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). A reviewing court accordingly may not “displace the Board’s choice between two fairly conflicting views of the facts, even though the court would justifiably have made a different choice had the matter been before it *de novo*.” *Id.* at 488.

The Court gives even greater deference to the Board’s determinations on questions of motive, because most evidence of motive is circumstantial. *Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 939 (D.C. Cir. 2011). Moreover, the Court will accept an administrative law judge’s credibility determinations that are

adopted by the Board unless they are “‘hopelessly incredible,’ ‘self-contradictory,’ or ‘patently unsupportable.’” *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 28 (D.C. Cir. 1998) (quoting *Capitol Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1004 (D.C. Cir. 1998)).

Further, where, as here, “the Board has disagreed with the [administrative law judge] . . . the standard of review with respect to the substantiality of the evidence does not change.” *Local 72, Int’l Bh’d of Elec. Workers v. NLRB*, 215 F.3d 11, 15 (D.C. Cir. 2000). Although “the Board, when it disagrees with the [administrative law judge], must make clear the basis of its disagreement,” in the end it is the Board that is “entrusted by Congress with the responsibility for making findings under the statute.” *Id.* at 15.

## **ARGUMENT**

### **I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY THREATENING HEDGER WITH CLOSER SCRUTINY AND DISCHARGE BECAUSE OF HIS PROTECTED UNION ACTIVITY**

#### **A. Applicable Principles**

Section 7 of the Act guarantees employees “the right to self-organization, to form, join or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .” 29 U.S.C. § 157. In turn, Section 8(a)(1) of the Act implements that guarantee by making it an unfair labor practice for an employer to “interfere

with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7.” 29 U.S.C. § 158(a)(1). The test for a Section 8(a)(1) violation is whether, considering the totality of the circumstances, the employer’s conduct has a reasonable tendency to coerce or interfere with employee rights. *See Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001); *Avecor, Inc. v. NLRB*, 931 F.2d 924, 931 (D.C. Cir. 1991). Proof of actual coercion is not necessary to establish a violation of Section 8(a)(1). *Avecor*, 931 F.2d at 931; *Teamsters Local 171 v. NLRB*, 863 F.2d 946, 954 (D.C. Cir. 1988).

It is well settled that an employer violates Section 8(a)(1) of the Act by threatening employees that union activity will result in job loss. *Amalgamated Clothing Workers v. NLRB*, 420 F.2d 1296, 1299 (D.C. Cir. 1969); *Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 544 (D.C. Cir. 2006) (threats of job loss in retaliation for protected union activities); *Southwire Co. v. NLRB*, 820 F.2d 453, 457 (D.C. Cir. 1987) (threats of closure and job loss for engaging in protected activities); *see also Cleveland Pneumatic Co.*, 271 NLRB 425, 426 (1984) (threatening to discipline and discharge union steward because of protected activity violates Section 8(a)(1)).

When evaluating an employer’s statement, the Board considers “the economic dependence of employees on their employer, and the necessary tendency of the former . . . to pick up the intended implications of the latter that might be

more readily dismissed by a more disinterested ear.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 607 (1969). This Court recognizes “the Board’s competence. . . to judge the impact of utterances made in the context of the employer-employee relationship.” *Progressive Elec.*, 453 F.3d at 544 (quoting *Gissel*, 395 U.S. at 620).

**B. The Company’s Threat To Watch, Catch, and Fire Hedger Reasonably Tended To Interfere with the Exercise of His Section 7 Rights**

Substantial evidence amply supports the Board’s finding (A. 351) that, in light of the language and context, Hedger would reasonably construe the Company’s verbal threat as coercive interference with the exercise of his Section 7 rights. The credited evidence demonstrates that a frustrated high-level corporate manager, the Company’s senior vice-president of operations, threatened Hedger, a chief union steward, stating “we’re watching you, we are going to catch you, and we are going to fire you” during a contentious bargaining session in which Hedger was representing the Union at the bargaining table. *See Manor Care of Easton, Pa., LLC v. NLRB*, 661 F.3d 1139, 1140 (D.C. Cir. 2011) (supervisor’s direct threat to union activist to “stop worrying about the union and worry about your job” an unlawful threat in violation of Section 8(a)(1)).

The credited record evidence amply supports the Board’s finding that the context of the meeting makes clear that Johnstone’s threat was directed at Hedger’s

protected activity. Johnstone made the statement to Hedger at a negotiating session that took place the day after the union membership rejected the Company's contract proposal because the bargaining committee recommended to its membership that the members turn it down. During the negotiation session, "Johnstone's general frustration with the Union was apparent to all at the bargaining table." (A. 351; 14, 63, 228-32.) According to Hedger, Johnstone griped that he wished the Union "had the courage of their convictions" and Hedger replied that the union representatives did have the courage of their convictions because they told the employees to reject the Company's proposal. (A. 64, 243, 274.) Johnstone repeatedly accused the Union of misconduct, waving a union flyer around and accusing the Union of improperly using the Company's copy machines to duplicate it and placing them on cars in the company parking lot. (A. 351; 64, 240-41, 243, 274.) Hedger denied those allegations. (A. 15; 243.) Importantly, Johnstone then expressed his aggravation that he "was tired of the union circus," and then immediately told Hedger that "we're watching you, we are going to catch you, and we are going to fire you." (A. 351, 355; 15, 64.) Additionally, Johnstone specifically directed his threat at Hedger, an active union steward and member of the bargaining committee. *See DaimlerChrysler Corp. v. NLRB*, 288 F.3d 434, 444 (D.C. Cir. 2002) (threat to discipline and discharge union steward because of protected activity violates Section 8(a)(1)); *Tasty Baking Co.*, 254 F.3d at 125

(high ranking company official threat to discharge well-known union activist because of his union activities violates Section 8(a)(1)). In these circumstances, the Board's finding that Johnstone's threat reasonably tended to interfere with Hedger's protected activities is supported by the credited evidence.

In sum, settled law supports the Board's finding that the threat violated Section (a)(1) because the threat "would reasonably tend to interfere with the free exercise of protected employee rights." *Conair Corp. v. NLRB*, 721 F.2d 1355, 1360-61, 1368 (D.C. Cir. 1983). *Progressive Elec., Inc.*, 453 F.3d at 544 (company president's threats of job loss in retaliation for protected union activities unlawfully coercive). As the Board correctly found, Johnstone was "saying that [the Company] would watch Hedger more closely and find a reason to discharge him *because* of his protected union activity." (A. 351.)

### **C. The Company Fails To Provide a Basis For Overturning the Board's Finding That the Threat Was Coercive**

The Company erroneously asserts (Br. 20) that the Board "invented the fact that Johnstone's threat was undisputed." To the contrary, the Board based its finding on Hedger's credited testimony, which was corroborated by pressman David Ishac, that Johnstone made the threat as found.<sup>5</sup> Before the Board, the

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<sup>5</sup> The judge noted that Ishac still worked for the Company at the time of the hearing. Testimony of current employees is particularly reliable because "these witnesses are testifying adversely to their pecuniary interest." *Flexsteel Indus.*, 316 NLRB 745, 745 (1995), *enforced mem.*, 83 F.3d 419 (5th Cir. 1996); *see also*

Company did not file exceptions to the judge's factual finding that Johnstone made the statement that the Company was going to watch, catch, and fire him. As a result, it is too late for the Company to contest the statement. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”).

Following the Board's decision, where the Board rejected the judge's recommended finding, the Company should have filed a motion for reconsideration if it wanted to challenge the statement. Again, it failed to do so. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982) (court lacks jurisdiction under Section 10(e) when party fails to except to a finding before the Board.) As this Court has explained, “[w]here as here, [an employer] objects to a finding on an issue first raised in the decision of the Board rather than of the ALJ, [the employer] must file a petition for reconsideration with the Board to permit it to correct the error (if there was one).” *Flying Foods Group, Inc. v NLRB*, 471 F.3d 178, 185 (D.C. Cir. 2006). This Court enforces that bar strictly, consistently holding that a litigant's failure to present a question to the Board in the first instance precludes

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*Shop-Rite Supermarket*, 231 NLRB 500, 505 n.22 (1977) (testimony of current employees that is adverse to their employer is “given at considerable risk of economic reprisal, including loss of employment . . . and for this reason not likely to be false”).

this Court from considering it on appeal. *See W&M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1345-46 (D.C. Cir. 2008); *UFCW Local 204 v. NLRB*, 506 F.3d 1078, 1087 (D.C. Cir. 2007).

The Board properly relied on credited testimony about what happened at the meeting, including Johnstone's statement that he was tired of the "union circus." The Board's finding that Johnstone's frustration at the Union "was apparent to all at the bargaining table" is amply supported by the record evidence, and it was during Johnstone's outburst of frustration that he made the comment that he was tired of the "union circus." (A. 351; 15, 244.) Indeed, at the hearing Johnstone admitted he had been frustrated at the meeting, and when pressed about the source of his frustration, testified that he thought the Company's proposal was in the employees' best interests and that "it's not uncommon for my children to have difficulties in school, but it doesn't prevent me from being frustrated." (A. 232.) Thus there is no support for the Company's claim (Br. 21) that the judge's failure to expressly reference this comment means it did not happen.

Contrary to the Company's arguments (Br. 21), the Board properly rejected the judge's proposed finding that Johnstone's threat could have referred to catching Hedger using the Company's copier. The Board found that such an argument missed the full context of the bargaining session, viewed from employee Hedger's perspective, where the Company's senior vice-president of operations expressed

frustration with the Union, accused the Union of misconduct, and ultimately issued the threat. The Company's reliance on Johnstone's subjective intent in making the statement is directly at odds with assessing employer statements under Section 8(a)(1) of the Act. The test for determining the illegality of an employer's statement is whether the conduct reasonably tended to interfere with an employee's Section 7 rights – objectively assessed from the perspective of a reasonable employee in the circumstances presented – not the employer's professed intent in making the statement. *See Unbelievable, Inc.*, 323 NLRB 815, 816 (1997) (finding supervisor's statements unlawfully coercive, irrespective of supervisor's intent), *enforced in relevant part*, 118 F.3d 795 (D.C. Cir. 1997). While the Company argues (Br. 22) that Johnstone's threat is susceptible to alternate plausible interpretations, any such ambiguity must be construed against the Company. *See ITT Fed. Servs. Corp.*, 335 NLRB 998, 1003 (2001) (employer runs risk that “any ambiguity in his statement [] could be construed by an employee as containing an unlawful threat”).

The Company engages in mere speculation in contending (Br. 19) that the General Counsel's failure to produce the union flyer that Johnstone waved around at the meeting demonstrates that the flyer “may have” contained offensive material. If the Company thought this was relevant to its defense, it could have produced the flyer that Johnstone possessed at the meeting. If the Company is

attempting to argue that Johnstone had a right to be angry, the argument is a red herring. Again, the test is not Johnstone's subjective intent, but how a reasonable employee would interpret those words in the context. The General Counsel demonstrated, through ample credited record evidence, that Johnstone's threat to subject Hedger to closer scrutiny and discharge, in the context of his union activity, reasonably tended to interfere with his protected rights; the Board agreed.

Finally, the Company argues (Br. 23) that Johnstone's statement should not be viewed as a threat because the Company claims it had a harmonious relationship with the Union. To the extent the Company is arguing that the Company had no ill-will against the Union, as discussed above, an employer's subjective motives are irrelevant to the inquiry. Moreover, as a practical matter, irrespective of the past relationship, substantial evidence supports the Board's finding that the Company's frustration with the Union had crept into the parties' relationship and the Company violated the Act. (A. 351; 14-15, 63-65, 228-32, 240-41, 244 .)

In sum, the Company has presented the Court with no basis, legal or evidentiary, to disturb the Board's reasonable finding that its threat to subject Hedger to closer scrutiny and discharge him because of his protected union activity was unlawfully coercive.

**II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY SUSPENDING AND DISCHARGING HEDGER BECAUSE OF HIS UNION ACTIVITY**

Following years of employee Hedger's zealous union advocacy, and on the heels of Johnstone's threat to watch, catch and fire him, the Company, purportedly by chance, discovered a videotape of Hedger escorting a visitor from the plant, and used the incident to "follow[] through on its threat by suspending and then discharging Hedger." (A. 351.) The Company claimed Hedger was discharged because he "brought an unauthorized person into the plant on August 12, 2010, and [] did not respond truthfully to the Company's questions regarding events on that date of which you were fully aware." (A. 356; 315.) The record amply supports the Board's finding, however, that Hedger was discharged because of his protected conduct and the Company's reasons for his suspension and discharge were pretextual.

As the Board found (A. 352 n.5), Hedger's active role representing the Union during the contract negotiations was a motivating factor in the Company's discharge decision. Hedger was an effective union steward who advised employees to reject the Company's contract proposal, the Company knew of that activity and bore animus toward Hedger because of it. The Company's contemporaneous threat and its prior failure to discipline, much less discharge, anyone for the common practice of having visitors during second shift amply

supports the Board's finding (A. 352 n.5) that the Company discharged Hedger because of his protected union activity. Moreover, the Company's reliance on Hedger's failure to respond truthfully in one of the two interviews was also pretextual in light of the fact that the Company allowed other employees not to cooperate in the investigation.

### **A. Applicable Principles**

An employer violates Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by suspending and discharging an employee for engaging in union activities.<sup>6</sup> In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Supreme Court approved the test for determining motivation in unlawful discrimination cases first articulated by the Board in *Wright Line*, 251 NLRB 1083 (1980). Under the test, if substantial evidence supports the Board's finding that an employee's union activity was a "motivating factor" in the discipline, the Board's conclusion of unlawful adverse action must be affirmed, unless the record, considered as a whole, compelled the Board to accept the employer's affirmative defense that the employee would have been disciplined even in the absence of protected union activity. *Transp. Mgmt.*, 462 U.S. at 397,

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<sup>6</sup> Section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization[.]" A violation of Section 8(a)(3) produces a "derivative" violation of Section 8(a)(1). See *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

401-03; *Wright Line*, 251 NLRB at 1089. *Accord Bally's Park Place*, 646 F.3d at 935; *Southwest Merch. Corp. v. NLRB*, 53 F.3d 1334, 1339-40 (D.C. Cir. 1995).

To establish an employer's discriminatory motive, the Board "considers such factors as the employer's knowledge of the employee's union activities, the employer's hostility toward the union, and the timing of the employer's action." *Power, Inc. v. NLRB*, 40 F.3d 409, 418 (D.C. Cir. 1994). Evidence that an employer has violated Section 8(a)(1) of the Act, or departed from established policies and practices, supports an inference of union animus. *See Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 423-25 (D.C. Cir. 1996). As it reviews the employer's reason for disciplining an employee, the Board may draw reasonable inferences from the credited evidence and may rely on circumstantial as well as direct evidence. *Power, Inc.*, 40 F.3d at 418; *Waterbury Hotel Mgmt, LLC v. NLRB*, 314 F.3d 645, 651 (D.C. Cir. 2003) (Board may rely on direct and circumstantial evidence in determining employer motivation); *Hacienda Hotel, Inc.*, 348 NLRB 854, 864-65 (2006) (holding unlawful "motive may be established by circumstantial evidence as well as by direct evidence and is an issue of fact," and finding such motive where "no direct evidence of motive [was] extant in the record").

The Board need not accept at face value the employer's explanation for the discipline if the evidence and the reasonable inferences drawn from it indicate that

union animus motivated the discipline. *Leading Edge Aviation Svcs.*, 345 NLRB 977, 977 (2005) (inferring animus, absent any direct evidence, from “the record as a whole, and in particular the [employer’s] pretextual reasons” for its actions), *enforced*, 212 F. App’x 193 (4th Cir. 2007); *Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 231-32 (D.C. Cir. 1995) (finding unlawful motive because employer’s stated reason was pretextual). If the employer’s proffered reason for its actions is found to be pretextual, the inquiry ends. *Waterbury Hotel Mgmt., LLC*, 314 F.3d at 653.

Once the Board’s General Counsel has made a sufficient showing that the employee’s protected conduct was a motivating factor in the employer’s decision to discipline, the burden then shifts to the employer to demonstrate, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in the protected activity. *Southwest Merch.*, 53 F.3d at 1339 (D.C. Cir. 1995) (citing *Wright Line*, 251 NLRB at 1089). See *U-Haul Co. of California*, 347 NLRB 375, 388-89 (2006) (finding reason for discharge pretextual “not only dooms [employer’s] defense but it buttresses the . . . affirmative evidence of discrimination” and supports inference of unlawful motive), *enforced mem.*, 255 F. App’x 527 (D.C. Cir. 2007); *Leading Edge*, 345 NLRB at 977-78 (finding pretextual reason supported initial finding of animus and rejection of employer’s but-for defense).

## **B. The Company Discharged Hedger Because of His Union Activity**

### **1. Hedger's discharge was motivated by union animus**

It is undisputed that Hedger engaged in activity protected by Section 7 of the Act in his capacity as the chief union steward and as a member of the Union's negotiating committee. (A. 356.) During his tenure as union steward, Hedger filed 35-40 grievances on behalf of bargaining unit members and avidly policed the parties' collective bargaining agreement. (A. 356; 12-13.) *See 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."); *Plumbers & Pipe Fitters Local Union No. 32 v. NLRB*, 50 F.3d 29 (D.C. Cir. 1995) (contract negotiations are union activity). As the Board found, "[t]here is no question that [the Company] was aware of Hedger's activities as union steward." (A. 356.)

The Board found (A. 352 n.5) strong evidence of the Company's discriminatory motivation to discharge Hedger in Johnstone's unlawful threat to watch, catch and fire Hedger, which explicitly foreshadowed Hedger's discharge. *See Vincent Indus. Plastics v. NLRB*, 209 F.3d 727, 735 (D.C. Cir. 2000) ("Evidence that an employer has violated [Section] 8(a)(1) of the Act can support an inference of anti-union animus."); *Igramo Enterprise*, 351 NLRB 1337, 1339

(2007) (unlawful threats to employees sufficient to meet General Counsel’s burden under *Wright Line*).

The timing of Hedger’s discharge also supports the Board’s finding of unlawful motivation. Just two months after threatening to fire Hedger, the Company did exactly what Johnstone had promised. As such, Hedger’s discharge was triggered by, and occurred shortly after, his participation in the contract negotiations. *See Power, Inc.*, 40 F.3d at 418 (timing is circumstantial evidence of union animus); *see also NLRB v. Relco Locomotives, Inc.*, 734 F.3d 764, 786 (8th Cir. 2013) (discipline almost two months after protected activity supports a determination of animus and unlawful motivation); *Abbey’s Transp. Servs. v. NLRB*, 837 F.2d 575, 580 (2d Cir. 1988) (timing of discharges are “persuasive evidence” of employer’s union animus); *NLRB v. Chem Fab Corp.*, 691 F.2d 1252, 1261 (8th Cir. 1982) (discharge one month after an employee engages in protected conduct indicates that the protected activity was a motivating factor); *NLRB v. Montgomery Ward & Co.*, 242 F.2d 497, 502 (2d Cir. 1957) (abruptness of the discharge – two months after start of union organization – is “persuasive evidence as to motivation”).

In the face of the Company’s knowledge and animus to Hedger’s protected activity, amply supported by Johnstone’s unlawful threat during the negotiating session, the Board reasonably found that Hedger’s protected activity was a

motivating factor in his suspension and discharge. This finding is also supported by the Board's additional finding that the reasons for Hedger's discharge were pretextual.

**2. The Company's reasons for discharging Hedger were pretextual**

As the Board found (A. 353 n.5) the Company's resort to pretextual reasons to justify Hedger's suspension and discharge supports the finding that Hedger's suspension and discharge were unlawfully motivated and the Company failed to prove otherwise. The Company's stated reasons for discharging Hedger were that he "brought an unauthorized person into the plant" on August 12, and "did not respond truthfully" to the Company's questions on August 18. The Company's reasons do not withstand scrutiny.

As an initial matter, there is no evidence Hedger "brought" Schmidt into the plant. All of the credited record evidence demonstrates that Schmidt was already in the plant when Hedger met him. Hedger was working on a production run when he received a page that he had a visitor. Hedger ignored the page until he finished the washup of the production run, and at about 8:40 p.m. went to the warehouse/shipping department. (A. 355; 20-21, 51.) When Hedger first saw Schmidt, a friend and fellow union member, Schmidt was already in the plant. (A. 355; 21, 52, 264.)

Significantly, the Company suspended and discharged Hedger for something that happens routinely and had never before been the subject of discipline during the second shift—walking an “unauthorized” visitor in the plant. The record provides ample evidence that there were a barrage of “unauthorized,” and unescorted, visitors in the plant during the second shift, when the Company’s front desk was unattended and visitors simply walked into the facility. Food delivery drivers regularly delivered food to employees in the plant, sometimes coming right up to their workstation. Family members regularly came into the plant to visit or bring food to their relatives. Former employees came back to visit with their former co-workers.<sup>7</sup> Truck drivers walked through the plant to the vending machines areas. Package delivery drivers were required to walk through the plant to pick up packages. (A. 41-45, 69-76, 85-89, 208-09, 221-13). Tellingly, until Hedger was suspended and discharged for walking Schmidt through the plant, no employee had ever been disciplined for having a visitor in the plant. (A. 45, 74-78, 97, 187.)

As the Board found (A. 358), the Company’s disproportionate response to learning that Hedger had walked a visitor through the plant further confirms that

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<sup>7</sup> Thus the Company (Br. 34) is simply wrong when it claims there is “not a scintilla of evidence” that outside visitors had knowledge of printing. Moreover, as the Board properly found (A. 358), the Company “had no way of knowing whether other unauthorized visitors also had . . . experience [in the printing industry].”

the Company's reasons for its actions were pretextual. The Board has long held that pretext may be "inferred from a blatant disparity in the manner of which an alleged discriminate is treated as compared with similarly situated employees with no known union sympathies or activities." *New Otani & Garden*, 325 NLRB 928 n.2 (1998); see *Fluor Daniel, Inc.*, 304 NLRB 970, 971 (1991); *Citizens Inv. Servs. Corp.*, 342 NLRB 316, 330-31 (2004). The Company's investigation, its suspension of Hedger, and subsequent discharge evidences a remarkable departure from past practice as well as the Company's progressive discipline policy.<sup>8</sup>

Here, the same day the Company learned that Hedger walked a visitor through the plant, top management officials, including two from the Company's corporate headquarters, immediately began investigating a breach of what was a previously-unenforced company rule. Tellingly, upon learning that Hedger had a visitor, the plant manager Kester called the corporate headquarters and informed Johnstone and Corporate Human Resources Director Samuels about the incident. Both had been present during the negotiation session when Johnstone made the threat to Hedger. (A. 14, 46-48, 61-62.)

Kester, the plant manager, and Vlahos, the pressroom manager, interviewed multiple employees and supervisors. On August 18, the Company interviewed

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<sup>8</sup> The Board found that Hedger's suspension was one of the steps taken as part of the Company's unlawfully motivated efforts to discharge Hedger and also violated the Act. (A. 352.)

Hedger. Corporate Human Resources Director Samuels came from headquarters and personally participated in Hedger's interrogation. At the outset of the meeting, company officials repeatedly denied Hedger's requests that union representative Frank Golden be physically present, prohibited Hedger from bringing paper or pencil to the interview, and denied Hedger's request to speak with Golden in private. (A. 24-26, 28, 151-53.) Samuels, with Kester and Vasquez present, interrogated Hedger from a list of written questions.<sup>9</sup> Hedger responded to their questions stating either that he did not know or did not remember.<sup>10</sup> Immediately after the interview, Hedger was suspended for being uncooperative. He was subsequently interviewed on August 23 with his union representative present and answered every question, with the exception of the name of the visitor on the advice of his union representative. Thereafter he was discharged.

Prior to Hedger's discharge, no one had been disciplined for having "an unauthorized visitor" during the second shift. Indeed, such visits were

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<sup>9</sup> Hedger testified that out of all of the investigatory interviews he participated as a union representative, this was the first time that Corporate Human Resources Director Samuels had been present; the first time the Company interrogated employees based on prepared questions; and the first time an employee was threatened with discipline if he did not cooperate in the interview. (A. 45-46.)

<sup>10</sup> Hedger testified that when the Company interrogated him: "The only thing that came to mind was 'I don't know' and 'I don't remember.' I was put in a room with all these faces looking at me, that didn't like me. I know they were trying to get rid of me and I didn't know what to say. Any answer I said would have been the wrong answer." (A. 60.)

commonplace. As the Board found (A. 352 n.5), the Company's failure to apply its progressive discipline policy establishes that the alleged violation of the unenforced rule was a pretext for terminating Hedger because of his protected activity. Kester admitted that the Company had a progressive discipline policy, but did not use it when disciplining Hedger. (A. 187-89.) Hedger had a virtually perfect record, having received only a single tardiness warning in his nine years with the Company. (A. 189-90.)

Moreover, as the Board found (A. 357), the Company's minor discipline of employees who allowed visitors into the plant after Hedger's discharge further establishes that the purported rule violation was a pretextual basis for his discharge. After Hedger's discharge, and a public announcement to employees that visitors were no longer allowed in the plant, two second-shift employees allowed a former employee into the plant. When the Company learned of this, it suspended the employees for one day. (A. 357; 74-78, 87-89, 191.) In sharp contrast, Hedger was suspended indefinitely and terminated based on a purported rule violation that, until that time, was habitually unenforced.<sup>11</sup>

The Company's contention (Br. 32-34) that it had legitimate concerns about unauthorized visitors because of its unique trade secrets is unsupported in the

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<sup>11</sup> The Company's argument (Br. 35-36) that there were different circumstances involved in the discipline of those employees ignores that their actions came after the Company announced it was enforcing the no-visitor policy, while Hedger was discharged at a time when the policy had not been enforced.

record and was properly rejected by the Board. The Company had not demonstrated a particular concern about protecting the secrecy of its production processes during the second shift. The doors of the plant were routinely unlocked and open during the second shift. In addition, contrary to the Company's understated admission (Br. 34) that "from time to time" visitors "found their way into the plant," strangers were often permitted to roam the plant unescorted. Despite the Company's purported concern about confidentiality of its unique processes, there was no security at the plant. As the Board found (A. 358), "[v]irtually anyone could walk into the plant."

Finally, the Board reasonably rejected the Company's second reason for Hedger's discharge: that Hedger "did not respond truthfully" during his first interview. To be clear, the Company did not discharge Hedger for the independent reason that he failed to cooperate during the Company's first interrogation. In the absence of this claim, the Board found (A. 352 n.5), "[e]ven assuming that Hedger's failure to cooperate could have constituted a legitimate basis for discipline, [the Company] failed to show that it actually would have disciplined Hedger for this reason in the absence of protected conduct." Thus, contrary to the Company's claims (Br. 37-38), the Board did not find that the Company was not entitled to obtain truthful answers from Hedger; rather the Board found that the

Company failed to demonstrate that Hedger's failure to cooperate alone would have warranted his discharge in the absence of his protected activity.

Indeed, the Board found that the Company's discharge of Hedger for his conduct during the August 18 interview was pretextual. As the Board noted, the Company "took no disciplinary action against other employees who refused to cooperate with the investigation." (A. 352 n.5.) The Company admitted that it did not interview Tony Sass, a pressman who worked alongside Hedger, because Sass told Kester he did not "want to get involved."<sup>12</sup> (A. 357 n.12; 179-80.) Despite the fact that Sass had first-hand knowledge of how long Hedger had been away from his work station—a key piece of information in the Company's investigation—the Company did not force him to answer questions under threat of discharge or discipline him in any way for being uncooperative. This treatment was markedly different from that given to Hedger and to foreman Schmitt. As the judge noted, the Company "could have threatened Sass with discharge if he did not answer its questions truthfully, just as it did with Hedger and Schmitt." (A. 358 n.12.) The Company's concern (Br. 37) about forcing an employee to "squeal[] on

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<sup>12</sup> The Company (Br. 36) complains that while the Board based part of its pretext finding on the fact that the Company did not discipline other employees who refused to cooperate in the investigation, "the ALJ found that only one employee 'didn't want to get involved.'" Contrary to the Company's claim, although the judge discussed Sass, he did not make a limited finding. The Company overlooks the fact that its own witness, Kester, testified that more than one employee refused to cooperate or "clearly didn't want to get involved" in its investigation. (A. 139.)

a fellow employee” apparently did not apply to any of its other interviews, notably the one with foreman Schmitt.

**C. The Company would not have discharged Hedger absent his union support**

As detailed above (pp. 32-39), the Board reasonably rejected (A. 356) as pretextual the Company’s two justifications for Hedger’s suspension and discharge. Before this Court, the Company asserts (Br. 24-26) for the first time, citing *Sutter East Bay Hospitals v. NLRB*, 687 F.3d 424, 434 (D.C. Cir. 2012), that irrespective of the evidence at the hearing, it had a “good faith belief” that Hedger wandered around the plant with Schmidt for almost an hour without permission, and that Hedger gave Schmidt an opportunity to view confidential and proprietary techniques. As an initial matter, the Company’s claim regarding its “good faith belief,” was never raised to the Board, and thus the Court is jurisdictionally-barred from considering this issue. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”); *Woelke & Romero Framing*, 456 U.S. at 666; *Flying Food Group*, 471 F.3d at 185-86.

In any event, *Sutter East Bay Hospitals* provides no haven for the Company because that case provides that an employer must show that it had a reasonable belief concerning the employee’s alleged misconduct *and* that the employer’s

actions were consistent with its policies and practices. The Company has shown neither. First, the Company fails to demonstrate that it had a reasonable belief that Hedger was with Schmidt for over an hour in the facility. Based on credited evidence, the Board found (A. 357 n.12) that Hedger left the press when the washup phase ended at 8:40 p.m.<sup>13</sup> The Company's own video shows Schmidt leaving the plant at 8:51 p.m. Therefore Hedger was with Schmidt for 11 minutes. As the Board found (A. 357 n.12), the Company's efforts to bolster its assertion that Hedger was away from his work station for more than an hour are utterly without record support. The Company's argument (Br. 27) that two employees told the Company that Schmidt arrived between 7:30 and 8:00 p.m. does not advance its argument, but only provides that someone else let Schmidt into the facility. Moreover, the Company cannot assert that it had a reasonable belief that Hedger was with Schmidt for over an hour because facility foreman Schmitt told Kester that he saw Hedger and Schmidt after 8:00 p.m. and that Hedger's visitor was in the plant for between 10 and 15 minutes. (A. 96, 207, 237.) Likewise, and tellingly, as the Board noted (A. 257 n.12), the Company did not ask the two people with firsthand knowledge when Hedger left his work station – his two co-

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<sup>13</sup> The judge credited Hedger's testimony, and the Company did not except to that finding. As such, the Company cannot now argue to this Court that Hedger left his work station during the wash-up. *See Woelke & Romero Framing*, 456 U.S. at 666 (court lacks jurisdiction under Section 10(e) when party fails to except a finding before the Board.)

pressmen Michael Naylor and Tony Sass. (A. 178-80.) In these circumstances, the Company cannot argue that it had a reasonable belief that Hedger was with Schmidt for almost an hour.<sup>14</sup>

Finally, as demonstrated above (pp. 35-37), the Company is unable to show consistent with *Sutter East Bay Hospitals* that its actions were in line with its policies and practices. In fact, the Company's actions were at odds with its progressive disciplinary policy and provided the ultimate penalty of discharge for a previously unenforced rule.

In sum, the Company asked the Board, and now asks this Court, to accept at face value the explanation it advances for Hedger's suspension and termination. However, the Board is under no obligation to accept the Company's explanation "if there is a reasonable basis for believing it furnished the excuse rather than the reason for [its] retaliatory action." *Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1077 (7th Cir. 1981). Indeed, "the policy and protection of the [the Act] does not allow the employer to substitute 'good' reasons for 'real' reasons when the purpose

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<sup>14</sup> The Company's claim (Br. 28) that it is "undisputed" that foreman Schmitt told Kester and Samuels that Hedger did not ask permission to escort his visitor through the plant is unsupported. The Board found (A. 355 n.6) whether foreman Schmitt gave Hedger permission to take Schmidt through the plant "makes no difference to the outcome of the case." Schmitt testified that he told the Company that although he did not give permission to let Schmidt *into* the plant (because Schmidt was already in the plant when Schmitt saw him with Hedger), he did give Hedger permission to escort Schmidt through the plant. (A. 94-96, 98-99.) Kester's notes from Hedger's interview corroborate Schmitt's testimony.

of the discharge is to retaliate for an employee's concerted activities." *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1352 (3d Cir. 1969). In other words, the Company "cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W.F. Bolin Co.*, 311 NLRB 118, 119 (1993), *enforced mem.*, 99 F.3d 1139 (6th Cir. 1996). The Company failed to meet its burden. As such, substantial evidence supports the Board's conclusion that the Company did not carry its burden of establishing that it would have suspended and terminated Hedger even in the absence of his protected activity.

**CONCLUSION**

For the foregoing reasons, the Board respectfully requests that the Court deny the Company's petition for review and enforce the Board's Order in full.

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NATIONAL LABOR RELATIONS BOARD

June 2015

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

FORT DEARBORN COMPANY	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 14-1263, 15-1007
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	13-CA-46331
	)	
and	)	
	)	
DISTRICT COUNCIL FOUR, GRAPHIC	)	
COMMUNICATIONS CONFERENCE OF	)	
THE INTERNATIONAL BROTHERHOOD	)	
OF TEAMSTERS	)	
	)	
Intervenor	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 9,952 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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Dated at Washington, DC  
this 4th day of June, 2015

## STATUTORY ADDENDUM

### NATIONAL LABOR RELATIONS ACT

Also cited NLRA or the Act; 29 U.S.C. §§ 151-169

[Title 29, Chapter 7, Subchapter II, United States Code]

### RIGHTS OF EMPLOYEES

Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

### UNFAIR LABOR PRACTICES

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .;

### PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. [§ 160.] (e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate

temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be

forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

**UNITED STATES COURT OF APPEALS  
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DISTRICT COUNCIL FOUR, GRAPHIC	)	
COMMUNICATIONS CONFERENCE OF	)	
THE INTERNATIONAL BROTHERHOOD	)	
OF TEAMSTERS	)	
	)	
Intervenor	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on June 4, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they a registered user or, if they are not by serving a true and correct copy at the address listed below:

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Dated at Washington, DC  
this 4th day of June, 2015