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

Advice Memorandum

S.A.M. DATE: November 4, 2016

TO: Paul Hitterman, Acting Regional Director
Region 13

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

SUBJECT: Universal Security, Inc.
Case 13-CA-178494

133-4100-0000-0000
506-4067-9000-0000
506-4067-9500-0000
512-5012-0125-0000
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524-8387-2350-0000

The Region submitted this case for advice as to whether the Employer unlawfully discharged two Employees because of their protected concerted activity or established that it lawfully discharged them because they lost the protection of the Act, either by disclosing sensitive security information ("SSI") or by making maliciously false statements about the Employer. We conclude that the Employer violated Section 8(a)(1) and (3) of the Act by terminating the two Employees for engaging in union or protected concerted activity, and that the Employees did not lose the Act's protection because, contrary to the Employer's assertion, they neither disclosed SSI nor maliciously defamed the Employer in the course of their Section 7 activity. In the alternative, we conclude that under *Wright Line*,[1] the Employer violated Section 8(a)(1) and (3) by discriminatorily terminating the two Employees because of their union and protected concerted activities. Finally, we conclude that the Employer unlawfully maintained an overbroad rule banning employee communications to the media and, under *Continental Group*,[2] violated Section 8(a)(1)

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[1] 251 NLRB 1083, 1089 (1980), *enfd. on other grounds*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

[2] 357 NLRB 409, 412 (2011).

and (3) by terminating the two Employees pursuant to that overbroad rule.[3] As a result, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) and (3) by terminating the two Employees and maintaining an overbroad rule.[4]

FACTS

In 2007, Universal Security, Inc. ("the Employer" or "Universal") contracted with the City of Chicago ("City") to provide unarmed security guard services at O'Hare International Airport. Sometime thereafter, Service Employees Local 1 ("the Union") began its effort to organize the 170 unarmed security guards who work for the Employer at O'Hare.

In September 2015, Employee 1 began attending Union meetings. In early 2016, Employee 2 also began attending Union meetings.[5] By mid-March, Employee 2 had complained to the press about the Employer's sick-day and vacation-day policies, her lack of health care, and her low wages. She was identified in the press by name as an O'Hare security guard.

On March 22, there was a bomb attack at Brussels Airport, Belgium. On that day, Employee 2 was quoted in local and national news outlets as saying: "We need critical training to protect ourselves, other workers and the passengers if there were to be an emergency." It was also reported that Employee 2 said that "she and her teammates don't receive training related to how to respond to an emergency similar to the one at the Brussels airport."

On March 30, Employee 2 was again quoted in local and national news outlets, making similar comments to those she had made on March 22, and additionally complaining about the limitations of her equipment in addition to her training:

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[3] (b) (5) [redacted]

[4] (b) (5) [redacted]

[5] All subsequent dates are in 2016.

> "We need critical training to protect ourselves, other workers and our passengers when emergencies happen," [Employee 2], a security officer at Chicago's O'Hare International Airport said. She said the Brussels attacks "should be a wake-up call for everybody."
>
> [Employee 2] is currently employed by Universal Security, which is contracted by the city Aviation Department to provide a so-called "third level" of security at O'Hare. The unarmed, uniformed guards handle lower-level security responsibilities such as monitoring doors and gates both in the terminals and on the airfield. One of the big complaints from the security workers — along with their $12.11-an-hour wage and no paid sick leave — is that they don't get enough training. In particular, they say they aren't instructed properly in how to deal with real security threats such as a terrorist attack. "All we have is the radio," [Employee 2] said Wednesday.

In a second article, Employee 2 also mentioned a video she was instructed to watch, referred to as "Run! Hide! Fight!,"[6] which provides instructions for unarmed persons on how to deal with an active-shooter situation. The article reported:

> After workers aired those complaints earlier this month to city Aviation Commissioner Ginger Evans, Universal Security followed up by showing its workers a Homeland Security video titled "Run! Hide! Fight!" The video was released four years ago as a way to advise members of the public about what to do if caught in an active-shooter situation, the main takeaway being you ought to try to get away quickly.[7]

On March 31, the Union organized a one-day strike at O'Hare. Both Employees participated in the strike and the Employer's operations manager is believed to have watched them on the picket line.[8] That same day, Employee 1 made the statement

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[6] *Run > Hide > Fight: Surviving An Active Shooter Event*, YOUTUBE (July 27, 2012), https://www.youtube.com/watch?v=p4IJA5Zpzz4.

[7] Prior to Employee 2's statements to the media, CNN also had reported that unarmed airport security guards are instructed to run and hide in the event of an active shooter situation at O'Hare Airport. That story was widely rebroadcast by other media sources.

[8] The two Employees were part of a group of 14 security guards who previously had informed the Employer in writing that they would participate in the March 31 strike.

below to the press, describing her job duties. At the beginning of her presentation, she both stated and spelled her name.

> Good morning supporters, co-workers, friends, my name again is [. . .]. I am a security officer with Universal Security. I guard entryways at the airport and assure that no one gets through that is not supposed to be there. We are here to close and secure doors on the concourse, screen IDs for employees' access and log-in vendors. I keep the airport safe.

Employee 1 also spoke about standing up for workers' rights, fighting for living wages and benefits, and the Employer's retaliation against employees who complained about their working conditions.

That same day, Employee 2 made several other statements to the press. She complained about sick-leave policy, scheduling, and having to work in freezing weather. She also complained about wages. As reported by one news outlet, "[Employee 2] says that she and other workers haven't seen a single pay raise in the last 5 years, even though their contracts stipulate yearly pay raises. When their paychecks did get a bump, it was a mere 20 cents." Other news outlets only reported Employee 2's statement that she had not received a raise, but not her other statement that she had received a 20-cent "bump." Employee 2 also complained about her equipment and training: "'We don't have nothing much but a radio to communicate with command center . . . . I don't think that's enough.' She also feels unprepared in an emergency, particularly pertinent in light of the Brussels attack, and wants more training on how to respond."

On April 13, the Employer discharged both Employees and later asserted that "[i]t would be reckless (and perhaps illegal)" to not have terminated them. Both Employees were personally handed termination letters while at their posts. The letters were virtually the same, with each mentioning the disclosure of SSI and violation of the Employer's Post Orders as the reasons for the terminations:

> It has come to our attention that you have repeatedly spoken to a number of media outlets over the past several weeks regarding the details of your security work at O'Hare International Airport. Your comments have included sensitive security information. As you are aware, Universal's General Post Orders, which are mandated by the Chicago Department of Aviation, make clear that Universal personnel are not permitted to speak to the media regarding security operations at the airports.
>
> Accordingly, your employment with Universal is terminated effective immediately.

The Employer did not notify TSA about the release of alleged SSI.

The Employer's General Post Orders for O'Hare state, "All USC employees are not permitted to speak to the media at any time. If media arrives at your post, immediately contact your supervisor who will in turn contact the OOC."

On April 15, a local paper reported that "a union trying to organize airport workers says [Employees 1 and 2] have been fired for comments made to the media that their [E]mployer says revealed sensitive security information." On May 11, a Transportation Security Administration (TSA) federal security director notified the Employer by letter that it was being investigated for allegedly violating 49 CFR § 1520.9(a) and (c).[9] Subsection 1520.9(a) deals with covered persons/entities not taking reasonable steps to safeguard SSI from unauthorized disclosure. Subsection 1520.9(c) deals with not reporting unauthorized disclosures of SSI. The letter stated, "This investigation is in regards to media reports indicating that two Universal Security employees were fired for disclosure of SSI to the media."

In response to a ULP charge alleging the terminations were unlawful, the Employer stated in an email to the Region that "the local TSA Supervisory Transportation Security Inspector for Aviation advised Universal that both individuals did in fact disclose SSI in violation of federal law." The Region spoke with a TSA official, who stated that TSA was "investigating [the Employees] because they disclosed sensitive security information (SSI) to the media." The next day, the same TSA official emailed the Region stating, "We *will* [emphasis added] also open investigations against . . . [Employees 1 and 2]." On May 31, the TSA official confirmed in a telephone conversation with the Region that the employees did disclose SSI, but would not identify specifically what SSI had been disclosed in violation of the federal transportation regulations.

On August 29, in response to questions from the Region about the status of TSA's investigation, the TSA official replied, "All three [investigations] were resolved with counseling."[10] When the Region requested letters confirming TSA's investigation of the Employees, the official said she would send confirmation but never did.

TSA issued a Warning Notice to the Employer but not to the Employees. The notice stated that: (1) "TSA at [O'Hare] became aware via a . . . news article dated April 15, 2016, that two Universal Security employees employed as contractors at

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[9] 49 CFR § 1520.9(a) & (c) (2015). Hereinafter, all references to the CFR will be to the 2015 edition.

[10] The three investigations apparently were of the Employer and the two Employees.

[O'Hare] released Sensitive Security Information (SSI) to the media and possibly other individuals"; (2) "No notification informing TSA of this unauthorized release of SSI was made by the Chicago Department of Aviation or Universal Security"; (3) "This incident may have represented a failure on the part of Universal Security at [O'Hare] to comply with 49 CFR § 1520.9(c) . . . "; (4) "[W]e have elected to send you this Warning Notice rather than seek a Civil Penalty"; (5) "A Warning Notice is not a formal adjudication or a legal finding of the matter and, therefore, there are no rights to appeal this Notice."

ACTION

We conclude that the Employer violated Section 8(a)(1) and (3) of the Act by terminating the two Employees for engaging in union or protected concerted activity, and that the Employees did not lose the Act's protection because, contrary to the Employer's assertion, they neither disclosed SSI nor maliciously defamed the Employer in the course of their Section 7 activity. In the alternative, we conclude that under *Wright Line*, the Employer violated Section 8(a)(1) and (3) by discriminatorily terminating the two Employees because of their union and protected concerted activities. Finally, we conclude that the Employer unlawfully maintained an overbroad rule banning employee communications with the media and, under *Continental Group*, violated Section 8(a)(1) and (3) by terminating the two Employees pursuant to that overbroad rule. As a result, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) and (3) by terminating the two Employees and maintaining an overbroad rule.

I. The Employer Terminated the Two Employees for Protected Concerted Activity That Did Not Lose the Protection of the Act.

Where an employee is discharged for alleged misconduct while engaged in protected concerted activity, to find an unfair labor practice the Board must only resolve "the question [of] whether the conduct is sufficiently egregious to remove it from the protection of the Act."[11] Concerted activities may be found unprotected when they involve conduct that is unlawful, violent, or otherwise "indefensible."[12] Concerted activities may also lose protection where employee statements were either

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[11] *Stanford Hotel*, 344 NLRB 558, 558 (2005), *citing Aluminum Co. of America*, 338 NLRB 20, 21 (2002). Thus, the Board need not apply the normal *Wright Line* analysis in such cases. *See, e.g., Chromalloy Gas Turbine Corp.*, 331 NLRB 858, 864 (2000), *enfd. sub nom.*, *NLRB v. Caval Tool Div.*, 262 F.3d 184 (2d Cir. 2001).

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

so disloyal or maliciously false such that they would fit into one of those traditional categories of unprotected speech.[13]

Here, the manner and content of the two Employees' statements establish that they were engaged in union and protected concerted activity when they spoke with the various media outlets in March. Employee 2 repeatedly voiced work-related complaints, and both Employees spoke with the media in furtherance of the one-day strike the Union had called at O'Hare to support the ongoing organizing campaign. The Employees' statements brought attention to the fact that they were underpaid, received poor benefits, had to work under harsh conditions, and needed additional training and equipment to do their jobs properly. In short, the Employees were engaged in union and protected concerted activity to improve their terms and conditions of employment.

It is also clear that the Employer discharged the two Employees for engaging in that Union and protected concerted activity. The termination letters the Employees received specified that the Employer was discharging them for their statements to the media. Nevertheless, the Employer seeks to legitimize the discharges by asserting that the Employees, who are airport security guards, lost the Act's protection either because their disclosure of SSI violated federal transportation regulations and created a threat to public safety (which was "indefensible" conduct) or because their statements maliciously defamed it. The Employees did not disclose SSI or make maliciously false statements, and therefore their conduct did not lose the Act's protection.

A. The two Employees did not disclose SSI, and thus could not have lost the protection of the Act for that reason.

An examination of the federal transportation regulations that the Employer asserts the Employees violated reveals that they did not disclose SSI. Initially, it is significant that TSA has not made a formal adjudication or legal finding that the two Employees here disclosed SSI. It is even unclear whether TSA concluded or conducted an investigation into the conduct of *the Employees*. Rather, TSA conducted investigations of the Employer for failing to report a potential unauthorized disclosure of SSI (in violation of 49 CFR § 1520.9(c)) and for failing in its duty to "safeguard SSI . . . from unauthorized disclosure"(in violation of 49 CFR § 1520.9(a)). TSA does not appear to have determined that the Employees disclosed SSI. Again, it appears that

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[13] *See NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464, 475–76 (1953) (finding disloyal statements about employer's product unprotected); *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 62–63 (1966) (finding statements constituting malicious libel unprotected).

the focus of TSA's investigation was on whether the Employer failed to report a disclosure had it believed SSI was disclosed. While the Employer could have violated subsection 1520.9(a) (failure to *prevent* disclosure) only if the Employees actually had disclosed SSI, there is no evidence that TSA ever substantiated a violation of subsection 1520.9(a) or warned the Employer for an alleged violation of that subsection.

Indeed, the form and content of TSA's warning notice to the Employer creates so much ambiguity that it is impossible to rely on the statements in that notice for any guidance. TSA only informally warned the Employer that in its non-legal opinion, the content of the April 15, 2016 Chicago Tribune article indicated that the Employer may have failed to comply with its reporting requirements under 49 CFR § 1520.9(c). Regarding the Employees, TSA never formally stated that they had disclosed SSI. Around May 20, the Employer told the Region that TSA had advised it that the Employees had disclosed SSI. However, this is contradicted by a May 24 email from the TSA official to the Region, stating, "We *will* [emphasis added] also open investigations against . . . [Employees 1 and 2]." By May 31, the Region noted that "the TSA agent confirmed in a telephone conversation . . . that the employees did disclose [SSI], but would not identify specifically what [SSI] was disclosed in violation of federal law." However, TSA never issued a warning notice to either Employee. Because TSA has not provided the Board with any definitive guidance on whether the two Employees disclosed SSI, the Board must resolve for itself whether the two Employees did so.[14] As set forth below, they did not.

1. Employee 1 did not disclose SSI.

In her press interview during the March 31 strike, Employee 1 stated and spelled her name, said she is a security officer with the Employer, and described her job duties as follows: "guard entryways at the airport and assure that no one gets through that is not supposed to be there," "close and secure doors on the concourse," "screen IDs for employees' access," "log in vendors," and "keep the airport safe." The Employer claims that these disclosures violated 49 CFR § 15.5(a)(3), 15.5(b)(1)(i), 15.5(b)(1)(iii), 15.5(b)(8), 15.5(b)(9)(i), 15.5(b)(10), and 15.5(b)(11).[15] We disagree,

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[14] The Employer alleges violations of 49 CFR § 15 and § 1520. Because these two sections are virtually identical, we will address only the text of 49 CFR § 15.

[15] While the Employer asserts that Employee 1 violated 49 CFR § 15.5(b)(1)(iii), that subsection deals with "Maritime transportation security plans" and does not apply here. It is also impossible to see how Employee 1 could be said to have disclosed "security training materials," which 49 CFR § 15.5(b)(10) defines as: "Records created or obtained for the purpose of training persons employed by, contracted with, or acting for the Federal government or another person to carry out any aviation or

finding that Employee 1's statements merely recited widely known duties of security guards,[16] one of which is checking "credentials."[17]

49 CFR § 15.5(a)(3) defines SSI as "information obtained or developed in the conduct of security activities, including research and development, the disclosure of which the Secretary of DOT has determined would . . . be detrimental to transportation safety." Employee 1 never disclosed any information based on research and development, and TSA has not determined, on behalf of the Secretary of DOT, that she disclosed information that would be detrimental to transportation safety. Nor could Employee 1's comments be construed to have violated 49 CFR § 15.5(b)(1)(i), which states that SSI includes, "Any security program or security contingency plans issued, established, required, received, or approved by DOT or DHS, including—(i) Any aircraft operator or airport operator security program or security contingency plan under this chapter."[18] Reciting general security guard duties says little or nothing about the Employer's "program or plan" to secure O'Hare Airport and has no bearing on security contingency plans.

Nor did Employee 1 disclose "security measures," which 49 CFR § 15.5(b)(8) defines as "Specific details of aviation or maritime transportation security measures,

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maritime transportation security measures required or recommended by DHS or DOT." Nothing in the facts suggests that she disclosed such records.

[16] *See Security Guard*, WIKIPEDIA.ORG, https://en.wikipedia.org/wiki/Security_guard (last visited Sept. 28, 2016), ("Security personnel may also perform access control at building entrances and vehicle gates; meaning, they ensure that employees and visitors display proper passes or identification before entering the facility.").

[17] *See Access Control*, WIKIPEDIA.ORG, https://en.wikipedia.org/wiki/Access_control (last visited Sept. 28, 2016).

[18] 49 CFR § 15.3 states that a "security program means a program or plan and any amendments developed for the security of the following, including any comments, instructions, or implementing guidance: (1) An airport, aircraft, or aviation cargo operation; (2) A maritime facility, vessel, or port area; or (3) A transportation-related automated system or network for information processing, control, and communications." The same section states that a "security contingency plan means a plan detailing response procedures to address a transportation security incident, threat assessment, or specific threat against transportation, including details of preparation, response, mitigation, recovery, and reconstitution procedures, continuity of government, continuity of transportation operations, and crisis management."

both operational and technical . . . ."[19] Employee 1's general comments could not be construed as "specific details" of security measures under this provision, either as a matter of common sense or under settled canons of statutory interpretation. According to the principle of *noscitur a sociis*,[20] which the Board has long accepted and still employs,[21] when trying to understand the meaning of a term in a statute, the Board should not stretch for the outermost possible meaning of a statutory term, but rather, should understand the meaning of a term in relation to the terms around it. Here, a reasonable reading of the subsection's references[22] to deployments, numbers, and operations of Federal Air Marshals and Flight Deck Officers compels finding that the regulation prohibits the disclosure only of specific security details, not general job descriptions.

Employee 1 also did not disclose "security screening information," which 49 CFR § 15.5(b)(9)(i) defines as "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 . . . ." Employee 1 did not reveal procedures for *how* she performs screening but only *that* she performs screening.[23] Furthermore, subsequent subsections of § 15.5(b)(9)

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[19] 49 CFR § 15.5(b)(8) further defines security measures as: "(i) Security measures or protocols recommended by the Federal government; (ii) Information concerning the deployments, numbers, and operations of Coast Guard personnel engaged in maritime security duties and Federal Air Marshals, to the extent it is not classified national security information; and (iii) Information concerning the deployments and operations of Federal Flight Deck Officers, and numbers of Federal Flight Deck Officers aggregated by aircraft operator."

[20] *See Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) ("The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not inescapable, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to Acts of Congress.").

[21] *See Schwan's Home Service*, 364 NLRB No. 20, slip op. at 5 n.15, 19 n.41 (June 10, 2016); *Auto Workers Local 833 (Paper Makers Importing Co.)*, 116 NLRB 267, 272 (1956).

[22] *See* note 18, *supra*.

[23] 49 CFR § 15.3, clarifies that "[s]ecurity screening means evaluating a person or property to determine whether either poses a threat to security," and "SSI means sensitive security information, as described in § 15.5." Based on those definitions, it does not appear that stating one performs "security screening" would qualify as SSI,

suggest that screening information refers to information at a greater degree of specificity than general job descriptions, *e.g.*,

> (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 or equipment are used, only if determined by TSA to be SSI. (iv) Any security screener test and scores of such tests. (v) Performance or testing data from security equipment or screening systems. (vi) Any electronic image shown on any screening equipment monitor, including threat images and descriptions of threat images for threat image projection systems.

Employee 1's statements about her general job duties are not on par with the specific prohibitions (*e.g.*, on revealing detailed information about screening at specific locations) enumerated in these subsections.

Finally, under the Employer's interpretation of 49 CFR § 15.5(b)(11), an employee could not even state her name in connection with her job without disclosing SSI. The regulation states that "Identifying information of certain transportation security personnel" is SSI, specifically,

> (i) Lists of the names or other identifying information that identify persons as—(A) Having unescorted access to a secure area of an airport or a secure or restricted area of a maritime facility, port area, or vessel or; (B) Holding a position as a security screener employed by or under contract with the Federal government pursuant to aviation or maritime transportation security requirements of Federal law, where such lists are aggregated by airport; (C) Holding a position with the Coast Guard responsible for conducting vulnerability assessments, security boardings, or engaged in operations to enforce maritime security requirements or conduct force protection; (D) Holding a position as a Federal Air Marshal; or (ii) The name or other identifying information that identifies a person as a current, former, or applicant for Federal Flight Deck Officer.

It is well-settled law that the Board and courts should avoid interpreting statutes in a way that leads to an absurd result.[24] Here, the absurd result—not being able to state

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for the fact that persons are employed to perform security screening is a matter of common knowledge.

one's name—does not stem from the language of the regulation. Rather, it stems from the fact that the Employer has overlooked that the applicable parts of the regulation—15.5(b)(11)(i)(A) and (B)—only prohibit the disclosure of "lists of names" or other information that identifies "persons" in the plural, in contrast to subsection 15.5(b)(11)(ii), which is inapplicable. Employee 1 never provided a list of names or any name other than her own. She never claimed to have unescorted access to secure areas, never provided a list of security screeners "where such lists are aggregated by airport," never provided a list of Coast Guard or Federal Air Marshal employees, and never identified a current/former/applicant Federal Flight Deck Officer. Thus, she did not violate this regulation.

2. Employee 2 did not disclose SSI.

Employee 2 stated to reporters that she felt unprepared for an emergency, that "we don't have nothing much but a radio to communicate with command center," and "we need critical training to protect ourselves, other workers and passengers if there were to be an emergency." She also told a reporter about a training video she watched. In doing so, the Employer argues that Employee 2 violated 49 CFR § 15.5(b)(4)(ii), 15.5(b)(5), 15.5(b)(10), and 15.5(b)(11). As with Employee 1, none of these statements disclosed SSI.

49 CFR § 15.5(b)(4)(ii) states that SSI includes any "performance specification" for "(ii) Any communications equipment used by the Federal government or any other person in carrying out or complying with any aviation or maritime transportation security requirements of Federal law." Employee 2 did not reveal the performance specifications of her radio. Rather, she provided the fact that she has a radio. This information—that contractors are only expected to provide radios to unarmed security guards—is not redacted in the Employer's contract with the City and is also made available to the public through the City's website.[25]

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[24] *See, e.g.*, *United States v. Granderson*, 511 U.S. 39, 47 n.5 (1994) (dismissing an interpretation leading to an absurd result); *Retail Stores Employees Union, Local 400, Etc.*, 136 NLRB 414, 425 (1962) ("If the literal import of the words … leads to absurd results the words of the statute will be modified by the intention of the legislature."); *United Packinghouse Workers of America*, 89 NLRB 310, 318 (1950) (rejecting a statutory interpretation leading to "unreasonable and absurd results, plainly at variance with the policy of the statute as a whole"); *see also Greenville Cotton Oil Co.*, 92 NLRB 1033, 1072 n.27 (1950).

[25] Unarmed Security Guard Services for Chicago Airport System 62, *City of Chicago Vendor, Contract and Payment Webpage*, CITYOFCHICAGO.ORG, https://webapps1.cityofchicago.org/VCSearchWeb/org/cityofchicago/vcsearch/controller/contracts/display.do?contractNumber=14731 (last visited Sept. 28, 2016).

49 CFR § 15.5(b)(5) states that SSI includes any "vulnerability assessment" that is "directed, created, held, funded, or approved by the DOT, DHS, or that will be provided to DOT or DHS in support of a Federal security program." Employee 2 did not publicize any vulnerability assessment, let alone one directed, created, held, funded, or approved by DOT or DHS, as provided above. While she did state that she felt undertrained and underequipped, that statement of her personal opinion on the shortcomings of airport security did not violate this subsection, which mentions only officially prepared evaluations.

49 CFR § 15.5(b)(10) states that SSI includes certain "Security training materials."[26] The only security training material that Employee 2 referenced was a video the Employer required her to watch that DHS had released to the public over four years ago. Because this information had been disseminated to the public by DHS, it cannot be SSI. Indeed, CNN had reported in advance of Employee 2's comments that unarmed airport security guards are instructed to run and hide in the event of an active shooter situation at O'Hare Airport,[27] and this CNN story was widely rebroadcast prior to Employee 2's comments.[28]

Finally, 49 CFR § 15.5(b)(11) states that "Identifying information of certain transportation security personnel" is SSI. As explained above in the discussion of Employee 1, the Employer's interpretation of subsections 15.5(b)(11)(i)(A) and (B) to prohibit Employee 2's self-identification leads to an absurd result and overlooks the fact that this part of the regulation only prohibits the disclosure of "lists of names" or other information that identifies "persons." Employee 2 never provided a list of names or any name other than her own.

B. Employee 2's statements were not malicious defamation that lost the protection of the Act.

The Employer also asserts that Employee 2 lost the Act's protection by making maliciously false statements against it. Specifically, it notes that Employee 2 publicly

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[26] See note 14, *supra*, where the full text of Section 15.5(b)(10) is reproduced.

[27] *Guidance to unarmed aviation police: Run and hide*, CNN (Dec. 31, 2015), (https://amp.cnn.com/cnn/2015/12/30/us/unarmed-aviation-officers/index.html.

[28] *See, e.g.*, AWR Hawkins, *Chicago Airport Police Officers Directed to 'Run And Hide' In Event of Active Shooter*, BRIETBART.COM (Jan. 4, 2016), http://www.breitbart.com/big-government/2016/01/03/airport-police-officers-directed-run-hide-event-active-shooter/amp/.

stated she had not received a raise in five years when, in fact, she had received an annual raise of 20 cents per hour for each of five years, as guaranteed by her employment contract. The Employer's defense is without merit.

Employee statements in the context of a labor dispute are unprotected only if they are maliciously untrue, that is, if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity.[29] The mere fact that statements are false, misleading, or inaccurate is insufficient to demonstrate that they are maliciously untrue.[30] The Board and courts also recognize that during a labor dispute, employees often use hyperbole,[31] figurative speech,[32] and altogether inaccurate language[33] to describe their experiences, and although these claims often prove to be untrue, they are not unprotected so long as they are truthful from the employee's perspective.[34] Indeed, as the Board recently stated, "[a]ny arguable departures from the truth . . . [that are] no more than good-faith misstatements or

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[29] *See, e.g., Valley Hosp. Med. Ctr., Inc.*, 351 NLRB 1250, 1252 (2007), *enfd. sub nom., Nevada Service Employees Local 1107 v. NLRB*, 358 F. App'x 783 (9th Cir. 2009); *see also Linn v. Plant Guard Workers Local 114*, 383 U.S. at 61–63.

[30] *See MasTec Advanced Technologies*, 357 NLRB 103, 107 (2011), *enfd. sub nom.*, *DIRECTV, Inc. v. NLRB*, __ F.3d __, 2016 WL 4933174 (D.C. Cir. Sept. 16, 2016).

[31] *See Steam Press Holdings, Inc. v. Hawaii Teamsters Local 996*, 302 F.3d 998, 1006-07 (9th Cir. 2002) (holding that during labor campaigns, rhetorical hyperbole blurs figurative expression and expressions of objective fact; local union president's statements at union meeting that employer's owner was "making money" and "hiding money" in a related holding company were not defamatory), *cert. denied*, 537 U.S. 1232 (2003).

[32] *See id.*

[33] *See Valley Hospital Medical Center*, 351 NLRB at 1252–53 (finding that biased, inaccurate statements are not maliciously false if an employee made the assertions in good faith, based on his personal experiences).

[34] *See id.* at 1253 (finding that inaccurate employee statements "based . . . on her own experiences and the experiences of other [employees] as related to" the employee were not maliciously false and remained protected).

incomplete statements [are not] malicious falsehoods justifying removal of the Act's protection."[35]

Here, Employee 2's statement that she and her coworkers had not received a pay raise in five years was nothing more than a good-faith misstatement or incomplete statement that was not maliciously false.[36] At least one news outlet reported that she also said, "[w]hen their paychecks did get a bump, it was a mere 20 cents." Thus, her complete statement, which was not reported in its entirety by every news outlet, makes clear that the claim that she had never received a raise was not meant to be taken literally. Rather, Employee 2 spoke figuratively in implying that she and her coworkers had only received a de minimis, meaningless raise, and spoke truthfully in stating that they had received a "mere 20 cent" raise. Thus, Employee 2 retained the protection of the Act.

II. In the Alternative, the Employer Violated Section 8(a)(1) and (3) Under *Wright Line* Because It Discriminatorily Terminated the Two Employees for Their Union Activities.

Because the evidence here establishes that the Employer knew of the two Employees' organizing activities and creates the strong inference that it discharged them in retaliation for those activities, it also violated Section 8(a)(1) and (3) under a *Wright Line* analysis.[37] The Board applies the two-part *Wright Line* analysis to determine whether an employer who asserted a legitimate reason for an adverse personnel action actually retaliated against its employee's union or protected concerted activities.[38] Under *Wright Line*, to show that an employer violated Section 8(a)(1) and (3) by terminating an employee, the General Counsel must establish that

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[35] *MasTec Advanced Technologies*, 357 NLRB at 108. *See also Jacobs Transfer, Inc.*, 201 NLRB 210, 218 (1973) ("[I]n determining whether [statements] are protected by the Act, a good-faith belief supported by colorable facts is in my opinion all that is necessary to establish such protection. A union member seeking to exercise his right to criticize the union administration and to supplant it does not speak at his peril. He is permitted reasonable latitude, even for error, though that error may be hurtful to others, if his utterances are in good faith, on colorable ground, and not deliberately or maliciously false.").

[36] *See MasTec Advanced Technologies*, 357 NLRB at 108.

[37] 251 NLRB at 1089.

[38] *Id.*; *see also Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 4, 6 (Feb. 20, 2014).

protected conduct was "a motivating factor" for the termination.[39] In order to do so, the General Counsel must demonstrate that: (1) the discriminatee engaged in union or protected concerted activities; (2) the employer knew of those activities; and (3) the employer's action was motivated by union animus.[40] After this showing, the burden shifts to the Employer to demonstrate that it would have terminated the Employees even in the absence of their protected conduct.[41]

The General Counsel can establish each of the *Wright Line* elements here. There is no dispute that the two Employees engaged in Union and protected concerted activities by supporting the one-day strike and speaking to media outlets about their working conditions and organizing campaign, and that the Employer knew about those activities. Extensive circumstantial evidence also strongly supports the inference that the Employer discharged the Employees because of its animus against those activities. The General Counsel can use circumstantial evidence to establish animus, including the timing of the discharges, the presence of contemporaneous unfair labor practices, and evidence showing that the reasons given for the discharge were a pretext.[42] Regarding this last factor, where an employer's proffered non-discriminatory motivational explanation is false, even in the absence of direct evidence of motivation, the trier of fact may infer an unlawful motivation.[43] Several factors can show that an employer is advancing a false reason for a discharge, including proffering a non-discriminatory reason that is not true, subjecting the employee to disparate treatment, or providing shifting explanations for the discharge.[44]

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[39] *Wright Line*, 251 NLRB at 1089; *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 4.

[40] *See, e.g.*, *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 4.

[41] *See id.*, slip op. at 6.

[42] *See id.,* slip op. at 4.

[43] *See, e.g.*, *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *see also Aliante Casino & Hotel*, 364 NLRB No. 78, slip op. at 1 & n.4, 13–14 (Aug. 25, 2016).

[44] *See, e.g., Cincinnati Truck Center,* 315 NLRB 554, 556–57 (1994) (finding employer's reason for termination "totally baseless" because employee could not have engaged in alleged insubordination where he had followed supervisor's instructions), *enfd. sub nom.*, *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997) (unpublished table decision); *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 4–5.

Here, the timing of the terminations, i.e., only two weeks after a highly publicized one-day strike during which these two Employees spoke with the media about their work-related complaints, strongly supports a finding of Union animus.[45] Moreover, the Employer's discriminatory motive is revealed by evidence showing that the reason it provided for the discharges is a mere pretext. Here, the Employer claims to have terminated the Employees because of their unauthorized disclosure of SSI. As noted in Section I.A. above, the Employees did not disclose SSI. Even more telling is that if the Employer in fact had believed that there was an unauthorized disclosure of SSI, it was required under the federal transportation regulations to report the disclosure to the TSA.[46] The Employer did not report the disclosure to the TSA, but rather terminated the Employees, which was *not* required under federal or state law. That conduct undermines both any asserted good-faith belief that the Employees disclosed SSI in the first place, and the Employer's claim that it adhered fastidiously to the law in terminating the Employees.[47] The legitimacy of the Employer's proffered reason for the discharges is further called into question by the fact that the Employer has not provided comparative data demonstrating that it has summarily terminated other security guards for similar assumed disclosures of SSI. Given that the Employer claims to define SSI so broadly that an employee stating her name or identifying herself as a security officer is deemed to have made an unauthorized disclosure, it is implausible that the Employer would not have disciplined other employees for these disclosures. In short, the Employer's animus here may reasonably be inferred from both the timing of and pretextual reason offered for the discharges.

For these reasons, and as described in Section I.A. above, the Employer cannot meet its burden in proving that it would have terminated the Employees for a legitimate reason (i.e., the improper release of SSI or malicious defamation) even in the absence of their Union or protected concerted activities.

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[45] *See, e.g., Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 4 (citing *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004) ("[T]he timing of an employer's action in relation to known union activity can supply reliable and competent evidence of unlawful motivation.")).

[46] 49 CFR § 1520.9(c).

[47] Indeed, the Employer asserted that "[i]t would be reckless (and perhaps illegal)" to not terminate the Employees.

III. The Employer Violated Section 8(a)(1) by Maintaining an Overbroad Rule and Violated Section 8(a)(1) and (3) Under *Continental Group* by Terminating the Employees Pursuant to that Rule.

The Employer's policy on employee communications with the media is stated as follows in its post orders: "*All USC employees are not permitted to speak to the media at any time. If media arrives at your post, immediately contact your supervisor who will in turn contact the OOC.*" The post order elaborates that "[f]ailure to follow post orders can and will result in disciplinary action and or termination" and that "[p]ost orders are to be strictly adhered to." We conclude that the italicized portion of the Employer's policy is facially unlawful because employees would reasonably construe its prohibition against them speaking to the media "at any time" as prohibiting Section 7 activity. Employees have a statutory right to speak publically about their complaints or concerns with their terms and conditions of employment, including to the press, without employer authorization.[48] This rule prohibits such activity by directing employees to immediately contact their supervisors if media arrives at their posts. Taken as a whole, the Employer's policy would have a severe chilling effect on the right of its employees to solicit third party support for their labor dispute, and hence violates Section 8(a)(1).

Under *Continental Group*, an employer violates Section 8(a)(1) or (3) by discharging or otherwise disciplining an employee for violating an unlawfully overbroad rule when the employee was engaged in protected conduct, unless the employer can establish that the employee's conduct interfered with production or operations and that this was the actual reason for the discipline.[49] Here, the

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[48] *See, e.g.*, *Quicken Loans,* 359 NLRB 1201, 1201 n.3, 1205 (2013) (rule requiring employees to not "publicly criticize, ridicule, disparage or defame" employer found unlawfully overbroad), *affd. and adopted,* 361 NLRB No. 94, slip op. at 1 n.1 (Nov. 3, 2014), *enfd.,* __ F.3d __, 2016 WL 4056091 (D.C. Cir. July 29, 2016); *DirecTV U.S. DirecTV Holdings*, 359 NLRB 545, 545–46 (2013) (finding unlawful rule stating "[e]mployees should not contact or comment to any media about the company unless pre-authorized by [p]ublic [r]elations"), *affd. and adopted,* 362 NLRB No. 48 (March 31, 2015), *enf. denied on other grounds,* 2016 WL 3074408 (5th Cir. May 31, 2016); *Trump Marina Casino Resort*, 354 NLRB 1027, 1027 n.2 (2009) (finding unlawful "broad rules prohibiting employees from releasing statements to the news media without prior approval, and authorizing only certain representatives to speak with the media"), *affd. and adopted* 355 NLRB 585 (2010), *enfd.* 435 Fed. Appx. 1 (D.C. Cir. 2011).

termination letters that the Employer gave to each Employee noted that they had violated the overbroad rule in the post orders prohibiting them from communicating with the media. As discussed above, the two Employees were engaged in union and protected concerted activities when they supported the organizing campaign by participating in the one-day strike and speaking to the media in an effort to improve their working conditions. Thus, their terminations for violating the overbroad rule were unlawful unless the Employer makes out an affirmative defense that their conduct interfered with security operations at the airport and that this interference was the reason for the discipline.[50] The Employer has not come forward with any evidence to show that the two Employees' statements to the media interfered with its ability to provide security at O'Hare. As previously set forth in Section I.A., the Employees did not disclose SSI. Moreover, the Employees' termination letters merely listed their violation of the overbroad media policy, and there is no evidence that the Employer ever informed the Employees of how that violation interfered with its ability to provide security services at O'Hare.[51]

Based on the preceding analysis, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) and (3) by unlawfully terminating Employees 1 and 2, and by maintaining an overbroad ban on employees speaking with media.

/s/
B.J.K.

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[49] *Continental Group, Inc.*, 357 NLRB 409, 412 (2011). The Board has applied its rule from *Continental Group* to also find violations of Section 8(a)(3). *See, e.g., Grill Concepts Services d/b/a Daily Grill*, 364 NLRB No. 36, slip op. at 3 (June 30, 2016).

[50] *See Continental Group, Inc.,* 357 NLRB at 412.

[51] *See id.* ("[A]ssuming that the employer provides the employee with a reason (either written or oral) for its imposition of discipline, the employer must demonstrate that it cited the employee's interference with production and not simply the violation of the overbroad rule.").