

**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

Nos. 14-1263, 15-1007

**MOTION OF THE NATIONAL LABOR RELATIONS
BOARD TO AMEND THE COURT’S APRIL 12, 2016 OPINION**

To the Honorable, the Judges of the United States
Court of Appeals for the District of Columbia Circuit:

The National Labor Relations Board (“the Board”), by its Deputy Associate
General Counsel, hereby moves this Court to amend the Court’s April 12, 2016
opinion in the above-captioned case. In support thereof, the Board shows as
follows:

1. On November 18, 2014, the Board issued an Order, reported at 361 NLRB No. 109, finding the Company violated the National Labor Relations Act (“the Act”) by (1) threatening chief union steward Marcus Hedger with closer scrutiny and discharge for engaging in union activity protected by Section 7 of the Act, and (2) suspending and discharging Hedger because of his union activity. 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.

2. On March 17, 2015, the Company submitted its proof brief. On April 15, the Board submitted its proof brief. The Intervenor, District Council 4, Graphic Communications Conference of the International Brotherhood of Teamsters, submitted its proof brief on April 30, 2015. On May 14, 2015, the Company submitted its reply brief. All parties submitted their final briefs on June 4, 2015. Oral argument was held March 9, 2016.

3. After the Company filed its reply brief, on May 21, 2016, the Board filed a letter withdrawing its argument regarding 10(e). Specifically, the letter stated that following review of the Company’s reply brief, “Board counsel recognizes that the Company raised the claim that it discharged Hedger based on what [the Company] believed about his actions” in two briefs filed before the Board. As a result, Board counsel advised the Court that the Board “withdraws its Section 10(e) argument.” Attachment A.

4. On April 12, 2016, the Court issued its decision in the above-captioned case. The Court's opinion included the following discussion:

The Board's threshold objection that the Company's good faith-belief argument is not properly before the court because it was not presented to the Board, *see* 29 U.S.C. § 160(e), is not well taken. Even though the Company's exceptions to the ALJ's decision do not clearly raise the good-faith issue, *see* Resp't's Exceptions at 2, 6 (Jan. 11, 2012), at times "vague exception[s]' to an ALJ's finding may be sufficient 'to preserve an issue for appeal when [the] petitioner's brief in support of its exceptions adequately puts the Board on notice' of the grounds on which the petitioner is objecting." *DHL Express, Inc. v. NLRB*, 813 F.3d 365, 372 (D.C. Cir. 2016) (quoting *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 417-18 (D.C. Cir. 1996)). That is true here. In its supporting brief to the Board, the Company argued that its managers reasonably believed that Hedger may have compromised confidential company information by walking Schmidt through the Plant for upwards of an hour. *See* Resp't's Br. in Support of Exceptions at 18-19, 21 (Jan. 11, 2012). The Company raised the issue more explicitly in other briefs to the Board: "The Company did not and does not claim that Hedger was discharged because he *actually* spent 50 minutes to an hour with Schmidt on the evening of August 12, 2010. He was discharged because of what [the Company] *believed* took place on August 12" Resp't's Reply to Charging Party's Br. In Opp'n to Resp't's Exceptions at 7 (Feb. 22, 2012) (emphasis in original); *see also* Resp't's Br. in Reply to Acting Gen. Counsel's Answering Br. at 5 (Feb. 22, 2012). Taken together, the Company's submissions to the Board adequately raised the good-faith issue, and the court has jurisdiction to consider these challenges. *See DHL Express*, 813 F.3d at 372.

4. The Board now asks this Court to revise its April 12, 2016 opinion to excise that portion of the decision discussing the Section 10(e) argument that was withdrawn. This will not change the outcome of any part of the case.

WHEREFORE, the Board respectfully requests that the Court grant the Board's motion to amend the Court's April 12, 2016 opinion.

Respectfully submitted,

/s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

NATIONAL LABOR RELATIONS BOARD

1015 Half Street SE

Washington, DC 20570

(202) 273-2960

Dated at Washington, D.C.
this 15th day of April 2016

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2016, 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.

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board

1015 Half Street SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 15th day of April 2016

Attachment A



United States Government

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

May 21, 2015

Mark J. Langer, Esquire
Clerk, United States Court of
Appeals for District of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Ave. N.W.
Washington, D.C. 20001

Re: *Fort Dearborn Company v. NLRB*
Nos. 14-1263 & 15-1007 (D.C. Circuit)

Dear Mr. Langer:

This letter respectfully requests that the Clerk's Office forward this letter to the panel of judges that will be assigned to the above-captioned case. Counsel for the Board would like to correct two errors in its brief to the Court. At pages 39-40 of its brief, counsel for the National Labor Relations Board argued that Petitioner/Cross-Respondent's (the Company's) claim regarding its "good faith belief" concerning Hedger's conduct was not raised to the Board and therefore the Court lacked jurisdiction under Section 10(e) of the Act (29 U.S.C. § 160(e)) to consider the argument. Following review of the Company's reply brief, Board counsel recognizes that the Company raised the claim that it discharged Hedger based on "what [the Company] believed" about his actions in its Reply to the Charging Party's Brief in Opposition to Respondent's Exceptions and its Reply to the Acting General Counsel's Answering Brief to Respondent's Exceptions. Please be advised that Board counsel withdraws its Section 10(e) argument. Counsel for the Board continues to rely on its remaining arguments (Br. 40-42) in support of the Board's findings that the Company's reasons were pretextual and therefore the Company was unable to demonstrate that it had a reasonable belief concerning Hedger's misconduct and took action consistent with its policies.

In addition, the Company's reply brief correctly pointed out a mistake in the Board's brief; Board counsel mistakenly transcribed (Br. 12) the quoted exhibit. The correct exhibit excerpt appears below.

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. We had just finished a job and were going into a wash up and I told them I would be gone for 2-3 minutes.

Bill Samuels: Did you meet this person at the warehouse door?

Marcus Hedger: Yes. I was on my normal break. He was inside the building when I got there.

Marcus Hedger: Let me tell you what happened. Paged 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. We entered on the west side of the building and left out the east side of the building.

(CPX 1.)

Very truly yours,

/s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

NATIONAL LABOR RELATIONS BOARD

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cc: Richard L. Marcus, Esq.
Norma Manjarrez, Esq.
Thomas D. Allison, Esq.
N. Elizabeth Reynolds, Esq.