

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

YELLOW ENTERPRISE SYSTEMS, LLC
d/b/a YELLOW AMBULANCE SERVICE

and

Case 26-CA-21587

INTERNATIONAL ASSOCIATION OF EMTs
and PARAMEDICS, NAGE/SEIU, AFL-CIO

Michael W. Jeannette, Esq., for the General Counsel
Matt Levy, Representative, for the Charging Party
Barbara J. Moss, Esq., for the Respondent

DECISION

STATEMENT OF THE CASE

Jane Vandeventer, Administrative Law Judge. This case was tried on July 26 and 27, 2004, in Nashville, Tennessee. After hearing oral arguments by counsel, I issued a Bench Decision on July 27, 2004, pursuant to Section 102.35(a)(10) of the National Labor Relations Board's Rules and Regulations setting forth findings of fact and conclusions of law.

I certify the accuracy of the portion of the transcript, as corrected,¹ pages 212 to 234, containing my Bench Decision, and I attach a copy of that portion of the transcript, as corrected, as Appendix A.

Attached as Appendix C is the Notice referred to in the Order portion of the Bench Decision.

If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order² shall, as provided in

¹ I have corrected the transcript containing my Bench Decision, and the corrections are reflected in the attached Appendix B.

² If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Dated, Washington, D.C., August 26, 2004.

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Jane Vandeventer
Administrative Law Judge

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APPENDIX C

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT imply that your union activities are being watched or that you are a bad employee because of those activities

WE WILL NOT threaten you with reduced benefits if you select a union to represent you.

WE WILL NOT threaten you with loss of jobs if you select a union to represent you.

WE WILL NOT solicit grievances and promise to remedy them if you do not select a union to represent you.

WE WILL NOT discharge you because of your union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL reinstate Dennis Creamer to his former job, and **WE WILL** make him whole for any loss of pay or other benefits he may have suffered because of our unlawful discharge of him.

WE WILL remove from our files any reference to the unlawful discharge of Dennis Creamer, and notify him in writing that this has been done and that the discharge will not be used against him in any way.

YELLOW ENTERPRISE SYSTEMS, LLC
d/b/a YELLOW AMBULANCE SERVICE

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

1407 Union Avenue, Mid-Memphis Tower Building, Suite 800, Memphis, TN 38104-3627

(901) 544-0018, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (901) 544-0011.

APPENDIX B

Page and Line(s)	Correct	To
212:1	Delete "headings."	
212:3	employee	an employee
212:5	employee	an employee
212:7	increase,	increased
212:10	Complaint	The complaint
212:17	testifying	testifying,
212:20	FINDING	FINDINGS
213:12	I. Background	1. Background
213:18	000	2000
214:3	20003	2003
214:22	marred	married
215:7	employee	employee,
215:8	Creamer's	Creamers
216:8	liter	later
217:25	bee	been
218:3	is	was
218:4	III.	2.
218:13	"bad rumors"	"bad rumors"
218:15	here	here,
219:12	employee's	employees'

	Page and Line(s)	Correct	To
5	219:19	testimony, he	testimony. He
	219:25	And both Tapp and Creamer's	Tapp and both Creamers
	220:3	IV.	3.
10	221:8	him	them
	222:13	Delete "4."	
15	22:14	Evidence	4. Evidence
	223:2	tot	to
20	223:8	Delete "1."	
	223:9	Section	1. Section
	224:12	Upon	Under
25	224:20	Houses	House
	224:21	V.	2.
30	225:2	activities. That	activities, that
	225:22	inaction in	inaction and
35	225:24	change mind	change his mind
	226: 4	in which	and which
	226:7	timing events	timing of events
40	226:19	employee's	employees'
	226:23	the that	the fact that
45	226:23	Fox,	Fox
	227:6	The decision	The discharge decision
50	227:8	Wilhelm, the decision to discharge that is.	Wilhelm.

	Page and Line(s)	Correct	To
5	227:20	anything.	anything
	227:21	And	and
	228:7	VI.	3.
10	228:8	assets	asserts
	228:16	above	above,
15	229:2	have	had
	229:3	counteracted	countermanded
20	229:4	record	regard
	230:9	Unless	Unlike
	233:6	matter	manner
25	233:12	anyway.	any way.
	233:23	attach the	attach to the
30	234:10	it's	its
	234:12	15th	15,

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5 1 and Southern Indiana.

2 During a representative one-year period, Respondent
3 derived gross revenues in excess of \$500,000, and purchased
10 4 and received at its Hopkinsville Kentucky facility, goods
5 values in excess of \$50,000 directly from points outside the
6 Commonwealth of Kentucky. Accordingly, I find, as Respondent
15 7 admits, that it is an employer engaged in commerce within the
8 meaning of Section 2(2), (6), and (7) of the Act.

9 The Charging Party (the Union) is a labor organization
20 10 within the meaning of Section 2(5) of the Act.

11 II. UNFAIR LABOR PRACTICES

25 12 A. The Facts

1. Background

13 In addition to the Hopkinsville operation, Respondent
14 has a larger ambulance operation in Owensboro, Kentucky.
30 15 Employees at the Owensboro facility are represented by a
16 union. An administrative law judge issued a decision in a
17 previous case involving the Owensboro facility (JD26-00,
35 18 February 25th, 2000). That case is currently pending before
19 the Board. Sherman Hockenbury, who is currently Respondent's
20 Vice-President and Executive Director of Emergency Service,
40 21 has an office in Louisville, but visits the Hopkinsville
22 office approximately weekly. The director of the Hopkinsville
45 23 facility, Jackie Fox, reports to Hockenbury.

24 Fox became director at the Hopkinsville facility on
25 November 4th 2003. Prior to that, he had worked for

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5 1 Respondent for about four months at the Owensboro facility,
2 2 where his job was assistant director. The previous director
3 3 at Hopkinsville was Phil Cundall, until About September 2003.

10 4 All dates hereafter will be 2003 and all events concern the
5 5 Hopkinsville facility unless specifically stated otherwise.

15 6 Hitomi Wilhelm had been the assistant director at
7 7 Hopkinsville since July 2002, and in the period between
8 8 Cundall's departure and the arrival of Fox, had acted as
20 9 director. It is undisputed that on December 12th Fox removed
10 10 Wilhelm from her supervisory position, and demoted her to the
11 11 position of paramedic. Respondent admits Wilhelm was a
25 12 supervisor until her demotion.

13 Respondent staged a Christmas party for employees on
14 December 5th. Prior to the party, employees were asked to
30 15 vote on "employee of the year" in several categories. The
16 16 ballots for these awards were kept in the dispatch office, as
35 17 was a shoebox sized cardboard box with a slit in the top where
18 18 employees placed their completed ballots. The dispatch office
19 19 was not customarily locked, nor was there invariably an
40 20 employee present there.

21 Employee Dennis Creamer, an EMT (Emergency Medical
22 22 Technician), was married to a dispatcher, Wanda Creamer. As he
45 23 worked primarily dayshift, and she worked a shift beginning at
24 24 4 in the afternoon, they often met for dinner together at the
25 25 break area in the outdoor vehicle bay, called in testimony the
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1 "smoker's table." Before the Christmas party, during the
5 2 voting period for employee awards, Wanda had told Dennis that
3 the slit on the ballot box had grown wider, as if someone had
4 put a hand inside the box. Dennis checked on the box and
10 5 found this was so. He then put his hand into the box, and
6 looked at the ballots, finding not only his own, but that of
7 another employee, missing.
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8 On December 3rd, the Creamers were eating dinner
9 together at the table in the bay. Dennis wanted to tighten a
20 10 mirror on the vehicle he had been using that day, as it was
11 loose. He went to get the toolbox employees customarily used.
12 Former Director Cundall had kept the toolbox in his office.

25 13 Three current employees, and Dennis Creamer all testified
14 credibly that Cundall had at various times told employees that
15 on the nightshift when he was not at the facility, he did not
30 16 want to be disturbed at home, and if they needed anything from
17 his office they were to open his office door by sliding a
35 18 plastic timecard between the door and the jamb. The three
19 current employees are Wanda Creamer, Kristopher Tapp, and
20 Hitomi Wilhelm. Their testimony was not contradicted, and is
40 21 otherwise worthy of credit.

22 On December 3rd, Dennis Creamer testified that he went
23 to the director's office, opened the door, and saw that the
45 24 tools were not in their usual place. He closed the door and
25 left. Dennis still wanted to fix the mirror for the next

1 shift, so he went to his own house, got his own tools, and
2 fixed the mirror on Respondent's vehicle. Fox testified that
5 3 he had moved the toolbox out to the cage area, a fenced area,
4 in the vehicle bay the day after he first assume his new
5 position at Hopkinsville. He admitted, however, that he did
10 6 not communicate this fact to the employees, either by an oral
7 announcement or by a written memorandum.

15 8 A little later that evening, Dennis saw then-Assistant
9 Director Wilhelm. According to Wilhelm's testimony, she was
10 in the director's office working on payroll, which was one of
20 11 her usual duties. Dennis told Wilhelm that some of the
12 ballots had never been counted. She responded with an
13 explanation of how she and Fox had tallied the ballots, and
25 14 offered to check the ballots and the tallies. She opened a
15 drawer of the desk to look for them, and testified that Dennis
16 reached to open a different drawer. Dennis also testified
30 17 that he reached to open a drawer. The two accounts differ as
18 to which drawer Dennis opened, but this difference is
35 19 immaterial. Both witnesses agree that neither the tally nor
20 the ballots were in either drawer, and Wilhelm stated that
21 they must have been moved or destroyed by Fox. From Wilhelm's
40 22 testimony, it is clear that all Dennis did in the office was
23 open a drawer so that Wilhelm, a supervisor, and he could look
24 for the ballots and tally.

45 25 I am mindful that the written statement Wilhelm gave to

1 Respondent at a later date contains the sentence, "In order to
2 ascertain the discrepancy he entered the Director's office and
3 located the final tally sheet and the counted votes."

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4 Wilhelm, in her testimony, explained that this was an
5 assumption on her part because of the fact that Dennis reached
6 toward a drawer. She testified that Dennis had not told her
7 he had come into the director's office earlier to look for the
8 ballots. In fact, his testimony makes clear that he looked at
9 the ballots in the dispatch office, not in the director's

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10 office. I credit Dennis Creamer and Wilhelm's testimony at
11 trial, and find that his is what occurred. The implication
12 which Fox apparently drew from Wilhelm's written statement
13 that Dennis had entered his office and looked in the desk by
14 himself prior to his conversation with Wilhelm about the
15 ballots, was an incorrect assumption on Fox's part.

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16 Wilhelm testified that she mentioned Dennis Creamer's
17 concern with the accuracy of the ballot count to Fox within a
18 day or two of the incident, and that she did so before the
19 Christmas party on December 5th. At that time she told Fox
20 that she and Dennis had looked for the ballots in Fox's
21 office. Since the award plaques had already been ordered,
22 nothing was done about it. Fox, however, states that it was
23 not until December 14th or 15th, while they were lunching
24 together, that Wilhelm told him about the incident. I credit
25 Wilhelm on this point. By December 14th, she had been demoted

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1 by Fox, and according to Fox, had several arguments with him.

2 In addition, by 10 days after the awards had been given out,
3 there was little point in bringing up the subject.

5 4 2. Allegations of Section 8(a)(1) Violations

5 In about mid-December, employee Kris Tapp contacted an
6 employee in the Owensboro facility to inquire about who to
10 7 contact concerning getting a union to represent the employees.

8 Fox admitted that about mid-December he was informed by a
9 personnel assistant in the Owensboro facility that

10 Hopkinsville employees had been asking about contacting a
11 union. According to the testimony of Tapp, within a few days

12 of his call to Owensboro, Fox spoke to him in the hallway and
13 said that he had heard, "bad rumors" about Tapp. When Tapp
14 asked who was spreading rumors, and that he would like to set

15 them straight, Fox told him it wasn't here, it was in

16 Owensboro. Fox admitted telling Tapp that he had heard "bad
17 rumors" about him.

18 Tapp received authorization cards, brochures, and other
19 union literature about union activity on about December 19th,
20 and passed them out to other employees. He and his partner,

21 Ronnie Browning, talked to nightshift employees, and Dennis
22 Creamer, who worked the dayshift, talked to dayshift

23 employees. Both Tapp and Dennis Creamer left union literature
24 in their company mailboxes, open pigeon holes approximately 9
25 inches wide by 3 or 4 inches high, which were located in the

1 hallway of Respondent's facility.

2 On December 19th, Fox called Tapp into his office and
3 closed the door. Fox asked Tapp if he enjoyed his job, if he
5 4 enjoyed access to the kitchen, if he enjoyed being stationed
5 at the facility instead of on the street, if he enjoyed
6 parking his vehicle in the bay at night, if he enjoyed the
10 7 television at the facility, and if he enjoyed being able to
8 wash his personal vehicle at Respondent's facility. Tapp gave
15 9 answers between each question. Then Fox told Tapp that if
10 something bad happens here, like it did in Owensboro, all this
11 will be gone. Fox then asked Tapp if he had complaints. When
20 12 Tapp mentioned cuts in employees' hours, Fox told him that
13 wasn't a legitimate complaint. Fox asked if Tapp had any
14 suggestions. Then Tapp said he thought they needed a crew
25 15 meeting, but Fox said there was no need for that as employees
16 could come to him individually.

17 Fox admitted that he had met with Tapp and asked him
30 18 many of the questions to which Tapp testified. I credit
19 Tapp's testimony. He is a current employee of Respondent, and
35 20 he testified clearly and coherently. On December 23rd,
21 several employees signed authorization cards for the Charging
22 Party Union. It is undisputed that Tapp, both Creamers, and
40 23 other employees signed cards and Tapp and Dennis Creamer asked
24 other employees to sign cards while at Respondent's
25 Hopkinsville facility. Tapp and both Creamers testified

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50 1 that union literature was visible in Tapp's and Dennis
2 Creamer's mailboxes in the facility.

3 3. Allegation of Section 8(a)(3) Violation

4 Dennis Creamer was discharged on December 30th by Fox.

5 The reason given by Fox was that Dennis had entered the

6 director's office and gone through the desk drawers at

7 sometime "prior to December 1st." It is undisputed that

8 Dennis had never been approached by Fox about this incident

9 before December 30th. Fox testified that he was not told

10 about the incident until December 14th or 15th, and that he

11 asked Wilhelm on December 17th for a written account of her

12 meeting with Dennis Creamer. He also stated that he

13 inventoried his office and found nothing missing.

14 Wilhelm testified that Fox did not ask her for a

15 statement until December 24th. I have already found out Fox

16 was informed about the incident before December 5th. I

17 further find that he did not ask Wilhelm for a written

18 statement until December 24th. I credit Wilhelm as she is a

19 current employee, and her testimony was overall more plausible

20 than that of Fox, who contradicted himself on numerous points

21 during his testimony.

22 As to Fox's inventory of his office, I find that there

23 is no proof of the timing of the inventory, and I discredit

24 Fox on the date that he performed the inventory, namely

25 December 15th. Fox told Wilhelm, after she gave him her

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1 December 24th statement, that it was too vague. On December

2 27th or 28th, Fox discussed Wilhelm's statement with

3 Hockenbury. Fox admitted that he told Hockenbury that he
4 wanted to discharge Dennis Creamer, that Hockenbury agreed
5 with him, and that the decision was made at that time to
6 discharge Dennis.

7 On December 29th, Fox approached some employees, told
8 them he had locked his keys in his office and asked if anyone
9 could help him. Dennis volunteered and opened the office door
10 with a plastic timecard. Either Dennis or Fox remarked at
11 that time that anyone could open the locked door. The
12 following day, December 30th, Fox called Dennis into his
13 office. At Dennis' request, Steve Stobaugh also attended.

14 According to Dennis' testimony, Fox asked Dennis if he had
15 come into his office. Fox asked, "Did you come to look for
16 ballots of any kind or for any kind of union stuff?" In
17 reply, Dennis denied rummaging in the desk, but stated that he
18 had come into the office to look for tools. At this point Fox
19 discharged Dennis, stating that "breaking into my office" was
20 a serious offense.

21 In his written memorandum of the discharge interview,
22 Fox added that it was "criminal." Dennis stated to Fox that
23 other employees went into the director's office in the same
24 way he had, using a plastic timecard. Fox denied knowledge of
25 that fact to Dennis, although at the hearing he testified that

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1 he knew about the practice by mid-December. Dennis asked Fox
2 what about employees using the company credit card to buy gas

3 for their personal vehicles, and gave employee Jason Ezell as
4 an example. Fox stated he would investigate that. The
5 interview ended. There was no evidence that Fox ever
6 investigated Jason Ezell's use of Respondent's credit card.
7 Fox's testimony concerning the discharge interview largely
8 parallels Dennis Creamer's, but is not as detailed. Fox did
9 not specifically deny Dennis' testimony concerning Fox's
10 asking him if he came into the office to look for ballots or
11 "any kind of union stuff." I credit Dennis Creamer's
12 testimony that Fox did, in fact, ask him if he had come into
13 the office to look for ballots or any kind of union stuff.

14 4. Evidence Relating to Disparity

15 Subsequent to the discharge of Dennis Creamer, the
16 union filed a petition for an election. An election was held
17 in March 2004, which the union lost.

18 Evidence regarding two instances of discipline of other
19 employees was introduced. In May 2004, employee Kenny Graves
20 was given a verbal warning for angrily telling Fox that if he
21 had been present when the last schedule was made out, he would
22 have knocked Fox's teeth out. In June of 2004, employee Tammy
23 Tucker (formerly wife of Jason Ezell) was believed by Fox to
24 have used Respondent's gasoline credit card for several
25 personal purchases she made while on vacation in Maryland.

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1 Tucker was given a final warning and demoted, but was not
2 discharged, according to Fox because she denied the
3 infraction and Respondent did not have "100 percent proof."

4 Fox testified that the decision to discharge Tucker was
5 tentative pending an interview with her to secure her side of
6 the story. Evidence was presented that Gray supported the
7 union openly, and that Tucker openly opposed it.

8 B. Discussion and Analysis

9 1. Section 8(a)(1) allegations:

10 I find that Fox's statement to Tapp that he had heard
11 "bad rumors" about Tapp from someone in the Owensboro facility
12 did reasonably convey an impression of surveillance of his
13 union activities. He had recently contacted a person in that
14 facility to ask about contacting a union, so Fox's remarked
15 about "bad rumors" would logically be understood to refer to
16 that contact. At the time Tapp had not manifested his support
17 for the union openly. Respondent violated Section 8(a)(1) by
18 this conduct. *Flexsteel Industries*, 311 NLRB 257 (1993).

19 Furthermore, Fox's one-on-one meeting with Tapp in a
20 management office constituted coercive conduct violative of
21 Section 8(a)(1). Fox began with a litany of the privileges
22 enjoyed by employees at Hopkinsville, and then remarked that
23 if anything bad happened, like at Owensboro, "it would all be
24 gone." Fox's remark was a clear reference to the fact that
25 employees at Owensboro had selected a union to represent them.

5 1 It would be difficult to interpret it in any other way. In
2 2 addition, Fox first asked Tapp if he liked his job. This too,
3 3 would be "gone" if employees selected a union. I find that
10 4 Respondent threatened Tapp with reduced privileges as well as
5 5 with discharge if employees selected a union to represent them.
6 6 Finally, I find that Fox did solicit grievances from
15 7 Tapp in the same meeting by asking him if he had any
8 8 complaints and any suggestions. There was no indication,
9 9 beyond the mere asking of those two questions, that Fox was
20 10 implying Respondent might do anything to remedy the
11 11 grievances. Fox rejected out of hand both of Tapp's responses
12 12 to his questions. Under Board law, however, the very fact that
25 13 an employer's solicitation of grievances is timed immediately
14 14 upon its learning of employee union activity implies that the
30 15 employer is willing to remedy the grievances. Here the
16 16 solicitation of grievances did follow quickly upon the heels
17 17 of Respondent's learning of union activity among the
35 18 employees. I find, therefore, that it does imply the possible
19 19 remediation of grievances, and it violates Section 8(a)(1) of
20 20 the Act. *Yoshi's Japanese Restaurant & Jazz Houses*, 330 NLRB
40 21 1339, 1343 (2000); *Columbus Mills*, 303 NLRB 223, 227 (1991).

22 V. Discharge of Dennis Creamer

45 23 It is well established that in order to demonstrate a
24 24 prima facie case of unlawful discharge, the General Counsel
25 25 must show that an employee engaged in union or protected

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1 concerted activities, that the employer knew of those
5 2 activities, that the employer had some animus against the
3 activities in question, that the employer discharged the
4 employee, or otherwise discriminated against him, and that
10 5 there was a connection between the employer's animus and its
6 taking action against the employee. In order successfully to
15 7 rebut a prima facie case, an employer must show that it would
8 have taken the same action against the employee in the absence
9 of any protected activities on the part of the employee.

20 10 Wright-Line, 251 NLRB 1083 (1980), enforced 662 F2d. 899 (1st
11 Circuit 1981) cert. denied, 455 U.S. 989 (1982).

12 Dennis Creamer's union activities are not in dispute.

25 13 Respondent admits that he engaged in union activities.

14 Respondent, however, denies that Respondent had knowledge of
15 those activities. Respondent admits that by mid-December Fox
30 16 had been informed of some union activity at Hopkinsville, but
17 denies that Fox knew Dennis was involved until after his
35 18 discharge. The evidence does not support Respondent's claim.

19 Fox's question to Dennis at the discharge interview, whether
20 he was looking for "any kind of union stuff" in the office,
40 21 shows that Fox believed Dennis to be involved in union
22 activities. In addition, Fox's initial inaction and
23 late-December action regarding the December 3rd incident is
45 24 some indication that something made Fox change his mind about how
25 25 to treat the December 3rd incident.

1 Several employees signed union cards on December 23rd,
2 and on December 24th Fox took the first step in building a
5 3 case against Dennis for the incident which had occurred three
4 weeks earlier and which he had ignored up until that time. An
10 5 employee who had been approached to sign a card may have
6 informed Fox that cards were being solicited, and by whom. It
7 is a valid inference from the timing of events that the catalyst
15 8 for Fox's about-face was learning that Dennis was involved in
9 the union activity. I find that it was.

20 10 Respondent's animus against the employee's union
11 activity is amply demonstrated by the several violations of
12 Section 8(a)(1) directed at employee Tapp. I find it
25 13 unnecessary to rely on the Respondent's opposition to the
14 union during the ensuing election campaign. Evidence of
15 Respondent's animus against employee's union activity which
30 16 occurred in 1999 at Owensboro is noted, but it is not
17 specifically relied upon in finding animus here. The record
18 herein supports a finding that Respondent harbored animus
35 19 against employees' union activities.

40 20 Respondent contends that the evidence does not show a
21 nexus, or connection, between the first three factors and the
22 discharge of Dennis Creamer. This contention is not supported
23 by the record. First, the fact that Respondent's Director Fox
45 24 asked Dennis during the discharge interview about "any kind of
25 union stuff" shows that there was a connection. Further, the

1 timing of Fox's actions in building a case for discharge of
2 Dennis is strongly indicative of a connection between Dennis'
5 3 union activities and Respondent's decision to discharge him.

4 The securing of a statement from Hitomi Wilhelm was
5 undertaken on the day after employees first signed
10 6 authorization cards. The discharge decision was made on practically the
7 next available business day after Fox had secured the
15 8 statement from Wilhelm. In

9 addition, the lack of any real investigation, especially of
10 soliciting any information from Dennis Creamer himself, prior
20 11 to making the decision to discharge him, shows that
12 Respondent's supposed investigation was only a sham. Had Fox
13 talked with employees about the common practice of entering
25 14 the director's office with a timecard, he would have learned
15 that he would have had to discipline numerous employees for
16 the same conduct. Had Fox talked with Wilhelm about what
30 17 actually happened on December 3rd, he would have learned that
18 Dennis Creamer was in Wilhelm's presence, i.e., in the
35 19 presence of a supervisor, at all times during the meeting, and
20 therefore did not have any unauthorized access to anything
21 and that she only assumed that Dennis had come into the
40 22 office previously to look at the award ballots. In fact, had
23 he read Wilhelm's statement carefully, he would have learned
24 that she was in the office doing payroll the whole time Dennis
45 25 talked with her that night. Had Fox talked with Dennis

1 Creamer himself, he could have learned all these things. In
2 fact, he did none of these things in his alleged
5 3 investigation. There was no real investigation by Respondent,
4 only a few motions aimed at discharging Dennis Creamer. I
5 find that the evidence supports a finding that the General
10 6 Counsel has presented a prima facie case.

7 3. Respondent's Defense

8 Respondent asserts that it would have discharged Dennis
15 9 Creamer with or without union activity because of Respondent's
10 policy which calls for discharge of any employee who gained
20 11 unauthorized access to its computer and other confidential
12 records. Neither Fox nor Hockenbury testified about any
13 evidence, mention of, or even suspicion concerning computer
25 14 access at the time of the decision to discharge Dennis
15 Creamer. Fox did not mention this policy or the handbook to
16 Dennis during the discharge interview. As stated above, a
30 17 supervisor was present during Dennis Creamer's presence in the
18 director's office near the desk.

35 19 I find that this asserted reason is entirely without
20 basis in the evidence. Other factors militate against
21 Respondent's defense, including Respondent's failure to
40 22 investigate, failure to allow the employee to speak to the
23 accusation, long delay in taking any action, and
24 mischaracterization of the alleged conduct of the employee.

45 25 Fox's memorandum called the entry of his office

1 "criminal." Considering that Fox knew at the time that many
2 employees hde been doing the same thing for months or years,
3 and that he had never countermanded Cundall's practice in this
5 regard, this statement is an exaggeration and mischaracterizes
4 the conduct. A Respondent's exaggeration of the seriousness
5 of an incident is one factor which has been relied upon by the
10 Board to show that the incident is not the real reason for the
7 discharge of an employee. See, for example, 299 Lincoln
8 Street, 292 NLRB 172, 202 (1988).

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9 In that case, as in this one, the Respondent not only
10 exaggerated the seriousness of the incident which it by then
20 knew many employees had engaged in, it also acted
12 inconsistently with a belief that any immediate threat of harm
13 existed. Here, Respondent acted inconsistently with its
25 asserted belief in the seriousness of the conduct by, for
14 example, not issuing instructions to employees not to enter
16 the director's office, by not changing the lock, and by not
30 contacting the police about the allegedly criminal act.

19 Disparity in the treatment of other cases of employee
35 discipline may show that a Respondent's asserted reason for
20 the discharge is not the real reason. Here, Respondent did
21 not discharge employee Tucker, who it believed had actually
40 stolen money from Respondent by using Respondent's gasoline
22 credit card. Dennis Creamer, who admittedly neither stole
23 anything, nor engaged in conduct different from that of other
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5 1 employees who commonly entered the director's office by means
2 of a timecard, was discharged. There is also disparity in the
3 procedure used by Respondent in each case. Dennis Creamer was
10 4 given no opportunity to tell his side of the story before it
5 was decided to discharge him. The opposite occurred in
6 Tucker's case. The decision to discharge her was put on hold
15 7 until her side of the story could be obtained. In Dennis
8 Creamer's discharge interview he denied rifling through the
9 director's desk. He was still discharged. Unlike Dennis,
20 10 whose denial of the conduct was ignored, Tucker's denial of
11 the misuse of a gasoline credit card and stealing from the
25 12 company, was seen as requiring her continued employment, and
13 preventing the Respondent from discharging her.

14 This glaring disparity in the treatment of the employee
30 15 misconduct shows clearly that Respondent would most definitely
16 not have discharged Dennis Creamer in the absence of his union
17 support. See, for example, Hospital San Pablo, 327 NLRB 300
35 18 (1998); American Crane Corp. 326 NLRB 1401, 1413 (1998);
19 Weather Shield of Connecticut, 300 NLRB 93, 96 (1990). I find
20 that Respondent's discharge of Dennis Creamer violated Section
40 21 8(a)(3) of the Act.

22 CONCLUSIONS OF LAW

45 23 1. By implying to employees that their union
24 activities are under surveillance and that they are bad
25 employees because of those activities Respondent has violated

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1 Section 8(a)(1) of the Act.

5 2 2. By threatening employees with loss of privileges

3 and jobs if employees choose a union to represent them,

4 Respondent has violated Section 8(a)(1) of the Act.

10 5 3. By soliciting employee complaints and grievances,

6 and implying promises of remedies if employees do not choose a

7 union to represent them, Respondent has violated Section

15 8 8(a)(1) of the Act.

9 4. By discharging an employee because of his union

20 10 support and activities, Respondent has violated Section

11 8(a)(1) and (3) of the Act.

12 5. The violations set forth above are unfair labor

25 13 practices affecting commerce within the meaning of the Act.

14 THE REMEDY

15 Having found that Respondent has engaged in certain

30 16 unfair labor practices, I shall recommend that it be required

17 to cease and desist there from and to take certain affirmative

18 action necessary to effectuate the policies of the Act.

35 19 I shall also recommend that Respondent be ordered to

20 remove from the employment records of Dennis Creamer any

40 21 notations relating to the unlawful action taken against him

22 and to make him whole for any loss of earnings or benefits he

23 may have suffered due to the unlawful action taken against

45 24 him, in accordance with F.W. Woolworth Co., 90 NLRB 289

25 (1950), plus interest as computed in accordance with New

1 Horizons for the Retarded, 283 NLRB 1173 (1987).

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2 On these findings of fact and conclusions of law and on
3 the entire record, I issue the following recommended

4 ORDER

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5 The Respondent, Yellow Enterprise Systems, LLC d/b/a
6 Yellow Ambulance Service, its officers, agents, successors,
7 and assigns, shall

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8 1. Cease and desist from

20

9 (a) Implying to employees that their union activities
10 are under surveillance and that they are bad employees because
11 of those activities.

25

12 (b) Threatening employees with loss of privileges and
13 jobs if employees choose a union to represent them.

30

14 (c) Soliciting employee complaints and grievances, and
15 implying promises of remedy if employees do not choose a union
16 to represent them.

35

17 (d) Discharging employees because of their union
18 support and activities.

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19 (e) In any like or related manner interfering with,
20 restraining, or coercing employees in the exercise of rights
21 guaranteed them by Section 7 of the Act.

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22 2. Take the following affirmative action necessary to
23 effectuate the policies of the Act.

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24 (a) Within 14 days from the date of this Order, offer
25 Dennis Creamer full reinstatement to his former job or if that

5 1 job no longer exists, to a substantially equivalent position,
2 2 without prejudice to his seniority or any other rights or
3 3 privileges previously enjoyed.

10 4 (b) Make Dennis Creamer whole for any loss of earnings
5 5 and other benefits suffered as a result of the discrimination
6 6 against him in the manner set forth in the remedy section of
15 7 this decision.

8 8 (c) Within 14 days from the date of this Order, remove
9 9 from its files any reference to the unlawful discharge, and
20 10 within 3 days thereafter notify the employee in writing that
11 11 this has been done and that the discharge will not be used
25 12 against him in any way.

13 13 (d) Preserve and, within 14 days of a request, or such
14 14 additional time as the Regional Director may allow for good
30 15 cause shown, provide at a reasonable place designated by the
16 16 Board or its agents, all payroll records, social security
17 17 payment records, timecards, personnel record and reports, and
35 18 all other records including an electronic copy of such records
19 19 if stored in electronic form, necessary to analyze the amount
20 20 of back pay due under the terms of this Order.

40 21 (e) Within 14 days after service by the Region, post
22 22 at its Hopkinsville Kentucky location, copies of a notice
45 23 marked "Appendix", which I will attach to the written version of
24 24 this decision. Copies of the notice on forms provided by the
25 25 Regional Director for Region 26, after being signed by the

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5 1 Respondent's authorized representative, shall be posted by the
 2 Respondent and maintained for 60 consecutive days in
 3 conspicuous places including all places where notices to
10 4 employees are customarily posted. Reasonable steps shall be
 5 taken by the Respondent to ensure that the notices are not
 6 altered, defaced, or covered by any other material. In the
15 7 event that, during the pendency of these proceedings, the
 8 Respondent has gone out of business or closed the facility
 9 involved in these proceedings, the Respondent shall duplicate
20 10 and mail, at its own expense, a copy of the notice to all
 11 current employees and former employees employed by the
 12 Respondent at any time since December 15, 2003.

25 13 (f) Within 21 days after service by the Region, file
 14 with the Regional Director a sworn certification of a
30 15 responsible official on a form provided by the Region
 16 attesting to the steps that the Respondent has taken to comply.

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