TNT Logistics North America, Inc. *and* Emerson Young, and John Jolliff. Cases 8–CA–33664–1 and 8–CA–33810–1

July 24, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On July 16, 2003, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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, findings, and conclusions only to the extent consistent with this Decision and Order.

The issue presented is whether a letter sent by employees to the Respondent's corporate management and to Honda of America (Honda), the Respondent's primary customer at its East Liberty, Ohio facility, constituted unprotected activity because it was maliciously false, warranting three employees' discharges for cause. The judge found that the discharges violated Section 8(a)(1) of the Act because the employees' involvement in preparing and sending the letter was protected concerted activity. For the following reasons, we find the employees' activity was not protected and, accordingly, we find that the employees were discharged for cause.[1]

I. THE RELEVANT FACTS

The Respondent engages in the interstate transportation of freight at its East Liberty, Ohio facility. Employees Emerson Young, John Jolliff, and Steven Daniels worked for the Respondent as truckdrivers at East Liberty until their terminations on August 26, 2002.[2] In May, a few employees approached Young, who had earlier contacted the United Auto Workers (UAW) about organizing the employees at the facility, with problems about working conditions and expressed interest in organizing. The employees also suggested sending a letter to the Respondent's corporate management describing problems with working conditions. Young agreed to draft the letter after the employees gave him their complaints. Jolliff and Daniels were among those who voiced complaints to Young. Jolliff earlier voiced complaints with management during a safety meeting and said that management should be "disciplined" because the employees were not getting runs to which they felt they were entitled.

On August 12, Young sent a letter to the Respondent's corporate management in Jacksonville, Florida, and to Honda. The letter indicated that "[c]opies and information" would be sent to two Columbus, Ohio television stations at a later date "if the Respondent did not resolve this situation." The letter was not signed individually but indicated that it was sent from the dock workers and drivers at the facility.

The letter, which is quoted in full in the judge's decision, stated that it was a "protest" of the "management [and] managers" at the facility. The letter listed items that the employees believed constituted mistreatment and discrimination by two named managers. It accused one of the managers of rarely being present to hear employee complaints and of lying to employees. It accused the other of being interested in his own needs and his own friends and of once pushing an employee. It listed and described four particular areas of concern at the facility: health, funerals, insurance, and logbooks.

Of particular relevance are the letter's statements about logbooks. The employees' concern about logbooks arose when management changed the length of time expected for delivery routes from 1 hour and 30 minutes to 1 hour and 15 minutes. Despite the change in route times, the employees claimed that it still took 1 hour and 30 minutes to legally drive the routes. Employee bonuses were affected by whether or not employees made timely deliveries. The employees' letter expressed their concern as follows:

> LOGBOOKS
>
> Some drivers are being asked to fix their logbooks to make extra runs. These drivers are being asked by dispatchers and management to do these runs and either fix their logbooks or turn their heads on it. Mr. John Cox once said he would not go to jail for fixing logbooks for anyone. Well Mr. Cox pack your suitcase, it has and is presently being done at [East Liberty].

Although the letter clearly and unequivocally stated that employees were "asked" by management to "fix" logbooks, Jolliff testified to the contrary at the unfair labor practice hearing. Specifically, Jolliff testified that employees were not asked to "fix" logbooks, but that he felt they had to "fix" them in order to drive legally and make their performance bonuses.

[1] The judge also found that the Respondent violated Sec. 8(a)(1) of the Act by threatening to discharge an employee because of his union sympathies, asking union supporters to resign their employment if they were dissatisfied with working conditions, coercively interrogating employees concerning employees' protected concerted activities, giving the impression to employees that it was surveilling their protected concerted activity, and coercively interrogating an employee concerning his union sympathy and support. In the absence of exceptions, we adopt these other findings of the judge.

[2] All dates are in 2002.

After receiving the letter, Honda contacted the Respondent and asked for assurances that there would be no "disruption" at the East Liberty facility. The Respondent discharged Young, Jolliff, and Daniels on August 26 for their participation in the letter.

II. THE JUDGE'S DECISION AND THE RESPONDENT'S EXCEPTIONS

The judge found, inter alia, that the discharges of Young, Jolliff, and Daniels violated Section 8(a)(1) of the Act. In making this finding, the judge noted that the test for determining whether employee statements are protected is not whether such statements are unsupported or unfounded but whether they are maliciously false. Without applying this test to the statements in the letter, the judge concluded that the letter was protected activity. He rejected, also without analysis, the Respondent's concern that the letter was sent to its primary customer at East Liberty. The judge said that "absent a malicious motive [an employee's] right to appeal to the public is not dependent on the sensitivity of Respondent to his choice of forum," quoting *Allied Aviation Service*, 248 NLRB 229, 231 (1980), enfd. 636 F.2d 1210 (3d Cir. 1980) mem.

The Respondent has excepted to the judge's finding that the letter was protected and argues, inter alia, that the statements accusing the Respondent of asking employees to "fix" logbooks—activity Respondent asserts could result in civil if not criminal penalties—rendered the letter unprotected. We find merit in the Respondent's argument.

III. ANALYSIS

Section 7 of the Act protects "concerted activities for the purpose of bargaining or other mutual aid or protection." The letter, which was discussed among employees and jointly drafted with input from various individuals, clearly constituted concerted activity. The question is whether it also constituted protected activity. The letter was sent to both the Respondent and its most important customer at East Liberty, with threats that further dissemination to media outlets might follow. As the Board recently reiterated, "employee appeals concerning working conditions made to parties outside the immediate employer-employee relationship may be protected by the Act." *Endicott Interconnect Technologies*, 345 NLRB 448, 450 (2005). However, such communications are not protected without limit, and will lose the protection of the Act if maliciously false, i.e., statements made with knowledge of their falsity or with reckless disregard for their truth or falsity. See *Sprint/United Management Co*., 339 NLRB 1012, 1018 (2003). Such communications may also lose protection where they constitute a "public disparagement of the employer's product or [an] undermining of its reputation." *Veeder-Root Co.,* 237 NLRB 1175, 1177 (1978). We find the letter unprotected because it was maliciously false.[3]

We find that the letter lost the protection of the Act because the statements in the letter accusing the Respondent of asking employees to "fix" the logbooks were maliciously false. The evidence supports a finding that the employees made this statement with knowledge of its falsity or at least reckless disregard for its truth. The employees' letter affirmatively represents that management "asked" employees to "fix" logbooks, but employee Jolliff admitted that management never made such a request, and there was no evidence whatsoever to contradict this explicit admission.[4] While the Respondent changed the route times, this was hardly a request from management that employees fraudulently record their log book entries, as described by the employees in the letter. Yet, the letter made this factual representation to Respondent's single largest customer. Thus, the letter evinced, at the very least, a reckless disregard for the truth. Further, Jolliff's earlier statement during a safety meeting that management should be "disciplined" suggests that the employees intended to effectuate their desire to "discipline" management by disseminating a damaging and false accusation to a vital customer, one likely to be sensitive to allegations of willful disregard of transportation regulations by its carrier. Thus, contrary to our colleague, we find that this false accusation, in context, was more than mere "exaggeration."

Accordingly, contrary to the judge and our colleague, we find that the letter lost the protection of the Act and that the Respondent did not violate Section 8(a)(1) of the Act by discharging employees Young, Jolliff, and Daniels for their participation in the letter.[5]

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[3] Chairman Battista agrees that the letter was unprotected because it contained the maliciously false assertion that officials of the Respondent engaged in unlawful conduct, i.e., asked employees to falsify logbooks. Because the letter here was unprotected as maliciously false, Chairman Battista finds it unnecessary to pass on the issue of whether the letter would be unprotected for the additional reason that it assertedly disparages the Respondent.

[4] Our dissenting colleague asserts that because Young and Jolliff raised their concerns to Cox, and because Cox failed to contradict or challenge Jolliff's statement that drivers were forced to falsify logbooks, it was "not unreasonable for Jolliff and Young to feel, even if incorrectly, that management was at least implicitly condoning the falsification of logbooks." This assertion is unsupported conjecture. Notwithstanding Cox's apparent failure to follow through, his response to Jolliff that he would "check into it," rather than indicating approval of the falsification of logbooks, suggests that management would disapprove of such falsification.

[5] We recognize that only Young drafted the letter. However, the letter indicated that it was sent from the dock workers and drivers at the facility. Indeed, the General Counsel acknowledges (and contends) that

ORDER

The National Labor Relations Board orders that the Respondent, TNT Logistics North America, Inc., East Liberty, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to discharge employees because of their union sympathies or support.

(b) Asking union supporters to resign their employment if they are dissatisfied with working conditions.

(c) Coercively interrogating employees concerning employees' protected concerted activities.

(d) Giving the impression to employees that it was surveilling their protected concerted activity.

(e) Coercively interrogating any employees about their union sympathy or support.

(f) 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 after service by Region 8, post at its various facilities copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 8, after 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, 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 May 6, 2002.

(b) Within 21 days after service by the Region, file with the Regional Director 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.

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the letter was the concerted activity of all three employees involved herein. Thus, inasmuch as the letter was unprotected, the concerted activity of all three was unprotected.

[6] 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."

MEMBER SCHAUMBER, concurring in part.

In addition to finding the employees' letter unprotected because it was maliciously false, as stated in the majority, I also find it unprotected because it publicly disparaged the Respondent. The employees' maliciously false statements went to the heart of the Respondent's business, the interstate delivery of commercial goods, and they were sent to the Respondent's primary customer at its East Liberty facility. The Board has found that "the right to engage in union or concerted activities does not justify an employee in maliciously disparaging his employer's product or undermining his reputation." *Firehouse Restaurant*, 220 NLRB 818, 825 (1975). See also *American Arbitration Assn.,* 233 NLRB 71 (1977) (employee questionnaire sent to the employer's clients unprotected in part because it held the employer up to ridicule and could have been interpreted as purposefully endeavoring to embarrass the employer). A fine line exists between raising sensitive issues that relate to terms and conditions of employment and disparaging an employer's reputation. See *Sahara Datsun*, 278 NLRB 1044, 1046 (1986), enfd. 811 F.2d 1317 (9th Cir. 1987), citing *Allied Aviation Service Co*., 248 NLRB 229, 231 (1980), enfd. Mem. 636 F.2d 1210 (3d Cir. 1980). I find the statements about fixing the logbooks crossed that line.

The interstate delivery of commercial goods is subject to State and/or Federal regulations. Compliance with governmental regulations is an integral aspect of the Respondent's business and accusing the Respondent of failing to comply with the regulations not only impugned the Respondent's business but, according to the Respondent's unrefuted claims, also subjected it to potential civil or criminal sanctions. The employees acknowledged this by stating in their letter that the Respondent's safety manager, John Cox, would go to jail for falsifying records. This serious accusation could have a devastating impact on the Respondent's reputation and could undermine the relationship between the Respondent and Honda, as evidenced by Honda's concern about an operational disruption.

In *Sahara Datsun*, supra, the Board found that an employee's conduct lost the protection of the Act when he informed a bank through which the employer obtained its financing for its customers that the employer's managers were submitting falsified customer credit applications to the bank. The Board found that the employee had little or no factual basis for his accusations and that the employee intended primarily to disparage the reputation of the employer in the eyes of the financial institution. Id. at 1046. Similarly, here, I find that the employees, by making the maliciously false statements about logbooks,

primarily intended to disparage the Respondent in the eyes of Honda. Thus, contrary to the judge, I find that the letter lost the protection of the Act because it was maliciously false and because it disparaged the Respondent.

MEMBER WALSH, dissenting.

My colleagues find that the employees' letter to management and customer Honda (the letter) lost the protection of the Act because the letter's accusation that the Respondent asked drivers to "fix" their logbooks was maliciously false. I disagree.

I.

The log book statement would be maliciously false if it were made with knowledge of its falsity or with reckless disregard for its truth or falsity. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964); *Linn v. Plant Guards Workers of America, Local 114*, 383 U.S. 53 (1966) (adopting the *New York Times* standard in NLRB proceedings). In *Titanium Metals Corp.*, 340 NLRB 766, 766 fn. 3; 772 (2003), the Board expressly adopted the judge's following thorough discussion of applicable principles:

> [I]n *Sahara Datsun*, 278 NLRB 1044 (1986), enfd. 811 F.2d 1317 (9th Cir. 1987), the Board found that an employee's statements that the employer falsified customer credit applications, which were made to the bank that granted financing to the employer's customers, were unprotected. The Board found that the statements, although related to terms and conditions of employment, were, nevertheless, unsubstantiated assertions that could have ruined a longstanding business relationship based on trust and fair dealing. On the other hand, the Board in *Veeder-Root Co.*, 237 NLRB 1175 (1978), found that employee literature did not lose the protection of the act because it was false, misleading, or inaccurate, provided that the statements were not deliberately or maliciously false or made with reckless disregard for the truth. See *National Steel Corp.*, 236 NLRB 822, 824 (1982). The Board has also found that employee action is protected whether or not employees were reasonable or correct in a good-faith belief. *Fredericksburg Glass & Mirror*, 323 NLRB 165, 179 (1997). The Board's decision in *New York University Medical Center*, 261 NLRB 822, 824 (1982), reflects how the Board applied this standard. In that case, the Board found that the statement, "[T]he NYU bosses have turned their security guards into a fascist gestapo illegally searching workers and firing them," was not deliberately or maliciously false because it was based on employee reports that the employer's guards were searching black and Hispanic employees.

II.

Here, the record establishes that Emerson Young often spoke with Safety Manager John Cox about how logbooks should be kept up, how people should be "straight" in them, and "not be fixing the logbooks to run extra runs." The record further establishes that John Jolliff told Cox that by reducing the prescribed amount of time for completion of particular delivery routes, Contract Manager Jeff Basinger was "setting up the routes so that you would have to falsify your logs to legally run the route." Jolliff explained in his testimony at the hearing that Basinger required particular routes to be completed in 1 hour and 15 minutes, whereas Jolliff believed that it took 1 hour and 30 minutes (the amount of time that Jolliff had previously been allowed) to complete these routes; according to Jolliff, "You legally can't do it in an hour and fifteen minutes." Also according to Jolliff, if a driver wanted to earn a monthly performance bonus for timely completion of his routes, he would have to "falsify" his log book to show that he had completed some routes in less time than it actually took him to do so. Jolliff expressed his concerns about these matters to Cox. Cox did not challenge Jolliff's claim that the drivers were having to falsify their logbooks to show compliance with Basinger's new standards, but told Jolliff instead that he was going to "check into it." There is, however, no evidence that Cox reported back to Jolliff about this matter. Instead, about a week later, Basinger angrily asked Jolliff why Jolliff had gone over Basinger's head to speak to Cox about the logbooks (among other problems).

Jolliff subsequently gave Young input into the letter that the employees sent to management and to Honda. Jolliff testified that he was not instructed by the Respondent to falsify his log book.

III.

While the log book statement in the letter may have in fact been false, in the sense that there is no evidence that employees were actually *asked* by management to falsify their logs, it did not lose the protection of the Act under the above-cited precedent if it was not maliciously false, i.e., knowingly false or made with reckless disregard for whether or not it was false. It was not unreasonable for Jolliff and Young to feel, even if incorrectly, that management was at least implicitly condoning the falsification of logbooks to show compliance with Basinger's reduced standard running times for some routes.[1] In fact, when Jolliff told Cox that the drivers were being forced

[1] My colleagues incorrectly reject this finding as unsupported conjecture. It is not. Rather, this finding is based on the totality of the relevant evidence, as set forth in the preceding section.

to falsify their logbooks to show such compliance, Cox never challenged or contradicted Jolliff's assertion. At most, therefore, the letter's statement that management was asking employees to fix their logbooks was an exaggeration, which hardly makes it deliberately or recklessly false. It was, in short, not maliciously false, and its inclusion in the letter therefore did not deprive Young, Jolliff, and Steven Daniels of the protection of the Act. I therefore dissent from my colleagues' reversal of the judge's finding that the Respondent violated Section 8(a)(1) of the Act by discharging these employees for their protected concerted activity.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY THE 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 to discharge employees because of their union sympathies or support.

WE WILL NOT ask union supporters to resign their employment if they are dissatisfied with working conditions.

WE WILL NOT coercively interrogate employees concerning employees' protected concerted activities.

WE WILL NOT give the impression to employees that we are surveilling their protected concerted activity.

WE WILL NOT coercively interrogate employees about their union sympathy or support.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

TNT LOGISTICS NORTH AMERICA, INC.

Allen Binstock, Esq., for the General Counsel.
John D. Webb, Esq., for Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Marysville, Ohio, on May 20, 2003. The charges were filed September 11 and November 4, 2002,[1] and the complaint was issued January 23, 2003. The complaint, as amended at the hearing, alleges that TNT Logistics North America, Inc. (Respondent) violated Section 8(a)(1) by threatening an employee with discharge because of his union activities, inviting an employee to resign because of the employee's union activities, creating the impression that it was engaging in surveillance of the protected concerted activity of its employees, interrogating employees concerning their protected concerted activities, and interrogating an employee concerning his union activities. The complaint also alleges that Respondent violated Section 8(a)(1) by suspending and then terminating employees John Jolliff, Emerson Young, and Steven Daniels because they engaged in protected concerted activity in the form of a letter that was sent to Respondent's corporate management and to a customer. Respondent filed a timely answer that denied the substantive allegations of the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is engaged in the interstate transportation of freight at its facility in East Liberty, Ohio, where it annually derives gross revenues in excess of $50,000 for the transportation of freight from the State of Ohio directly to points outside the State of Ohio. 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 Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Prior to September 2001, Respondent was known as CTI Logistics and before that as Customized Transportation, Incorporated. Honda of America is Respondent's biggest customer at its East Liberty, Ohio facility. Robert Wheeler is Respondent's director of Honda operations, a position he had held since August 2002. Before that Wheeler was district manager for Honda manufacturing. Jeff Basinger is Respondent's contract manager at the facility.

Emerson Young worked for Respondent as a truckdriver from 1990 until his termination on August 22, 2002.[2] At the time of his termination Young made three trips daily to Troy, Ohio, where he picked up a trailer loaded with automobile parts for Honda and returned to Respondent to drop off the loaded trailer. While employed by Respondent, Young received awards for safe driving and professionalism; he was never disciplined. John Jolliff began working for Respondent in November 1995 as a truckdriver. Like Young, Jolliff received

[1] All dates are in 2002 unless otherwise indicated.

[2] From 1992 to 1996 Young worked as a casual employee. During the remaining periods of his employment Young worked full time.

awards for safe driving. Steven Daniels worked for Respondent as a truckdriver since December 1994. He too received several performance awards.

In January Young contacted the United Auto Workers in Marysville, Ohio. The union officials advised Young to have the workers who favored a union ready, but to wait until another organizing campaign at Honda became active.

During a safety meeting in April at which all the drivers were present, Jolliff complained to Basinger that the drivers were concerned that they were not going to get the routes that they felt they were entitled to, among other complaints. Jolliff said that management should be disciplined as a result. Wheeler, who was also present, answered that Jolliff was prounion, that Honda did not like unions, and that he should go somewhere else and to work there.[3]

Meanwhile, in January 2001, Jolliff filed a worker's compensation claim over an injury he sustained at work. Jolliff asserts that his relationship with Respondent deteriorated after that and he began to be harassed by Basinger. In about late April or early May 2002, Jolliff complained of this to John Cox, Respondent's safety manager and someone with whom Jolliff felt he had a good relationship. About a week after Jolliff complained to Cox about Basinger, Basinger summoned Jolliff into his office and asked why Jolliff went over his head. Basinger appeared angry; he spoke in a loud voice and threw papers on a table. Jolliff replied that he never got any results by talking with Basinger and that Respondent had an open door policy. Basinger said that Jolliff was a weak link among the drivers and that Jolliff should go work somewhere else like Clark Trucking.[4] Basinger asked if Jolliff had any problems working with Respondent. Jolliff replied that he had no problems with the workers but he did with management. Basinger declared that Jolliff was prounion and Honda did not like unions and that if Jolliff did not keep his mouth shut Wheeler was going to fire him (Jolliff). Jolliff had seen Basinger react angrily at other times too, sometimes physically pushing people out of his way.[5]

In May some dock workers complained to Young about working conditions and expressed their desire to go forward to obtain union representation. They also suggested sending a letter to Respondent's higher management that described the local conditions that the employees felt were issues. The employees thought the letter was a good idea because they felt that local managers had not responded to their concerns and because Respondent had expressed that it had an open door policy that purported to welcome such action. Young discussed the idea of sending the letter with about 80—90 employees. The group concluded that because Young had contacted the Union, they would give him their grievances and he would compose the letter. Jolliff was among the employees who voiced complaints to Young. Jolliff complained that he was being harassed; he was aware that Young intended to prepare and send a letter to Respondent's corporate executives expressing the complaints. Likewise Young told Daniels that he was working on the letter and that he felt the corporate officials should know their problems. Daniels voices his concerns about scheduling for Saturday overtime.

On August 12, Young sent a letter to Respondent's corporate management in Jacksonville, Florida; he also sent a copy to Honda. Because Respondent relies on the content of the letter to justify its termination of the three employees, the rather lengthy letter is set forth in its entirety:

> This letter is being sent to protest the management & managers at contracts 006 & 001. We hope that our management at our home office will get an idea of how we the dock workers and truck drivers at these contracts are being treated & do something about it.
>
> Some of the things listed in this letter are just some of the many wrong things we feel are mistreatment & discrimination against our work force here by managers Robert Wheeler and Jeff Basinger.
>
> These are the poorest managers we have had in the history of these two contracts since our beginning in 1989.
>
> Mr. Wheeler is hardly ever here to listen to our problems when we need advise on problem solving. He has lied to us on various occasions and we do not approve of this and many of his methods. We feel he should be a better leader and manager. We have lost a lot of business under Mr. Wheeler's management. He has done some good things for us, but the loss of business and leadership looms big.
>
> Mr. Basinger came here with what appears to be his own personal gain for himself. He put up a wall to most people—mainly the drivers—under his contract. You do as I say or else.
>
> Well it may be else as most people or drivers don't care for him. He believes he put TNT on the map here, well we know better.
>
> We the dock workers & drivers of 006 & 001 are tired of being treated the way these 2 managers are doing us. We want to have a good & decent place to work and have a good relationship with our management here.
>
> We have a list of some of the things that both managers have imposed on both dock workers and rivers and hope you will step in and help us to have harmony again.
>
> HEALTH

[3] These facts are based on the credible testimony of Young and Jolliff. Wheeler denied making these statements, but his recollection of this meeting was lacking in detail and his demeanor was unconvincing; I do not credit his testimony on this matter. Basinger's version of this meeting was likewise unpersuasive. For example, he claimed that he did not conclude that Jolliff was prounion until after he learned of the letter described below. Yet, when asked to explain how he came to know that Jolliff was prounion, Basinger answered he made that conclusion based on the letter that was sent. Yet Jolliff made complaints at this meeting that were similar to those made in the letter but Basinger would have us believe that he made no similar inference.

[4] Clark Trucking is apparently a nonunion employer that has undergone several organizing campaigns.

[5] These facts are based on Jolliff's credible testimony. Basinger's denials were unconvincing and his demeanor lacking in credibility. I do not credit his testimony on this matter either.

We are given points for going to the doctors and or dentist even if we have a written excuse. We thought the company TNT wanted us to take care of our health. Lots of workers are showing up sick & then going home and getting ½ points so they don't get fired. Drivers are driving sick & tired and this is not safe or healthy. People are not taking care of or not given the time to see a dentist, this is totally uncalled for from managers. We bet you people don't have this problem.

FUNERALS

People are given points when they attend family funerals. This is about as low as any company can get. This is dirty period. Any funeral outside of a family is another story—you should or can get a point for that, but not inside your own family.

LOGBOOKS

Some drivers are being asked to fix their logbooks to make extra runs. These drivers are being asked by dispatchers and management to do these runs and either fix their logbooks or turn their heads on it. Mr. John Cox once said he would not go to jail for fixing logbooks for anyone. Well Mr. Cox pack your suitcase, it has and is presently being done at 001.

INSURANCE

Our present insurance is the worst we have ever had and we feel that TNT needs to make a change in that as soon as they can—it is lousy.

These are just a few of the nasty things that are going on at these contracts. We hope TNT will make management changes at these contracts.

We the dock workers & drivers feel this needs to happen and the point system modified for health, sickness, & funerals.

We realize that there are some bad apples in every group—but don't punish good workers or their families, and don't let these managers dictate their lives. TNT says they are family oriented-prove it.

We just held the drivers re-bid meeting on the new routes and this is what happened, to not one but several of the drivers. When drivers went to bid on our new runs. Mr. Basinger told these drivers these runs were already taken and he had other runs for them.

One driver asked who took the run he wanted and Mr. Basinger did not want to tell him who took it. But then asked again and Mr. Basinger told him who got it and it turned out to be one of his friends from a previous contract.

Mr. Basinger finally said he was entitled to take the route since he had seniority over his friend. He in turn did get the route. That is dirty of Mr. Basinger to keep trying to put his friends & buddies in our jobs. We will not stand for this crap and you can count on that!!!

One last thing on Mr. Basinger, a driver accidentally bumped into him in the office & Mr. Basinger told the driver to excuse himself and physically shoved the driver and hurt his shoulder & is having trouble with it.

We all agreed that the driver should contact his attorney about this matter and take certain action against Mr. Basinger. No one should have to be treated like this. This man is going to get hurt if he shoves the wrong person and it will be no ones fault but his own if he gets hurt.

We are 90% of the workers at these two contracts. We are together and have seeked outside help. We hope we can prevent bringing in or having to be represented by an outside organization. But we will have no choice if this treatment continues.

Remove managers, Wheeler & Basinger. It is not all about money, as it is working conditions such as no heat on the dock in the winters. You put up a new office in Florida-we bet it is heated and cooled both.

We the dock workers and drivers hope you will step in and resolve this matter with the management problem at 006 & 001 East Liberty, Ohio.

We are sending copies of this letter to the following parties:

Dave Kulik	President—TNT
Jeff Hurley	V President—TNT
John Cox	Safety Department—TNT
Scott Johnston	Honda of America

Copies and information to 2 television stations in Columbus Ohio to be aired at a later date if TNT Headquarters does not resolve this situation.

Because no one wanted to sign the letter individually, the letter indicated that it was sent from the dock workers and drivers at the facility. This letter was addressed and sent to Richard Kulik, Respondent's president, Jeff Hurley, Respondent's vice president, John Cox, Respondent's safety director, and Scott Johnston, employed by Honda. Although Jolliff and Daniels voiced complaints to Young concerning working conditions before the letter was written, neither played any role in writing or mailing the letter.

On August 21, District Manager Wheeler summoned Young into Wheeler's office. Wheeler asked if Young had problems of any sort with management. Young answered that he did and mentioned a problem the employees had with recent route assignments and disciplinary points assessed against employees. Wheeler answered that there was nothing he could do about it; the directions had come from "corporate." They shook hands and Young left.

The next day Jolliff was summoned to Wheeler's office. Kevin Schafer, a supervisor or manager on the cross-dock area, was also present. Wheeler stated that a letter was sent to corporate headquarters and to Honda. Wheeler explained that the letter threatened Honda with bad news and media coverage. The letter appeared to be on a table, but Jolliff was not allowed to read it. Wheeler asked if Jolliff knew who wrote the letter. Jolliff answered that it was the first time he had heard of the letter. Jolliff explained at the trial that he feared retaliation if he answered Wheeler's question truthfully. Wheeler said that he had reliable sources that reported that Jolliff had a part in writing and sending the letter. Jolliff asked who the sources

were and Wheeler answered that it was the dock workers. Wheeler asked again if Jolliff knew who sent the letter and Jolliff again answered that he did not. Wheeler asked if Jolliff had problems with Respondent; Jolliff replied that he did and that Wheeler already knew about them. Wheeler said that he wanted to hear about the problems, so Jolliff described his problems with Basinger. Wheeler said that Jolliff was being placed on suspension and that if the investigation did not find any wrongdoing on his part he would be brought back to work. Jolliff asked who was behind the suspension, and Wheeler said that it was Jeff Hurley, Respondent's vice president.[6]

That same day Young received a call in his truck to again report to Wheeler's office. As he was going to Wheeler's office Young encountered Jolliff. Young asked Jolliff what was going on and Jolliff explained that he had been suspended because of the letter that was sent to Respondent's corporate headquarters. Daniels joined the conversation. When Young arrived in Wheeler's office he discovered that Basinger and Schafer were also present. Wheeler announced that he had called Young to the office because of the letter that had been sent to corporate office. Wheeler said that he had heard from a reliable source, someone on the docks area, that Young had a part in writing and sending the letter; he then asked Young if he had a part in the letter. Young said the he did not. Wheeler asked if Young knew anything about the letter. Wheeler explained that he brought Young into the office to terminate him. He said that if Young could help him he could save Young's job with a short suspension instead of termination. Wheeler asked what workers were talking about on the docks and Young answered "Various things." Wheeler asked like what? Young responded "Like what assholes you three really are." Wheeler also asked what good a union would do for Young at that point in his life. Young replied "Probably none." Wheeler then told Young to clean out his truck and that he was on extended suspension until further notice. Young had not revealed his union sympathies to anyone in management prior to the meeting.[7]

Daniels was the third person summoned into Wheeler's office that day. Wheeler said that Daniels was involved in a letter that was sent to corporate officials and to a supplier; he said that he had reliable sources. Daniels asked to see the letter because he did not know what Wheeler was talking about. Wheeler held the letter in his hand but turned it upside down so that Daniels could not read it. Daniels said that he had been there a long time and had dealt with Wheeler. Wheeler said that he did not believe that Daniels was involved with the letter. Wheeler and Schafer, who was also present, went to the office area a few minutes and then returned. Wheeler then announced that Daniels was suspended until an investigation was completed. Wheeler assured Daniels that he would try and complete the investigation quickly and if Daniels was cleared he would be brought back to work with full backpay.[8] Daniels left and Schafer followed him. After they discussed whether it was necessary for Daniels to remove his personal items from his truck, Schafer said that he would see Daniels in a few days.[9]

Respondent fired Young, Jolliff, and Daniels on August 26. Their termination letters read:

> On August 20, 2002 our customer Honda Manufacturing North America received a letter signed by TNT Logistics North America, Drivers and Dock Workers, East Liberty, OH. The letter stated that management was mistreating employees, harassing employees and threatened the Customer (Honda) that if they did not do something they would turn the matter over to the local news stations (our customer is very sensitive to bad media coverage). The letter also directly threatened a Contract manager quote "This man is going to get hurt if he shoves the wrong person and it will be no ones fault but his own if he gets hurt." This letter violates TNT company policy 315-workplace violence. Also, sending a threatening letter of this nature to our customer puts TNT's reputation in a bad light and additionally could lead to a loss of business or failure to get new business and we can not tolerate that by any employee.
>
> Our company has an open door policy and for an employee to send a letter to our customer without contacting local management or Corporate Headquarters to work on their issues is inexcusable. This act cannot and will not be tolerated by TNT North America.
>
> We have it on reliable sources that you had a part in the writing and sending of this letter to our customer. This act jeopardized our entire operation and all employees' livelihood at this location.
>
> As of today August 26, 2002 we are terminating your employment with TNT Logistics North America.

III. ANALYSIS

I first address the issue of the discharges. Section 7 of the Act protects the right of employees to engage in concerted activities designed to address working conditions. Activities are concerted when they are by, or on behalf of, more than one employee. *Meyers Industries,* 268 NLRB 493, 497 (1984) remanded sub nom. *Prill v. NLRB*, 755 F. 2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985) (*Meyers I*), on remand, *Meyers Industries,* 281 NLRB 882 (1986), enfd. sub nom. *Prill v. NLRB,* 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988) (*Meyers II*). Here, the letter was clearly the product of concerted activity. Many employees provided their concerns to Young and agreed that he should send the letter as a means of addressing those concerns. Respondent argues that the employees' activity was not concerted because "Young acted without the knowledge and consent of other TNT em-

[6] These facts are based on Jolliff's credible testimony.

[7] These facts are based on Young's credible and largely uncontroverted testimony. To the extent that Wheeler's testimony conflicts with Young's, I do not credit it. Wheeler's version seemed incomplete and his demeanor was uncertain.

[8] In his brief the General Counsel contends that Wheeler asked Daniels if he had participated in sending the letter. I have examined the transcript pages relied on by the General Counsel and conclude that this contention is not supported by the record.

[9] These facts are based on Daniel's credible and uncontroverted testimony.

ployees." This assertion is simply contrary to the facts that I have found as described above. Many employees voiced their complaints to Young and agreed that sending a letter was the appropriate vehicle of making Respondent aware of those concerns. Respondent may be arguing that in order to be concerted activity the actual letter had to be shown to other employees for the approval. There is no support for such a constricted view of concerted activity. It is enough that employees had input into the letter and gave general approval to sending it.

An employer must also know of the concerted nature of the activity. Here, the content of the letter clearly reveals its concerted nature. The letter indicated it was sent from the dock and driver employees. Indeed, Respondent must have at least suspected the concerted nature of the letter because it fired three employees as a result. I conclude that the letter constituted concerted activity and Respondent was aware of its concerted nature. *Oakes Machine Corp.,* 288 NLRB 456 (1988).

In its brief Respondent cites *Compuware Corp. v. NLRB,* 134 F.3d 1285, 1291 (6th Cir. 1998), and concedes that an employee has the right to engage in concerted communications to a third-party customer, such as Honda of America, if the third-party communications addresses legitimate employee concerns such as terms and conditions of employment or employee grievances. The letter sent to Honda by the employees fits comfortably within that description. Respondent, however, argues that parts of the letter did not deal with employee grievances or terms and conditions of employment. More specifically, Respondent argues that the letter "contained a direct threat of violence to Mr. Basinger." I disagree. I have concluded above that Basinger in fact has physical contact with employees as he shoved them out of his way. In this context, the letter was not threatening Basinger but was merely highlighting the conduct of Basinger that the employees found offensive and was stressing the obvious—that some people may react angrily to getting physical pushed around. Respondent also argues that the letter lost the protection of the Act because it contained broad criticisms of the managers of the facility. But this was the core concern of the employees— that the managers were not treating the employees fairly. Fair treatment by management is as much a term and condition of employment that may be addressed by concerted activity as wages and pensions. Respondent's citation to *New River Industries v. NLRB,* 945 F.2d 1290, 1294 (1991) is unpersuasive. In that case an employee sent a letter that mocked the employer's offer to give employees a free ice cream cone. Here, the letter was an attempt to address legitimate employee concerns. Respondent also asserts that the employees sent a "scandalous letter full of unfounded criticisms and unsupported allegations." First, the record in this case does not support this assertion. Second, the test in determining whether employee statements lose the protection of the Act is not whether the assertions were unsupported or unfounded, but rather whether they are maliciously false. *New River Industries v. NLRB,* 945 F.2d 1290, 1294–1295 (4th Cir. 1991). Respondent cites *Shelly & Anderson Furniture Mfg. Co. v. NLRB,* 497 F.2d 1200, 1203 (9th Cir. 1974). But in that case the court upheld the Board and concluded that an employer violated the Act in unlawfully discharging two employees who participated in a 15-minute protest during working time. Respondent complains of the fact that Honda was its largest customer at the facility and by sending the letter to Honda the employees were treading on very sensitive grounds. However, as the General Counsel points out, the Board has held that "absent a malicious motive [an employee's] right to appeal to the public is not dependent on the sensitivity of Respondent to his choice of forum." *Allied Aviation Service,* 248 NLRB 229, 231 (1980).

By discharging employees John Jolliff, Emerson Young, and Steven Daniels because they engaged in, or because Respondent believed that they engaged in, protected concerted activity, Respondent violated Section 8(a)(1).

The General Counsel alleges that Respondent unlawfully threatened to discharge an employee because he engaged in union activity. I have concluded above that in early May Basinger declared that Jolliff was prounion and Honda did not like unions and that if Jolliff did not keep his mouth shut Wheeler was going to fire Jolliff. By threatening to discharge an employee because of his union sympathies, Respondent violated Section 8(a)(1).[10]

Next, the General Counsel contends that Respondent unlawfully invited an employee to resign. During the same meeting referred to in the previous paragraph, Basinger suggested that Jolliff quit his employment with Respondent and work elsewhere. This occurred in the context where Basinger had declared that Jolliff was prounion and could be fired for that reason. Thus, the invitation to resign was intertwined with Jolliff's perceived support for a union. By asking union supporters to resign their employment if they are dissatisfied with working conditions, Respondent violated Section 8(a)(1). *General Fabrications Corp.,* 328 NLRB 1114 (1999).

The General Counsel contends that Respondent unlawfully interrogated employees concerning their protected concerted activities. As set forth above, on August 22 Wheeler questioned both Jolliff and Young about the letter. I have also concluded above that the letter was concerted activity protected by the Act. The Board has held that it is unlawful to coercively interrogate employees concerning such activity. *TPA, Inc.,* 337 NLRB 282 (2001). Here, the coercive nature of the questioning is clear: it was designed to procure information in order to discipline the employees. By coercively interrogating employees concerning employees' protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

The General Counsel contends that Respondent violated the Act by unlawfully giving the impression to employees that their protected concerted activities were under surveillance. As set forth more fully above, on August 22 Wheeler told Jolliff, Young, and Daniels that he learned from a reliable source that

[10] Respondent's brief does not address the 8(a) (1) allegations of the complaint. Respondent has thus waived any argument that it may have that this allegation is barred by Sec. 10 (b) of the Act. In any event the evidence shows that the charge in Case 8–CA–33810–1 was served on Respondent on November 6. Therefore conduct that occurred on or after May 6 may be appropriately alleged to be unlawful. Here, Jolliff testified that his meeting with Basinger occurred about a week after he talked to Cox and the discussion with Cox occurred in late April or early May. I conclude that a preponderance of the evidence shows that Basinger's comments occurred within the 10(b) period.

these employees had participated in the creation and sending of the letter. The Board has held that an employer may not create the impression that employees' protected concerted activities are under surveillance under circumstances that reasonably tend to instill fear in employees for having engaged in those activities. Here, Respondent not only indicated to the three employees that it had been monitoring their lawful activity, but it did so in order to procure information to be used to discipline them. I conclude that Respondent violated Section 8(a)(1) by giving the impression to employees that it was surveilling their protected concerted activity. *Trade West Construction, Inc.,* 339 NLRB 12 (2003).

Finally, the General Counsel contends that Respondent violated the Act when it interrogated Young concerning his union activities. I have described above how on August 22, Wheeler asked what good a union would do for Young at that point in his life. Young replied "Probably none." Questioning an employee about his union activity is not a per se violation of the Act. Rather, the questioning must be weighed against all relevant circumstances to determine whether it was coercive. *Rossmore House,* 269 NLRB 1176 (1984). On the one hand, Wheeler's questioning was of a general nature and Young's response to the question highlights this fact. On the other hand, the questioning occurred in Wheeler's office in the presence of two other supervisors. As described above, it was accompanied by another unlawful interrogation and was part of Young's unlawful termination. Also, Young had not revealed his recent union activities to Respondent. Under these circumstances, I conclude that Respondent violated Section 8(a)(1) by coercively interrogating an employee concerning his union sympathy and support.

CONCLUSIONS OF LAW

1. By the following conduct, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discharging employees John Jolliff, Emerson Young, and Steven Daniels because they engaged in, or because Respondent believed that they engaged in, protected concerted activity, Respondent violated Section 8(a)(1).

3. Threatening to discharge an employee because of his union sympathies.

4. Asking union supporters to resign their employment if they are dissatisfied with working conditions.

5. Coercively interrogating employees concerning employees' protected concerted activities.

6. Giving the impression to employees that it was surveilling their protected concerted activity.

7. Coercively interrogating an employee concerning his union sympathy and support.

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.

Having discriminatorily discharged John Jolliff, Emerson Young, and Steven Daniels, Respondent must offer them reinstatement and make them 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 as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]