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

DATE: June 27, 2012

TO: William A. Baudler, Regional Director
Region 32

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

SUBJECT: Propark d/b/a Expresso Airport Parking
Cases 32-CA-068927 and 32-CA-073418

506-4067-9000-0000
506-4067-9500-0000
506-4067-9700-0000
512-5030-4020-0000
512-5030-4090-0000
512-5036-6735-0000
512-7550-0143-0000

The Region submitted this case for advice on whether employees of an airport parking service were engaged in protected concerted activity when they posted flyers on their vehicles and distributed those flyers to the public stating that the California Environmental Protection Agency deemed the land on which they worked contaminated with various dangerous chemicals and ordered cleanup, that exposure to the chemicals causes adverse health effects, and that the Employer needed to clean up its land and the way it treats its workers and the community. We conclude that it would not effectuate the policies and purposes of the Act to issue a complaint in this case where there is a very close question of whether the employees' flyer was so disloyal as to lose protection under *Jefferson Standard*,[1] and no employee has been disciplined for distributing or posting the flyer. Accordingly, absent withdrawal, the Region should dismiss the allegations that the Employer unlawfully interrogated and threatened to discipline employees if they continued distributing the flyer and unlawfully promulgated a rule prohibiting employees from distributing or posting the flyer.

FACTS

Background

Propark d/b/a Expresso Parking ("Employer") operates a large parking lot outside the Oakland International Airport. The Employer's facility is located on land owned

[1] *NLRB v. IBEW Local 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953).

by Redemco, LLC, a land holding company that is wholly owned by Anne Becher-Smead. The prior owner of the property manufactured rocket nozzles and aircraft parts, and left numerous residual toxic substances on the site. The State of California Environmental Protection Agency ("CA EPA") concluded in a June 2004 report ("2004 report") that the site was contaminated with the following substances: dichloroethane, dichloroethylene, tetrachloroethane, trichloroethylene, and vinyl chloride. The 2004 Report also noted that these contaminants can cause extreme side effects such as nausea, vomiting, weakness, tremor, cramps, unconsciousness, numbness, headaches, dizziness, vertigo, irregular heart beat, fatigue, blurred vision, irritation of the eyes, nose, and throat, liver and kidney damage, and cancer. The CA EPA required the land owner to take remedial action and continuously monitor toxin levels throughout the course of the development and use of the land. According to an independent monitoring agency's May 2009 report, the land owner has complied with the CA EPA's order, but it is unclear from the report whether the CA EPA has deemed the site remediated and safe for use, or whether remediation efforts are ongoing. Employees continue to witness individuals taking soil samples from the property.

In mid-2009, the Teamsters Local 853 ("Union") successfully organized the Employer's employees. Some employees supported the Union during the organizing campaign primarily because they were concerned about the toxic chemicals present on the Employer's property and felt they were experiencing side effects.

The parties began bargaining in 2010 and have not yet reached agreement on an initial contract. During their initial bargaining sessions, several employees voiced concerns about the contaminants. In response, the Employer simply stated that it was compliant with its legal obligations, but never stated that it did not own the land or that it was not responsible for the clean up. Moreover, because Becher-Smead visits the Employer's facility and meets with employees and the Employer's managers, and based on representations by Employer officials that it was in a joint venture with Becher-Smead, Union representatives gained the impression that the Employer was responsible for remediating the property.

The employees continued to voice their complaints about the contaminants to the Union Business Representative and claimed that they felt symptoms related to the contaminants, such as rashes, headaches, and nausea. As a result, in February 2011,[2] the Business Representative requested a California OSHA inspection. The California OSHA inspection did not address the presence of toxins on the property because that issue was within the CA EPA's jurisdiction. The Union never proposed any particular course of action that the Employer might take to improve conditions for employees who continue to complain about the side effects they experience.

[2] All dates are in 2011 unless otherwise indicated.

The Employees' Flyer

In May, the Union drafted a flyer regarding the toxic waste on the Employer's premises. The flyer contained large bold print at the top left corner in a banner stating "CAUTION! Toxic Waste?" To the right of that text was a headline in bold and several times larger than any other text: "Nausea Headaches Vomiting[.]" Below that headline appeared the following text in small print:

> This land was deemed contaminated with hazardous waste by the California Environmental Protection Agency, which ordered cleanup because of the risk to human health and/or the environment: Hazardous chemicals such as 1,2-Dichloroethylene, Trichloroethylene, and Vinyl Chloride were found at this site that exceeded standards for human exposure.
>
> Acute exposure to these chemicals can cause headaches, weakness, blurred vision, vertigo, dizziness, tremors, nausea, vomiting, abdominal pain, cramps, numbness, tingling of the extremities, and eventually unconsciousness.
>
> Not only does Expresso Parking need to clean up its land, Expresso Parking management needs to clean up the way it treats its workers and the community.

Underneath that text was the large, bolded sentence "What's gone wrong at Expresso Parking?" alongside a picture of a gas mask. The flyer purported to be authored by the "Coalition for Safe Environment and Good Jobs." The following disclaimer appeared at the bottom of the flyer in small print: "This leaflet is not intended to nor does it ask any employee to cease work or delivery."

After drafting the flyer, the Business Representative emailed copies to the Employer's Attorney and President. The Employer's Attorney called the Business Representative and told him that the Employer had complied with its legal obligations and would sue for defamation if employees distributed the flyer. Despite the Employer's assertions to the contrary, the Union maintains that at no time during this conversation did the Employer state that it did not own the land or that it had no responsibility for cleaning up the land.

Although the Business Representative delayed distributing the flyer, he eventually gave in to the employees' requests that the Union do something about the toxins issue. Thus, on November 7, Union representatives distributed the flyer to customers entering and exiting the facility, just outside the entrance.

Additionally, five employees taped the flyers all around their car windows while their cars were parked in the employee parking lot, located on the Employer's property and separate but visible from the customer parking area. Around November 12, employees began distributing the flyer to customers who were entering and exiting the Employer's facility, and continued to do so every weekend thereafter. There is no evidence that employees leafleted during working time or in work areas. The employees distributed the flyer in order to get the Employer to discuss the contamination issue with them.

The Employer's Response to Distribution of the Flyer

On November 13, the Employer's General Manager called the Shop Steward into his office. The General Manager asked him why he was handing out flyers to customers and employees. The Shop Steward responded that there are a lot of toxins at the site, the Employer did not keep employees apprised of cleanup efforts or potential adverse health effects, and there were not even signs posted stating that the site was contaminated with carcinogens. The General Manager stated that he would contact Human Resources, but that the Union and employees needed to stop distributing the flyer. The Shop Steward replied that they would not stop distributing the flyer until the Employer gave employees proof that the land was safe. The General Manager responded that the Employer was losing customers, and the Shop Steward replied that the employees were not worried about the Employer losing customers or money and were instead worried about their lives and customers' lives.

On November 14, the Employer distributed a memo entitled, "Prohibition Against Distributing and/or Posting Defamatory Material Concerning Our Business on ProPark Property." The memo read in relevant part:

> Recently, we have needed to address a situation involving employees who have been posting literature on their personal vehicles while parking in our parking lot. This literature untruthfully indicates that our parking lot is contaminated with toxic waste and is designed to encourage customers to park elsewhere. Obviously we are concerned that the information contained in this literature is false and is intended to harm our business and so it is important to communicate to everyone that the distribution and/or posting of such false and defamatory information anywhere within our property is prohibited. This includes posting or attaching the literature to your own personal vehicle and parking it on our property. . . .
>
> Please be advised that if we find that any employee acts in violation of the directives contained in this memorandum, you will leave us with no choice but to take appropriate disciplinary action for such insubordination, up to and including the termination of your employment. . . .

The Employer has not disciplined any employee for distributing or posting the flyer.

ACTION

We conclude that because the issue of whether the flyer was "so disloyal" as to lose protection of the Act is a close one, no employee has been disciplined for distributing or posting the flyer, and the employees will be able to publicize their dispute effectively by making minor changes to the flyer, it would not effectuate the policies and purposes of the Act to issue complaint in this case. Thus, the Region should dismiss all allegations, absent withdrawal.

Employees are protected under the "mutual aid or protection" clause of Section 7 when they seek to "improve their lot as employees through channels outside the immediate employee-employer relationship."[3] The Board has held that Section 7 protects employee communications to third parties in an effort to obtain their support where "the communication indicate[s] it is related to an ongoing dispute between the employees and the employers and it is not so disloyal, reckless, or maliciously untrue as to lose the Act's protection."[4]

1. The Employees' Flyer Was Related to an Ongoing Labor Dispute.

The threshold inquiry in assessing whether employees' communications to third parties are protected is whether the communication is related to an ongoing labor dispute between the employees and their employer. Section 2(9) of the Act defines "labor dispute" very broadly to include "any controversy concerning terms, tenure or conditions of employment...." Further, it is well established that controversies over workplace health and safety constitute labor disputes.[5]

In determining whether employees' communications to third parties have a sufficient nexus to a labor dispute, the Board looks to the subject matter of the

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[3] *Eastex, Inc. v. NLRB,* 437 U.S. 556, 565 (1978) ("labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context").

[4] *Mastech Advanced Technologies*, 357 NLRB No. 17, slip op. at 5 (July 21, 2011). *See also Endicott Interconnect Technologies, Inc.*, 345 NLRB 448, 450 (2005) (citation omitted), *enforcement denied on other grounds,* 453 F.3d 532 (D.C. Cir. 2006).

[5] *See, e.g., Jasper Seating Co.*, 285 NLRB 550, 550 (1987) (labor dispute existed by virtue of band saw operators' complaints that employer's policy of leaving overhead shop door open compromised their health and safety by exposing them to cool air drafts and sawdust), *enforced*, 857 F.2d 419 (7th Cir. 1988).

communication and the context in which it was made.[6] For example, in *Valley Medical Hospital Center*, the Board held that a nurse's story on a union website that appeared one day after a union rally regarding staffing issues was related to the ongoing labor dispute, even though the story did not mention the labor dispute or attempt to elicit public support for the union and focused instead on the effect staffing levels had on patient care.[7] The Board reasoned that "[i]n the health care field, patient welfare and working conditions are often inextricably intertwined," and it was clear from the context of the story that it related to a labor dispute and/or employees' terms and conditions of employment.[8]

We conclude that the Union's flyer in this case satisfies this threshold inquiry. The parties undeniably had an ongoing labor dispute. The employees' concern about the toxic substances on the property predate the Union organizing campaign and was one of the initial reasons that many employees selected Union representation. Employees complained to Union officials and the Employer about the side effects they believed they were experiencing, and raised the issue during bargaining negotiations. And the Union requested that the CA OSHA inspect the premises in an effort to address those concerns. Further, the subject of the flyer—toxic chemicals at the Employer's place of business—is "inextricably intertwined" with employee working conditions. As in *Valley Hospital*, where the Board found that the nurse's online article about the effect of staffing levels on patient care was sufficiently

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[6] *See, e.g., Valley Medical Hospital Center*, 351 NLRB 1250, 1253-54 (2007) (nurses' third-party statements regarding staffing levels/nurse workloads protected where they were connected to ongoing bargaining over this issue and called for improved working conditions), *enforced sub nom. Nevada Service Employees Union, Local 1107 v. NLRB*, 358 F. App'x 783 (9th Cir. 2009); *Emarco, Inc.*, 284 NLRB 832, 833-334 (1987) (employees' response to general contractor's inquiry about why the employees were on strike, which included statements that their employer, a subcontractor for the general contractor, did not pay its bills, was "no damn good," and could not "finish the job," were "made in context of and expressly related to labor dispute"); *Allied Aviation Service*, 248 NLRB 229, 231 (1980) (steward's letters to employer's customers emphasizing safety concerns protected because they were related to ongoing grievances over employee discipline even though parties did not discuss safety aspect of labor dispute during grievance process; the key is whether communication is "part of and related to" an on-going labor dispute), *enforced mem.* 636 F.2d 1210 (3rd Cir. 1980); *Richboro Community Mental Health Council*, 242 NLRB 1267, 1268 (1979) (criticism of employer's decreased quality of service originated with, and made in letter protesting, discharge of coworker).

[7] 351 NLRB at 1250-51, 1253.

[8] *Id.* at 1252.

connected to an ongoing labor dispute about nurse workloads,[9] the statements here about the presence of toxic chemicals on a job site and their effects upon the Employer's customers and employees were sufficiently connected to the ongoing labor dispute over employees' health and safety to satisfy this element of the Board's test.

2. The Flyer Was Not Reckless or Maliciously Untrue.

The Board has held that communications to third parties are unprotected if they are "maliciously untrue," defined as "made with knowledge of their falsity or with reckless disregard of their truth or falsity."[10] Significantly, 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.[11]

Reckless disregard of truth or falsity has been defined as having "serious doubts as to the truth" of a statement or having a "high degree of awareness of...probable falsity."[12] Thus, an incorrect perception or mistake does not result in a loss of protection.[13] Moreover, if an employee reasonably relied in good faith on the reports of others, the Board will not find "reckless disregard" notwithstanding the

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[9] *Id.* at 1253.

[10] *Id.* at 1252.

[11] *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.") (citing cases); *Valley Hospital Medical Center*, 351 NLRB at 1252-53 ("in 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"). *See also Letter Carriers v. Austin*, 418 U.S. 264, 285-86 (1974) (union newsletter accusing striker replacements of being traitors is "merely rhetorical hyperbole . . . commonplace in labor disputes and protected by federal law"); *Jolliff v. NLRB,* 513 F.3d 600, 609-17 (6th Cir. 2008); *DHL Express, Inc.*, 355 NLRB No. 144, slip op. at 14 (2010).

[12] *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

[13] *See, e.g., Tradewest Incineration,* 336 NLRB 902, 907 (2001) (employee who posted flyer containing erroneous information about a new employee's wages did not lose protection even though his perception was incorrect, absent evidence information was deliberately or maliciously false); *Ben Pekin Corp.,* 181 NLRB 1025, 1025 (1970) (employee's assertion to union business agent that the employer must have paid off

employee's failure to independently verify the accuracy of the information.[14]

Virtually all of the statements made in the flyer at issue here are true. Specifically, the CA EPA's report found that the property was contaminated with a host of toxins, including those referenced in the flyer, noted the health effects those toxins could cause, and ordered that the land be cleaned up. The statement the Employer argues is untrue and therefore defamatory—that the Employer needs to clean up its land—when read in context, arguably is a statement of opinion, incapable of being proved true or false in any objective sense and akin to the "loose, figurative, or hyperbolic language" that is protected by the Act.[15] To the extent that the flyer conveyed the false impression that the Employer owned or was responsible for the land on which its business was situated, the Employer has not demonstrated that the statements conveying that impression were maliciously untrue. The employees reasonably believed, based upon the Employer's statements that it was in a joint venture with Becher-Smead and their reliance upon Union officials, that the Employer owned or was responsible for the land on which they worked. Moreover, the employees had no obligation to independently investigate the statements in the handbills before distributing them. It is not even clear that the Union knew that the Employer did not control the property on which it was situated; the Union maintains that the Employer never imparted that information. Thus, there is no evidence that

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the business agents rather than giving the janitors their contractually-guaranteed raise did not lose the protection of the Act where it was based on a genuine mistake of fact), *enforced*, 452 F.2d 205 (7th Cir. 1971). *Cf. Sprint/United Management Co.*, 339 NLRB 1012, n.2, 1018-19 (employee's statements in email to coworkers about anthrax in one of employer's buildings were unprotected because some of the statements were made with either knowledge of their falsity or reckless disregard for the truth); *Pizza Crust Co.*, 286 NLRB 490, 505–07 (1987) (where employee's statements were fabricated out of the whole cloth and employee did not simply pass on a rumor, employee's statement to another employee that the employer fixed its books was unprotected because the employee made the statement with knowledge of its falsity or reckless disregard for the truth), *enforced*, 862 F.2d 49 (3d Cir. 1988).

[14] *KBO, Inc.*, 315 NLRB 570, 571, n.6 (1994) (employee who relied in good faith upon information from a union official did not act with reckless disregard of the truth), *enforced mem.*, 96 F.3d 1448 (6th Cir. 1996). *Cf. HCA/Portsmouth Regional Hospital*, 316 NLRB 919, 919 & n.4 (1995) (if employee had reasonably believed the rumor was true, "she would not have forfeited the Act's protection by good-faith repetition of the rumor even if she failed to investigate its accuracy").

[15] *DHL Express, Inc.*, 355 NLRB No. 144, slip op. at 14, quoting *Jolliff*, 513 F.3d at 609, 610.

any of the employees who distributed the handbills did so with knowledge of falsity or reckless disregard of the truth.

3. The Communications Were Arguably "So Disloyal" as to Lose the Protection of the Act.

Under current Board law, the overarching inquiry for determining whether appeals to third parties are "so disloyal" is whether the statements are designed to publicly harm the company in a manner that does not further the employees' position in the dispute.[16] An examination of the following factors helps in determining how closely tied a communication is to the labor dispute and whether the communication furthers resolution of the labor dispute: whether the communication specifically references the labor dispute; whether the communication seeks to enlist sympathy or support for the employees' cause; and whether the communication is not otherwise so incommensurate with the grievances as to show that the purpose was to harm the employer in a manner unrelated to the labor dispute. Although there is some overlap between the determination of whether the communication specifically references a labor dispute and the threshold inquiry of whether the communication is related to and in the context of an ongoing labor dispute, this aspect of the test goes to a different inquiry. That is, how closely the communication references the labor dispute assists the Board in determining whether its purpose was to harm the employer in a manner unrelated to the labor dispute. Furthermore, where the communication clearly references the labor dispute, the effect of disparaging statements is lessened because third parties view them through the prism of labor strife.[17]

Applying these principles, the Board held in *Allied Aviation Service Company of New Jersey, Inc.* that a steward did not lose the protection of the Act when he sent letters related to the subject matters of grievances to airline customers that the employer serviced, presenting the employees' concerns, seeking the recipients' "assistance," and asking them to express their opinions on the matter to the employer's management.[18] One letter asserted that the employer was jeopardizing airline passenger safety by ordering employees to start their carts while they were hooked up to planes, while the second letter alleged that the employer was

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[16] *See generally* General Counsel's Position Statement to the Board on Remand in *TNT Logistics North America, Inc.*, Case 8-CA-33664, filed July 24, 2008, at 13-14. In its decision on remand, the Board did not address the "so disloyal" standard. *TNT Logistics North America, Inc.*, 353 NLRB 449 (2008).

[17] *See Sierra Publishing Co. v. NLRB,* 889 F.2d 210, 217 (9th Cir. 1989) ("third parties who receive appeals for support in a labor dispute will filter the information critically so long as they are aware it is generated out of that context").

[18] 248 NLRB 229, 229 n. 1 (1980), *enforced mem.*, 636 F.2d 1210 (3d Cir. 1980).

compromising passenger safety by failing to establish job qualifications and classifications for the auto-gas site where employees fueled the airplanes.[19] The Board rejected the employer's argument that the letters lost protection because of their disloyalty notwithstanding that airline safety was a very delicate issue and that the employer was sensitive to the employees raising those issues to its customers.[20] Similarly, in *Professional Porter & Window Cleaning Co.*, the Board found that housekeeping employees' statements in a letter to their employer's customer that its facility was "deteriorating" because of the quality of equipment and supplies that their employer provided to them was not so disparaging as to lose protection since the clear purpose of the letter was to get the customer to remedy their working conditions rather than to have the customer cancel its contract with the employer.[21]

By contrast, in *Five Star Transportation*, the Board found that letters sent by bus drivers to the school board in an effort to dissuade the board from replacing their employer with a new contractor were unprotected where those letters disparaged the contractor's business reputation "in ways that go beyond complaints about terms and conditions of employment."[22] The letters characterized the contractor as "so reckless that they employed alcohol abusers, drug offenders, child molesters, and persons that have had their licenses suspended."[23] The Board found that the drivers had used "inflammatory language" in the context of incidents not related to the drivers' concerns about their terms and conditions of employment, and thus "in a manner that suggested that the drivers intended to damage the Respondent's reputation [,]" rather than to advance their position in the labor dispute.[24] Likewise, in *Mountain Shadows Golf Resort*, the Board found that an employee who distributed flyers at a city council meeting advocating the replacement of his employer with a competitor as operator of a municipal golf course was so disloyal as to lose protection.[25] The flyer "made no mention of the labor dispute, the Union, management's treatment of employees, or any issue having anything discernibly to do with employees' terms and

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[19] *Id.* at 230-31.

[20] *Id.* at 231.

[21] 263 NLRB 136, 138-39 (1982), *enforced mem.*, 742 F.2d 1438 (2d Cir. 1983).

[22] 349 NLRB 42, 45 (2007), *enforced*, 522 F.3d 46, 53 (1st Cir. 2008).

[23] *Id* at 46.

[24] *Ibid.*

[25] 330 NLRB 1238, 1241 (2000), *supplemented,* 338 NLRB 581 (2002), *petition for review denied sub nom. Jensen v. NLRB,* 86 F. App'x 305 (9th Cir. 2004).

conditions of employment."[26] Instead, the flyer addressed the impact of the employer's capital investments and other business practices on the quality of service provided, and "bore no indication that it was written by or on behalf of any employee" or that issues were raised "as part of an effort to enlist public or governmental sympathy or support for the maintenance employees' collective bargaining efforts."[27]

Here, the employees' flyer arguably was not so disloyal as to lose the protection of the Act under the test applied by the Board. First, the flyer expressly referenced employees' working conditions by describing how the land that the employees worked on was contaminated with toxins and urging that the Employer clean up the land and "clean up the way it treats its workers. . . ." Additionally, the toxic waste issue addressed in the employees' flyer was related to complaints and concerns that employees had previously brought to the Employer's attention, and did not "attack... public policies of the company [that] had no discernible relation to that controversy."[28] Second, the language, tone, and graphics displayed in the flyer were not so incommensurate with the grievances that the employees presented to the Employer so as to establish that the employees' purpose was to harm the Employer in a manner unrelated to the labor dispute and not to further the resolution of that dispute.

On the other hand, an argument also could be made that the flyer was so disparaging that the employees who distributed it lost protection. The flyer did not indicate that it was written by the Union or clearly convey that it was written on behalf of the employees and instead purported to be sponsored by a fictitious "Coalition for Safe Environment and Good Jobs." Moreover, the flyer did not specifically request any action on the part of the public or seek support for the employees in an ongoing labor dispute. And the flyer significantly disparaged the very product the Employer offers its customers—a safe place to park near the airport.

Accordingly, because the issue of whether the flyer was "so disloyal" as to lose protection is such a close one, no employee has been disciplined for distributing or posting the flyer, and employees remain free to amend the flyer when they make

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[26] *Id.*

[27] *Id.*

[28] *Jefferson Standard*, 346 U.S. at 476.

further communications to third parties, it would not effectuate the policies and purposes of the Act to issue complaint in this case. Therefore, the Region should dismiss all allegations, absent withdrawal.

/s/
B.J.K.