United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

S.A.M. DATE: June 9, 2016

TO: Margaret Diaz, Regional Director
Region 12

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Trinity Technology Group
Case 12-CA-165643

506-2017-4000
506-4067-9000
506-6070-2550
506-6070-6000
506-6070-7500

This matter was submitted to Advice to determine whether an airport security employee was engaged in protected concerted activity when [redacted] called into a radio talk show and discussed employee concerns over wage cuts and other terms and conditions but also assertedly revealed sensitive security information. We conclude that the employee's conduct in soliciting third-party support by calling into this talk show remained protected throughout because [redacted] on-air statements were neither maliciously false nor so disloyal as to lose protection and no sensitive security information was revealed. Therefore, the Region should issue complaint, absent settlement, alleging that the employee's discharge was unlawful.

FACTS

In 2015, Trinity Technology Group (Trinity or the Employer), a private security contractor, entered into a contract with the Department of Homeland Security/ Transportation Safety Administration (DHS/TSA) to provide security screening services for TSA at Sarasota-Bradenton International Airport (SRQ), effective April 1, 2015. Trinity held several meetings with TSA employees who had been working at SRQ and were interested in continuing to work there for Trinity. At those meetings, Trinity stated that it would pay security officers who transitioned from TSA the same hourly rate they were currently earning with TSA.

As of [redacted], 2015, the Charging Party had worked for TSA for [redacted] years and had worked at SRQ for [redacted] years. [redacted] went to work for Trinity as a [redacted], at the rate of [redacted]/hr., the same pay rate [redacted] had at TSA.[1]

At the outset of [redacted] new employment, the Charging Party was required to sign a DHS Non-Disclosure Agreement, wherein [redacted] agreed not to disclose Sensitive Security Information (SSI) or other Sensitive But Unclassified (SBU) information. The definition of SSI set forth in 49 CFR §1520.5 includes trade secrets, privileged or confidential information, and information that would be detrimental to the security of transportation.

Sometime between [redacted] and [redacted], the Charging Party attended a meeting with a Manager and the Chief Operating Officer (COO). No other employees were present. The COO told the Charging Party that Trinity had made a bad business decision. [redacted] said that normally when acquiring a contract to provide security service at an airport, it retains 85% to 90% of the existing workforce so it does not have to spend a lot of money and time training new hires, but in the case of SRQ, it had only been able to retain 40% of the TSA workforce. The COO told the Charging Party that because of the resulting need to hire and train more new employees, Trinity was in financial trouble and was going to cut the pay of the former TSA employees by one-third. The COO told the Charging Party [redacted] could quit or accept the cut. The Charging Party replied that [redacted] was not happy and signed a document confirming they had met. The COO and Manager separately met with each former TSA employee to notify them of the wage cut.

After [redacted] meeting with management, the Charging Party returned to the security checkpoint. There, [redacted] and [redacted] fellow employees who had worked for TSA talked about the wage cut in front of checkpoint supervisors. They were all upset about the pay cut. There was serious, continuous talk about getting an attorney and writing to Congress about Trinity not fulfilling its agreement.[2]

In mid to late [redacted] 2015, the Charging Party was called into the supervisor's office at the checkpoint by the Manager. The Manager told [redacted] not to discuss going to

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[1] The Region has determined that the Charging Party was not a Section 2(11) supervisor at Trinity.

[2] They agreed to act, but at the time of the Charging Party's discharge, employees had not gone to speak to an attorney nor had they contacted Congress. The Charging Party does not know if employees have taken any such steps since Trinity discharged [redacted].

Congress or attorneys on Trinity's time.[3] The Charging Party thanked the manager and told [redacted] would refrain from speaking about those things while on company time.

On [redacted] while driving to work, the Charging Party was listening to the [redacted] on [redacted] The topic was the reported 95% failure rate in covert tests of whether weapons and simulated bombs would be caught by TSA and its contractors at airport security checkpoints. During the program, on several occasions [redacted] questioned [redacted] first guest, [redacted] about whether TSA work should continue to be contracted out to private companies. Then [redacted] interviewed [redacted] other guests.[4] [redacted] of them strongly criticized airport security and TSA management (including [redacted]), and noted poor training, poor morale, and low pay among TSA agents. Fifty [redacted] tes into the program, after the aforementioned discussion and several calls from other listeners, the Charging Party called in as "[redacted]." [redacted] did not reveal [redacted] real name, the name of [redacted] employer, or the airport where [redacted] worked.

The following is a complete transcript of the Charging Party's on-air statements:

10:50:10 AM – [redacted]: All right. Let's go to [redacted] in Sarasota, Fla.

10:50:19 AM – [redacted] Good Morning

10:50:20 AM – [redacted] Hi.

10:50:20 AM – [redacted] I rolled out with TSA in [redacted], worked for [redacted] [redacted] years. The airport that I'm presently working at went private. So

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[3] The Region concluded that Trinity violated Section 8(a)(1) of the Act by directing the Charging Party not to discuss Congress or attorneys on "Trinity's time" and by telling employees not to talk about the wage reductions or "bad mouth" the company at the checkpoint. In this regard there is no evidence that Trinity previously had a rule prohibiting employees from talking about non-work related subjects, so the prohibition appears to be discriminatory. In addition, this new rule was made in response to the employees' protected concerted discussions about wage reductions and was facially overbroad because it prohibited talking on company time, as opposed to working time.

[4] Other guests on the program were [redacted]

we're under private contractor now. I retired from TSA and went to work for the contractor. It's a nightmare. We are understaffed by 50 percent most of the time. We are running checkpoints that require a minimum of 12 people with five people. We're running baggage areas that require a minimum of two with one person.

10:50:51 AM – [redacted]: We've been probed by people on the watch list and dummy bombs on their way to Cairo, Egypt. We are being probed, we are understaffed, under-trained and everybody is burned out because we're required to work overtime. Private contractors are not the way to go because, for instance, they promised those of us from TSA that we would get the pay we were making with TSA. We signed contracts to that effect. A month in they brought us all into the office individually and told us we are cutting your pay by a third.

10:51:34 AM – [redacted] So now you've got a disgruntled workforce, the only experienced people in the airport are disgruntled because their pay was cut by a third after signing contracts for the pay that we were originally getting. Private contractors are not the way to go and they are dangerous. And Congress and the gentleman (unintelligible) have been pushing. . .

10:51:54 AM – [redacted] [redacted], do you want to ask a question?

10:51:57 AM – [redacted] . . .for privatization and [redacted] family is involved in the private security business. And we need to shut that down.

10:52:06 AM – [redacted]: All right. I think [redacted] wants to ask a question.

10:52:11 AM – [redacted]: Well, yeah, I was just sort of curious about what some anecdote around this probing that you experienced, where you found like dummy bombs and things like this. How did you find them? And what was that interaction like? Was this something that showed up on a, you know, the x-ray machine, on the back-scatter machine or was there a behavior that somebody noticed, a screener, while that person that was trying to sort of – I don't know – mess with the system, something that – was he exhibiting some behavior that you observed? Oh.

10:52:45 AM – [redacted] Are you there, [redacted]?

> 10:52:47 AM – [redacted]: And we did – we found it in checked baggage. We – the supervisor in baggage was TSA trained and a former TSA employee. [redacted] did [redacted] job. The management for the contractor dropped the ball. And it was two and a half hours before the bomb appraisal officer from TSA arrived at the airport. We never evacuated the airport. And the whole situation was poorly handled by the management level of the contractor. We on the ground did our job, but the contractor let a lot of stuff slip through the cracks. And the people at the coordination center, at our hub airport, were not up to speed the way they should have been.

On [redacted], at a regular operations meeting with TSA, Trinity's COO learned that someone had discussed security operations at the airport on the radio. Following the meeting, TSA forwarded an email that had originated with the TSA Deputy Assistant Federal Security Director to Trinity's COO and a number of other Trinity managers. The subject line read "TSA on [redacted]" and contained an instruction to listen to the attached link to the [redacted].

Trinity's Manager identified the voice as the Charging Party's voice. [redacted] concluded that the Charging Party had revealed matters covered under TSA's SSI regulations and Trinity's Non-Disclosure policy. The Manager then shared the radio clip with TSA's Technical Monitor/Assistant Federal Security Director, who is onsite at SRQ and oversees the performance of Trinity's contract. Based on the content of the recording, [redacted] concluded that the Charging Party had disclosed SSI and violated the DHS Non-Disclosure Agreement, and [redacted] informed the Manager that if the Charging Party had been a TSA employee, [redacted] conduct would most likely have resulted in discipline up to and including termination, and the level of discipline would be based on the outcome of a thorough investigation and any mitigating and aggravating factors.

On [redacted], the Manager stopped the Charging Party on [redacted] way to the checkpoint and asked [redacted] to join [redacted] in the conference room. The Manager's Assistant was also in the conference room. The Manager proceeded to read a counseling statement and termination notice to the Charging Party. The Charging Party was then escorted from the airport.

The counseling statement stated that the Charging Party's voluntary participation in and disclosure of SSI during the radio interview was a direct violation of the following policies:

- DHS Non-Disclosure Agreement
- DHS TSA 49 CFR §1520 SSI Regulation
- Trinity Non-Disclosure Agreement

- Trinity Employee Agreement
- Trinity Code of Ethics & Business Conduct
- Trinity Standards of Conduct
- Trinity Use of Company Technology & Property Policy

More specifically, according to the counseling statement, the Charging Party's statements about understaffing and undertrained staff at SRQ were false because there have been no incidents of excessive wait times or security incidents related to inadequate staffing since (b) (6), (b) (7)(C), 2015. The counseling statement further stated that the Charging Party's on-the-job training was current as of (b) (6), (b) (7)(C) 2015, and therefore all of (b) (6), (b) comments about staff being undertrained relate to (b) (6), (b) previous employer, TSA, and not to Trinity. The Charging Party, on the other hand, asserts that the understaffing could be seen by anyone going through an airport checkpoint or checking baggage because passenger lines stretched back to the stairwells and elevators, and therefore this information is not SSI. The Charging Party further states that (b) (6), (b) comments about undertraining related to Trinity's new hires, not the former TSA screeners. With respect to the Charging Party's contention on the radio that "everybody is burned out because we're required to work overtime," the counseling statement noted that the Charging Party personally had not worked a single hour overtime, and since Trinity took over operations, overtime hours have been 50% lower than before. On the other hand, the Charging Party's statements were not limited to (b) (6), (b) own overtime, and in any event (b) (6), (b) paystubs show that (b) (6), (b) worked (b) (6), (b) hours of overtime during the payroll period from (b) (6), (b) (7)(C) to (b) (6), (b) (7)(C).

The counseling statement also stated that the Charging Party's reference to SRQ being "probed by people on the watch list" was "a gross exaggeration of factual data," and that the Charging Party was unable to obtain such information. Further, the Charging Party's comments about the "dummy bomb" was a false depiction of an actual event that was undisclosed to the public or media prior to (b) (6), (b) (7) radio comment. Moreover, the Charging Party's comments about the response time of the Transportation Security Specialist-Explosives (TSS-E) were a direct violation of TSA's SSI policy. Also, the exact arrival time of the TSS-E could not be information the Charging Party was aware of because (b) (6), (b) signed off of (b) (6), (b) shift two hours before their arrival. In (b) (6), (b) defense, the Charging Party asserted that (b) (6), (b) obtained the information about probes at briefings, where they were discussed at length, and the "dummy bomb" probe was widely known by airline personnel, baggage handlers, airport employees, the airport police, and anyone in the flying public who might have overheard the radio communications. (b) (6), (b) heard chatter on the radio (i.e. Trinity's internal radio communications) about the incident while (b) (6), (b) was on duty and learned the details during discussions with colleagues who were directly involved in the incident.

Finally, the counseling statement asserted that the Charging Party's statements regarding the failure to evacuate the airport when the suspicious item was found was a gross exaggeration because it was the determination of the Federal Security Director's staff and local law enforcement that the location of the item in question posed no threat to the traveling public.

ACTION

We conclude that the Charging Party's on-air statements did not lose the protection of the Act because there is insufficient evidence that the statements regarding the Employer's operation of the facility were objectively false, or if objectively false, that the Charging Party spoke with "actual malice," i.e., knowledge that [redacted] statements were false or reckless disregard for the truth or falsity of [redacted] statements. Nor were the opinions [redacted] advanced regarding [redacted] unnamed employer's operation of airport security, and [redacted] opinions generally about private contractors controlling airport security, so "disloyal" as to lose protection of the Act. Lastly, the Charging Party's general statements do not appear to disclose SSI in violation of federal regulations and therefore are not so "indefensible" as to cause [redacted] to lose the protection of the Act.

As a threshold matter, we conclude that the Charging Party's call into the [redacted] show was protected, concerted activity. Section 7 protects the right of employees to communicate with third parties in an effort to obtain their support.[5] And, the Charging Party's call was concerted because it was a logical outgrowth of the employees' discussions of their common complaints and planned protected concerted activity over the wage cuts, and was "in furtherance of the group's goals," even though it had not been expressly discussed with the other employees.[6] Moreover, it was evident to listeners of the [redacted] that the Charging Party's comments concerned an ongoing labor dispute between employees and their employer over wage cuts, as well as employee dissatisfaction over other working conditions, such as

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[5] *MasTec Advanced Technologies*, 357 NLRB 103, 107 (2011), citing *Mountain Shadows Golf Resort,* 330 NLRB 1238, 1240 (2000), *supplemental decision at* 338 NLRB 581 (2002), *pet. for rev. denied sub nom. Jensen v. NLRB*, 86 F. App'x 305 (9th Cir. 2004).

[6] *See, e.g., Every Woman's Place, Inc.*, 282 NLRB 413, 413 (1986), *enforced mem.* 833 F. 2d 1012 (6th Cir. 1987) (although Charging Party made phone call to DOL Wage and Hour Division on her own, call was "a logical outgrowth" of three employees' complaints to management about overtime compensation for holidays and therefore constituted concerted activity).

onerous work assignments due to understaffing and inadequate training.[7] Accordingly, the Charging Party's call was protected unless [redacted] said something that was "so disloyal, reckless, or maliciously untrue"[8] or [redacted] conduct was otherwise so "indefensible"[9] as to cause [redacted] to forfeit the protection of Act.

1. The Employer has not established that the Charging Party's on-air statements were false statements of objective fact or recklessly or maliciously untrue.

In considering whether a communication loses the Act's protection because it is "reckless or maliciously untrue," the Board applies the test for "malice" enunciated by the Supreme Court in *New York Times Co. v. Sullivan*[10] and *Linn v. United Plant Guard Workers Local 114*.[11] Under this standard, a statement is maliciously untrue if it is made with knowledge of falsity or reckless disregard of truth or falsity.[12] Thus, statements that are merely false or mistaken do not lose the protection of the Act.[13]

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[7] *See, e.g., Valley Hospital Medical Center*, 351 NLRB 1250, 1252-53 (2007) (holding nurse's third-party statements regarding staffing levels and workloads protected where context of statements clearly related to labor dispute and nurses' terms and conditions of employment), *enforced sub nom. Nevada Service Employees Local 1107 v. NLRB*, 358 F. App'x 783 (9th Cir. 2009).

[8] *MasTec*, 357 NLRB at 107.

[9] *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962).

[10] 376 U.S. 254, 280 (1964).

[11] 383 U.S. 53, 61 (1966).

[12] *See*, *e.g., Sprint/United Management*, 339 NLRB 1012, 1012 n.2 (2003) (employee's email spreading false information regarding anthrax scare was uttered with reckless disregard for truth or falsity and therefore was unprotected); *HCA/Portsmouth Regional Hospital*, 316 NLRB 919, 919 & n.4 (1995) (employee "essentially admitted" using false rumor to discredit supervisor and lost protection).

[13] *See, e.g., MasTec,* 357 NLRB at 107-08 (to the extent that any statements made by technician employees during television newscast were "arguable departures from the truth," they were "no more than good-faith misstatements or incomplete statements, not malicious falsehoods" justifying a loss of protection); *KBO, Inc.*, 315 NLRB 570, 570-71 (1994) (finding employee's inaccurate claim that the union had a recording of a supervisor stating that the employer was financing its anti-union campaign with

Moreover, the Board and courts also have recognized that statements in hotly contested labor campaigns are often statements of opinion or figurative expression, "rhetorical hyperbole" incapable of being proved true or false in any objective sense.[14] An employer bears the burden of proving that an employee's statements were false and that those false statements were made with knowledge of falsity or reckless disregard of truth or falsity.[15]

The Employer has not carried its burden to demonstrate that the Charging Party made objectively false statements. With respect to [redacted] comments regarding staffing levels, it is common knowledge that the TSA screener positions are under-staffed at the Nation's airports.[16] The Charging Party's statement regarding training pertained to the newly hired employees, whom the Employer conceded required more training in seeking to justify its wage cuts. Similarly, although the Charging Party did not work much overtime, [redacted] did work some, and the Employer has not shown that other employees weren't working overtime; also, the Charging Party's opinion that employees were "burned out" from understaffing and overtime is not an objective fact susceptible of a true-or- false evaluation. With respect to [redacted] remaining statements about probes and the "dummy bomb," the Employer concedes that there was in fact a

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employees' profit-sharing funds was not reckless or maliciously false because employee reasonably relied on union's statements), *enforced mem.*, 96 F.3d 1448 (6th Cir. 1996).

[14] *See Steam Press Holdings, Inc. v. Hawaii Teamsters and Allied Workers Union, Local 996*, 302 F.3d 998, 1006 (9th Cir. 2002) (in the "heated and volatile setting" of a labor dispute, "even seemingly 'factual' statements take on an appearance more closely resembling opinion than objective fact") (citation omitted); *Valley Hospital Medical Center*, 351 NLRB at 1253 ("[I]n the context of an identified, emotional labor dispute, the fact that an employee's statements are hyperbolic or reflect bias does not render such statements unprotected.").

[15] *See generally American Hospital Association*, 230 NLRB 54, 56 (1977); *see also Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1321 n.16 (2006) (finding employer failed to proffer any specific evidence to disprove employee's allegedly false statements).

[16] For example, Congressman Kathleen Rice recently noted that, "The shortage of TSA screeners is causing a lot of problems for passengers in airports across the country …." *Congress approves TSA request for screeners to meet summer crush,* USA Today, May 11, 2016. http://www.usatoday.com/story/news/2016/05/11/white-house-urges-congress-allow-tsa-hiring-ot/84238540/

bomb discovered in luggage, and disputes only the need to evacuate the airport, not the fact that no evacuation occurred.

Moreover, even assuming that the Employer could establish that the Charging Party's statements were objectively false, the Employer will not be able to meet its burden of establishing that they were *maliciously* false, i.e., that the Charging Party knew that [redacted] statements were false or had serious doubts of their truth or a high degree of awareness of probable falsity. The Charging Party conveyed [redacted] good-faith belief that the Employer was understaffed based on [redacted] own observation of staffing levels and wait lines and the Employer's admitted need to train the new employees. Similarly, with regard to the Charging Party's statements about probes, including [redacted] praise of the supervisor who was a former TSA employee and [redacted] criticism of [redacted] Employer's management of the situation once it was discovered, the Charging Party based [redacted] comments on information [redacted] overheard on internal radio communications or learned from other employees who were directly involved in the incident.[17] To the extent that the Employer asserts that the Charging Party's comments contained "gross exaggerations," exaggeration in itself does not constitute a malicious falsehood.[18]

2. **The Charging Party's on-air statements were not "so disloyal" as to lose the protection of the Act.**

In *Jefferson Standard,* the Supreme Court found that certain public statements by employees are so disloyal as to lose protection of the Act.[19] In applying this

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[17] *See KBO, Inc.*, 315 NLRB at 570-71 (1994) (finding that employee reasonably relied on union official's false claim, passed on to him by another employee, that the union had a recording of a supervisor stating that the employer was financing its anti-union campaign with employees' profit-sharing funds).

[18] *See MasTec,* 357 NLRB at 107-08 ("arguable departures from the truth" were "no more than good-faith misstatements or incomplete statements, not malicious falsehoods").

[19] *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464, 471-78 (1953) (finding unprotected "a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income."). *See also Five Star Transportation, Inc.,* 349 NLRB 42, 45 (2007) (finding unprotected letters from the predecessor's drivers disparaging successor contractor with inflammatory language relating to incidents that occurred seven years earlier, which were unrelated to

standard, the Board has repeatedly distinguished between unprotected disparagement of an employer's product that is calculated to harm the employer's reputation and reduce public patronage "and the airing of what might be highly sensitive issues."[20] A public airing of sensitive issues loses protection as an act of disloyalty only where the public criticism "evidence[s] a malicious motive."[21] Thus, the Board typically will not find public appeals "so disloyal" where the intent is not to harm or disparage the employer, but rather to pressure the employer to ameliorate working conditions.[22] For example, in *Allied Aviation Service Co.,* a union steward's letters to customers of [redacted] employer, an airline-maintenance contractor, stating that [redacted] employer's practices created a safety hazard for airline personnel and customers were protected, despite the public airing of highly sensitive issues, because they were linked to an ongoing labor dispute and there was no malicious motive to harm the employer.[23]

The Charging Party's statements concerning airport safety, i.e., probes by travelers on the watch list and "dummy bombs," as well as [redacted] statement that "Private contractors are not the way to go and they are dangerous," made in conjunction with [redacted] discussion of the cut in wages and unfavorable working

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employees' concerns about maintenance of predecessor's terms and conditions of employment), *enforced*, 522 F.3d. 46 (1st Cir. 2008).

[20] *Allied Aviation Service Company of New Jersey, Inc.*, 248 NLRB 229, 231 (1980), *enforced mem.* 636 F.2d 1210 (3rd Cir. 1980).

[21] *Jimmy John's*, 361 NLRB No. 27, slip op. at 4 (Aug. 21, 2014), *quoting Valley Hospital Medical Center*, 351 NLRB at 1252.

[22] *See, e.g., Valley Hospital Medical Center*, 351 NLRB at 1253-54 (nurse's statements at a union press conference and on union website that staffing cuts could result in critically ill patients not getting necessary care and monitoring were not to disparage or harm the employer but rather to pressure the employer to increase staffing and thereby improve nurses' working conditions); *Professional Porter & Window Cleaning Co.*, 263 NLRB 136, 139 (1982) (employees' letter to customer complaining that the employer was not providing employees with adequate cleaning products and equipment, thereby causing the customer's building to deteriorate, did not lose protection where purpose of the letter was to "remedy the various problems they were encountering in their working conditions" and not to "disparage the Respondent's product or undermine its reputation."), *enforced mem.* 742 F.2d 1438 (2d Cir. 1983).

[23] 248 NLRB at 231.

conditions, are similar to the statements that implicated customer safety and that were found protected in *Allied Aviation Service.* As was the case there, the Employer here would prefer to keep these issues "out of the public eye" but to find these statements unprotected would "serve to preclude employees from protesting safety matters through requests for assistance from third parties … because safety, particularly in the airline industry, is by its very nature a potentially volatile issue."[24]

Furthermore, although the Employer did not rely on the Charging Party's statements opposing privatization of TSA services as a basis for [redacted] discharge, we conclude that those statements also were not "so disloyal" as to lose protection under the Act. Thus, the Charging Party referred to [redacted] experience with this private contractor as a "nightmare," and opined that private contractors are "not the way to go" and that they "let a lot of stuff slip through the cracks." These strong statements were commensurate with [redacted] legitimate and substantial grievance against the Employer for cutting [redacted] wages by a third, and [redacted] did not specifically advocate the cancelling of [redacted] unnamed employer's contract but merely expressed [redacted] opinion about privatization. [25] In all the circumstances, we conclude that these statements were not so disloyal as to remove [redacted] conduct from protection of the Act.[26]

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[24] *Id.* There is no evidence that the Charging Party's *intent* was to harm the Employer's reputation. Indeed, although the TSA assumed "[redacted]" worked at the SRQ airport, the Charging Party was careful not to identify [redacted] the airport where [redacted] worked, or the company [redacted] worked for, making the Employer's identity unknown to the average listener.

[25] *See Five Star Transportation,* 349 NLRB at 45, 47 (six school bus drivers who wrote letters urging school committee to reconsider award of contract to a new contractor and retain the prior contractor, their employer, out of concern over maintenance of terms and conditions of employment, and without otherwise disparaging new contractor, engaged in protected activity). *Cf. ATC/Forsythe & Associates,* 341 NLRB 501, 503 (2004) (employee of bus service contractor for Tempe, Arizona who offered his dissident union group "as an alternative to [his employer] either as city employees or as alternate service provider" held unprotected because his object was the replacement of his employer with his employee group); *Kenai Helicopters,* 235 NLRB 931, 936 (1978) (employees were lawfully discharged based on employer's reasonable belief that they were going to use a strike to divert their employer's business to a competitor whom they planned to join).

[26] Indeed, protected activity often has a negative effect on an employer's business, such as appeals for consumer boycotts of an employer's business. *See Santa Barbara News-Press,* 357 NLRB 452, 455 (2011), and cases cited therein (seeking a consumer boycott in support of employees' position in a labor dispute is protected activity).

3. The Charging Party did not disclose SSI, as defined in 49 C.F.R. §1520.5, or otherwise

Concerted activity may be found unprotected when it involves conduct that is unlawful, violent, or otherwise "indefensible."[27] The Employer specifically contends that the Charging Party's on-air statements violated federal regulations and, accordingly, the DHS Non-Disclosure Agreement that [redacted] signed, by disclosing the SSI set forth in the following portions of 49 C.F.R. §1520.5(b)(9):

> (i) Any procedures, including selection criteria and any comments, instructions, and implementing guidance pertaining thereto, for screening of persons, accessible property, checked baggage, U.S. mail, stores, and cargo, that is conducted by the Federal government or any other authorized person.
>
> (ii) Information and sources of information used by a passenger or property screening program or system, including an automated screening system.
>
> (iii) Detailed information about the locations at which particular screening methods are used, only if determined by the TSA to be SSI.

The Employer first contends that the Charging Party's statements that the Employer is understaffed, that its staff are undertrained, and that "everyone is required to work overtime" and are "burned out" constituted disclosures of SSI within the meaning of the above-cited regulations. But staffing and training levels are not specifically enumerated in the cited regulations, and employee staffing and the adequacy of training (as opposed to the content of training) do not fit within any of the three types of SSI the Employer claims [redacted] revealed. Indeed, understaffing at security checkpoints at the Nation's airports is hardly confidential information, but rather the subject of almost daily revelations in the media.[28] Similarly, TSA's own Inspector

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[27] *See NLRB v. Washington Aluminum Co.*, 370 U.S. at 17.

[28] *See, e.g., Congress approves TSA request for screeners to meet summer crush, USA Today, May 11, 2016.* **http://www.usatoday.com/story/news/2016/05/11/white-house-urges-congress-allow-tsa-hiring-ot/84238540/**; Officials at Atlanta airport also noted the shortage of TSA screeners. *Fed up with waiting: Atlanta airport gives*

General has in the past released information about lack of proper training for TSA screeners.[29] And there also has been press coverage of the topics of necessary overtime[30] and employee burnout,[31] which also cannot be considered SSI under the cited regulations.

The Employer likewise contends that the Charging Party's statements about the airport being probed by people on the watch list and dummy bombs involved information that was not previously disclosed in the media or made public and therefore constituted SSI. Again, we do not read the cited regulatory provisions as encompassing this kind of information. Moreover, when the premise of the radio show was that federal undercover teams had recently tested security at dozens of U.S. airports and were able to get weapons or simulated bombs through checkpoints 95% of the time, it is inconceivable that the Charging Party's revelation that personnel at an unidentified airport actually discovered a simulated bomb would be considered SSI. Nor did it create a heightened security risk, e.g., by alerting potential terrorists to vulnerabilities that would make this particular airport a prime target, given the breadth of the publicly-identified problems at airports around the country. Lastly, notwithstanding the TSA official's opinion that the Charging Party had disclosed SSI, TSA did not require [redacted] discharge.

In sum, since the information disclosed by the Charging Party was already generally available in public discourse, its disclosure presented no risk to the flying

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ultimatum to TSA, RT.Com, February 19, 2016. **https://www.rt.com/usa/333044-atlanta-airport-tsa-staff/**

29 *See TSA Training Lacking, Investigators Find, The Wall Street Journal,* November 17, 2010 **http://blogs.wsj.com/middleseat/2010/11/17/tsa-training-lacking-investigators-find/** See also *Will More Training for TSA Screeners and Supervisors Help Curb Problems?* The Wall Street Journal, May 24, 2012 (then TSA Director Pistole acknowledged that training of supervisors and screeners was inadequate). ***http://blogs.wsj.com/middleseat/2012/05/24/will-more-training-for-tsa-screeners-and-supervisors-help-curb-problems/***

30 *TSA asks Congress to pay for overtime to shorten lines,* USA Today, May 5, 2016. http://www.usatoday.com/story/news/2016/05/04/tsa-asks-congress-overtime-shorten-lines/83917826/

31 *Facing Yet Another Shutdown, TSA Union President Warns Of Employee Burnout, Compromised Security*, ThinkProgress, February 24, 2015. http://thinkprogress.org/immigration/2015/02/24/3625921/tsa-local-union-president-dhs-shutdown/

public, and it was not properly classified as SSI, the Charging Party did not engage in "indefensible" conduct that would remove [redacted] from the Act's protection.

For all the foregoing reasons, we conclude that the Charging Party was discharged for engaging in protected concerted activity and, accordingly, complaint should issue, absent settlement.

/s/
B.J.K.

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