May the Circle be Unbroken: The historical ebb and flow of circular definitions of impermissible employee actions, and why “disloyalty” and “malice” don’t mean much anymore.

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If the topic of this session were phrased as a question – When does employee disloyalty make otherwise protected conduct unprotected? – the answer would be relatively clear: When a majority of Board members, and perhaps a reviewing court, say so. And if the topic is phrased as another question – Is there any analytical consistency to the circumstances under which that which is alleged to be “employee disloyalty” makes otherwise protected conduct unprotected? – there is an equally simple answer. No. And if the question asked were yet a third one – Does the analysis of the interplay of “employee disloyalty” and “protected activity” replay the same circular arguments that dominated pre-NLRA labor law, only occasionally changing the terminology used to describe the circle? – the answer is, alas, simple yet again. Yes.

In 1894, Oliver Wendell Holmes, then still a justice on the Massachusetts Supreme Court, wrote one of the most influential papers of what came to be called the Legal Realist school of jurisprudence. In “Privilege, Malice, and Intent,” Justice Holmes delivered a masterful disquisition on how courts mask the grounds upon which they determine legal rights and wrongs:

[If] [t]here is no dispute that the manifest tendency of the defendant’s act is to inflict temporal damage upon the plaintiff . . .[and] that result is expected, and often at least it is intended . . .[then] the first question that presents itself is why the defendant is not liable without going further. The answer is suggested by the commonplace, that the intentional infliction of temporal damage . . . is actionable if done without just cause.3

When the defendant escapes, the court is of the opinion that he has acted with just

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3 Emphasis is supplied in all instances in this quotation.
cause. There are various justifications. In these instances, the justification is that the defendant is privileged knowingly to inflict the damage complained of.

But whether, and how far, a privilege shall be allowed is a question of policy. Questions of policy are legislative questions, and judges are shy of reasoning from such grounds. Therefore, decisions for or against the privilege, which really stand only upon such grounds, are often presented as hollow deductions from empty general propositions . . . or else are put as if they themselves embodied a postulate of the law and admitted of no further deduction, as when it is said that, although there is temporal damage, there is no wrong; whereas, the very thing to be found out is whether there is wrong or not, and if not, why not.⁴

... For instance, a man has a right to set up a shop in a small village which can support but one of the kind, although he expects and intends to ruin a deserving widow who is established there already. . . He has a right to give honest answers to inquiries about a servant, although he intends thereby to prevent his getting a place. [The first privilege] rests on the economic postulate that free competition is worth more to society than it costs. . . [The latter privilege rests] upon the proposition that the benefit of free access to information, in some cases and within some limits, outweighs the harm to an occasional unfortunate. I do not know whether the principle has been applied in favor of a servant giving a character to a master.⁵

... Take a case where . . . the harm complained of is a malicious interference with business . . . I assume . . . that the defendant’s act is not unlawful or a cause of action unless it is made so by reasons of the particular consequence mentioned, and the defendant’s attitude toward that consequence. I assume, finally, that the acts or abstinences of third persons induced by the defendant are lawful. If a case could be put where the defendant’s act was justified by no grounds of policy more special or other than the general one of letting men do what they want to do . . . I think courts would say that the benefit of spontaneity was outweighed by the damage which it caused . . . There is no

⁴ I have a personal favorite illustration of Justice Holmes’ plaint:

Malice, as here used, does not merely mean an intent to harm, but means an intent to do a wrongful harm and injury. An intent to do a wrongful harm and injury is unlawful, and if a wrongful act is done, to the detriment of the right of another it is malicious, and an act maliciously done, with the intent and purpose of injuring another, is not lawful.

⁵ This rumination – something of a throwaway – suggests at least one fundamental problem with the “disloyalty” analysis that is the subject of this session. “Loyalty” is something that arises out of reciprocal social relationships, based (generally) on something more or other than a pure economic relation. You are loyal to your friends, your family; your country; your tribe or your religion as part of a complex web of mutual obligation and benefit. It’s not clear what role “loyalty” plays in the economic relationship between capital and labor.
general policy in favor of allowing a man to do harm to his neighbor for the sole pleasure of doing harm.

... 

The danger is that such considerations should have their weight in an inarticulate form as unconscious prejudice or half conscious inclination. To measure them justly needs not only the highest powers of a judge and a training which the practice of law does not insure, but also a freedom from prepossessions which is very hard to attain. It seems to me desirable that the work should be done with express recognition of its nature. The time has gone by when law is only an unconscious embodiment of the common will. It has become a conscious reaction upon itself of organized society knowingly seeking to determine its own destinies.

Fast forward to June 26, 1951. The NLRB releases its decision in Jefferson Standard Broadcasting Company, 94 NLRB 1507. IBEW Local 1229 has been engaged in a bitter and well-publicized dispute with its employer, Jefferson Standard, a Charlotte, South Carolina t.v. station. Failing in more traditional labor actions (weeks of picketing, leafleting and handbilling), the union disseminates a handbill describing the service provided by the employer to the people of Charlotte as inadequate, due to Jefferson Standard’s unwillingness to purchase equipment necessary to “bring you the same type of programs enjoyed by other leading American cities.” The handbill “occasioned widespread comment in the community, and caused Respondent to apprehend a loss of advertising revenue due to dissatisfaction with its television broadcasting service,” and the employer fired 10 technicians. The ALJ found, and the Board majority agreed, that there was no (willful, at least) untruth in the handbill, and that “their ultimate purpose – to extract a concession from the employer with respect to the terms of their employment – was lawful.” But the handbill didn’t disclose that ultimate purpose (it was signed by “WBT Technicians” and didn’t reference the union or the labor dispute), and the Board concluded that “. . . these tactics, in the circumstances of this case, were hardly less ‘indefensible’ than acts of physical sabotage.”

Why? The facts of the case suggest that the labor dispute between the union and Jefferson Standard was well-known, so the context of the challenged handbill would have been clear to most
readers. The Board majority accepts that the handbill was substantially accurate and, if so, it wasn’t
telling its readers anything that they didn’t already know – that WBTV was broadcasting dated national
programs, with no local news or sports. The rhetorical question with which the handbill ended – “Could
it be that [WBTV] consider[s] Charlotte a second-class community and only entitled to the pictures now
being presented them?” – is a flight of rhetoric, and would not meet any legal definition of slander or
libel. Board member Murdock, in strong dissent, notes that neither the means the union employed, nor
its objective, was otherwise unlawful. Why was the handbill indefensible? And what relationship does
“indefensible” bear to “illegal?” Indeed, the D.C. Circuit Court of Appeals remanded the matter to the
Board to consider exactly this last question: “By giving ‘indefensible’ a vague content different from
‘unlawful,’ the Board misconceived the scope of the established rule.” 202 F. 2d 186, 188-189. But the
employer took the remand to the Supreme Court, and that court sustained the Board.

The majority of Supreme Court (NLRB v. Electrical Workers, 346 U.S. 464 (1953)) knew why the
handbill was indefensible. It was “vitriolic” and disloyal.6 “There is no more elemental cause for
discharge of an employee than disloyalty to his employer. It is equally elemental that the Taft-Hartley
Act seeks to strengthen, rather than to weaken, that cooperation, continuity of service and cordial

6 “Vitriol” may be (painfully) in the eye of the beholder, but this author wouldn’t describe the following as vitriolic:

"IS CHARLOTTE A SECOND-CLASS CITY?

"You might think so from the kind of Television programs being presented by the Jefferson Standard
Broadcasting Co. over WBTV. Have you seen one of their television programs lately? Did you know that all
the programs presented over WBTV are on film and may be from one day to five years old. There are no
local programs presented by WBTV. You cannot receive the local baseball games, football games or other
local events because WBTV does not have the proper equipment to make these pickups. Cities like New
York, Boston, Philadelphia, Washington receive such programs nightly. Why doesn’t the Jefferson
Standard Broadcasting Company purchase the needed equipment to bring you the same type of programs
enjoyed by other leading American cities? Could it be that they consider Charlotte a second-class
community and only entitled to the pictures now being presented to them?

"WBT TECHNICIANS"
 contractual relation between employer and employee that is born of loyalty to their common enterprise. . . The attack related itself to no labor practice of the company. . . It was a continuing attack, initiated while off duty, upon the very interests which the attackers were being paid to conserve and develop. “ Indeed the Court concludes, although the Board did not, that this vitriolic handbill - which truthfully reminded the community of facts it already knew against the backdrop of a labor dispute of which it was probably aware – was so outside the pale of acceptable activity that “Even if the attack were to be treated . . . as a concerted activity . . . the means used by the technicians in conducting the attack have deprived the attackers of the protection of [Section 7] . . .”

Justices Frankfurter, Black and Douglas dissented. They noted that Sec. 10(c) of the Taft-Hartley Act permits discharge “for cause,” but doesn’t identify “disloyalty” (or anything else) specifically as such cause, and observed that “Many of the legally recognized tactics and weapons of labor would readily be condemned for ‘disloyalty’ were they employed between man and man in friendly personal relations. . . . To suggest that all actions which in the absence of a labor controversy might be "cause" - or, to use the words commonly found in labor agreements, "just cause" - for discharge should be unprotected, even when such actions were undertaken as ‘concerted activities, for the purpose of collective bargaining,’ is to misconstrue legislation designed to put labor on a fair footing with management. Furthermore, it would disregard the rough and tumble of strikes, in the course of which loose and even reckless language is properly discounted.” Id. at 479-480 [Emphasis supplied] “Section 7 of course only protects "concerted activities" in the course of promoting legitimate interests of labor. But to treat the offensive handbills here as though they were circulated by the technicians as interloping outsiders to the sustained dispute between them and their employer is a very unreal way of looking at the circumstances of a labor controversy.” Id. at 481. And they warn that “to float such imprecise notions as "discipline" and "loyalty" in the context of labor controversies, as the basis of the right to
discharge, is to open the door wide to individual judgment by Board members and judges. One may anticipate that the Court's opinion will needlessly stimulate litigation.” *Id.*

Boy, howdy.

Half a century and a hundred-odd cases later (shephardizing *Jefferson Standard* with a focus on the word “disloyal” gets 129 hits), Justices Frankfurter, Black and Douglas look prescient. And even a quick skimming of those intervening decades' worth of cases displays exactly the sort of imprecision in the notion of disloyalty which they feared. As an example, in *Sierra Publ. Co. v. NLRB*, 889 F.2d 210 (9th Cir. 1989), a letter to the newspaper’s 50 largest advertisers that *inter alia* claimed that the newspaper’s stance in negotiations was sending the paper "speeding down-hill" was found to be neither disloyal nor disparaging. The letter’s assertion that “circulation has plummeted, good employees have left for better jobs, and advertising has suffered” did not impugn the “journalistic quality” of the paper, and its tone was “both constructive and hopeful.”*Id.* at 217.

A 1997 collection of partial dissenters and concur-ers on the D.C. Court of Appeals described the evolution of the law under *Jefferson Standard* in *Diamond Walnut Growers, Inc. v. NLRB*, 113 F.2d 1259 thus:


7 The court does note that the advertisers to whom this letter was sent might have been concerned about claims of plummeting circulation, but sees no inconsistency in focusing on the “journalistic quality” of the paper to distinguish this from product disparagement. From advertisers' point of view, circulation is the product, so it's hard to take this seriously as a meaningful legal distinction.
(1977) (ridiculing content and tone of questionnaire distributed by employee rendered it unprotected under the Act); see generally Sierra Publ. Co. v. NLRB, . . .

While this standard, as articulated, may still contain a fair measure of subjectivity, it looks a lot like the way the common law is always practiced and avoids the fully subjective and hopelessly circular “disloyalty” which looks so much like the “malice” of pre-NLRA law, as described by Justice Holmes.

But subjectivity and hopeless circularity appear to be what this body of law is all about. In another stop along the way to the cases that are the subject matter of this session, the Sixth Circuit took its own shot at summarizing the law in Compuware Corp. v. NLRB, 134 F.3d 1285 (6th Cir. 1998). A temporary employee was fired in what was described (by the ALJ) as a “preemptive strike” – 320 NLRB 101, 103 -- against what his employer feared would be a complaint to its contractor (Peat Marwick) about working conditions on a project Compuware was performing for Peat Marwick for the State of Michigan. The discussion of Compuware’s claim that the employee was disloyal starts out with an even narrower standard than that articulated by the DC Circuit dissenters (because it omits “malicious tone”):

“An employee's appeal to a third party or in this case a client only loses its protected status if the appeal does not relate to the labor practices of the employer or are maliciously false.” Id. at 1291. But then the opinion goes on: “The caveat in these cases is that the communication not be so disloyal or maliciously false to remove the employees from the protection of the Act.”

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8 This opinion was written by Judge Wald, and joined by Judges Edwards, Rogers and Tatel. If this is a correct statement of the standard, as it had evolved, it is difficult to see that the Jefferson Standard circular would have been unprotected, at least if the Board or reviewing court took a practical and realistic look at whether the circular had clearly related to the ongoing labor dispute.

9 One might suggest the following as the alternative definition of “disloyalty” under the Jefferson Standard view, as a paraphrase of the Doremus v. Hennessey definition of malice:

“Disloyalty, as here used, does not merely mean an intent to harm, but means an intent to do a wrongful harm and injury. An intent to do a wrongful harm and injury is unlawful, and if a wrongful act is done, to the detriment of the right of the employer, it is disloyal, and an act disloyally done, with the intent and purpose of injuring another, is not lawful.”
Oops. How did disloyalty sneak back in there, and why wasn’t Mr. Schillinger (the protected discriminatee) disloyal? Everyone agrees that what he’d threatened to say was both true and related to a (reasonably defined) labor dispute, but the reason his employer fired him to keep him from saying it was that it would have hurt the business, which is to say, it was disloyal. The reference to disloyalty adds nothing to the analysis, but would continue to create future confusion.

As in the (Curious Case of) Endicott Interconnect Technologies, 345 NLRB 448 (2005), in which a Board majority of Members Liebman and Schaumberg determined, over the dissent of Chairman Battista, that employee Richard White had engaged in protected concerted activity that was not disloyal, and the DC Circuit (453 F.3d 532 (D.C. Cir. 2006)) said that it was.

First, to the Board, and the facts: Endicott Interconnect Technologies bought a plant that printed computer circuit boards near Binghamton, New York from IBM. “Their motivation in acquiring the business was, in part, to protect the local economy from massive layoffs being contemplated by IBM . . . In exchange for their commitment to maintain jobs at the facility [EIT] received financial assistance from the State of New York.” 345 NLRB 448. Two weeks after the purchase, EIT laid off 10% of its workforce. Rick White, an employee who was not laid off, and who was a member of a CWA local that had been trying to organize the plant for some years, was asked by his union to, and did, provide a quote for a newspaper story on the layoffs. Mr. White was quoted as saying:

“There’s gaping holes in this business,” said Rick White, an employee with 28 years at the Endicott plant who, with nearly 2,000 other people, recently transferred from IBM to Endicott Interconnect.

10 The pairing is what makes the case curious . . .

11 This suggests that any comment on EIT’s employment practices would have had a strong element of public interest. However, this did not play a role in the Board’s, or court’s, analysis, although it would seem certainly to be relevant to whether White was disloyal or, alternatively, public spirited.
White, who kept his job, said development and support people with specific knowledge of unique processes were let go, leaving voids in the critical knowledge base for the highly technical business.

According to the employer, EIT’s owner got a call from IBM (now the largest customer for EIT) with questions about the “gaping holes” comment. White was called in and told that his comments were considered disparaging, and would not “be tolerated further.” Then

Because of the significance of the business to the local economy, the newspaper that had published the November 16 article maintained a public-forum website where people could read and/or submit opinions about the purchase of the business by the Respondent. On December 1, White responded to an antiunion message that an individual named House had contributed to the forum:

To Mr. House: Why do you continue to try to bundle reasons why a union is suspect and not so desirable for EIT employees? Why do you site [sic] all the bad things about Unions, and ignore all the bad things that IBM and EIT have done to the employees and their families and the community at large? Isn’t it about time you seriously thought about the fact that no one else will help to stop the job losses, and root for the workers of the community instead of defending the likes of Bill Maines, George Pataki, and Tom Libous? Hasn’t there been enough divisiveness among the people working in this area? Isn’t it about time we stood up for our jobs, our homes, our families and our way of life here? Do you want to sit by and watch this area go to hell and dissolve into a welfare town for people over 70? This business is being tanked by a group of people that have no good ability to manage it. They will put it into the dirt just like the companies of the past that were “saved” by Tom Libous and George Pataki, i.e., “Telespectrum”, “IFT (Flex)”. When are you going to get it??? A union is not just a protection for the employees. It’s an organization that collectively fights for improvements and benefits for working people in communities like ours. Forget Jimmy Hoffa and the mob. Those people and situations are stereotypes of fools who chose to undermine the very system they vowed to protect. They are the minority and always have been. Look around. Do you think the government will help you when you lose your job and your house? Think again. A union is the beginning of a community standing up for itself. It’s time is now. [Emphasis supplied]

Id. at 449.

12 This is the sort of convenient customer complaint that drives union lawyers crazy. IBM had run the plant until two weeks earlier. Surely, they would have known better than anyone if the layoffs would be likely to cause operational problems. And the odds that IBM would be that spooked by the comments of one operational employee (whose name they probably recognized from the 3-year organizing campaign) seem low, at least as compared to possible concern that EIT didn’t have the financial wherewithal to survive, suggested both by the layoffs themselves and by the rest of the article. So if IBM really called, the author doubts they actually called about poor Mr. White. But we just have to take the facts as they are reported, however unlikely they seem.
On December 19, Maines and White met in Maines’ office to discuss the internet-forum message. Maines testified that he told White he had disparaged the Company again, especially his reference to the Company “being tanked” by Maines and others. White was then discharged, consistent with Maines’ warning of November 19. *Id.* at 449

The majority, viewing these facts, concluded as to the newspaper interview that 1) viewed in the context of a highly publicized and contentious 10% layoff, where 2) White was identified as an employee and 3) “the nexus between White’s statements and these labor controversies is apparent” (*Id.* at 450), 4) “the most casual reader of the article would recognize that the layoff involved a controversy between management and employees concerning employment conditions. . . [and] [5]) With CEO McNamara’s comments on one side of the dispute, and White’s on the other, a reader can ‘filter the information critically,’ i.e., identify the interests of the parties to the dispute.” *Id.* at 451

As to the internet posting, once again, they held that there was a clear connection to a labor dispute and:

[T]he Act permits certain criticism in connection with a labor dispute, if readers or listeners can grasp the connection. Once this nexus is established, such statements are not inherently unprotected. White’s references to the Respondent “being tanked” and “put into the dirt” in the posting, and to “gaping holes” and “voids in the critical knowledge base” in the newspaper article, were “not so misleading, inaccurate, or reckless, or otherwise outside the bounds of permissible speech, to cause [him] to lose the Act’s protection.” The Board has permitted far more offensive comments to retain their protected character in similar circumstances. In context, White’s statements

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13 The Board, here, references the following: *Titanium Metals, Titanium Metals Corp.*, 340 NLRB 766 (2003), enf. denied on other grounds 392 F.3d 439 (D.C. Cir. 2004) (employee’s newsletter that referred to the respondent’s supervisors as “Public Enemy Number One,” as “secret police” that “might kick down your door,” as the “Dynamic Duo,” and as “Howdy Doody and Buffalo Bob,” and described one of them as “trying to sink his canoe and ours too,” found protected); *Emarco, Inc.*, 284 NLRB 832 (1987) (two employees’ comments to a client of the respondent that the respondent “can’t finish the job,” and that the respondent’s president was “no damn good” and a “son of a bitch,” found not to exceed the protection of the Act). See also *Allied Aviation Service Co. of New Jersey*, 248 NLRB 229, 231 (1980), enf’d. mem. 636 F.2d 1210 (3d Cir. 1980) (employees wrote letters to customers accusing the company of enforcing procedures that endangered airline personnel [sic] equipment, facilities and customers); *Community Hospital of Roanoke Valley*, 220 NLRB 217, 220, 223 (1975), enf’d. 538 F.2d 607 (4th Cir. *Cont’d*
evince no more than the kind of bias and hyperbole that the Board has found within the acceptable limits of Section 7 in Jefferson Standard situations.

Id. at 452

Chairman Battista dissented. He would have found that the statements in the newspaper article were unprotected because White did not specifically refer to “a labor dispute”:

[T]he labor dispute here was about the plight of the employees who were being laid off, and about the Union’s opposition to that layoff. However, White’s remarks in the article made the different point that the layoff would be detrimental to the quality of the Respondent’s product; . . .

Id. Further, according to Battista, White was disciplined for his views about the condition of the company, which (Battista states) is separate from the context of the “passages in the article [that] refer to the laid-off employee’s chagrin as to the effect that the layoff would have on them.” White’s comments “lack any reference to a labor controversy. They were also harmful, disparaging, and disloyal to the Respondent.” Id. at 453.

Battista concluded that EIT, then, was justified in warning White, based on his quotes in the newspaper, and justified then in firing him after the internet posting which also lacked a clear nexus to the labor dispute concerning the layoffs. Although there is a reference to a potential loss of jobs, the major thrust of the posting is an attack on a third-party posting and on others who were perceived as being antiunion. The one clear reference to the Respondent’s layoff is not about the plight of those laid off, but rather about the Respondent’s business. The reference is a disparaging one (“This business is being tanked by a group of people that have no good ability to manage it.”). In addition, White’s comments were also insubordinate, in light of the Respondent’s explicit warnings to White to cease from making such disloyal statement to the public.

Accordingly, I would find that both of White’s communications were unprotected by the Act because they failed to reference an ongoing labor dispute and because they were disloyal to the Respondent. Divested of Section 7 protection, the statements constituted simply “a sharp, public, disparaging attack upon the quality of the nurses gave interviews saying that there weren’t always enough RNs to cover the hospital units, and had trouble attracting new nurses because the hospital underpaid.)
Company’s product and its business policies, in a manner reasonably calculated to harm the Company’s reputation and reduce its income.”

_id._ at 452-453.

The DC Circuit reversed the Board, at 453 F.3d 532. The court’s majority (453 F.3d fn. 5) didn’t address the issue of whether White’s statements were initially protected by a nexus to a labor dispute, and chose instead to focus directly in on the question of disloyalty, finding that “White’s communications were unquestionably detrimentally disloyal.” _Id._ at 537. “The damaging effect of the disloyal statements, made by an experienced insider at a time when EIT was struggling to get up and running under new management, is obvious from the immediate reaction of IBM’s vice president, who telephoned Maines concerned about EIT’s continuing ability to supply IBM’s circuit board needs. The critical nature and injurious effect of White’s newspaper comments alone gave EIT “cause” to immediately discharge him.” [Emphasis supplied] On top of that, then, the internet posting, with its reference to the company “tank[ing]” “constituted ‘a sharp, public, disparaging attack upon the quality of the company’s product and its business policies’ at a ‘critical time’ for the company. Jefferson Standard, 346 U.S. at 471, 74 S.Ct. at 172. Thus, as in _Jefferson Standard_, the disloyal, disparaging and injurious nature of White’s attacks on the company "ha[s] deprived [him] of the protection of that section, when read in the light and context of the purpose of the Act." _Id_ at 477-78, 74 S.Ct._14

One need only review the cases the Board majority cited (laid out in footnote 11, _infra_) to scratch one’s head. As to the “labor nexus,” both Chairman Battista and Judge Henderson are (covertly) proposing an entirely new rule. Under their view, it is no longer enough that there be a readily discernible relation between the statements at issue and a labor dispute: The only protected speech an

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14 Judge Henderson, concurring, _would have found_ that there was an insufficient labor nexus to establish protected activity in the first place either as to the newspaper story or the internet posting because “the specific statements that precipitated EIT’s ultimate discharge of White related not to any labor issue but to the capabilities of EIT and its management.” _Id._ at 538.
employee has is speech stating a view specifically and explicitly on a labor matter. However, since this was a minority view both at the Board and the Court, it might be viewed as nothing more than a sort of a blip on the radar screen.

The reliance on “disloyalty,” pure and simple and stripped of any analysis of falsehood, let alone malicious falsehood, would appear more troublesome. As noted in footnote 15, the law elsewhere recognizes that the language of labor disputes tends toward the muscular, and the “disloyalty” cases cited by the Board majority show that that recognition has been applied not only to organizing campaigns, but to disputes within existing bargaining relationships as well. Given the rhetorical nature of White’s statements of opinion (How else could one describe the assertion that the company is being “tanked” by its managers?), it is frankly impossible to discern why these comments are impermissibly disloyal, while those in, for example, Emarco, Inc., supra that the employer “can’t finish the job,” and that president was “no damn good” and a “son of a bitch,” were not, other than the assertion that “it is disloyal to be unlawful and unlawful to be unprotected and unprotected to be disloyal, and this was disloyal.”

The second of the three cases we were asked to address – TNT Logistics North America, Inc., 347 NLRB 568 (2006) – would have looked (in 2006) like part of an inexorable progression back to the “indefensible” standard of Jefferson Standard. In this instance, God was back in his heaven and Member Schaumber was back in a majority with Chairman Battista. The employees in this case were drivers who were talking with the UAW about an organizing campaign, and with their employer about dissatisfaction with terms and conditions of their employment. In August 2002, one of them (Emerson Young) sent a

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15 Presumably, were this position to prevail, a handbill headed “Employer X is unfair to his employees,” with a union logo plastered prominently all over it would be unprotected to the extent that it contained a disparaging statement about management. That does not appear to be the law, and would seem inconsistent with the parallel body of law that has developed concerning slander and libel in a labor dispute, which recognizes the frequently “robust” and hyperbolic rhetoric of labor disputes. See, e.g., Letter Carriers v. Austin, 418 U.S. 264 (1974).
letter which he wrote based on information from other employees – including John Jolliff – to his employer’s corporate management and to the company’s biggest client, Honda of America, complaining of a long list of employment concerns (hence, no question about a nexus with a labor dispute) including, 

*inter alia*, the assertion that some of the drivers were “being asked to fix their log-books to make extra runs.”  

Young, Jolliff, and a third employee (Steven Daniels) were fired for their participation in the letter.

“Fixing the log-books” would have been illegal (accurate log books are Department of Transportation requirements to insure safety on the road), and it was conceded in trial that no one in management had ever explicitly told any driver to do so, so the statement, as made, was untrue. But what was alleged by the employees was more nuanced: Young wrote the letter based on what he was told by, among others, Jolliff.  

Jolliff, in turn, testified that he had spoken to safety manager John Cox on a number of occasions about the fact that the company had reduced the prescribed times for some routes, and that the new times could be met only either by unsafe driving or by falsifying the logs, and that Cox had effectively put him off, repeatedly saying that he would “look into it.”  

ALJ William Kocol and dissenting member Walsh both concluded, on these facts, that even if the allegation about

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16 According to the majority, “[a]fter receiving the letter, Honda contacted the Respondent and asked for assurances that there would be no “disruption” at the East Liberty facility.”  *Id.* at 569. It once again seems incredible that the customer was concerned about the content of the employee communication, rather than the strong suggestion of future labor unrest that the letter represented, but Member Schaumber – the only person who focused on this – accepted uncritically that “This serious accusation [of illegality] could have a devastating impact on the Respondent’s reputation and could undermine the relationship between the Respondent and Honda, as evidenced by Honda’s concern about an operational disruption.”  *Id.* at 570.

17 Young himself denied having any personal knowledge about the log book accusation.
management directing illegal activity was untrue, it was not “maliciously” untrue, i.e., stated with knowledge of falsity or reckless disregard to truth.  

The Board majority dismissed as “unsupported conjecture” dissenting member Walsh’s statement that it was “not unreasonable for Jolliff and Young to feel, even if incorrectly, that management was at least implicitly condoning the falsification of logbooks. . . . Notwithstanding Cox’s apparent failure to follow through, his response to Jolliff that he would “check into it,” rather than indicating approval of the falsification of logbooks, suggests that management would disapprove of such falsification.  

In light of the standard for actual malice – knowing falsity or reckless disregard for truth – the ALJ and Walsh’s “conjecture” would have seemed to cut to the heart of the legal standard (and, indeed, that is exactly what the 6th Circuit found) but Chairman Battista and Member Schaumber concluded that it was enough that the employees admitted that they were never explicitly asked to fix the books to convert this into a malicious falsehood evidencing “at the very least, a

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18The Board and courts have given “malicious falsehood” what is, in essence, the N.Y. Times v. Sullivan definition in disloyalty cases. See e.g., Sprint/United Management Co., 339 NLRB 1012, 1018 (2003).

In addition to the “actual malice” standard of Sullivan, other aspects of defamation law have been imported into the analysis of whether a statement is protected under the Act. These include the fact-opinion distinction and the fact-hyperbole distinction:

Moreover, expressions of opinion, though false, and couched in very strong language, are not to be treated as falsifications of facts. [Letter Carriers, 418 U.S. at 284] Likewise, the use of hyperbole which would not be treated by a hearer or reader as intended to be literally believed is not actionable. Id. This court has held highly offensive language protected by § 7 of the Act, where it is clearly used in a rhetorical rather than a literal sense. NLRB v. Container Corp. of America, 649 F.2d 1213 (6th Cir. 1981) (per curiam).

Davis Co. v. United Furniture Workers, 674 F.2d 557, 562 (6th Cir. 1982).

Jolliff v. NLRB, 513 F.3d 600 (6th Cir. 2008), discussed below.

19 This is another of those moments in which union lawyers simply throw their hands up in disbelief. Is that really what Cox’s statement suggested? Really? In this universe, as opposed to some alternate reality? Really?
reckless disregard for the truth.”

Member Schaumber, concurring with Chairman Battista, wrote that he would have held the letter to be unprotected in any event because it publicly disparaged the employer’s product, going “to the heart of the Respondent’s business. . . [and] A fine line exists between raising sensitive issues that relate to terms and conditions of employment and disparaging an employer’s reputation.” Id. at 570.

The 6th Circuit reversed, focusing just on the issue of “malicious falsehood.” The court (after analysis) “proceed[s] as if the logbooks statement was false.” It noted that “[o]n the basis of the testimony of Young, Daniels, and Jolliff – all of whom the ALJ deemed to be credible witnesses – the ALJ concluded that the statements were not made with actual malice; critiqued the Board for effectively overriding the ALJ’s determination of credibility; and noted as to the key distinction between “false” and “maliciously false” that

“There is a “significant difference between proof of actual malice and mere proof of falsity.” [Citation omitted] “The burden of proving ‘actual malice’ requires the [party asserting actual malice] to demonstrate with clear and convincing evidence that the [accused party] realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement.” Id at 511, n.30 (emphasis added). Certainly, it is warranted to infer knowledge of falsity when a statement is so obviously false that any rational person making it would have to know that it is false. But that is not the case at hand. Indeed, the company found the charge of logbook-fixing credible enough to investigate whether it was true or false. Thus, the statement is not so obviously false that a rational person would necessarily conclude that Young knew of its falsity.

513 F.3d at 615

Interestingly in light of their feelings about “conjectures,” Battista and Schaumber argue that the fact that Jolliff had stated during a safety meeting that management should be “disciplined” for shortening route times “suggests that the employees intended to effectuate their desire to “discipline” management by disseminating a damaging and false accusation to a vital customer, one likely to be sensitive to allegations of willful disregard of transportation regulations by its carrier. Thus, contrary to our colleague, we find that this false accusation, in context, was more than mere ‘exaggeration.’” The court addresses this particular conjecture (see below).

Thus, in Schaumber’s view, it wouldn’t matter either if the accusations were true or that they were clearly related to a labor dispute. Indeed, as in Jefferson Standard itself, putative truth would apparently have made the letter more disloyal.
The court observed that “the Board based its finding of actual malice, in part, on a bizarre reading of a statement made by Jolliff that he thought management should be disciplined . . . [which] runs contrary to the most reasonable interpretation of Jolliff’s statement” (i.e., that Jolliff meant that the employer should discipline its manager) and concluded that “the Board’s finding of actual malice was not supported by substantial evidence in the record. There was little or no direct evidence on whether Young knew that the statement was false. Rather, the Board reached its finding of actual malice by supplementing the thin record with unwarranted inferences and misinterpretations of testimony.” Id. at 617.

A propos the Schaumber position, although not specifically addressing it, the court notes the “prima facie protection for communications to third parties” on “legitimate employee concerns.” It would be hard to reconcile this prima facie protection with Schaumber’s view, since the Young letter dealt entirely with legitimate employee concerns and, again, Schaumber would not have held it to be protected even if its accusations were 100% true. Thus, to the extent that the Schaumber concurrence represents another attempt to reinsert the concept of “disloyalty,” untethered from labor concerns or actual malice, it would appear that the 6th Circuit was holding the line.

The third case that is part of our topic really (with apologies to the organizers) doesn’t belong here at all because, at least at the appellate court level, it wasn’t about disloyalty. It was, however, a fairly confusing mess, that suggests the difficulties these cases continue to present.

In Five Star Transportation, Inc. 349 NLRB No. 8 (2007), Chairman Battista and Member Schaumber once again agreed with each other, disagreeing in that case with Member Liebman. The facts are complicated, and the majority decision is almost bizarrely elaborate. In simple form, 11 union bus drivers wrote letters to the Belchertown, Massachusetts school board in a concerted attempt to get the Board to not move their transportation contract from the drivers’ organized employer to (the presumptively anti-union) Five Star. After the letter-writing campaign was unsuccessful, the 11 applied
for jobs with Five Star, and all were turned down “based solely on the fact that each had sent a letter to the school committee.” (Slip op., p. 2) The employer did not distinguish among the 11 letter writers in any respect.

But the Board majority did. They agreed with the findings of the ALJ that all of the letters were the product of concerted activity. However, they reversed their own acknowledgement in *American Steel Erectors, Inc.*, 339 NLRB 1315, 1317 (2003) that potential hires don’t owe a duty of loyalty, *per se* to the prospective employer, writing that “Just as an employer legitimately wants extant employees to be loyal, so a prospective employer legitimately wants prospective employees to be loyal. In both cases, the goal is the same—not to have disloyal employees on the payroll,” *Id.* at 5. They divided the prospective employees into three groups – one (with two members) did not specifically mention any labor concerns in their letters. The second (with three members), did make it clear that there was a nexus between their letter and a labor dispute, but “essentially disparaged the Respondent’s business.”

The third group of six “primarily raised the drivers’ common employment-related concerns.” They found, with the ALJ, that the first group was unprotected because their letters did not raise employment-specific concerns and “we are not persuaded that these two letters should be interpreted as raising the drivers’ common concerns simply because they were written as part of the drivers’ letter-writing campaign.” As to the second group, the majority reversed the ALJ and found them to be unprotected on grounds that

Their letters disparaged the Respondent’s business by bringing to the school committee’s attention22 incidents that had occurred approximately 7 years prior to the instant labor dispute and that, significantly, had no relation to the drivers’ concern that the Respondent would not maintain the terms and conditions of employment that the drivers had negotiated with First Student. Furthermore, these three drivers used inflammatory language—again, in the context of incidents not related to the drivers’ group concerns—to describe the Respondent in a manner that suggested that the drivers intended to damage the Respondent’s reputation. We recognize that these letters refer to terms and conditions of employment and, in this sense, refer to a “labor

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22 Truthfully described.
dispute” with the Respondent. But these references are minor in comparison with the many disparaging remarks, which did not involve terms and conditions of employment, set forth in the letters.

. . .

The individuals here attacked the capacity of the Respondent to safely drive school children, a matter that would be of the utmost concern to the school board. It matters not whether the communications were true or false. Indeed, we may applaud these individuals for raising a matter of public concern. But, the issue here is whether the National Labor Relations Act affords protection to those individuals. Where, as here, the drivers’ letters implicate the safety of children, not the common concerns of employees, and those letters are aimed at keeping the Respondent from becoming the new bus service contract provider, we conclude that the NLRA does not offer protection to the drivers.

Id. at 5. These two quotations rather muddy the waters – it is unclear whether these letters were unprotected because they were just so mean, or because they were only a little mean, but the meanness wasn’t directed at labor issues. In any event, though, Battista and Schaumber found, once again, that even truthful statements made in a context bearing a clear and close relation to a labor dispute were unprotected “disloyalty.”

The final group of prospective employees was those whom everyone – ALJ and all three Board members – agreed were protected because their letters “raised common employment-related concerns” without “disparagement.” 23

However, only Five Star appealed so the issues of, on the one hand, whether letters written and known to be written as part of an organized labor campaign and identified as such by the employer are

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23 This is why the case isn’t as enlightening as it might be on the issues of this session – the employees and union didn’t appeal the Board’s decisions in regard to groups one and two.

Member Liebman dissented on broad grounds that the letters were all of a single piece of labor activity (which was, after all, what Five Star’s president had said) and therefore protected; that prospective employees didn’t owe a duty of “loyalty;” and that, in any event, none of the “inflammatory” allegations met standards for malicious falsehood and used language that was “certainly no more ‘inflammatory’ than other language . . . that the Board has found to be protected.” Id. at 13. In terms of the first point, it is interesting to note that Five Star would argue to the 1st Circuit that all the letters were “indistinguishable,” even though the Board majority held that the first two letters were entirely different from the rest.
initially “protected, concerted activity” if they don’t specifically identify labor issues (Group 1); and on the other hand of when, whether or to what degree “inflammatory” language converts protected into unprotected activity (Group 2), were not before the court.24 As to the third group, the court (522 F.3d 46 (1st Cir. 2008)) affirmed the Board relying, interestingly, in some measure on Frankfurter’s dissent in Jefferson Standard:

> It is widely recognized that not all employee activity that prejudices the employer, and which could thus be characterized as disloyal, is denied protection by the Act... Indeed, were harm or potential harm to the employer to be the determining factor in the Court's § 7 protection analysis, it is doubtful that the legislative purposes of the Act would ever be realized. See Jefferson Standard, 346 U.S. at 479-80 (Frankfurter, J., dissenting) ("Many of the legally recognized tactics and weapons of labor would readily be condemned for 'disloyalty' were they employed between man and man in friendly personal relations."). Instead, we have held that whether concerted employee activity is deemed to be protected depends on whether the employees' actions "appeared necessary to effectuate the employees' lawful aims."

*Id.* at 53-54

The court then punt, stating that it was its policy to defer to the Board on such matters as the “balancing of countervailing employer and employee interests”:

In this case, the NLRB found the discriminatees to be protected because their letters primarily addressed employment-related concerns and did not disparage Five Star. The NLRB made this finding despite the fact that some of the discriminatee letters also made tangential references to non-employment related concerns such as child safety. Another group of drivers was found to be unprotected, however, because the NLRB read their letters to primarily address those same non-employment related concerns. . .we "will not reposition a line drawn by the Board between protected and unprotected behavior unless the Board's line is 'illogical or arbitrary.'" [Citations omitted] Here the NLRB tipped the scale in favor of the discriminatees and such a finding is not arbitrary or

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24 The decision indicates that the Group 1 people, at least, would have been found by the court to be protected had an appeal been brought in their behalf, since the court appears to accept Liebman’s analysis of what makes activity concerted. “The critical inquiry is not whether an employee acted individually, but rather whether the employee’s actions were in furtherance of a group concern.”
illogical, and it is supported by the record. Thus, an assignment of protection is warranted.\textsuperscript{25}

\textit{Id.} at 54-55.

In summarizing the Board’s decision, the court focused on the “non-employment related concerns” attributed to the unprotected letters, and not on their “inflammatory” nature, so it is simply impossible to tell how the court would have reacted to a question squarely put: Are “disloyal” statements made clearly in a labor context protected only and to the extent that the specific statements reference labor matters and are even such statements unprotected if they are “inflammatory,” even if they are neither false nor maliciously false?

Discerning legal principles under the LMRA, and the scope of protected activity, seems often to resemble the act of trying to identify how far waves will come up at the beach, just by looking at the detritus -- there are spring tides and neap tides and high tides and low tides within each, and pieces of shells left all over the beach. \textit{Jefferson Standard} represents one of the low water marks in employee protection; cases like \textit{Compuware} or \textit{Emarco} the high water marks. None of the cases discussed in this paper appears to represent any sort of clarification or trend, either in the Board or the courts. In \textit{EIT}, the Board held the activity to be protected, and the DC Circuit disagreed on the basis of “disloyalty.” In \textit{TNT}, the Board held the activity to be unprotected, and the 6\textsuperscript{th} Circuit disagreed based on the lack of “malicious falsehood.” In \textit{Five Star}, the Board carved up the baby, and the 1\textsuperscript{st} Circuit only had to review one-third of its decision. Additional cases over the past few years don’t clarify a trend; they follow no discernable pattern at all.\textsuperscript{26}

\textsuperscript{25} I call this a punt because, as all labor lawyers know, the courts are perfectly ready to reposition the Board’s lines when they disagree with them.

\textsuperscript{26} An incomplete listing of Board cases dealing with allegations of “disloyalty” in recent years would include \textit{Benjamin Franklin Plumbing}, 352 NLRB No. 71 (2008) (LaMont’s discussion of his timecards and the pay dispute falls short of comments that could be considered flagrantly disloyal. The only part of LaMont’s comments that warrant discussion are his repeated remark that it would be nice to work for someone who was honest and had

Cont’d
The Board and courts have come, over the years since *Jefferson Standard*, to incorporate a number of standards into the determination of when appeals to third parties will be protected activity. The standards are recited as if they are consistent, provide an ordered decision rule, and can be applied with at least as much reasonable certainty as can be expected of any legal rule: Speech is protected if it is 1) concerted; 2) clearly relates to an ongoing labor dispute; 3) isn’t “disloyal,” “inflammatory” or “vitriolic” or, if it is, is obviously rhetorical or hyperbolic; and 4) is not “maliciously false.” The first and fourth criteria are almost fully factual; the second strays more closely toward a subjective judgment as to what “clearly relates.” The third criterion is just a new version of an old song – disloyalty is malice with a different name. So long as “disloyalty” continues to figure into legal decisions as an independent factor, there will never be any certainty or guidance as to what are, and what are not, permissible employee appeals to third parties in support of demands in a labor dispute. In 2007, you were disloyal

*Valley Hospital Medical Center, Inc.*, 28 CA-21047 (Decision of ALJ, 2007)(“While Ms. Wells’ accusations were perhaps over generalized and certainly hyperbolic, the Respondent has not met its burden of showing they were maliciously false.”); *but see Mastec Advanced Technologies* (Decision of ALJ, 2008)(“ Based on the above, I find that the statements broadcast in the Channel 6 news story were so ‘disloyal, reckless, and maliciously untrue’ as to lose the Act’s protection. A review of the broadcast convinces me that the employees’ attitude during the broadcast was ‘flagrantly disloyal, wholly incommensurate with any grievances they had, and manifested by public disparagement of [the Respondents’] product and undermining of their reputation.’ . . . The focus of the news report and the employees’ comments on apparently fraudulent and deceptive business practices overshadowed the labor dispute that led the employees to seek media support in the first place and were necessarily injurious to Respondents’ business. [Further] [a]lthough only two of employees named in the complaint made disparaging comments in the broadcast (Fowler and Eriste), I find that the others who participated and were shown in the broadcast, are equally culpable. Their appearance lent tacit support to the disloyal, disparaging and malicious statements made by the technicians who spoke. A reasonable person viewing the broadcast would perceive the employees as being in agreement since no one spoke up to clarify the damaging statements. The employees’ mere presence is no different from the conduct of the employees in *Jefferson Standard* who distributed the disloyal handbill that was prepared by someone else, or the employees who did not sign a disparaging letter but authorized another employee to send it.”)
if Chairman Battista and the DC Circuit said you were, and might not have been in the 6th Circuit; in 2010, who knows what disloyalty will be?