

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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DRESSER-RAND COMPANY

and

**Cases 3-CA-27141
3-CA-27260**

LOCAL 313, IUE-CWA, AFL-CIO
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**BRIEF IN REPLY TO RESPONDENT'S OPPOSITION TO CHARGING PARTY'S
EXCEPTIONS AND IN OPPOSITION TO RESPONDENT'S CROSS-EXCEPTIONS**

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Charging Party Local 313, IUE-CWA, AFL-CIO (herein, “Local 313”) submits this brief in Reply to Respondent’s Opposition to Charging Party’s Exceptions and in Opposition to Respondent’s Cross-Exceptions.

REPLY TO RESPONDENT’S OPPOSITION TO CHARGING PARTY’S EXCEPTIONS

ARGUMENT

1. Respondent Failed to Offer Sufficient Evidence to Prove that Painter’s statement “Olean’s workload has also dropped off by 50%” was False. (CP Exceptions 6, 7, 8)

Respondent does not dispute Charging Party’s assertion that Respondent’s evidence of a drop in production failed to include any workload data on half of the bargaining unit. It, thus, concedes the point.

Rather than dispute this point, Respondent makes the extraordinary argument that “the Charging Party never cross-examined [the Respondent’s Exhibit 11] creator about the inadequacies the Charging Party now claims it has.” (Resp. Opp. Brief, p. 33.) As Charging party pointed out in its Exceptions Brief, however, the General Counsel did cross-examine Edward Wilber, the creator of the exhibit, about indirect labor and elicited testimony that Respondent did, in fact, keep track of it. (Tr. 711.) The burden of proving that Painter’s statement was false was Respondent’s, not the General Counsel’s nor the Charging Party’s. It was not the responsibility of the General Counsel or Charging Party to point out the deficiencies in Respondent’s case. Indeed, the law permits judges to draw adverse inferences in those circumstances in which a party to litigation fails to present evidence that would be expected to be produced if it were helpful to that party. Here, the Board should draw the adverse inference that

Respondent's failure to produce workload data on half of the bargaining unit would not have been helpful to its case. Martin Luther King, Sr., Nursing Center, 231 NLRB 15, fn 1 (1977).

Respondent also does not dispute Charging Party's assertion that the ALJ improperly claimed Painter made statements about "production" at Olean, when he in fact used the term "workload." It, thus, concedes the point. Instead, Respondent opposes "Charging Party's argument that 'workload' had no relation to either 'production' or 'direct labor hours,' and that the ALJ erred by reviewing the actual production to evaluate Painter's statements . . ." (R. Opp. Brief, 33.) Charging Party never made that argument. Of course it was proper for the ALJ to review production and direct labor hours, and of course production and workload is related. What Respondent and the ALJ failed to realize is that evidence of production and direct labor hours only tell part of the story. Painter did not make a statement about production, nor did he limit his statement to workload of half of the bargaining unit. Indeed, he did not limit his statement to the bargaining unit at all. Since Respondent only put in evidence about half of the bargaining unit at best, and only evidence of production workers' workload, the ALJ never received the complete picture. For example, Charging Party argued that, in the period covered by Respondent's exhibit 11, production work handled by subcontractors fell more than 50%. It is entirely possible, therefore, that the workload of employees in the plant that is tied to subcontracting fell by more than 50% as well. Employees involved in shipping and receiving, inspecting the subcontractors' work, sales, clerical and office, all must have experienced a significant drop in their workload. We don't know to what extent, however, because Respondent neglected to introduce any evidence concerning non-production or indirect labor hours.

Respondent also makes the extraordinary argument that the law does not require that it prove falsity. (Resp. Opp. Brief p. 32.) Board law is quite clear on this point. In Valley Hospital Medical Center, Inc., the Board described the law as follows:

Statements are also unprotected if they are maliciously untrue, i.e., if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity. The mere fact that statements are false, misleading or inaccurate is insufficient to demonstrate that they are maliciously untrue.

351 N.L.R.B. 1250, 1252 (2007)(citation omitted). The Board there found that the discharge of a union member for statements to third parties was unlawful, saying that the employee “may have been mistaken in the inferences she drew from her conversations and/or observations, but the Respondent has not proven her statements were clearly erroneous, much less that they were maliciously false.” Id. at 1261. There is no Board precedent holding that an employee loses the protection of the Act for making a statement that is true but made with reckless disregard for its truth or falsity.

In finding the necessary malice, the Respondent would have to show that Painter made a false statement “with a ‘high degree of awareness of . . . probable falsity . . .’” St. Amant v. Thompson, 390 U.S. 727, 731 (1968). Thus, a necessary element of proof of malice is proof of a false statement. Not only is there insufficient evidence to prove that Painter’s statement was false, but the Administrative Law Judge found that Painter believed that the informant he relied on for the statement was reliable. (ALJ, p. 30, fn. 36.)

The failure of Respondent to put in any evidence regarding workload for over half of the bargaining unit leaves too big a hole in Respondent’s ability to meet their burden of proving that Painter made a false statement. Where there is insufficient evidence that an employee made a maliciously false statement, the Board must find that that the Employer violated the Act in

discharging him. See TNT Logistics N. Am., Inc. & Emerson Young & John Jolliff, 353 NLRB No. 41 (Oct. 30, 2008).

2. The ALJ Incorrectly Found Painter’s Last Statement that “Mr. Volpe Stated in his Year-end Conference Call that Employment Levels Would be Maintained” was Detrimentially Disloyal Based Only on Painter’s Statement about Olean (CP Exception 9)

Concerning Painter’s last statement regarding Volpe’s year end conference call, the ALJ found that “Painter’s final comment would be protected activity as it does not contain any demonstrably false or disparaging content.” (ALJ p. 33, l. 43-44.) Respondent did not except to this statement of the ALJ. Since the ALJ found this last statement to be unprotected based only on his finding that the statement regarding Olean was maliciously untrue,¹ if the Board were to find the Olean statement protected, then this statement would also be protected.

In this regard, Painter’s statement is clearly distinguishable from the statements that the court found to be detrimentally disloyal in Endicott Interconnect Technologies v. N.L.R.B., 453 F.3d 532, 537 (D.C. Cir. 2006). There, the discharged employee made public comments in the press that directly disparaged company management, as well as the quality of the company’s product. Id. at537-38. Indeed, the employer did not discharge the employee the first time he made public disparaging comments, but only after it warned him and he made additional disparaging comments in the press. Id. By contrast, the ALJ here found that Painter’s statement contained no “disparaging content,” but only was implicitly disparaging based on the falsity of the separate statement concerning workload at Olean.

¹ Charging Party did except to this holding. (C.P.E. 9.)

3. The ALJ's Credibility Determinations Were Based on an Analysis of the Facts and Inferences to be Drawn and, thus, are not Immune to being Reversed by the Board (CP Exceptions 1, 2, 3, 4, 5, 10, 12)

Respondent opposed most of Charging Party's remaining exceptions by arguing that these were based on the ALJ's credibility determinations and his review of the witness' demeanor and, thus may not be overturned under Standard Dry Wall Products, 91 N.L.R.B 544 (1950). Where, as here, credibility resolutions are based on an analysis of the facts and the inferences to be drawn by those facts, the Board has held that it is as capable of deciding issues of credibility as the ALJ. Herbert F. Darling, Inc., 267 NLRB 476, 478 (1983). There, the Board said:

Notwithstanding the Administrative Law Judge's reference at the outset of his Decision to the demeanor of the witnesses, it is clear from the Decision itself that the Administrative Law Judge's credibility resolutions are not based specifically on demeanor, but rather are premised on an analysis of the facts and the logical inferences to be drawn therefrom, and we are therefore as able to decide issues of credibility as he.

Id.

Charging Party's remaining exceptions concern the ALJ's findings on the element of malice. All of these determinations are based on an analysis of the facts and inferences to be drawn from those facts. Thus, all are credibility determinations that are not based on demeanor, and all are within the competence of the Board to decide differently than the ALJ.

For example, exceptions 1 and 3 concern the ALJ's findings that Painter's decision to make the calls to the analysts anonymously were evidence of malice. As Charging Party argued in its Brief in Support of its Exceptions, anonymous appeals to third parties are protected conduct

under the Act.² This is not a question of credibility, but rather a question of law. The Board can certainly decide if activity that is protected under the Act may at the same time form the basis for stripping an employee of the protection of the Act. Exceptions 2, 3, 4, 5, 10 and 12 concern other legal issues having nothing to do with demeanor or credibility. Rather, they require an analysis of the facts and what inferences and legal conclusions may be drawn from those facts. Specifically, those facts concern Painter's reliance in part on a hearsay statement, his decision to speak to labor conditions at another plant, and the tactical decisions he made regarding the content and timing of the statement. The Board is certainly competent to decide whether the ALJ properly considered these facts as evidence of malice since they raise questions of law, not credibility.

OPPOSITION TO RESPONDENT'S CROSS-EXCEPTIONS

QUESTIONS PRESENTED

1. Are a union member's actions concerted when they grew out of previous protected activity, were motivated by collective goals, and were known to be concerted by the employer? (Respondent's Exceptions #1-5).
2. Are statements protected that are related to an ongoing labor dispute, loyal, and not maliciously untrue? (Respondent's Exceptions #6-15).

² Respondent's citation to Texas Instruments, Inc. v. N.L.R.B., 637 F.2d 822 (1st Cir. 1981), for the proposition that not all anonymous activity is automatically protected is misplaced. The employees there were not discharged for engaging in protected anonymous activity, nor did they in fact engage in any anonymous activity. Rather, the employees were discharged for their "deliberate disclosure of confidential wage survey material, gathered for management purposes and marked 'strictly private,' that had come to the employees' attention irregularly, outside proper channels." Id., at 829. The employees received the confidential material from an anonymous source, but did not themselves engage in anonymous activity.

ARGUMENT

1. The ALJ Did Not Err in Finding That Painter's Actions Were Concerted because They Logically Grew Out of Prior Concerted Activity, They Were Motivated by Collective Goals, and They Were Known to be Concerted by the Company. (Respondent's Exceptions #1-5).

A union member is protected under Section 7 when a single member, acting alone, participates in an “integral aspect of a collective process.” N.L.R.B. v. City Disposal Systems, Inc., 465 U.S. 822, 835 (1984). Put another way, a member's actions are deemed concerted when they “stem from” or “logically gr[o]w” out of prior, protected, concerted activity. Alton H. Piester, LLC v. N.L.R.B., 591 F.3d 332, 337 (4th Cir. 2010), *citing* Ewing v. N.L.R.B., 861 F.2d 353, 361 (2nd Cir. 1988). Consistent with this approach is the ALJ's finding that the Board declines to require proof of authorization by other employees to establish that an individual engaged in concerted activity. (ALJ p. 21, lines 43-44). The sections below illustrate that Painter's activities were concerted and thus garner the protections of Section 7 because they logically grew out of protected activity and because Painter acted in the best interest of the Union as a whole and not just for himself.

(a) The ALJ correctly held that Painter's telephone calls were concerted activity because they stemmed from previously protected activity. (Respondent's Exceptions #5).

The Board in the case Meyers Industries, Inc. (“Meyers II”) requires a totality of the circumstances analysis to determine whether a union member's activities are concerted. 281 N.L.R.B. 882, 887 (1986). A totality of the circumstances analysis reveals that both the Company and the Union used a wide range of economic weapons to gain an advantage during their labor dispute. (ALJ p. 5, lines 20-22). From 2007 to 2008, the Union, its International, and the AFL-CIO developed strategies targeted towards helping return striking employees to work

and concluding negotiations with favorable employee terms. (ALJ p. 5, lines 20-22, 34-35). In February 2008, Painter, as part of the strategy decided upon by the group of unions, made telephone calls to the investment analysts who evaluated the stock of the Company to give a “negotiation update” and inform them of potential company losses because of the strike. (ALJ p. 7, lines 5-10). Painter employed the same technique again during the April 28, 2009 bargaining session by making another round of telephone calls to investment analysts. (ALJ p. 9 line 45, p. 10, lines 35-40). To enforce his position as a union representative, Painter began each call with the statement, “[t]his is a representative of union employees at the Dresser-Rand Company.” (ALJ p. 11, line 16).

When asked why he made the second round of calls, Painter stated that he wanted to give the analysts the Union’s perspective on negotiations and that the calls would put pressure on the Company to negotiate and reach an agreement. (ALJ p. 10, lines 45-50). Given that the purpose behind the original round of telephone calls was to gain a favorable bargaining agreement for union members, Painter was simply continuing the tactic used by the union in its previous negotiation session. He affirmed this tactic by identifying himself as a representative of union employees from the Dresser-Rand Company.

(b) Painter acted with a collective goal when making the telephone calls. (Respondent’s Exceptions #1-5).

Throughout the events surrounding Painter’s telephone calls, he steadfastly maintained that he acted out of concern for the Union as a whole. Painter stated that after the negotiation sessions had ended for the day on April 28, he went to the Company website to research the analysts and then he “snapped.” (ALJ p. 19, lines 21-23). He repeatedly testified that his primary reason for making the calls was to prevent workplace violence among his fellow employees. (ALJ p. 18, lines 29-31). No matter whether Painter’s concerns about workplace

violence were well-founded, as the ALJ noted in his decision, Painter was concerned that if Company policy changes were to go into effect, it would reduce the Union's overall ability to function. (ALJ p. 22, lines 38-41). Painter held a substantial leadership role in the Union and had a history of family members working for the Company. (ALJ p. 4, lines 21; Tr. 361-362). Logic dictates that Painter had strong feelings towards the well-being of Union members as well as towards the well-being of the plant itself.

(c) The Company was aware that Painter's actions were concerted based on its prior behavior (Respondent's Exceptions #5).

Using the standard set forth in *Meyers I*, an employer must have known of the concerted nature of the employee's activity to find a violation of §8(a)(1). Meyers Industries, Inc. ("Meyers I"), 268 NLRB 493, 497 (1984). The Company exhibited its knowledge of the concerted nature of Painter's activity through its proactive and investigatory actions surrounding Painter's telephone calls. Shortly after Painter's first round of telephone calls in February 2008, knowledge of these calls reached the highest levels of management. (ALJ p. 7, lines 13-14). The CEO then visited the Painted Post facility and during a meeting with union officials told Painter that "the stock analysts are not your friends." (ALJ p. 7, lines 23-24). Painter later reported that the statement was in reference to the Union and not Painter alone. (ALJ p. 7, lines 25-26). Then, on the morning of April 29, the Company delayed its negotiating session after receiving a report that a union representative had reported on the status of labor negotiations to investment analysts. (ALJ p. 12, lines 9-11). The Company, by then so convinced of the concerted activity, used a ploy to get the Local's negotiating committee to admit to authoring the calls. (ALJ p. 13, lines 11-14). Later the Company conducted an investigation to determine the extent of the Union's involvement. (ALJ p. 13, lines 45-46).

Knowledge of the Union's concerted activity during the first round of telephone calls is un rebutted; the CEO even expressed his disapproval of the calls in his meeting with union officials. The Company then illustrated by its subsequent actions and schemes on negotiation day that it knew the calls to analysts were union-created.

2. Painter's Contested Statements Are Protected As They Were Related to a Labor Dispute and Were Not Maliciously False or Disloyal. (Respondent's Exceptions #6-15).

The threshold issue for determining whether statements to third parties are protected by Section 7 is whether they are related to an ongoing labor dispute. Allied Aviation Service Company of New Jersey, 248 NLRB 229, 230 (1980). The Board has held that to find the existence of ongoing labor dispute, one must determine "whether the communication was *a part of and related to* the ongoing labor dispute." Id. at 231. In the case Allied Aviation Service Company of New Jersey, a union representative raised safety concerns in a letter to the employer's clients in connection to two filed grievances unrelated to safety concerns. Id. at 229. Finding the letter to be related to an ongoing labor dispute, the Board criticized the ALJ's decision which questioned the efficacy of the tactics used by the employee rather than evaluating the relationship between the employee's communications and the ongoing labor dispute. Id. at 231. As the Board held, "it is not the Board's function to appraise the potential effectiveness of the tactics utilized by employees in their disputes with management." Id. Likewise, it is not the function of the Board to appraise the potential effectiveness of Painter's statements to the investment analysts. It is undisputed that, no matter what his motive, Painter made the statements to the analysts in reaction to the ongoing negotiations. Painter acted in relation to an ongoing labor dispute, and as shown by the Company's reaction to the statements the next

morning before negotiations, his communications were viewed as an integral part of the ongoing labor dispute.

- (a) **Painter’s statements “the workload and backlog at Painted Post had fallen off dramatically” and “the Company has proposed a possible 32 hour work week” are protected. (Respondent’s Exceptions #6-12).**

After a finding that Painter’s statements were a part of an ongoing labor dispute, it also must be shown that his statements were not “so disloyal, reckless or maliciously untrue as to lose the Act’s protection.” In re Am. Golf Corp. (Mountain Shadows), 330 NLRB 1238, 1240 (2000), enforced sub nom. Jensen v. NLRB, 86 Fed.Appx. 305 (9th Cir. 2004); accord, Endicott Interconnect Techs., Inc. v. NLRB, 453 F.3d. 532, 537 (D.C. Cir. 2006). A statement is maliciously untrue if it is made with knowledge of its falsity or with reckless disregard for the truth. Valley Hospital Medical Center, 351 NLRB 1250, 1252 (2007), enf. 358 Fed. Appx. 783 (9th Cir. 2009). Biased or hyperbolic statements do not rise to this standard and thus are not sufficient for a speaker to lose his protection under the Act. Id. at 1253. Examining the content of Painter’s statement regarding the workload and backlog at Painted Post, it is apparent that Painter was, at most, merely making a biased or hyperbolic statement that did not rise to the level of disloyalty or malicious untruthfulness. The phrase “fallen off dramatically” is not concrete enough to have given analysts a measure of just how much workload had decreased. Painter’s statement was based on his own observations while working for the Company. His observation that some departments did not have enough work for their employees was unrebutted by the Company. (Tr. 326).

Turning to Painter’s statement that “the company has proposed a possible 32 hour work week,” a statement that is false, misleading, or inaccurate is not enough to demonstrate its malicious untruthfulness. Sprint/United Management Co., 339 NLRB 1012, 1018 (2003). In

Painter's statement, the word "possible" is a signal to a sophisticated listener, as investment analysts are, that the speaker does not know with certainty that the fact will occur. A possibility of an occurrence is not the same as a statement that the Company will implement a 32 hour work week starting next month. Additionally, even if Painter's statement were viewed by the analysts as misleading, the mere fact that a statement is misleading is not enough to demonstrate its malicious untruthfulness. Painter himself testified that ambiguity remained as to the extent that employees from any plant would be affected, so at most his statement can be viewed as misleading to the public and not made from a malicious mindset.

(b) Painter's statement "it's not looking good at this time that an agreement will be reached by August 15, 2009" regarding the Wellsville negotiations is protected. (Respondent's Exceptions #13-15).

An employee's statement is also protected if the employee has a good-faith belief that the statement is true. Valley Hospital, 351 NLRB at 1252-53. Irrelevant for purposes of this protection is whether the employee's belief is unreasonable or incorrect. Id. After speaking to the IAM local president, Painter determined that the negotiation state at Wellsville "(was)n't looking good." (Tr. 327-328). Painter also spoke to other Local 313 colleagues after they returned from a meeting in Wellsville where they had heard similar remarks. (Tr. 327-328). As Painter would not have reason to think that either the president or his colleagues would mislead him, his good faith belief in the information he received was well-founded.

In addition to Painter's good faith belief which did not evince a reckless disregard for the truth, Painter's statement is also not disloyal to the Company. A statement is disloyal if an employee's public criticism of an employer evidences a malicious motive. Valley Hospital, 351 NLRB at 1252, *citing* Richboro Community Mental Health Council, 242 NLRB 1267, 1268 (1979). In the case Valley Hospital, a statement made by a union member during negotiations

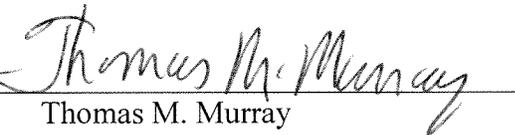
was found to be protected by the Board. Valley Hospital, 351 NLRB at 1253. The union member was quoted in a union flyer as stating that she had been discharged for standing up to management assigning its employee's too many patients. The Board found the statements protected and not disloyal because they were not intended to injure the employer's business but instead to pressure the employer into improving its position during negotiations. Id. at 1254. Parallel to this case, Painter contacted the investment analysts with the intent of pressuring the Company to cede more to the employees. Painter's actions were not disloyal to the company because he did not have a malicious motive and instead was motivated by the thought of speeding up the negotiation process.

CONCLUSION

For the reasons stated above, Charging Party respectfully requests that the Board grant its exceptions and find that Respondent violated the Act when it discharged Painter for engaging in protected, concerted activity and that it unlawfully applied its Insider Trading Policy and Code of Conduct. Charging Party further requests that the Board overrule Respondent's Cross-Exceptions.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT copies of the Charging Party's Exceptions to the Administrative Law Judge's decision and Brief in Support of the Exceptions have been served electronically on this date, at the e-mail addresses indicated below, upon:

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