

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

October 30, 2008

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN SCHAMBER AND MEMBER LIEBMAN

On July 24, 2006, the National Labor Relations Board issued a Decision and Order in this proceeding, in which it found that the Respondent did not violate Section 8(a)(1) of the Act by discharging employees Emerson Young, John Jolliff, and Steven Daniels for their participation in preparing and sending a letter critical of management to the primary customer of the Respondent's East Liberty, Ohio facility.¹ Subsequently, Jolliff and Daniels petitioned the United States Court of Appeals for the Sixth Circuit for review of the Board's decision. On January 22, 2008, the Sixth Circuit granted the petition for review and remanded this case to the Board "for proceedings consistent with [its] opinion."² On May 20, 2008, the Board notified the parties that it had decided to accept the court's remand and that all parties could submit statements of position with respect to the issues raised by the remand. The Respondent, the General Counsel, and Jolliff and Daniels (jointly) each filed a statement of position.³

We accept the court's remand as the law of the case.⁴ Consistent with that remand, we find that the Respondent violated Section 8(a)(1) by discharging Young, Jolliff, and Daniels for their participation in writing and sending the letter.⁵

¹ 347 NLRB 568 (2006). Former Member Walsh, dissenting, would have found that the Respondent violated Sec. 8(a)(1) of the Act by discharging the employees. Member Liebman did not participate in this decision.

² 513 F.3d 600, 617 (6th Cir. 2008).

³ Jolliff's and Daniels' request for oral argument is denied as the record and statements of position adequately present the issues and the positions of the parties.

⁴ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

⁵ Although Young did not join in petitioning the court for review of the Board's Order, the remedy resulting from this decision applies to him as well. First, the court's remand to the Board encompassed Young because the court made findings regarding Young as well as Jolliff and Daniels. Second, the complaint alleges that all three employees engaged in concerted activity and that the Respondent terminated all three employees in violation of the Act, and the Board in the underlying decision made findings regarding all three employees.

Facts

The Respondent engages in the interstate transportation of freight at its East Liberty, Ohio facility. In May 2002, a number of dock workers approached Young with concerns about working conditions. The employees suggested outlining those concerns in a letter to the Respondent's upper management. Because of Young's previous experience with a union, he was selected to draft the letter based on grievances to be submitted to him by other employees. Jolliff and Daniels were among the employees who provided input for the letter to Young.

On August 12, 2002, Young sent a letter to the Respondent's senior executives and to the Respondent's biggest customer at the facility, Honda of America. The letter was not signed, but was sent on behalf of the "dock workers and drivers" of East Liberty. The letter stated it was "being sent to protest the management & managers" and that "[w]e 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." Under a section titled, "Logbooks," the letter read as follows:

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 [the Respondent's Safety Manager] 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].

The Respondent terminated Young, Jolliff, and Daniels on August 26, 2002, for their participation in writing and sending the letter to Honda of America.

Board Decision

In its decision, the Board found that the letter lost the Act's protection because the statement accusing the Respondent of asking employees to "fix" the logbooks was maliciously false. In so finding, the Board relied on Jolliff's admission that management never requested drivers to "fix their logbooks" and the absence of any record evidence to contradict that express admission. The Board also noted that Jolliff asserted in a safety meeting that management should be "disciplined," which supported an inference that the employees intended to effectuate the discipline through the circulation of false and damaging accusations about management to the Respondent's largest customer. The Board concluded that the evidence supported a finding that the "fix the logbooks" statement was made with knowledge of its falsity or at least reckless disregard for its truth. Consequently,

the discipline of the employees for participation in the letter did not violate the Act.

Sixth Circuit Decision on Review

Upon review, the Sixth Circuit held that substantial evidence did not support the Board's decision. The court initially determined that the statement about fixing the logbooks was sufficiently factual to be capable of carrying a defamatory meaning, and that the General Counsel had not carried his burden of proving that the statement was true. 513 F.3d at 611–614.

Next, the court cited four facts which led it to conclude that the Board's finding with respect to actual malice was erroneous and not supported by the record. First, the administrative law judge, who, unlike the Board, actually observed the demeanor of the witnesses, had credited Young's testimony that Young believed everything in his letter to be true. *Id.* at 614–615. Second, the Board, seemingly made an unwarranted inference in concluding that because the underlying statement was false it was made with knowledge of its falsity. In the court's view, while one may infer knowledge of falsity when a statement is "so obviously false that any rational person making it would have to know it is false," the charge of logbook fixing did not fall into that category. *Id.* at 615. Third, the Board placed too much emphasis on Jolliff's admission that management had not told employees to alter their logbooks. In the court's view, even if Jolliff was never personally asked to fix the logbooks, other employees could have been, and the record was silent as to the source of information Young relied upon in formulating the statement. *Id.* at 615–616. Moreover, the court reasoned, even if Jolliff was the sole source of Young's information, his admission alone would not prove malice on Young's part because "neither Young nor Jolliff are particularly articulate or eloquent speakers." *Id.* at 616. Such laymen, in the court's view, would not be attentive to legal precision in wording, and may simply have been "careless" or "inartful" in describing what management requested. *Id.* The court concluded that the record was too "thin" and incomplete for the Board to infer malice on Young's part from Jolliff's concession that he had not been asked to fix logbooks. *Id.* Fourth, the Board, in finding actual malice, could not properly rely on Jolliff's statement that he thought management should be disciplined. *Id.* at 617.

Analysis

Because we have accepted the court's remand as the law of the case, the court's findings and conclusions are necessarily binding upon us. As the court noted, the record below was not well developed, and the court's decision effectively eliminates from consideration virtually

all of the evidence of malice relied upon by the Board in its earlier decision. Accordingly, we find that there is an insufficient basis on this record to conclude that Young either knew that the logbook-fixing statement was false or acted in reckless disregard for the statement's truth or falsity.⁶ We therefore conclude that the Respondent violated Section 8(a)(1) by discharging Young, Jolliff, and Daniels for their participation in writing and sending the letter to the Respondent's customer, and we enter an Order remedying that violation.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondent violated Section 8(a)(1) of the Act by discharging Emerson Young, John Jolliff, and Steven Daniels for engaging in protected concerted activity.
3. The unfair labor practice found above affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(1) by discharging Emerson Young, John Jolliff, and Steven Daniels because they engaged in protected concerted activity, we shall order the Respondent to offer them full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to remove from its files any and all references to the unlawful discharges of Young, Jolliff, and Daniels and to notify them in writing that this has been done and that the discharges will not be used against them in any way.

⁶ We deny the Respondent's request for remand to relitigate the issue of actual malice. The court found that evidence of actual malice is lacking, and the Respondent does not offer to adduce any additional relevant evidence that is newly discovered and previously unavailable. Nor does it argue that it was precluded from presenting any evidence on this issue at the hearing.

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) Discharging or otherwise discriminating against any employee for engaging in protected concerted activity.

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

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

(a) Within 14 days from the date of this Order, offer Emerson Young, John Jolliff, and Steven Daniels, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Emerson Young, John Jolliff, and Steven Daniels, whole for any loss of earnings and other benefits suffered as a result of the unlawful action against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and, within 3 days thereafter, notify Emerson Young, John Jolliff, and Steven Daniels, in writing that this has been done and that the discharges will not be used against them in any way.

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

(e) Within 14 days after service by Region 8, post at its East Liberty, Ohio facility, copies of the attached notice marked "Appendix."⁷ 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.

(f) 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.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any employee for engaging in protected concerted activity.

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

WE WILL, within 14 days from the date of the Board's Order, offer Emerson Young, John Jolliff, and Steven Daniels immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Emerson Young, John Jolliff, and Steven Daniels whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

⁷ 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."

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Emerson Young, John Jolliff, and Steven Daniels, and WE WILL, within 3 days thereafter, no-

tify them in writing that this has been done and that the discharges will not be used against them in any way.

TNT LOGISTICS NORTH AMERICA, INC.