## No. 06-2434

# UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN JOLLIFF and STEVEN DANIELS

**Petitioners** 

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

TNT LOGISTICS OF NORTH AMERICA, INC.

Intervenor

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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# STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of John Jolliff and Steven

Daniels (collectively "Petitioners") to review an order of the National Labor

Relations Board ("the Board"). The Board had jurisdiction over the proceeding

below pursuant to Section 10(a) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 160(a), which empowers the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction pursuant to Section 10(f) of the Act, 29 U.S.C. § 160(f), because the unfair labor practices alleged in the complaint occurred in East Liberty, Ohio.

The Board's Decision and Order was issued on July 24, 2006, and is reported at 347 NLRB No. 55, 2006 WL 2078837. (D&O 1-11, JA 5-15.)<sup>1</sup> That order is final under Section 10(f) of the Act. The petition for review, filed on November 15, 2006, was timely, for the Act places no time limitation on such filings. The respondent in the underlying unfair labor practice proceeding, TNT Logistics of North America, Inc. ("the Company"), has intervened in support of the Board's request to deny the petition for review.

<sup>&</sup>lt;sup>1</sup> Pursuant to this Court's Rules 28, 30, and 31, filing of the joint appendix was deferred until after the filing of proof briefs. Record references in this final brief are to both the original record and joint appendix. "Tr" refers to the transcript of the unfair labor practice hearing; "GX" refers to exhibits introduced at the hearing by the General Counsel; "RX" refers to exhibits introduced by the Company; and "D&O" refers to the Board's Decision and Order. "JA" refers to the parties' joint appendix. "Br" refers to Petitioners' opening brief. Record references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

#### STATEMENT REGARDING ORAL ARGUMENT

The Board believes that the briefs and record demonstrate that this case involves the routine application of settled principles to well-supported findings of fact. As a result, the Board submits that oral argument would not significantly aid this Court's decisional process. If, however, the Court deems oral argument necessary, the Board requests that it be permitted to participate.

#### STATEMENT OF THE ISSUE PRESENTED

The Act's protection for employees to engage in concerted activities for the purpose of mutual aid or protection ensures the right of employees to complain concertedly to third parties—including the employer's customers—regarding legitimate employee concerns. Yet, that right may not be exercised with total impunity, and an employee complaint to a third party will lose its protected status if it is maliciously false.

The instant petition for review turns on a single issue: Whether substantial evidence supports the Board's conclusion that the Company's termination of Petitioners was lawful because the only employee conduct alleged to enjoy the Act's protection was tainted by a maliciously false accusation that the Company instructed drivers to "fix" their logbooks.

#### STATEMENT OF THE CASE

This case came before the Board on a complaint issued by the Board's General Counsel on January 23, 2002, pursuant to charges filed by Petitioners. (GX 1(a), (c), (e) & (g), JA 246-57.) The General Counsel's complaint alleged, in relevant part, that the Company violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by terminating Petitioners because they "concertedly complained . . . regarding the wages, hours, and working conditions of [the Company's] employees, by sending a letter to . . . [the Company's] largest customer, Honda Motor." (GX 1(g), JA 253.) The Company, answering the complaint, denied that it had violated the Act as alleged. (GX 1(i), JA 259-60.)

The matter was heard before an administrative law judge, who took evidence on disputed facts and heard arguments in a hearing on May 20, 2003. (D&O 5-11, JA 9-15.) Although Petitioners were parties to the proceedings by virtue of their

<sup>&</sup>lt;sup>2</sup> The complaint also alleged that the Company unlawfully fired another employee, Emerson Young, for engaging in the same protected activity. (GX 1(g), JA 251-54.) Furthermore, the complaint alleged that the Company violated Section 8(a)(1) by threatening an employee with discharge because of his union activities, by inviting an employee to resign because of the employee's union activities, by creating the impression that it was engaging in surveillance of the protected concerted activity of its employees, by interrogating employees concerning their protected concerted activities, and by interrogating an employee concerning his union activities. (*Id*.)

filing the underlying unfair labor practice charges,<sup>3</sup> they did not exercise their right to retain counsel, call witnesses, introduce evidence, make oral arguments, or participate in the hearing (other than as fact witnesses).<sup>4</sup> On July 26, 2003, the judge issued a decision and recommended order finding that the Company violated Section 8(a)(1) by discharging Petitioners "because they engaged in, or because [the Company] believed that they engaged in" protected concerted activity in the form of a letter that was sent to the Company's customer. (*Id.*)

The Company sought review of the judge's decision by filing exceptions before the Board. (Exceptions 1-3, JA 77-79.) The General Counsel filed an answering brief urging the Board to affirm the judge's conclusion.<sup>5</sup> In particular,

<sup>&</sup>lt;sup>3</sup> See 29 C.F.R. § 102.8; see also Lincoln Tech. Inst., Inc., 256 NLRB 176, 176-77 (1981), petition for review denied sub nom. Giacalone v. NLRB, 682 F.2d 427 (3d. Cir. 1982).

<sup>&</sup>lt;sup>4</sup> See 29 C.F.R. § 102.38 (providing that all parties have the right: "to appear at ... [the] hearing in person, by counsel, or by other representative[;] to call, examine, and cross-examine witnesses[;] and to introduce into the record documentary or other evidence"); *id.* § 102.42 (providing that parties may present oral argument and submit to the judge a brief or proposed findings and conclusions).

<sup>&</sup>lt;sup>5</sup> Although the General Counsel urged the Board to find that Petitioners' firings violated the Act, the General Counsel must adopt a different position on appeal in defending the Board's dismissal of the complaint. That is because the Board has delegated to the General Counsel the responsibility to resist petitions for review of Board orders. *See Vapor Blast Ind. Shop Worker's Ass'n v. Simon*, 305 F.2d 717, 719 (7th Cir. 1962) (citing 20 Fed. Reg. 2175 (Apr. 1, 1955), as (continued ...)

the General Counsel argued that the specific protected activity at issue was "the sending of a letter stating employee grievances to . . . [the Company's] primary customer," and that the Company violated the Act by firing Petitioners "for having engaged in this protected concerted activity or because [the Company] believed they had . . . ." (GC Answering Brief 2-3, JA 81-82.) Petitioners did not exercise their rights as parties to file cross-exceptions or an answering brief opposing the Company's exceptions. <sup>6</sup> (D&O 1, JA 5.)

On July 24, 2006, the Board issued its Decision and Order overruling the judge's recommendation and dismissing the complaint insofar as it alleged that the Company violated the Act by discharging Petitioners.<sup>7</sup> (D&O 1-3, JA 5-7.) That Decision and Order is summarized in greater detail below. Following the issuance

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amended, 23 Fed. Reg. 6966 (Sep. 8, 1958), as amended, 24 Fed. Reg. 6666 (Aug. 12, 1959)).

<sup>&</sup>lt;sup>6</sup> See 29 C.F.R. § 102.46(a) & (d)(1); see also JPH Mgmt., Inc., 337 NLRB 72, 72 n.1 (2001) (holding that a charging party may file exceptions, even though it did not present a case at the hearing and merely "piggy-backed" on the General Counsel's case).

<sup>&</sup>lt;sup>7</sup> The Board also found that the Company did not violate the Act by firing Ernest Young, who has not petitioned for review of the Board's decision here. (D&O 1-3, JA 5-7.) Furthermore, the Board affirmed the judge's findings that the Company committed several unfair labor practices that are not at issue in this appeal. (*Id.*)

of the Board's Order, Petitioners did not move for reconsideration, rehearing, or reopening of the record.<sup>8</sup>

#### STATEMENT OF FACTS

#### I. THE BOARD'S FINDINGS OF FACT

The Company provides freight delivery services from a facility in East Liberty, Ohio. (D&O 1, JA 5; GX1(i), JA 259.) The Company's largest customer is Honda of America ("Honda"), which manufactures automobiles at a factory located near the Company's East Liberty facility. (D&O 1, JA 5; Tr 138, JA 230 (Robert Wheeler).) John Jolliff and Steven Daniels worked for the Company as truckdrivers. (D&O 1, JA 5; Tr 58-59, 94, JA 150-51 (John Jolliff), 186 (Steven Daniels).) Jolliff began working for the Company in 1995; Daniels began in 1994. (*Id.*)

Federal regulations require truckdrivers, such as those employed by the Company, to maintain logbooks to record their duty status. *See* 49 C.F.R. § 395.8. Those logbooks may be reviewed by federal authorities to ensure compliance with regulations that limit the hours drivers may drive in a particular time period. *See* 49 C.F.R. § 395.3. Making false reports in a logbook can subject the driver or his

<sup>&</sup>lt;sup>8</sup> See 29 C.F.R. § 102.48(d).

employer to civil liability in agency proceedings,<sup>9</sup> or to criminal prosecution resulting in fines and imprisonment.<sup>10</sup>

The Company links the receipt of certain performance bonuses to time targets it sets for drivers' delivery runs. (D&O 2, JA 6; Tr 78-80, JA 170-72 (Jolliff).) In April 2002, Jolliff approached John Cox, the Company's safety director, to complain about this practice. (*Id.*) Jolliff contended that the targets were set in such a way that would encourage drivers to falsify their logs if they wanted to receive the full performance bonus. (*Id.*) Regardless of Jolliff's complaints, the Company did not instruct drivers to falsify logs in order to comply with the targets set for the drivers' performance bonuses. (D&O 2 JA 6; Tr 78-80, 141, JA 170-72 (Jolliff), 233 (Wheeler).)

In May 2002, some of the Company's employees complained to truckdriver Emerson Young about their working conditions and expressed interest in joining a union. (D&O 1, JA 5; Tr 21-24, JA 113-16 (Emerson Young).) Young had earlier contacted the United Auto Workers about organizing the employees at the East

<sup>&</sup>lt;sup>9</sup> See 49 U.S.C. § 521(b)(2); Arctic Express, Inc. v. U.S. Dep't of Transp., 194 F.3d 767, 768 (6th Cir. 1999).

<sup>&</sup>lt;sup>10</sup> See 18 U.S.C. § 1001 (prohibiting the making of materially false statements in matters within the jurisdiction of federal departments and agencies); see also United States v. McCord, Inc., 143 F.3d 1095, 1096-97 (8th Cir. 1998).

Liberty facility, but the union told him that an organizing campaign at the Company would have to wait until a campaign at Honda also became active. (*Id.*)

The complaining employees decided to send a letter to the Company's corporate management describing problems with working conditions at the East Liberty facility. (*Id.*) The employees felt that such a step was warranted because local managers had not responded to earlier complaints. (*Id.*) Young agreed to draft the letter, and he proceeded to collect work-related complaints for inclusion in the letter by discussing working conditions with roughly 80 to 90 of his fellow employees. (D&O 2, JA 6; Tr 24-25, JA 116-17 (Young).) Jolliff and Daniels were among those who voiced complaints to Young during this process. (D&O 2, JA 6; Tr 70, 96, JA 162 (Jolliff), 188 (Daniels).)

Young completed the letter and, on August 12, 2002, sent it to the Company's corporate management in Jacksonville, Florida, as well as to Honda's management in East Liberty. (D&O 1, JA 5; RX1, JA 272-74.) The letter stated that it was a "protest" of the "management [and] managers" at the Company's facility. (*Id.*) The letter was not signed but indicated that it was sent from the dock workers and drivers at the facility. (*Id.*) In addition to listing complaints about alleged mistreatment by managers and poor benefits, the letter made the following assertion regarding drivers' logbooks:

Some drivers are being asked to fix their logbooks to make extra runs. These drivers are being asked by dispatchers and management to do

these runs and either fix their logbooks or turn their heads on it. Mr. John Cox once said he would not go to jail for fixing logbooks for anyone. Well Mr. Cox pack your suitcase, it has and is presently being done at [East Liberty].

(*Id.*) The letter closed by stating that the employees would have "no choice" but to seek union representation "if this treatment continues." (*Id.*) It also threatened that "[c]opies and information" would be sent to two television stations if the Company did not resolve this situation. (*Id.*)

After receiving its copy of the letter, officials at Honda contacted the Company's management in East Liberty and asked for assurances that there would be no "disruption" at the facility. (D&O 2, JA 6; Tr 120-25, JA 212-17 (Wheeler).) The Company conducted an investigation to determine who was responsible for sending the letter. (*Id.*) After completing the investigation, the Company discharged Young, Jolliff, and Daniels for their participation in the letter-writing incident. (*Id.*)

#### II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Battista, Member Schaumber concurring in relevant part, and Member Walsh dissenting) overruled the recommendation of the judge and dismissed the General Counsel's complaint insofar as it charged the Company with violating the Act by terminating Petitioners. (D&O 1-3, JA 5-7.) In agreement with the Company's exceptions, the Board found that the Act did not protect the only employee conduct alleged to

enjoy the Act's protection (namely, the circulation of the letter to Honda), and that the Company therefore did not commit an unfair labor practice by firing Petitioners for that conduct. (*Id.*)

The Board noted the well-established rule that an otherwise protected employee communication with a third party will lose the protection of the Act if it contains statements that are "maliciously false, *i.e.*, statements made with knowledge of their falsity or with reckless disregard for their truth or falsity."

(D&O 2, JA 6.) Based on the facts found by the judge—and, in particular, the judge's crediting of Jolliff's unrebutted testimony that the Company had *not* asked employees to falsify logbooks—the Board concluded that "the letter lost the protection of the Act because the statements in the letter accusing the [the Company] of asking employees to 'fix' the logbooks were maliciously false." [1]

In so doing, a majority of the Board declined to reach the primary ground for reversing the judge's recommendation urged by the Company—namely, that Petitioners forfeited the Act's protection by publicly disparaging the Company, under *NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U.S. 465 (1953). (D&O 2 n.3; JA 6.) Because the Board did not reach the disparagement issue, it is not before this Court to review. *See SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) (holding that a reviewing court may uphold an agency's action only on the grounds stated by the agency); *accord Albertson's Inc. v. NLRB*, 301 F.3d 441, 453 (6th Cir. 2002).

Following the issuance of the Board's Order, neither the General Counsel nor Petitioners moved for reconsideration, rehearing, or reopening of the record.

#### **SUMMARY OF ARGUMENT**

The Act protects the right of employees to complain concertedly to their employer's customers about legitimate employee concerns. Yet, that right may not be exercised with total impunity, and an employee complaint to a third party will lose its protected status if it is maliciously false. Here, the Board concluded that the circulation of a letter to the Company's largest customer lost the Act's protection because it contained the maliciously false accusation that the Company instructed drivers to "fix" their logbooks. That conclusion is entitled to deference because it is supported by substantial evidence.

The Board justifiably found that the accusation in the letter—that "[s]ome drivers are being asked to fix their logbooks to make extra runs"—was a false statement of fact. In finding that the statement was false, the Board primarily relied on one of Petitioners' own concessions at the hearing that the Company did not tell drivers to falsify logs. There is no merit to Petitioners' claim that the specific accusation of log-fixing in the letter is protected because drivers were under indirect pressure to falsify logs; on the contrary, there is no indication whatsoever that failing to meet time targets placed drivers in jeopardy of discipline or termination. Equally unavailing is Petitioners' claim that the statement in the

letter was mere "rhetorical hyperbole," as any reader would understand the specific accusation in the letter as an account of real facts.

Substantial evidence also supports the Board's conclusion that the letter's log-fixing accusation was made with "malice." Given the factual specificity of the false accusation, as well as the absence of any credible evidence from which to conclude that one might non-recklessly believe the accusation to be true, the Board permissibly inferred that the statement was published with actual knowledge of its falsity or serious doubts as to the truth. Petitioners make no headway by disputing whether the false statement was motivated by animosity or hatred of the Company. As a legal matter, hatred or a desire to injure is not necessary to find malice; and, as a factual matter, Petitioners' argument cannot be squared with the well-supported finding that a statement by one of Petitioners suggests that the employees were in fact motivated by a desire to punish the Company.

Petitioners two remaining arguments are jurisdictionally barred and are, in any event, without merit. First, Petitioners argue for the first time on appeal that, even if Young's conduct was unprotected, their concerted activity remained protected because it consisted of merely airing their grievances to Young. Not only is that theory jurisdictionally barred because it was never raised before the Board, but it also fails as an improper attempt to second-guess the General Counsel's unreviewable authority to frame the case in accordance with his

prosecutorial prerogatives. Second, Petitioners fare no better in arguing that the Board's ruling would unduly chill the exercise of employees' Section 7 rights in the future. At the outset, Petitioners are jurisdictionally barred from raising those policy concerns for the first time in this Court; furthermore, by seeking judicial relief on pure policy grounds, Petitioners are improperly asking this Court to usurp the Board's central policymaking function.

Here, because the Board reasonably found that the only Section 7 activity alleged by the General Counsel was rendered unprotected by virtue of a maliciously false statement, Section 8(a)(1) did not bar the Company from firing Petitioners. Accordingly, the petition for review must be denied.

#### **ARGUMENT**

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S CONCLUSION THAT THE COMPANY'S TERMINATION OF PETITIONERS WAS LAWFUL BECAUSE THE ONLY EMPLOYEE CONDUCT ALLEGED TO ENJOY THE ACT'S PROTECTION WAS TAINTED BY A MALICIOUSLY FALSE ACCUSATION THAT THE COMPANY INSTRUCTED DRIVERS TO "FIX" THEIR LOGBOOKS

Section 7 of the Act, 29 U.S.C. § 157, guarantees employees the right to, among other things, engage in "concerted activities for the purpose of . . . mutual aid or protection." Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), secures that right by making it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by Section 7. An employer therefore violates Section 8(a)(1) by discharging employees because

of their protected activity. *See NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17-18 (1962).

The protections of the Act are construed broadly, especially for employees who have no designated bargaining representative to speak on their behalf. See id. at 14; Hagopian & Sons, Inc. v. NLRB, 395 F.2d 947, 953 (6th Cir. 1968). Nevertheless, those protections are far from absolute, as the Act is not a license for employees to behave with complete impunity. See Hagopian & Sons, 395 F.2d at 952 ("All concerted activity is not protected by the Act, however, even if it is in protest of conditions of employment."). Activity that might otherwise be protected by Section 7 can be "manifested in a manner that exceeds the protection of the Act." Nor-Cal Beverage Co., 330 NLRB 610, 611 n.5 (2000); see also Hagopian & Sons, 395 F.2d at 952-53. An employer is within its rights to terminate an employee for conduct exceeding the Act's protection because, where "the activity for which employees are discharged is not protected by [S]ection 7, there can be no violation of [S]ection 8(a)(1)." Food Fair Stores, Inc. v. NLRB, 491 F.2d 388, 393 n.5 (3d Cir. 1974).

As we now show, substantial evidence supports the Board's conclusion that the *only* employee conduct alleged to enjoy the Act's protection—namely, the delivery of a letter complaining about working conditions to the Company's largest customer—exceeded the Act's protection because the letter falsely and maliciously

accused the Company of instructing drivers to "fix" their logbooks. As a result, the Board properly concluded that the Company's termination of Petitioners for this conduct did not violate the Act. Furthermore, we show that Petitioners' various arguments to the contrary were not preserved for this Court's review and are, in any event, without merit.

### A. Applicable Legal Principles and Standard of Review

It is well established that Section 7 protects the right of employees to engage in concerted communications with third parties—including the employer's customers—regarding legitimate employee concerns, such as terms and conditions of employment and grievances. See Compuware Corp. v. NLRB, 134 F.3d 1285, 1291 (6th Cir. 1998); see also Eastex, Inc. v. NLRB, 437 U.S. 556, 565 (1978) (holding that the Act protects employee efforts "to improve terms and conditions of employment . . . through channels outside the immediate employee-employer relationship"). Moreover, because the Act encourages freewheeling debate during labor disputes, it protects employees' use of intemperate, abusive, and even inaccurate statements in those disputes. Davis Co. v. United Furniture Workers, 674 F.2d 557, 562 (6th Cir. 1982). After all, "[l]abor disputes are ordinarily heated affairs" in which "[b]oth labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language." Linn v. Plant *Guard Workers*, 383 U.S. 53, 58 (1966).

The Board draws an unwavering line, however, at the use of appeals to third parties as a "license to injure [the employer] . . . intentionally by circulating defamatory or insulting material." *Id.* at 61. In such cases, the Board will withhold the Act's protection for false statements made with actual malice—that is, with knowledge of falsity or reckless disregard of the truth. *Id.*; *Compuware Corp.*, 134 F.3d at 1291. It need not be shown that the false statement was motivated by hatred, spite, ill will, or desire to injure. *See Old Dominion Branch No. 496, Nat'l Ass'n Letter Carriers v. Austin*, 418 U.S. 264, 281 (1974).

This Court's review of the Board's order is limited, as the Board's determination whether certain activity enjoys the protection of the Act is "entitled to great deference." *Compuware Corp.*, 134 F.3d at 1288. This Court will accept the Board's interpretations of the Act so long as they are reasonable, and it will uphold the Board's factual findings if they are supported by substantial evidence. *See Temp-Masters, Inc. v. NLRB*, 460 F.3d 684, 688 (6th Cir. 2006) (citing 29 U.S.C. § 160(e) & (f)).

That deferential standard of review is not altered merely because the Board reversed the recommendations of the administrative law judge. *See W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 870 (6th Cir. 1995) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488-94 (1951)). Although the judge's findings constitute part of the record for review, the Board—not the judge—is ultimately vested with

the responsibility for determining whether an unfair labor practice has been committed. *See Universal Camera Corp.*, 340 U.S. 497-98. Thus, no special weight is given to the judge's conclusions where, as here, the disagreement between the Board and the judge turns only upon the inferences drawn from the facts found and the application of those facts and inferences to the Board's interpretations of the Act. *See Laborers' Dist. Council v. NLRB*, 501 F.2d 868, 873 n.16 (D.C. Cir. 1974).

B. Substantial Evidence Supports the Board's Conclusion That the Letter's Accusation That the Company Instructed Drivers To "Fix" Logbooks Was Maliciously False and Therefore Unprotected

In the proceedings before the Board, the General Counsel's sole theory of liability under Section 8(a)(1) was that Section 7 protected the circulation of a letter to the Company's largest customer complaining about working conditions at the Company, and that the Company unlawfully terminated Young, Jolliff, and Daniels because they engaged in, or because the Company believed that they engaged in, that allegedly protected conduct. Confronted with that theory of the case, as well as the Company's admission that it fired all three employees for the letter-writing incident, the Board's inquiry was limited to "whether that activity lost its protection under the Act." *Nor-Cal Beverage*, 330 NLRB at 611.

The allegedly protected letter contained the accusation that "some drivers are being asked to fix their logbooks to make extra runs." (RX1, JA 273.) The

Board concluded that this accusation was a false statement of fact and, further, that it was made with knowledge of its falsity or reckless disregard for the truth.

Accordingly, the Board found that the letter was rendered unprotected under established Board law. Because those findings are supported by substantial evidence on the record, the petition for must be denied.

# 1. Substantial evidence supports the Board's finding that the letter's accusation of log-fixing was false

The Board found that the accusation in the letter—that "[s]ome drivers are being asked to fix their logbooks to make extra runs"—was a false statement of fact. That conclusion is supported by substantial evidence. Indeed, for their part, Petitioners make no serious effort to contend that the statement is literally true, and their attempts to portray the statement as tantamount to the truth or a mere expression of hyperbole are both unavailing.

In finding that the log-fixing allegation was factually false, the Board primarily relied on Jolliff's testimony at the hearing. That testimony, which was credited by the judge and unrebutted by any other witness, is as follows:

- Q. So you're accusing Mr. Basinger [the Company's account manager] of telling you to falsify logs?
- A. He didn't say falsify logs.
- Q. What did he say?
- A. He was setting up the routes so that you would have to falsify your logs to legally run the route.

\* \* \*

Q. Why would you have to falsify your logs?

A. If you want to make your performance bonus at the end of the month, if they show you getting there late, then that affects your performance bonus.

(Tr 78-80; JA 170-72 (Jolliff) (emphasis added).) In addition, the Company's director of operations for the Honda account, Robert Wheeler, testified that the Company conducted an audit of its logbooks after the letter was sent and found no falsification. (Tr 141, JA 233 (Wheeler).) Petitioners do not dispute the veracity of Jolliff's or Wheeler's testimony. Nor do they point to any evidence indicating that drivers were, in fact, instructed to falsify their logs. Indeed, they largely concede that, taken literally, the statement in the letter is not true. (*See* Br 16 ("[The Company] did not expressly instruct drivers to 'fix their logs'. . . .").)

In addition, there is no doubt that the false accusation of fixing logbooks was a very serious matter. *See Altex Ready Mixed Concrete Corp.*, 223 NLRB 696, 699-700 (1976) (concluding that the Act's protection is forfeited by serious or prejudicial falsities, not by minor or harmless inaccuracies), *enforced*, 542 F.2d 295 (5th Cir. 1976). Drivers' logs must be maintained pursuant to federal regulations, and the logs may be reviewed by federal authorities to ensure compliance with limits on driving times. *See* 49 C.F.R. § 395.3. Failure to maintain accurate logbooks could subject the Company and its drivers to both civil

and criminal liability. *See* 49 U.S.C. § 521 (establishing civil penalties for failing to maintain accurate logbooks); 18 U.S.C. § 1001 (establishing criminal penalties for the making of materially false statements in matters within the jurisdiction of federal departments and agencies). Indeed, the letter sent to Honda acknowledged these possible consequences by suggesting that the Company's safety manager could "go to jail for fixing logbooks." (RX1, JA 273.)

Furthermore, the letter's accusation of this potentially criminal wrongdoing was neither vague nor generic. Instead, the letter purports to offer a host of particulars as to how the wrongdoing took place. For instance, the letter states who received the instructions to falsify logs ("[s]ome drivers"). It states also who gave those instructions ("dispatchers and management"), how the conduct was taking place ("drivers are being asked . . . [to] either fix their logbooks or turn their heads on it"), and when the conduct occurred ("it has and is presently being done"). (*Id*.) Thus, the Board's finding that the letter's accusation was a false statement of fact is well grounded in the record.

Without disputing the literal falsity of the log-fixing accusation, Petitioners challenge the Board's finding of falsity on two grounds. They argue that the accusation is tantamount to the truth because drivers were under indirect pressure to falsify logs. Failing that, they also contend that the accusation is mere rhetorical

hyperbole that would not be understood as a statement of fact. Both contentions are mistaken.

In essence, Petitioners' first argument is that the log-fixing accusation was more-or-less true, and the letter therefore retained the Act's protection, because the time targets for performance bonuses presented drivers with "an untenable choice: either drive unsafely and be on time, or drive safely and fudge the records." (Br 16.) But even on the generous assumption that the time targets were too ambitious to be met, there was no "untenable choice" that would justify making a concededly false accusation. Instead, the unrebutted evidence before the Board establishes that the time targets were used *only* for calculating drivers' bonuses (D&O 2, JA 6; Tr 78-80, JA 170-72 (Jolliff)), and there is no indication whatsoever that failing to meet time targets placed employees in jeopardy of discipline or termination. 12 As the Board observed, "this was hardly a request from management that employees fraudulently record their log book entries, as described by the employees in the letter." (D&O 2, JA 6.)

<sup>&</sup>lt;sup>12</sup> Especially puzzling is Petitioners' claim (Br 20-21) that the Board somehow *reversed* the judge's decision to credit Jolliff's testimony on this issue. Jolliff's testimony fully supports the Board's finding that the Company did not ask drivers to fix the logs, as well as the conclusion that the bonus targets did not effectively require drivers to fix logs. That is why the Board expressly relied upon—and in no way discredited—Jolliff's account. (D&O 2, JA 6.)

Equally unconvincing is Petitioners' suggestion (Br 13) that the letter's logfixing accusation is mere "rhetorical hyperbole." To be sure, a false employee statement can be protected as hyperbole, but such protection applies only where the statement "would not be treated by a hearer or reader as intended to be literally believed." Davis Co. v. United Furniture Workers, 674 F.2d 557, 562 (6th Cir. 1982). In other words, a statement qualifies as protected hyperbole only when it is "clearly used in a rhetorical rather than a literal sense." *Id.* Here, the accusation that the Company instructed drivers to falsify their logs—replete with factual particulars as to who, how, and when—is far from the kind of statement that "even the most careless reader must have perceived . . . [as] no more than rhetorical hyperbole." Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6, 14 (1970). Rather, careful and careless readers alike would understand the statement as a factual representation accusing the Company and its management of engaging in specific (and potentially criminal) wrongdoing.

Petitioners' reliance on *Pioneer Finishing Corp. v. NLRB*, 667 F.2d 199 (1st Cir. 1981), is therefore misplaced. In that case, an employee's accusations that a spate of recent workplace injuries were "serious" and "crippling" retained the Act's protection because they would "not to be construed as fact by fellow employees" and were instead an "argument typical to labor disputes." *Id.* at 203-04. Here, by contrast, the letter's particular accusation of wrongdoing was neither

a "lusty and imaginative expression of . . . contempt" nor typical of a labor dispute over employees' dissatisfaction with their managers and working conditions. *Old Dominion Branch No. 496, Nat'l Ass'n Letter Carriers v. Austin*, 418 U.S. 264, 285-86 (1974) (concluding that, in the context of a labor dispute, the statement that a strike-replacement worker was a "traitor to his God, his country, his family and his class" could not be construed as a representation of fact). Rather, the letter's specific accusation that "[s]ome drivers" had been asked by "dispatchers and management" to "fix" logs (or "turn their heads on it") is precisely the kind of statement that could be construed as an unembellished account of real facts. All of that being so, the Board properly found that the log-fixing accusation in the letter was a false statement of fact.

# 2. Substantial evidence supports the Board's finding that the statement was made with knowledge of its falsity or reckless disregard of the truth

The Board further concluded that the letter's log-fixing accusation was made with "malice"—that is, with knowledge of its falsity or with reckless disregard for the truth. (D&O 2, JA 6). That conclusion is also based on substantial evidence on the record, and Petitioners' arguments to the contrary are without merit. As a result, the Board properly concluded that the letter was not protected by the Act and that Petitioners were therefore vulnerable to lawful termination.

Jolliff testified unambiguously that the Company had not asked any drivers to falsify their logs to make extra runs. (D&O 2, JA 6; Tr 78-80, JA 170-72 (Jolliff).) Jolliff's testimony was buttressed by Wheeler's account of the Company's post-letter audit finding no falsification of the logs. (Tr 141, JA 233 (Wheeler).) Furthermore, knowledge that the Company had merely set ambitious time targets—not that it had actually instructed employees to falsify logs—appears to have been widespread, as Jolliff testified without contradiction that "several" other drivers had complained to management about the Company's practices. (Tr 79-80, JA 171-72 (Jolliff).)

No evidence was offered to refute those witnesses. Nor was any evidence offered to suggest that one could draw the erroneous, but non-reckless, conclusion that the Company had, in some fashion, instructed drivers to falsify their logs. But more to the point, there is not a scintilla of evidence indicating that one could have been anything but reckless in asserting that such misconduct took place in the *precise manner specified in the letter*—namely, that both "presently" and in the past, "dispatchers and management" had told "[s]ome drivers" to "fix their logbooks" or at least "turn their heads on it." <sup>13</sup>

<sup>&</sup>lt;sup>13</sup> To be sure, Young gave conclusory testimony that he was not aware of anything in the letter that was false. (Tr 39-40, JA 131-32 (Young).) But the judge did not mention—much less, specifically credit—that vague testimony. Nor was (continued ...)

Given the factual specificity of the false accusation, as well as the absence of any credible evidence from which to conclude that one might non-recklessly believe the specific accusation to be true, the Board permissibly inferred that the statement was published with actual knowledge of its falsity or, at least, with "serious doubts as to the truth." *Davis Co.*, 674 F.2d at 562 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

Petitioners dispute the well-supported finding of malice by arguing that the false statement was not motivated by animosity or hatred of the Company. (*See* Br 15 (arguing that malice requires showing of "intent to harm the employer" or "pique and vengeance"); *id.* 20 (arguing that malice requires "ill will, hatred or personal spite").) As a legal matter, that argument misapprehends the contours of the actual malice standard. The Supreme Court has explained that, in this context, the term "malice" is used as a "shorthand expression" for the requirement of showing "knowledge of falsity or reckless disregard of the truth." *Austin*, 418 U.S. at 281. Whether a speaker acted with "hatred, spite, ill will, or desire to injure" is

that testimony relied upon by any party before the Board. The Board therefore did not err by giving such conclusory and self-serving testimony no weight. *See W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 874 (6th Cir. 1995) (noting that Board need not credit vague, self-serving, or conclusory testimony); *NLRB v. Brooks Cameras*,

Inc., 691 F.2d 912, 915 (9th Cir. 1982) (explaining that "the Board is not required to accept [a party's] self-serving declarations . . . , but may draw its own information and the statements the sweight it doesno control is a service of the statements the sweight it doesno control is a service of the statements the sweight it doesno control is a service of the statements the sweight it doesno control is a service of the statements the sweight it doesno control is a service of the statements of the sweight it doesno control is a service of the statements of the sweight it doesno control is a service of the statement of the sweight it doesno control is a service of the statement of the sweight it doesno control is a service of the statement of the sweight in the sweight in the sweight is a service of the sweight in the s

inferences, giving such statements the weight it deems appropriate").

therefore not necessary to find malice. *Id.* And, as a factual matter, Petitioners' argument cannot be squared with the Board's well-supported finding that Jolliff's statement at a safety meeting—to the effect that management should be "disciplined"—suggests that the employees were in fact motivated by a desire to punish the Company. (D&O 2, JA 6; Tr 68, JA 180 (Jolliff).) Because the Board justifiably found that the log-fixing accusation in the letter was both false and made with actual malice, the Board properly concluded that sending the letter was not protected by Section 7 and that the Company did not violate Section 8(a)(1) by terminating Petitioners.

## C. Petitioners' Remaining Arguments Are Jurisdictionally Barred and Lack Merit

In addition to disputing that the statements in the letter were factually false and made with actual malice, Petitioners advance two arguments against the Board's Order. First, they complain that the Board improperly held Jolliff and Daniels responsible for Young's false statements. Second, they contend that, as a policy matter, the Board's decision will unduly chill the exercise of employees' Section 7 rights in the future. These arguments, which are raised for the first time on appeal, have not been preserved for this Court's review. Moreover, they lack merit because they seek to undermine the prosecutorial independence of the General Counsel and the policymaking function of the Board.

1. Petitioners' attempt to inject a new theory of liability is jurisdictionally barred and conflicts with the General Counsel's authority over the issuance and prosecution of unfair labor practice complaints

Petitioners argue that the Board should have found their terminations unlawful because there is no evidence that they "drafted or endorsed the letter or otherwise made similar [false] statements to [a] third party." (Br 17.) In essence, Petitioners attempt to separate their lot from Young's and argue that, while the Board may have permissibly found that Young forfeited his protection under the Act, his conduct was distinguishable from that of Jolliff and Daniels, which remained protected. (*Id.* 17-18.) That argument fails for two reasons. First, this Court is jurisdictionally barred from considering such a belated argument. Second, that argument seeks to improperly usurp the General Counsel's statutory role as the master of the complaint and the theory of liability argued to the Board.

Under Section 10(e) of the Act, "[n]o objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court ...." 29 U.S.C. § 160(e). This Court enforces that jurisdictional provision strictly, holding consistently that a litigant's failure to present a question to the

<sup>&</sup>lt;sup>14</sup> The statute provides an exception for issues or objections that were not raised before the Board due to "extraordinary circumstances." 29 U.S.C. § 160(e). That exception is inapplicable where, as here, the party had the opportunity to assert its new arguments by requesting rehearing before the Board. *See NLRB v. Sambo's Restaurant, Inc.*, 641 F.2d 794, 796 (9th Cir. 1981).

Board precludes this Court from considering it on appeal. *See Southern Moldings, Inc. v. NLRB*, 728 F.2d 805, 806 (6th Cir. 1984) (en banc) (citing *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982)); *see also Temp-Masters, Inc. v. NLRB*, 460 F.3d 684, 690 & n.1 (6th Cir. 2006). Adherence to the jurisdictional command of Section 10(e) results in "a win-win situation" because "it simultaneously enhances the efficacy of the agency, fosters judicial efficiency, and safeguards the integrity of the inter-branch review relationship." *NLRB v. Saint-Gobain Abrasives, Inc.*, 426 F.3d 455, 459 (1st Cir. 2005).

Here, neither Petitioners nor any other party presented the Board with the argument that Young's alleged protected activity can or should be distinguished from that of Petitioners. Instead, throughout the proceedings before the judge and the Board, the General Counsel presented a "unified front"—arguing consistently that Young, Jolliff, and Daniels were all insulated from discharge because the letter to Honda constituted concerted activity protected by Section 7. For their part,

<sup>&</sup>quot;concertedly complained . . . regarding the wages, hours, and working conditions . . . by sending a letter to . . . [the Company's] largest customer" and that the Company violated the Act by firing them because of this conduct); GC ALJ Brief at 3-4, JA 58-59 (arguing "that the writing and distribution of the letter was protected concerted activity" and that the "[t]ermination of these three individuals for engaging in this activity or because [the Company] believed they engaged in the activity was therefore violative of Section 8(a)(l) of the Act"); GC Answering Brief at 2; JA 81 (arguing that "[t]he protected concerted activity involved the (continued ...)

Petitioners neither challenged this approach nor exercised their rights as parties to retain counsel, call witnesses, introduce evidence, make oral arguments, participate in the hearing (other than as fact witnesses), file briefs before the judge, submit exceptions to the Board, or file a motion for reconsideration. Furthermore, given the General Counsel's framing of the issues, the Company's defense against the unfair labor practice charge involved no effort to distinguish between the conduct of Young and that of Jolliff and Daniels; instead, it focused entirely on whether the letter itself was written in a way that exceeded the Act's protection. (Exceptions 1-3, JA 77-78.) In short, there were "no objections, no arguments, absolutely nothing . . . in the record before the Board to suggest" the argument now brought before this Court. *NLRB v. Monson Trucking, Inc.*, 204 F.3d 822, 826-27 (8th Cir. 2000).

Petitioners' failure to present its argument to the Board is not excused from Section 10(e)'s jurisdictional bar merely because the administrative law judge recommended finding that their termination was unlawful under the General Counsel's theory of the case. Once the Board ruled in the Company's favor, Petitioners were at least required to file a motion for reconsideration informing the Board of their argument. *See Des Moines Mailers Union, Teamsters Local No.* 

sending of a letter stating employee grievances to [the Company's] corporate offices and to its primary customer, Honda").)

358 v. NLRB, 381 F.3d 767, 770 n.1 (8th Cir. 2004). Although Petitioners chose to "piggy-back" on the General Counsel's presentation throughout the proceedings before the judge and the Board, their status as parties entitled them to file such a motion, see 29 C.F.R. § 102.48(d)(1), and their failure to do so precludes this Court from reviewing their argument, see Southern Moldings, 728 F.2d at 806.

Furthermore, Petitioners' argument is not preserved merely because the Board remarked on the different roles of Young and Petitioners in creating the letter. (*See* D&O 3 n.5, JA 7) Section 10(e) "requires objection to the Board, and not discussion by the Board, before an issue may be presented in court . . . ." *Local 900, Int'l Union of Electrical Workers v. NLRB*, 727 F.2d 1184, 1191 (D.C. Cir. 1984). Otherwise, if any issue considered by the Board were automatically preserved for review, Section 10(e) would largely be nullified. *See Temp-Masters, Inc.*, 460 F.3d at 690 n.1; *cf. Woelke & Romero Framing*, 456 U.S. at 665-66 (holding that, in the absence of a motion for reconsideration, Section 10(e) bars a court from considering a previously unraised issue that the Board nevertheless discussed and decided); *International Ladies' Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975) (same).

Even in the absence of Section 10(e)'s strict jurisdictional bar, Petitioners' argument would still fail as a patent attempt to end-run the General Counsel's authority to control the theory of liability pursued before the Board. Under Section

3(d) of the Act, the General Counsel is endowed with "final authority" with respect to the "issuance of complaints" and "the prosecution of such complaints before the Board." 29 U.S.C. § 153(d). As this Court declared after reviewing the text and history of that provision, Congress intended "to afford [the] General Counsel the broadest unreviewable discretion in the prosecution of unfair labor practices." Jackman v. NLRB, 784 F.2d 759, 763 (6th Cir. 1986). From this broad grant of authority, it follows that the General Counsel has discretion to articulate the theory of liability and to frame the issues which will be contested at a hearing. See Brown v. NLRB, No. 89-5396, 1990 WL 8086, at \*5 (6th Cir. Feb. 5, 1990) (unpublished per curiam). <sup>16</sup> A litigant therefore may not expand the scope of the complaint or alter the theory of the case without first obtaining the consent of the General Counsel. See American Postal Workers Union, AFL-CIO v. NLRB, 370 F.3d 25, 27 (D.C. Cir. 2004).

By separating themselves from Young, Petitioners are seeking to have the best of both worlds: on the one hand, they claim that their connection to Young's letter protects them from discharge; and, on the other hand, they claim that they cannot be exposed to the consequences of the letter's maliciously false accusation

<sup>&</sup>lt;sup>16</sup> This Court expressly permits the citation of unpublished opinions. 6th Cir. R. 28(g). The Board is filing and serving a copy of the unpublished opinion by appending it to this brief. Fed. R. App. P. 32.1.

because of their "limited role" in producing it. (Br 17.) To accomplish that feat, they contend that, even if Young's conduct was unprotected, Jolliff and Daniels remained protected because their concerted activity consisted of airing their grievances to Young. (*Id.* at 8-9, 18.) That, however, was never the theory advanced by the General Counsel in the complaint, in the hearing before the judge, or in the proceedings before the Board.

The General Counsel's sole theory of liability advanced at each stage of this case was that the Section 7 activity protecting Young, Jolliff, and Daniels from discharge was the sending of the letter to the Company's customer. For instance, the General Counsel's complaint alleges that Young, Jolliff, and Daniels "concertedly complained . . . regarding the wages, hours, and working conditions ... by sending a letter to ... [the Company's] largest customer" and that the Company violated the Act by firing them because of this conduct. (GX1(g), JA 253.) Later, in its post-hearing brief to the judge, the General Counsel "maintain[ed] that the writing and distribution of the letter was protected concerted activity" and that the "[t]ermination of these three individuals for engaging in this activity or because [the Company] believed they engaged in the activity was therefore violative of Section 8(a)(1) of the Act." (GC ALJ Brief at 3-4, JA 58-89.) Finally, in its brief in opposition to the Company's exceptions before the Board, the General Counsel asserted that "[t]he protected concerted activity involved the

sending of a letter stating employee grievances to [the Company's] corporate offices and to its primary customer, Honda." (GC Answering Brief at 2, JA 81.) In sum, the General Counsel made no effort at any stage of the case to separate the lots of Young and Petitioners, or to argue that Petitioners engaged in activity *other than sending the letter* that protected them from discharge.

The Board acknowledged the limits of the General Counsel's theory of the case and concluded that it could not find for Petitioners under that theory. As the Board stated:

We recognize that only Young drafted the letter. However, the letter indicated that it was sent from the dock workers and drivers at the facility. Indeed, the General Counsel acknowledges (and contends) that the letter was the concerted activity of all three employees involved herein. Thus, inasmuch as the letter was unprotected, the concerted activity of all three was unprotected.

(D&O 3 n.5, JA 7.) Although Petitioners deride as "logic-defying" the Board's decision to rule based on the General Counsel's sole theory of liability (Br 18), that decision comports with the General Counsel's authority under the Act to frame the case in accordance with his prosecutorial prerogatives. *See Brown*, 1990 WL 8086, at \*5.

2. Petitioners' complaints about the policy implications of the Board's ruling are jurisdictionally barred and are, in any event, misplaced

Finally, Petitioners lament the chilling effect the Board's ruling could have in the future. (Br 18-19, 23.) They claim that other employees may forgo

protected complaints about their working conditions out of "fear of being misquoted" by another employee. (Br 19.) At the outset, Petitioners are jurisdictionally barred from raising those policy concerns for the first time in this Court. In addition, it is the Board—not this Court—that Congress entrusted with the responsibility of setting national labor policy. The policy concerns raised by Petitioners are also largely unfounded.

Much like its argument concerning the limited roles of Jolliff and Daniels in the letter-writing incident, Petitioners never presented the Board with its argument that adverse policy implications would result from holding Petitioners' conduct unprotected. Such an argument could have been raised even after the Board's decision had issued by filing a motion for reconsideration. *See Southern Moldings*, 728 F.2d at 806. Because Petitioners failed to take any action to inform the Board of its argument, they are precluded for presenting it for the first time here. *Temp-Masters*, 460 F.3d at 690 & n.1.

Even assuming the jurisdictional bar of Section 10(e) does not apply,

Petitioners' argument is still a non-starter. By seeking judicial relief on pure

policy grounds, Petitioners are improperly asking this Court to usurp the Board's

central policymaking function. As the Supreme Court has observed:

It is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy . . . . The function of striking [the balance between conflicting legitimate interests] to effectuate national labor policy is often a difficult and delicate responsibility, which Congress committed primarily to the [Board] subject to limited judicial review.

Beth Israel Hospital v. NLRB, 437 U.S. 483, 500-01 (1978). Thus, the policy implications of its decision must be addressed by the Board in the first instance, not by a court on a petition for review.

In any event, the Act already provides ample protection in the scenario envisioned by Petitioners. It is well established that Section 7 protects the right of employees to speak with their colleagues about working conditions. *Id.* at 491. Furthermore, under the Supreme Court's holding in *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1984), an employer violates Section 8(a)(1) by discharging an employee based on the employer's honest, but mistaken, belief that the employee engaged in some unprotected misconduct during otherwise protected activity. Thus, an employee will generally be protected against discharge when falsely accused of wrongdoing during the course of protected discussions with other employees. *See*, *e.g.*, *Shamrock Foods Co. v. NLRB*, 346 F.3d 1130, 1133-35 (D.C. Cir. 2003); *Webco Indus., Inc. v. NLRB*, 217 F.3d 1306, 1312-15 (10th Cir. 2000).

In this case, however, the General Counsel neither alleged nor argued that the protected conduct of Jolliff and Daniels consisted of discussing workplace issues *prior* to the sending of Young's maliciously false letter; instead, the only protected conduct put before the Board was the sending of the letter itself. Nor did

the General Counsel pursue a theory of the case based on *Burnup & Sims*, under which Jolliff and Daniels were unlawfully fired based on the Company's mistaken belief that they were responsible for the letter's maliciously false statements.

Although these acts of prosecutorial judgment are not reviewable here, *see Brown*, 1990 WL 8086, at \*5, that does not mean that employees are generally unprotected from discharge when falsely accused of misconduct in the course of known protected activity.

In the end, one could argue that it was unjust and unwise for the Company to single out Petitioners and fire them for their lesser role in the creation of the letter.

Jolliff and Daniels were, by all accounts, decent and hardworking employees. But, as one court memorably put the matter:

[M]anagement is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which [Section 8] forbids.

Schwob Mfg. Co. v. NLRB, 297 F.2d 864, 870 (5th Cir. 1962). Here, because the Board reasonably found that the only Section 7 activity alleged by the General Counsel was rendered unprotected by virtue of a maliciously false statement, Section 8(a)(1) did not bar the Company from firing Jolliff and Daniels. Accordingly, the petition for review must be denied.

### **CONCLUSION**

For the reasons stated above, the Board respectfully requests that this Court deny the petition for review.

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/<sub>S</sub>/

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Dated at Washington, D.C. this 19th day of July, 2007

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN JOLLIFF, et al. Petitioners	) ) )
v.  NATIONAL LABOR RELATIONS BOARD  Respondent	<ul><li>) No. 06-2434</li><li>) Board Case No.</li><li>) 8-CA-33664-1</li></ul>
and	)
TNT LOGISTICS NORTH AMERICA, INC. Intervenor	) ) )

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by U.S. Mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by U.S. Mail upon the following counsel at the addresses listed below:

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Dated at Washington, DC this 19th day of July, 2007

# **ADDENDUM**

894 F.2d 1336, 1990 WL 8086 (C.A.6), 134 L.R.R.M. (BNA) 2840 (Cite as: 894 F.2d 1336)

H

Brown v. N.L.R.B.

C.A.6,1990.

NOTICE: THIS IS AN UNPUBLISHED OPINION. (The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.

James BROWN, Petitioner,

NATIONAL LABOR RELATIONS BOARD, Respondent,

and City Disposal Systems, Inc., Intervenor. No. 89-5396.

Feb. 5, 1990.

N.L.R.B.

PETITION DENIED.

On Petition to Set Aside an Order of the National Labor Relations Board.

Before MILBURN and ALAN E. NORRIS, Circuit Judges, and CONTIE, Senior Circuit Judge. PER CURIAM.

\*1 James Brown petitions to set aside an order of the NLRB determining the amount of back pay to be paid to him because of his wrongful discharge by his former employer, intervenor City Disposal Systems, Inc. ("City Disposal"). For the reasons that follow, Brown's petition is denied.

I.

A.

On May 14, 1979, Brown was discharged by his employer, City Disposal. He filed unfair labor practice charges with the NLRB. The NLRB determined that Brown had been discharged for engaging in protected concerted activity and ordered that City Disposal offer him reinstatement and make him whole. We refused to order enforcement of the Board's order, but upon our being reversed by the Supreme Court, we ordered enforcement in *City Disposal Systems, Inc. v. NLRB*, 766 F.2d 969 (6th Cir.1985) (per curiam).

City Disposal offered Brown reinstatement on July 18, 1985, and subsequent proceedings were held to determine the back pay owed to Brown. In a supplemental decision dated July 14, 1987, an ALJ determined that for certain periods of time Brown had incurred a willful loss of earnings, had intentionally concealed earnings, and had been physically disabled. The ALJ set Brown's back pay accordingly, but the back pay award did not include pension and health benefits.

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On January 11, 1988, Brown filed exceptions to the back pay determination, but he did not raise the issue of pension and health benefits. Finally, on February 4, 1988, Brown made an untimely motion to remand for consideration of pension and health benefits. On July 29, 1988, the Board denied the untimely motion to remand and, with minor exceptions, affirmed the ALJ's findings.

Thereafter, when City Disposal tendered a check to Brown for \$7,505.38, the back pay amount ordered by the Board, Brown refused to accept the check, stating an intention to seek review by this court. The Board petitioned for enforcement of its order on February 6, 1989, under docket number 89-5121. The NLRB and City Disposal agreed to the entry of a judgment, and on April 18, 1989, we ordered City Disposal to comply with the NLRB's order.

In the meantime, on April 5, 1989, Brown filed a pro se motion to intervene and oppose the consent judgment along with a petition to set aside the order of the NLRB. His motion to intervene was denied, FN1 but his petition to set aside the order is before us.FN2 On May 4, 1989, City Disposal was granted leave to intervene in support of the NLRB's position.

В.

The back pay proceeding began with Mr. Canfield entering an appearance for the General Counsel of the NLRB, Mr. Opperwall entering an appearance for City Disposal, and Mr. Brown entering an appearance in his own behalf. The evidence was directed at Brown's employment record between the dates of May 14, 1989, when Brown was discharged and July 18, 1985, when he was offered reinstatement.

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#### 1. Credibility

The ALJ found that Brown had "little regard for the truth and sanctity of an oath" and proceeded to discredit Brown's testimony on several points. The record reveals several instances of untruthful conduct by Brown including falsified employment applications, falsified tax returns, false statements under oath regarding his job search activities and the use of the alias, "James Hunter," in conjunction with his use of his deceased mother's social security number. Brown does not seriously challenge the ALJ's finding in regard to his credibility.

#### \*2 2. Best Wrecking Job Offer

The ALJ found that "Brown was offered a truck driver position with Best Wrecking Company, Inc." A letter dated May 30, 1986, from the General Counsel's office to City Disposal and Brown stated:

#### Gentlemen:

Based upon the presentation of substantial evidence regarding interim earnings and interim expenses applicable to the back pay period from the third quarter, 1980 through the 1st quarter, 1982 and regarding an offer of interim employment made by and rejected Company Wrecking discriminatee James Brown in around May, 1979, thereby rendering discriminatee James Brown ineligible for back pay until on or about April, 1980, when he secured employment at Plymouth Hill Mobile Court, at the hearing in this matter, I intend to move to amend the back pay specification which issued in this matter on December 6, 1985....

Please let me know as soon as possible if you have any objections to this proposal amendment.

#### J.A.(Supp.) at 30.

In conformity with his letter, Canfield conceded at the hearing that the offer was made and rejected. Tr., Vol. III at 324. Brown denied that he had been offered the job FN3 and claimed that he was not qualified to drive Best's equipment. However, David Mardigian, part-owner of Best, testified that he had observed Brown operating equipment similar to Best's equipment. The ALJ credited Mardigian's testimony and refused to credit Brown's claims that he was not qualified to operate the equipment.

Mardigian also testified that Teamster's Local 247 (the same union which represented City Disposal drivers) represented Best's drivers. Mardigian indicated that his drivers worked less hours than City Disposal drivers but earned four to five dollars more per hour. Mardigian admitted to a high turnover rate which he said was typical of the industry, but Mardigian said that three of his drivers had worked for him for a number of years. In early June of 1982, all of Best's Detroit drivers were transferred to demolition jobs located in Minnesota.

#### 3. Detroit City Dairy

Brown worked from April 21, 1980, until July 1, 1980, for Detroit City Dairy. He began earning five dollars an hour, and, when he quit, his salary was \$7.20 per hour. He claimed that he quit because he could not get a raise. Brown was unemployed from July 3, 1980, until August 13, 1980, when he began working as an over-the-road truck driver. He was terminated from that job in February 1982 after an accident.

In the period between 1980 and 1985, City Dairy steadily increased the wages it paid its drivers, and it had a steady demand for more drivers as evidenced by bi-weekly classified ads seeking drivers. In fact, City Dairy's controller responded to an inquiry about Brown's work history by indicating that City Dairy was willing to re-employ Brown even though he had quit them. Brown claimed that he sought re-employment with City Dairy but was told there were no openings.

#### 4. Reitzloff Disposal

\*3 Payroll records supplied pursuant to a subpoena revealed that Brown began work for Reitzloff Disposal Company on September 7, 1983. earlier stated, he used the alias, "James Hunter," in conjunction with his mother's social security number. In a back pay questionnaire submitted to the NLRB on April 4, 1984, Brown indicated that he was currently unemployed and had been throughout 1983. Later, he admitted that he was employed by Reitzloff Disposal but only as early as He did not indicate to the NLRB January 1984. that he was working under an alias, and, in fact, asked the general manager of Reitzloff to use the name Brown rather than Hunter when supplying information to the NLRB.

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#### 5. Enviroquip

Brown periodically earned \$200 per trip for driving garbage trucks to Knoxville, Tennessee for Enviroquip Corporation. Brown was paid by check. Kevin Reitzloff, Brown's supervisor at Reitzloff Disposal, often gave Brown his check since Reitzloff had family ties with Enviroquip and had authority to draw checks on the separate Enviroquip account. The checks bore Enviroquip's name, and no deductions were withheld. According to Reitzloff, Brown began the trips in the fall of 1984 or spring of 1985. Brown claimed that he did not begin until the summer of 1985 but offered no evidence other than his own testimony.

#### 6. Findings

The ALJ found that Brown intentionally concealed earnings from Reitzloff Disposal for the third and fourth quarters of 1983. The ALJ also found that Brown intentionally concealed earnings from Enviroquip Corporation for the fourth quarter of 1984 and the first three quarters of 1985.

The ALJ found that Brown had incurred a willful loss of earnings extending from June 1, 1979, to June 30, 1982, by refusing the job offered him by Best Wrecking Company. The ALJ also found that Brown incurred a willful loss of earnings for the period between July 1, 1982, and July 18, 1985, by unjustifiably quitting his job with Detroit City Dairy and failing to seek re-employment with City Dairy after he lost his job as an over-the-road truck driver.

The principal issues presented for review are (1) whether substantial evidence supports the finding that Best Wrecking Company offered Brown a job, (2) whether substantial evidence shows that employment with Best Wrecking Company would have been "substantially equivalent" to employment with City Disposal, (3) whether substantial evidence supports the finding that Brown intentionally sought to conceal earnings from Enviroquip Corporation; and (4) whether the Board erred by failing to remand for an inclusion of pension and health benefits in Brown's back pay award.

II.

A.

Where the issue before the Board is the amount of an employer's liability to an employee for the unfair labor practice of discharge for engaging in protected activity, the burden on the General Counsel for the NLRB is limited to showing the gross amount of back pay due. NLRB v. Overseas Motors, Inc., 818 F.2d 517, 521 (6th Cir.1987). On the other hand, "the burden is on the employer to establish facts which would negative the existence of liability to a given employee or which would mitigate that Id. (emphasis in original) (quoting liability." NLRB v. Reynolds, 399 F.2d 668, 669 (6th Cir. 1968)). "[T]he Board's conclusion as to whether an [employer has met its burden] will be overturned on appeal only if the record, considered in its entirety, does not disclose substantial evidence to support the Board's findings." NLRB v. Westin Hotel, 758 F.2d 1126, 1129-30 (6th Cir.1985).

\*4 "The Board has broad discretion in fashioning the back pay remedy, and its order cannot be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' " Overseas Motors, 818 F.2d at 520 (quoting Fiberboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 216 (1964)).

Β.

Brown argues that "there is absolutely no evidence to the effect that [he] was offered a job by Best Wrecking Company." Brown claims that the ALJ abused his discretion by considering a letter from Canfield to City Disposal and Brown's stating that Brown had rejected an offer of employment from Best Wrecking Company because "there is no record that the letter was admitted into evidence either as an exhibit or the contents of the letter were presented through testimony." However, it is clear that the letter was received into evidence as respondent's exhibit 2. J.A.(Supp.) at 30; Tr., Vol. III at 65. Throughout the hearing and on the record, the parties argued about the implications of Canfield's letter declaring that Best had offered Brown employment. Tr., Vol. III at 68, 69, 314, 324-28.

Moreover, it is clear from the record that Canfield conceded during the hearing that Brown received an offer from Best Wrecking Company:

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Judge Holley: Well, let me ask you your theory of the case right now, then. Do you concede or don't you concede that Mr. Brown received an offer of employment from [Best Wrecking Company].

Mr. Canfield: Yes, I guess we concede.

Judge Holley: You concede that, okay.

Id. at 324.

In his reply brief, Brown argues that Canfield, as counsel for the General Counsel, did not have the authority to concede that an offer had been made, citing *NLRB* v. *United Food and Commercial Workers Union*, 108 S.Ct. 413 (1987). In fact, *United Food* convinces us that Canfield was doing just what his office was created for.

The words, structure, and history of the LMRA amendments to the NLRA clearly reveal that Congress intended to differentiate between the General Counsel's and the Board's "final authority" along a prosecutorial versus adjudicatory line. Section 3(d) of the NLRA provides that the General Counsel has "final authority" regarding the filing, investigation, and "prosecution" of unfair labor practice complaints. Conversely, when the authority of the Board is discussed ... it is in the context of adjudication of complaints....

The history of the LMRA also reflects this dichotomy. The House Conference Report on the LMRA states: "... [T]here shall be a General Counsel of the Board ... [who] is to have final authority to act in the name of, but independently of any direction, control, or review by, the Board in respect of the investigation of charges and the issuance of complaints of unfair labor practices, and in respect of the prosecution of such complaints before the Board."

\*5 *United Food*, 108 S.Ct. at 421 (citations omitted) (emphasis in original).

Because of the General Counsel's grant of authority, the Court concluded in *United Food* that the General Counsel had unreviewable discretion to decide whether to file or withdraw a complaint and, in the period of time between the filing of a complaint and the hearing, to dismiss a complaint in favor of a formal settlement. *Id.* at 422. From this grant of

authority logically flows the discretion to frame the issues which will be contested at a hearing. See Royal Typewriter Co. v. NLRB, 533 F.2d 1030, 1040 (8th Cir.1976), overruled in part on other grounds, Bryan Memorial Hosp. v. NLRB, 814 F.2d 1259, 1261 (8th Cir.), cert. denied, 484 U.S. 849 (1987).

Even if we were inclined to hold that the General Counsel is powerless to concede a point, we would Brown, having entered an not in this case. appearance as charging party, could have taken a position contrary to the General Counsel and pursued it. Kellwood v. NLRB, 411 F.2d 493, 499-500 (8th Cir. 1969). However, the most Brown did in this case was to deny under cross-examination that he was offered the job. Afterward, when a long discussion between the court and counsel took place, which led City Disposal to believe that it need not present evidence of the offer, Brown kept silent. FN4 Tr., Vol. III at 323-30. In light of Brown's silence, we will not now hold that the concession by Canfield did not constitute substantial evidence of a job offer.

C.

Next, Brown argues, in effect, that even if there were an offer, truck driving for Best Wrecking Company was not "substantially equivalent" to truck driving for City Disposal. He states that the ALJ "made no determination on the desirability of employment with Best Wrecking Company." However, it is clear from the ALJ's analysis that he was guided by the "substantially equivalent" standard in finding that Brown incurred a willful loss of earnings.

Much of Brown's argument that the jobs were not comparable is directed at working conditions at Minnesota job sites after Best left Detroit. However, the ALJ concluded that Brown's willful loss ceased when Best transferred all drivers from Detroit to Minnesota job sites. The ALJ reasoned that Brown would have been justified in refusing to transfer from Detroit to Minnesota. Thus, Brown's arguments concerning working conditions at Minnesota job sites are misdirected.

Brown also argues that the high turnover among Best Wrecking drivers shows the undesirability of the job. Mardigian, part-owner of Best Wrecking, (Cite as: 894 F.2d 1336)

testified that a high turnover rate was typical of the industry. He also said that three of his drivers had been with Best for a long period of time. According to Mardigian, his equipment was similar to the equipment owned by City Disposal and his drivers were paid higher wages and worked shorter hours than City Disposal drivers. In our view, Mardigian's testimony was enough to convince a reasonable person that the jobs were substantially The record indicates that even more evidence could have been presented but for the combination of Canfield's concession and Brown's failure to oppose the concession. Thus, we hold that there was substantial evidence for finding that Brown incurred a willful loss of earnings when he refused a job offer from Best Wrecking Company.

D.

\*6 Brown argues that there was not substantial evidence for finding that he intentionally concealed earnings from Enviroquip Corporation.FN5 It is uncontested that Brown made numerous trips for Enviroquip Corporation and that he was paid \$200 per trip. The Enviroquip checks bore Enviroquip's name, but Reitzloff's checks bore Reitzloff's name. Enviroquip checks withheld no deductions. Even Brown acknowledged that there were two accountsone for Reitzloff and one for Enviroquip.

Also, the ALJ noted that despite Brown's contention that he mistakenly believed that his Enviroquip earnings were reported by Reitzloff, Brown must have known that as of the date of the hearing that Enviroguip earnings had not been reported, but Brown made no attempt to cure the omission in the months following the hearing when the record was kept open for additional evidence. We agree that Brown's continuing failure to disclose is indicative of willful concealment. American Navigation Co. v. NLRB, 268 NLRB 426 (1983) (award of full back pay where continuing failure to disclose prevents accurate calculation of interim earnings would not further purposes of the act); see also NLRB v. Flite Chief, Inc., 640 F.2d 989, 991-92 (9th Cir.1981) (not persuaded of honesty where disclosure was postponed until "11th hour" and then only made in response to subpoena).

We hold that Brown's use of the alias and unauthorized social security number during the period in question, his failure to report Enviroquip earnings to the IRS, his knowledge that the payment was made from a separate account and without deductions, and his failure to report the Enviroquip earnings are substantial evidence that he intentionally concealed earnings from Enviroquip Corporation.

Brown also argues that even if the ALJ was correct that he intentionally concealed earnings from Enviroguip, the ALJ erred in concluding that he had earned money from them as early as the third quarter of 1984. No witness at the hearing could clearly establish the date Brown began working for Enviroquip. Brown points to his own testimony; however, the ALJ found on the basis of substantial evidence that Brown's testimony could not be believed. Kevin Reitzloff testified that Brown probably began in the spring of 1985, "[m]ay be the fall of '84 at the earliest. But I think it was in calendar '85." Tr., Vol. III at 408. The ALJ was justified in resolving the doubt against Brown once he determined that Brown was guilty of concealing See McCann Steel Co. v. NLRB, 570 F.2d 652, 654 (6th Cir.1978) ( "The allocation of the burden of producing evidence ... is upon the party having knowledge of the facts."); American Navigation, 268 NLRB at ---n. 6 ("[W]e will ... deny all back pay to claimants whose intentionally concealed employment cannot be attributed to a specific quarter or quarters because of the claimant's deception."); Flite Chief, 640 F.2d at 992. Thus, we find substantial evidence to support the finding that Brown intentionally concealed earnings from Enviroguip Corporation as early as the fourth quarter of 1984.

E.

\*7 Finally, Brown argues that the ALJ erred by not including health and pension benefits in his back pay. The law is clear that health and pension benefits are payable as back pay. East Wind Enter. v. NLRB, 268 NLRB 655 (1984). However, the burden is upon the General Counsel to establish that pension and health contributions were part of the gross pay that the discriminatee would have earned but for the unfair labor practice. Id.

The Board found "no evidence in the record that pension contributions or health plan benefits exist or should have been included in the back pay specification."

Brown argues that there was

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evidence in the record that pension contributions and health benefits existed because his employment contract with City Disposal was made part of the record in the underlying unfair labor practice proceeding wherein the Board found his discharge was illegal. There is authority for the proposition that the employment contract could have been considered by the ALJ. S.D. Warren Co. v. NLRB, 353 F.2d 494, 497 (1st Cir.), cert. denied, 383 U.S. 958 (1965) (Board in unfair labor practice hearing could take judicial notice of evidence previously offered by same party in representation hearing). However, Brown has pointed to no authority, and we have found none, for the proposition that the ALJ was bound sua sponte to consider the collective bargaining agreement as part of the record in the back pay proceeding.

We are guided in this regard by the Federal Rules of Evidence which are applied "so far as practical" in hearings before the Board. 29 U.S.C. § 160(b); NLRB v. West Side Carpet Cleaning Co., 329 F.2d 758, 760 (6th Cir.1964). Under the Federal Rules of Evidence, judicial notice is not mandatory unless "requested by a party." Fed.R.Evid. 201(c) & (d). The record shows that in this case neither party at the hearing requested the ALJ to take judicial notice of the employment contract.

Brown tried to excuse his failure to raise the issue with the ALJ by arguing to the Board that "because [he] entered no appearance and proceeded without counsel at the hearing, he was not in a position to raise these issues at that time." The Board found that contrary to Brown's assertions, he did enter a formal appearance in his own behalf at the hearing. FN6 The record confirms the Board's finding.

Judge Holley: Would the parties please state their appearances for the record.

Judge Holley: Any other parties that desire to enter an appearance?

Mr. Canfield: Your honor, I believe the Charging Party's going to enter an appearance.

Judge Holley: Fine.

Mr. Brown: James Brown, 20190 Riopelle, Detroit, Michigan.

Tr., Vol. III at 4. Thus, Brown, as charging party, had the right and opportunity to bring the employment contract to the ALJ's attention. See Kellwood Co. v. NLRB, 411 F.2d 493, 499-500 (8th Cir.1969); International Union of Elec., Radio & Machine Workers v. NLRB 289 F.2d 757, 760 (D.C.Cir.1960).

- \*8 Brown also had the opportunity to raise the issue of pension and health benefits by filing exceptions to the ALJ's order. The Board has set out a procedure for filing exceptions in 29 CFR § 102.46 (1989) which provides in relevant part:
- (a) Within 28 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to § 102.45, any party may ... file with the Board in Washington, D.C., exceptions to the administrative law judge's decision or to any other part of the record or proceedings....

(b)(1) ...

- (2) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.
- (h) No matter not included in exceptions or crossexceptions may thereafter be argued before the Board, or in any further proceeding. (Emphasis added)

If timely and proper exceptions are not filed pursuant to 29 C.F.R. § 102.46, the findings of the ALJ "automatically become the decision and order of the Board and become its findings, conclusions, and order, and all objections and exceptions thereto [are] deemed waived for all purposes." 29 C.F.R. § 102.48(a) (1989). "It is only in cases of rare extenuating circumstances that the courts have waived the rules requiring the filing of exceptions within the time prescribed by the statute or extended by the Board." *NLRB v. Ferraro's Bakery, Inc.*, 353 F.2d 366, 368 (6th Cir.1965).

In this case, the ALJ issued his supplemental decision on July 14, 1987. Brown filed exceptions with the Board on January 11, 1988, but he failed to raise the issue of pension and health benefits.

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Brown waited until February

Brown waited until February 4, 1988, in his motion to remand which was filed out of time, to object to the exclusion of pension and health benefits. Thus, we find that Brown waived any right to object to the exclusion of pension and health benefits from his back pay award by his failure to timely take exception under 29 C.F.R. § 102.46.

Brown argues that it was "manifest error" to "refuse to even consider the pension and health benefits." Brown points to no authority to show either that the rule of manifest error applies to NLRB back pay proceedings, or that it is manifest error to consider pension and health benefits in a back pay proceeding. The cases Brown cites are criminal cases recognizing the doctrine of plain error. FN7

Even if it is manifest error to refuse to consider pension and health benefits in a back pay proceeding, that is not the case before us. record before us shows that the ALJ did not refuse to consider the benefits, but did not consider them because they were not brought to his attention by way of a request for judicial notice. Similarly, the Board did not refuse to consider the benefits but found that Brown's asserted reasons for his untimeliness were untrue and without merit. Given Brown's failure to ask the ALJ to judicially notice the contract provisions dealing with pension and health benefits, and his untimeliness in objecting to the exclusion of the benefits, we find no manifest error in either the ALJ's or the Board's failure to include the benefits in Brown's back pay award.

III.

\*9 Accordingly, for the reasons stated, we deny Brown's petition to set aside the Board's order.

FN1. The rationale for denial of intervention was not stated, but it is apparent that the motion was untimely under Federal Rule of Appellate Procedure 15(d).

FN2. At first glance it might appear that our April 18, 1989, order of enforcement would be res judicate to this proceeding. The Supreme Court discussed that possibility as part of its rationale for allowing intervention by interested parties in *United Auto.*. Aerospace and Agric. Implement Workers v. Scofield, 382 U.S. 205, 213 (1965) as follows: "To be sure, if intervention is denied in the initial review

proceeding, the charged party would not be bound by the decision under technical res judicata rules."

FN3. When opposing counsel pointed out Canfield's concession to Brown, Brown answered, "I am aware of that, yes. Not that I agree with it."

FN4. Brown presents a misleading argument by claiming that the ALJ ordered City Disposal to present evidence of the job offer. It is true that the ALJ stated at one point that City Disposal should present evidence of the offer; however, the ALJ's statement came when Canfield expressed an intention to recant his concession. When the ALJ's statement is examined in context, it is apparent that the ALJ accepted Canfield's concession and did not require proof of the offer.

FN5. Much of Brown's argument on this point is misdirected. He tries to prove that there was no intentional concealment by showing that Enviroquip and Reitzloff were joint employers. Assuming arguendo that the latter proposition is true, the former does not follow from the latter. Common sense teaches that a person could intentionally conceal part of his earnings even from a single employer, especially if he knew that part of the earnings came from a payroll account and another part came from a separate account.

FN6. Brown also raises arguments that Canfield was not concerned with his rights, that there was a conflict of interest between the positions of Canfield and himself, and that he objected a number of times to Canfield's failure to mention health and pension benefits. However, Brown offers nothing from the record to substantiate his accusations.

FN7. Brown relies on Clyatt v. United States, 197 U.S. 207 (1905), and Wiborg v. United States, 163 U.S. 632 (1896). We note that application of the plain error doctrine is discretionary and is applied "only [where] the failure to do so would result in a manifest miscarriage of justice." Finch v. Monumental Life Ins. Co., 820 F.2d 1426, 1432 (6th Cir.1987) (quoting United States v. Grosso, 358 F.2d 154, 158 (3d Cir.1966), rev'd on other grounds, 390 U.S. 62 (1968)). We perceive no such danger in this case.

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