DHL Express, Inc. *and* American Postal Workers Union, AFL–CIO. Case 9–CA–43277

September 30, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND PEARCE

On June 21, 2007, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and Charging Party Union filed answering briefs, and the Respondent filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

1. The judge found, and we agree, that the Respondent violated Section 8(a)(1) when, on September 15, 2006, it: (1) distributed a memo to employees stating that if they selected the Union as their bargaining representative "all of your wages and benefits would be frozen pending the outcome of negotiations;" and (2) told employees, through Supervisor Carla Ford, that if they "were up for [their] six-month step increase, that if we were in contract negotiations at that time, that we would not be able to get our wage increase, that it would be frozen during that time."

Although we agree with the judge that *Jensen Enterprises*, 339 NLRB 877, 877–878 (2003), supports these 8(a)(1) findings, we disavow his further statement that two prior Board cases—*Mantrose–Haeuser Co.,* 306 NLRB 377 (1992), and *Uarco*, 286 NLRB 55 (1987), review denied sub nom. *Auto Workers v. NLRB*, 865 F.2d 258 (6th Cir. 1988) (Table),—"appear . . . inconsistent and materially indistinguishable from *Jensen"* and therefore "appear to have been overturned *sub silentio*" by *Jensen.*

There is no indication that the Board in *Jensen* implicitly overruled *Mantrose–Haeuser* or *Uarco*.[3] Further, the cases are distinguishable from *Jensen* and the instant case, and afford the Respondent no defense to the judge's 8(a)(1) findings.

In *Mantrose–Haeuser*, the respondent stated in an election campaign pamphlet that "while bargaining goes on, wage and benefit programs typically remain *frozen* until changed, if at all, by a contract." The Board found that this statement was not an 8(a)(1) threat because, among other reasons, the respondent contemporaneously assured employees that freezing wage and benefit programs meant that, during negotiations, it would continue its past practice of granting a Christmas bonus and December merit wage increases, and that only the amounts would be subject to negotiations with the union. 306 NLRB at 377–378. The Board also relied on the fact that the statement appeared only once in a lengthy campaign document, and that during the "entire [campaign] period, there were no other allegations of unfair labor practices or objectionable conduct committed by the Respondent." Id. at 377.[4]

In contrast to *Mantrose–Haeuser*, no assurances were given to employees here or in *Jensen* that the status quo of granting scheduled wage increases would continue during contract negotiations. To the contrary, Supervisor Ford reinforced the clear message of the Respondent's September 15 memo by telling employees that the past practice of granting step wage increases would not continue while contract negotiations were ongoing. Further, unlike *Mantrose–Haeuser*, the Respondent here and in *Jensen* committed additional unfair labor practices during the organizational campaign.

Similarly, in *Uarco*, the judge found that other employer statements at the same meetings at which the

[1] There are no exceptions to the judge's dismissal of allegations in pars. 5(b) and (e) of the complaint that the Respondent's director, Thomas Roksvag, and its senior operations manager, Steven Crowthers, threatened employees in violation of Sec. 8(a)(1). There are also no exceptions to the judge's dismissal of the allegation that Carolyn Fisher, director of labor relations, unlawfully threatened employees with discontinuance of step wage increases during the 10:15 a.m. meeting with employees on November 15, 2006.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In fact, the Board explicitly relied on *Mantrose-Haeuser*, post-*Jensen*, in *American Red Cross Missouri—Illinois Blood Services Region*, 347 NLRB 347, 347 fn. 5 (2006).

[4] In *American Red Cross*, supra at fn. 5, the Board also noted that the language used in *Mantrose-Haeuser* referred to freezing wage and benefit *programs* (possibly suggesting the continuation of annual increases and other regular adjustments), not to freezing wages and benefits. It is the latter type of statement that is at issue here. We need not reach the question of whether that subtle distinction in language should, standing alone, make a difference, but together with the distinguishing facts described above, it serves to further distinguish this case from *Mantrose-Haeuser*.

statement concerning benefits being frozen was made clarified its meaning. In that case, the statement at issue was that "benefits were 'frozen' during negotiations," 286 NLRB at 82. But, the judge stated: "Within the context of all Respondent's statements, I conclude that employees were not told that they would not receive benefits and wages already scheduled or due them, but that the use of the word 'frozen' was merely calculated to mean that nothing could be lost pending negotiations and resolution of the question concerning representation, i.e., the status quo would continue." Id. at 84. While the judge's decision points to no specific statements tending to give the frozen statement the meaning he attributed to it, the Board expressly adopted his conclusion, specifically explaining that the judge found the statement to mean only that the employer would maintain the status quo "[i]n the context of all the Respondent's oral statements. . . ." Id. at 57. Here, the record does not reveal any statements by the Respondent's agents that would have led employees to understand the frozen statement merely to mean that the Respondent would maintain the status quo, including any regularly scheduled improvements in wages or benefits.

In sum, although we disagree with the judge's assessment of the continued viability of the precedent predating *Jensen,* we affirm his findings that the Respondent's September 15 memorandum and Supervisor Ford's statement violated Section 8(a)(1).

2. In adopting the judge's finding that the Respondent violated Section 8(a)(1) when Supervisor Rob Darner threatened employee James Hamilton with stricter enforcement of the Respondent's policy on tardiness, we agree that there is "no significant difference" whether Darner stated that he "would not" or "might not" retain flexibility not to make a record of minor tardiness if employees selected the Union. Either way, Darner's statement predicted potential negative actions the Employer might take in regard to tardiness if the Union was selected. Under *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), lawful predictions of the effects of unionization must be based on objective fact *and* address consequences beyond an employer's control. See *Systems West, LLC*, 342 NLRB 851 (2004). Darner's statement satisfied neither *Gissel* element. Thus, we agree with the judge that rather than a lawful prediction, Darner's statement constituted an unlawful threat to enforce tardiness rules more strictly if the Respondent was unionized.[5]

3. We also agree with the judge that Labor Relations Director Carolyn Fisher's statements during her "pie chart" presentation violated Section 8(a)(1) by threatening employees that they would gain nothing in collective bargaining. Given Fisher's contemporaneous unlawful threat that employees would not receive regularly scheduled step increases during bargaining, employees would reasonably understand Fisher's pie chart presentation as a message that selecting the Union would be futile.

Here, the pie illustrated the employer's negotiating budget[6] and Fisher suggested that all the Respondent would do in negotiations was shift money from one slice of the pie to another, i.e., that if the Union obtained a wage increase for employees, the Respondent would take the money out of the employees' benefits. The judge thus correctly concluded that in this case, "a reasonable employee would have likely concluded that Respondent was threatening employees with a negotiating posture, i.e., that employees would not gain any increase in any benefit during collective bargaining negotiations without an offsetting reduction in other benefits."

Save Mart Supermarkets, 326 NLRB 1146 (1998), relied on by the Respondent is distinguishable. First, the judge there found the testimony to be conflicting as to exactly what was said using the pie metaphor. Second, at most, the pie image was used to symbolize the employer's *entire budget*—including, but not limited to, labor costs—in connection with a manager's statement that "only so many pieces of the pie could be allocated to labor." Id. at 1148–1149. Under the circumstances, such a statement would convey only the truism that there were limits to what the union could obtain for employees in collective bargaining. In contrast to this case, nothing about the statement at issue in *Save Mart* would reasonably have suggested to employees that the limits of what they could gain were defined by what they already had.[7]

[5] In adopting the judge's 8(a)(1) finding, we find it unnecessary to rely on his adverse inference against the Respondent for failing to call Darner to testify.

Contrary to the Respondent, *International Baking & Earthgrains*, 348 NLRB 1133 (2006), does not warrant a contrary result. The statement by Human Relations Director Elioff in that case did not follow immediately after excusing an employee's minor tardiness (id. at 1139) and thus did not contain the same implied threat of stricter enforcement if a union was selected.

[6] The judge found, "one of the slices had a $ sign to represent wages; other slices were labeled vacation, sick time, retirement and possibly 'all other.' At none of the meetings were any of the slices labeled corporate profits, executive salaries or 'anything like that.'" The judge credited Fisher's testimony that the chart was used as part of a discussion of employers' "negotiating budget."

[7] In light of this distinction, we need not pass on the judge's finding that *Save Mart* has "very limited precedential value on the pie chart issue" because the decision does not make clear whether the issue was before the Board on exceptions.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, DHL Express, Inc., Wilmington, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. September 30, 2010

Wilma B. Liebman, Chairman

Craig Becker, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Jonathan D. Duffy, Esq., for the General Counsel.
David A. Kadela and *Jenna S. Barresi, Esqs. (Littler Mendelson, P.C.)*, of Columbus, Ohio, for the Respondent.
Anton G. Hajjar and *Jennifer E. Ku, Esqs. (O'Donnell, Schwartz & Anderson, P.C.),* of Washington, D.C. for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Cincinnati, Ohio, on May 2 and 3, 2007. The charge was filed on November 24, 2006, and the General Counsel filed a complaint on April 6, 2007.

The case arises out of an organizing campaign by the American Postal Workers Union (APWU; "the Union") at a very large private airport owned and operated by Respondent, DHL Express, in Wilmington, Ohio, which is located between Cincinnati and Columbus. Respondent's business is the shipping of mail and freight both domestically and internationally.

In September 2006, the Union filed a petition to represent approximately 377 of Respondent's employees working in Building F at the Wilmington airport, which Respondent designates as its "Gateway" operation. In response to the Union's petition, Respondent contended that the only appropriate bargaining unit is a wall-to-wall unit including 91 employees in Building 11 of the airport, who work in its shipment recovery center and international services departments. The Regional Director of Region 9 agreed with the Respondent in his Decision and Direction of Election issued on November 3, 2007, Case 9–RC–18108.[1]

A representation election was scheduled for November 30, 2006. The election ballots would have given employees a choice of representation by the Union, representation by the International Brotherhood of Teamsters, which was also trying to organize the bargaining unit, and no collective-bargaining representative. The election was cancelled due to the filing of the instant charges, which allege a number of violations by Respondent of Section 8(a)(1) between September and November 16, 2006.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, receives and distributes mail and freight at its airport facility in Wilmington, Ohio. It annually performs services valued in excess of $50,000 in States other than Ohio. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union, the American Postal Workers Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Complaint Paragraph 5(a): Respondent distributes a memo to employees in September 2006 informing employees that if they select the Union as their collective bargaining representative, their wages, benefits, and working conditions will be frozen pending the outcome of negotiations for a collective bargaining agreement.

In September 2006, Respondent distributed to its employees a memorandum, GC Exhibit 2, entitled, "THE APWU: What you should know about this union." The second page of the memo contained the following two paragraphs:

> What is Collective Bargaining?
>
> You should understand that even if you were to sign an authorization card, and ultimately vote for a union under the National Labor Relations Board's election procedures, you would not be voting for a wage increase or any other thing that the union may have promised. *The only thing decided by the employees through a NLRB vote is whether they want the union to speak for them in collective bargaining.* There is often a misconception that there will automatically be a contract between an employer and the union, but the fact is that the day after the union is voted in, nothing changes. Actually, all of your wages, benefits, and working conditions would be frozen pending the outcome of negotiations.
>
> This would only be the beginning of contract negotiations—a process that can take a very long time. Also, keep in mind that if the APWU were voted in, DHL would only be obligated to sit down and bargain with the union in good faith. The Company would not, however, be under any legal obligation to agree to any specific union proposal that it did not think would be in its own best business interest.

[1] As requested by the Respondent, I take administrative notice that the Board denied the Union's request for review of the Regional Director's decision on November 29, 2006.

The next section was entitled "Will a Collective Bargaining Agreement be better than what I have today?" It informed employees that they can lose benefits through collective bargaining.

> During bargaining, wages and benefits can go up, but they can also stay the same, or even go down. One reason employees can lose in collective bargaining is that unions often trade employee benefits to get an employer to agree to something important for the union.
>
> Unions often try to negotiate:
>
> Automatic dues deduction from employee paychecks
> An agreement that the employer will send the dues deducted directly to the union.
> Required union membership or payment of a monthly dues equivalent as a condition of continued employment.
> Allow special privileges for union stewards.

Complaint paragraph 5(c)

Complaint paragraph 5(c) alleges that Carla Ford, one of Respondent's supervisors, violated Section 8(a)(1) during a meeting in September 2006, in which the aforesaid memo was distributed to 15–20 employees who reported to her. This allegation rests on the testimony of Jennifer Morris, a prounion employee who worked under Ford until April 2007.[2]

Morris testified that when distributing the memo, Ford spoke to employees about its contents. According to Morris, Ford said that if employees selected the Union that during collective bargaining there would be no step increases, that wage increases would be frozen. Morris also testified that Ford said that employees would not be able to change their health insurance, even during the open enrollment season, and that vacation benefits would not accrue.

Respondent has a step increase schedule for Wilmington employees. Essentially, if employees are performing satisfactorily, they receive a 50-cent-per-hour increase after 6 months of employment and periodic increases thereafter until they reach a maximum hourly wage (GC Exh. 3).

Ford testified that in response to an employee's question about what would happen to wages during contract negotiations, she replied that everything would stay as it is. She testified that she did not recall using the word "frozen." Ford then testified that Jennifer Morris challenged her on the issue of whether wages would be "frozen" and she replied that, "I didn't say it was frozen. Everything's just staying as it is (Tr. 370)." Ford denied saying anything regarding the effect of unionization on vacation accrual or employees' opportunities to change their health insurance coverage during open enrollment. On cross-examination, she conceded she did not have complete recall as to what was said at the meeting.

Morris gave an affidavit to a Board agent on November 8, 2006 (R. Exh. 1).[3] This affidavit is consistent with her testimony as to what Ford said with regard to step increases but includes nothing about vacations accruals or health insurance.[4] I credit Morris' testimony that Ford told employees that there would be no step increases during contract negotiations and discredit it with regard to the other benefits.

Ford was working from Respondent's memo, GC Exh. 2, when she was talking to employees. Morris' account of what Ford stated is consistent with the memo. The memo does not mention the nuance regarding regularly scheduled evaluations and raises. There is no evidence that Ford knew on September 15, that maintenance of the status quo required Respondent to continue its practice of granting wage increases according to fixed criteria at predictable intervals.[5] I therefore find that Ford followed the memo and told employees what Morris testified she said.

On the other hand, if Ford had mentioned a freeze regarding vacation accruals and health benefits, I believed Morris would have mentioned it in her affidavit. Thus, I credit Ford's testimony that she did not address these issues.

Complaint paragraph 5(d): Respondent, by Supervisor Rob Darner, threatened that it would no longer have flexibility in enforcing work rules if the Union was voted in.

The vast majority of bargaining unit employees work nights, starting work anywhere from 10 p.m. to midnight and working until 4 or 4:30 a.m. One evening in October 2006, James Hamilton, a unit employee and open union supporter, was 5 minutes late getting to his work station due to a delay in getting from the facility's main gate on a company bus. Hamilton testified that during the evening, he was talking about the Union with his supervisor, Rob Darner. At some point, Darner told Hamilton that he did not mark him down as tardy, but that if the Union wins, he would not be able to be as flexible.

Darner did not testify and I conclude that Hamilton's testimony is completely credible. The only hole in his testimony occurred during this exchange on cross-examination:

> Q. Is it just as likely that Mr. Darner said that if a union [comes in] here I might not be able to do—I might not have the flexibility?
>
> A. I don't remember the exact wording?

I find that there is no significant difference between "would not have the flexibility" and "might not have the flexibility." Respondent relies on *CPP Pinkerton,* 309 NLRB 723 (1992), in arguing that since Darner may have phrased his statement as only a possibility, it did not violate Section 8(a)(1). *CPP Pinkerton* is easily distinguishable in that the employer's agent in that case was making a prediction about what a third party

[2] Respondent terminated Morris for absenteeism in April 2007.

[3] Thus, Morris gave the affidavit 5 months before she was discharged. She also gave a second affidavit in December 2006, which was not entered into this record.

[4] Respondent at p. 20 argues that Morris should not be credited because her affidavit does not state that Ford used the word "frozen." It does, however, relate that Ford told employees that they would not get step increases until a contract was negotiated and ratified.

[5] When an employer has an established practice of granting wage increases to fixed criteria at predictable intervals, a discontinuance of that practice during collective-bargaining negotiations, constitutes a change in the terms and conditions of employment. Such a change, absent overall impasse on bargaining for an agreement as a whole, violates Sec. 8(a)(5) and (1) of the Act, *Daily News of Los Angeles,* 315 NLRB 1236, 1237–1241 (1994), enfd. 73 F. 2d 406 (DC. Cir. 1996); *Rural/Metro Medical Services,* 327 NLRB 49 (1998).

might do if employees organized. This prediction was based on what the Board deemed to be an objective basis, not what the Respondent might do. Darner was simply threatening Hamilton with action this Respondent might take in the event of unionization—without any objective basis for the statement.

I credit Hamilton's testimony without regard to the fact that Darner did not testify. However, I also draw an adverse inference from Respondent's failure to call Darner, who is still its employee, that he intended, and in fact clearly conveyed to Hamilton that if employees selected the Union as their collective-bargaining representative, Respondent's work rules would be more strictly enforced.[6]

Complaint Paragraph 5(e): alleged violations by Steve Crowthers

Complaint paragraph 5(e) is supported solely by the testimony of former employee Heath Martin, who was terminated for absenteeism in November 2006. Martin testified that Steve Crowthers, Respondent's senior operations manager in the imports division, saw him one night in October 2006 wearing union paraphernalia and asked him if he was supporting the Union. Then Martin testified that Crowthers engaged him in conversation and told him that if the Union prevailed that wages would be frozen. Crowthers testified that he never had any discussion with Martin about the Union or wages being frozen. I find Crowthers' testimony to be at least as credible as Martin's and thus dismiss these allegations of the complaint.

The allegation in paragraph 5(e)(iii) concerns what transpired at a company meeting on November 8, 2006. Respondent conducted four series of meetings for its employees regarding the union campaign. These series were held on October 25, November 8, 15, and 28. On each of these dates individual meetings for different groups of employees were conducted in several sessions prior to the start of night operations and several sessions in the early morning of the next day, after the business operation had ended.

At all the sessions on October 25 and November 8, the only speaker was the Director of Respondent's Gateway operation at Wilmington, Tom Roksvag. Each meeting session on these dates was limited to about 20 minutes each, followed by a 5 minute break. At the beginning of each session Roksvag announced there was insufficient time for him to entertain questions but that there were question and answer sheets at each seat for employees to write down any questions or concerns they might have.

At the November 8 sessions, Roksvag used a power point presentation while speaking to address the Regional Director's Decision and Direction of Election and an APWU flyer. This union flyer was critical of the Region's decision and the positions taken by Respondent regarding the scope of the bargaining unit. Heath Martin testified that he did not hear Roksvag say that there would be no questions and that therefore he made comments and asked questions during Roksvag's presentation. He did not testify that he raised his hand and/or was recognized by Roksvag.

These comments apparently concerned testimony Roksvag had given at the representation hearing bearing on the interaction between Gateway employees and employees from Building F, who the Regional Director found to be part of an appropriate bargaining unit. After a while, Steve Crowthers came over to Martin and told him to be quiet and to write down any question he had and that they would be answered later.

Crowthers testified that he was standing in the back of the room while Roksvag spoke and heard someone in the front row heckling Roksvag. He walked over to the person, who he recognized as Heath Martin, and told him that if he had a question, to write it down, but that if he continued heckling Roksvag, he'd remove Martin from the room. Crowthers testified that immediately after the meeting, he had a brief discussion with Martin in which he verbally reprimanded him for interrupting Roksvag, but had no other conversations with Martin.

Martin testified that later in the evening, Crowthers confronted him and told him that if he ever showed disrespect to Roksvag again, he would lose his job. Crowthers testified that he had no contact with Martin other than at the meeting and immediately afterwards.

If I were to credit Martin's testimony, Crowther's threat would violate Section 8(a)(1). An employee's unsolicited and even disruptive comments at a company meeting regarding unionization do not lose the protection of Section 7 unless they are far more egregious than those made by Martin, *Anheuser-Busch, Inc.,* 337 NLRB 3, 10–11 (2001); *F. W. Woolworth Co.,* 251 NLRB 1111, 1111–1115 (1980). For example, had Martin persisted to the point that Roksvag could not continue with his presentation, such conduct might lose the protection of Section 7. Here there is no such evidence and Martin stopped making comments after Crowthers spoke to him. However, I find that Martin's testimony about his conversations with Crowthers, except where corroborated by Crowthers, is insufficiently reliable to be credited.

Martin also testified that sometime between November 8 and 14, when he was terminated, Crowthers overheard Martin telling his immediate supervisor that he was running late. According to Martin, Crowthers told him that Respondent was able to work with him on his attendance, but would not be able to do so if employees selected the Union.[7] Crowthers denies that this conversation ever took place. I credit Crowthers' testimony as I find Martin's account to be very contrived. Therefore, I dismiss this allegation.

[6] Respondent argues at p. 20 of its brief, at fn. 16, that an adverse inference cannot be drawn because the record does not establish that Robert Darner is still a supervisor. At Tr. 204, James Hamilton testified that in the fall of 2006 Darner and his current supervisor, Bruce Morris, simply traded places. From this testimony, I infer that Mr. Darner is still a supervisor. I would also note that in the cases cited by Respondent in fn. 20, the former supervisor was no longer an employee of the respondent employer, a situation distinguishable from the instant case.

[7] Martin was present in the hearing room throughout the trial as the General Counsel's representative. He testified that his recollection of this incident was refreshed by hearing the testimony of a witness on the first day of the hearing (James Hamilton). The General Counsel moved to amend the complaint and I granted this motion over Respondent's objection.

Statements by Thomas Roksvag at the November 8 meeting sessions: Complaint paragraph 5(b)

The General Counsel alleges that at the November 8 meeting sessions, Thomas Roksvag, the director of Respondent's Wilmington Gateway, violated Section 8(a)(1) by telling employees that everything would be frozen until a contract was negotiated. This allegation is supported solely by the testimony of Robert Storer, a current DHL employee.

Storer testified that he attended three meetings conducted by Roksvag regarding the Union. According to Storer, at the end of the second meeting, an unidentified employee raised his hand and asked if it was true that benefits and wages would be frozen during "this time period of deciding whether you wanted to bring a union in or not."[8] Storer recalled Roksvag answering:

> He said [they] would be frozen at that period up till the decision was made and if the decision was made of no union then everything would go back to the way it was and the increase would continue to come and so on . . .
>
> Q. Did he say what would happen if the decision [was] that there would be a union?
>
> A. Then it would still be continued frozen throughout negotiations.

Tr. 287–288.

Respondent proffered two witnesses who discussed what transpired at the November 8 meeting sessions. Thomas Roksvag testified that he told employees that due to the tight time schedule no questions would be entertained and that employees who had questions should write them down on a sheet of paper at their desks. He also testified that he did not discuss the collective-bargaining process or the affect on wages, benefits, and working conditions of the employees voting in a union. Further Roksvag testified that no employee asked a question at the November 8 meetings, although he testified that at one session, he was interrupted by the heckling of an employee (Heath Martin). Roksvag testified that he conducted the November 8 meeting sessions with the aid of a power point presentation (R. Exh. 2), and the Union's "News Flash" (R. Exh. 3).

Steve Crowthers, Respondent's senior operations manager for Imports, also testified about the November 8 meetings. Crowthers testified that the November 8 meetings were all conducted in the same fashion and on a strict time schedule which lasted 20–25 minutes. He also recalled that employees were told at the outset that the meeting was not a question and answer session and that they should write any questions on a piece of paper at their desks.

Respondent contends that I should not credit Storer's testimony for a number of reasons. First, it notes that other General Counsel witnesses, namely, Jennifer Morris and James Vandiver testified that collective bargaining was not discussed by the Respondent until the November 15 meeting. However, there is no evidence indicating that Storer attended the same session on November 8, as Morris and Vandiver. On November 15, Storer attended an evening session, while Morris and Vandiver attended an early morning session, making it quite likely that he did not attend the same session on November 8. However, I am troubled by the fact that the General Counsel did not produce any other witnesses to corroborate Storer's testimony, because a number of other employees should have been able to do so, if Storer's testimony was accurate.[9]

Secondly, Respondent points out that Storer's testimony, that there were no employee questions asked of Carolyn Fisher at the meeting he attended on November 15, is clearly incorrect. Three other General Counsel witnesses, who appear to have attended the same November 15 meeting, recalled Fisher fielding employee questions. While this establishes that Storer's memory is inaccurate in some respects, it is not conclusive, as he did accurately recall other aspects of the November 15 meeting.[10]

Thirdly and most importantly, Storer testified that Roksvag did not use any props or Power Point slides during his presentation on November 8. There is no reason for me not to credit Roksvag's testimony to the contrary and I would think Storer would remember this if he recalled anything about the November 8 meeting.

On the other hand, Storer's testimony regarding the question to Roksvag is very specific and is corroborated to some extent by James Vandiver's testimony[11] that at meetings Vandiver attended, employees asked Roksvag questions even though they were initially told not to do so.[12]

In addition to testifying about an employee's question and Roksvag's response, Storer's testimony differs from Respondent's evidence in a number of other respects. He remembered this meeting lasting about 45 minutes, longer than Respondent's evidence indicates it lasted. He also testified that there was not a piece of paper in front of him to write down any questions he might have.

A factor in favor of crediting Storer is that Respondent had already told employees in writing that wages and benefits would be frozen during contract negotiations. Moreover, it is not clear when management learned that it would be best not to use this terminology. There is a suggestion that they might have become aware of the problem with the term "frozen" when Carolyn Fisher arrived at Wilmington on November 14.

[8] Storer testified that the questioner was not Heath Martin (see discussion of complaint par. 5(e)) and that Martin did not attend the same November 8 meeting that he did.

[9] Storer testified that there were 50–100 people at this meeting. Fifty to 60 would be consistent with the size of the unit and the number of meetings.

[10] Storer was also probably incorrect in testifying that the number of attendees at the Fisher meeting was approximately the same as at prior meetings. Since Respondent had reduced the number of meetings, the number of employees in attendance on November 15, would most likely have been substantially greater than on November 8.

[11] However, Vandiver's recollection of the events in November 2006 wasn't very good either.

[12] It is not absolutely clear whether Storer attended the same meeting session on November 8, as any of the other General Counsel witnesses. The only evidence that all the meetings on November 8, were conducted in a virtually identical manner, with the exception of the Heath Martin outbursts, is the testimony of management witnesses Roksvag and Crowther.

Storer appears to have been far less active in support of the Union than most of the General Counsel's witnesses and as a current employee would have a substantial motivation to testify truthfully to avoid retaliation in the future.[13] Finally, Roksvag and Crowther are even more interested parties in the outcome of this case than is Storer.

Nevertheless, in the final analysis, Storer's failure to recall the power point demonstration, leaves me with enough doubt as to the reliability of his recollection of what occurred, that I am unable to credit his testimony. Thus, I dismiss complaint paragraph 5(b).

Carolyn Fisher's talk at the November 15–16 employee meetings, complaint paragraph 5(f)

Respondent conducted five meeting sessions for employees on November 15–16, 2006. the first session started at about 10 p.m.; a second session at 11:15 p.m.; a third at about 4:00 a.m.; and a fourth at about 5:15 a.m. A fifth session was conducted at about 11 a.m. for Respondent's day-shift employees.

Thomas Roksvag started each meeting by introducing Carolyn Fisher, who had been hired by DHL as its director of labor relations only a few weeks previously. Fisher, who then conducted the meetings, had held a similar position with Coca-Cola Enterprises after spending several years as management attorney practicing labor law. Each meeting was conducted in a similar, but not identical fashion. Fisher did not read from a script. The General Counsel's evidence concerns only two of the sessions, 10 p.m. (witnesses Grant, Hyden, Hamilton, and Storer) and the 5:15 a.m. meeting (witnesses Jennifer Morris, Rebecca Vandiver, and James Vandiver).

Fisher discussed similarities between Coca-Cola's bottling and distribution operations and DHL's operations. Then she told the employees about a public broadcasting program about "noodling," a way in which some people catch catfish by letting the fish bite their bare hands. She used this story to communicate to employees that they may not know what they are getting into if they choose to be represented by the Union.

Fisher went on to discuss the election process, telling the employees that there would be three choices on their ballots; the Union, No Union, and the International Brotherhood of Teamsters. She described how to mark ballots and encouraged employees to vote by informing them that if they did not want the Union and did not vote, the Union would represent them if it received the majority of the votes cast.

Then Fisher told the employees that if the Union prevailed, all it won was the right to call DHL and request bargaining. She emphasized that employees were not voting for any particular collective-bargaining agreement.[14] Additionally, she said, Respondent was only required to listen to and consider the Union's proposals and was not required to agree to any of them.

During each session, Fisher drew a pie chart, either on a white board or a flip chart.[15] At one or more of the sessions, one of the slices had a $ sign to represent wages; other slices were labeled vacation, sick time, retirement, and possibly "all other." At none of the meetings were any of the slices labeled corporate profits, executive salaries, or "anything like that." (Tr. 437–438). I credit the following testimony by Fisher with regard to what she told employees at one or more of the meetings in connection with the pie chart:

> . . . I said companies also prepare for negotiations and when companies prepare for negotiations they create a negotiations budget.
>
> And you know, I said every company has a budget and that budget isn't, doesn't necessarily change from before negotiations to after simply because a union is on the scene but the companies come into negotiations with a budget.
>
> That's when I drew the pie chart that's been referenced on numerous occasions. And I did just hand draw the pie chart on a white board.
>
> There may have been, there may have been a couple of occasions when it was on a flip chart but it, each time it was just a hand drawn circle and just real rudimentary making pie pieces on the chart.
>
> And I said let's say, you know, the employer comes into negotiations and they have their budget looking like this. And so there was a dollar sign for wages and you've got health insurance and you've got vacation and sick time.
>
> You've got retirement. And then I think I did one that was just all other. And I said from the employer's perspective, you know, if a union's saying, hey we want more in this area and you're an employer with a budget, you've got to figure out where that money is going to come from.
>
> And so as the employer you might say okay they want more in this area, let's see if we can find that money in this area.
>
> I then wrapped up that part of the presentation by saying I'm not, I can't predict how negotiations will turn out because no company can.
>
> I also said the union can't predict how negotiations will turn out because I said at the end of the day you could end up with more, you could end up the same or you could end up with less but nobody knows.

Tr. 413–414.

Fisher also told employees that negotiations could last a long time. Then she told the employees that it would be very diffi-

[13] The testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests. *Flexsteel Industries,* 316 NLRB 745 (1995); *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961). Thus, a witness' status as a current employee may be a significant factor, but it is one among many which a judge utilizes in resolving credibility issues. See, e.g., *Farris Fashions*, 312 NLRB 547, 554 fn. 3 (1993), enfd. 32 F.3d 373 (8th Cir. 1994); *Circuit-Wise, Inc.*, 309 NLRB 905, 909 (1992).

[14] The Teamsters had been distributing one of its collective-bargaining agreements amongst unit employees.

[15] Fisher testified that the flip charts were discarded after each session, Tr. 425.

cult for them to get rid of the Union once it had been selected as their collective-bargaining representative. She discussed the 1-year prohibition against decertification and the 3 year contract bar rule, thus informing employees that they could be stuck with the Union for 4 years even if they were dissatisfied with it. She concluded this part of her talk by opining that it was easier to get a divorce than get rid of a union.

Fisher testified that she never used the word "frozen," and never told employees that they would lose benefits in collective bargaining. She testified that she told employees that they could gain, lose, or stay the same as the result of the negotiations.

I credit Fisher's testimony that she did not say wages would be frozen and that she told employees that they could gain, lose, or stay the same in collective bargaining. Her testimony in this regard is corroborated by some of the General Counsel's evidence, which is discussed below.

Fisher spoke for approximately 30–40 minutes and then entertained questions. An employee at one meeting asked Fisher about the effect of "Right to Work" laws. Fisher responded by saying that Ohio was not a "Right to Work" state and therefore if employees selected the Union, all unit members would either have to join or pay to the Union an amount equivalent to that portion of the union dues attributable to the Union's representational activities.

Another employee asked if wages would be "frozen" during collective-bargaining negotiations. Fisher testified that her response was that this was not the correct terminology; that the correct term was "status quo," that whatever employees had presently would continue through contract negotiations, including step increases and vacation accrual. She also testified that she discussed step increases at each meeting even though she did not know whether or not DHL had an established practice of granting step increases. Despite this, she discussed step increases because she felt it was the easiest way to explain to employees the meaning of maintaining the "status quo."

I credit Fisher's testimony regarding her discussion of step increases and the "status quo." I find that it is essentially corroborated by employee Jerry Hyden's affidavit and Jennifer Morris' testimony on this subject.

General Counsel Testimony regarding the meetings conducted by Carolyn Fisher on November 15–16.[16]

The 10:15 meeting

Robert Storer, who attended the 10:15 meeting on November 15, testified there were no questions asked of Fisher at the meeting he attended. He also testified that on the pie chart drawn by Fisher at the meeting he attended, she left some pie slices blank. Other than that, Storer's testimony is consistent with Fisher's.

Jerry Hyden testified that all the pie slices pertained to employee benefits. Hyden also testified that there was a question and answer session in which Fisher told employees that "wages and things" would be frozen during negotiations. He specifically stated that Fisher did not say that step increases would continue during bargaining. However, in an affidavit given to a Board agent on December 5, 2006, Hyden wrote:

> Ms. Fisher explained that but if it was status quo, then that meant if you were already promised wage increases, then things would stay the same.

On the basis of this statement in Hyden's affidavit, I credit Fisher's testimony that she explained to employees what status quo meant—using the example of step increases that were a company's established practice.

Donald Grant testified that in response to a question, Fisher stated the wages would be frozen during contract negotiations. However, in an affidavit given a Board agent he said Fisher did not use the word frozen, but that she did say wages would not increase during contract negotiations. I therefore do not credit his testimony that Fisher told employees that wages would be frozen.

Grant also testified about Respondent's pay increases. Then he responded to the following question:

> Q. Okay, Did Ms. Fisher state whether those pay increases would continue during negotiations with the Union?
> A. She kind of left it open, but she –she didn't—she did not say anything about anything—any of the status quo. She—basically said that the wages would be frozen when there was negotiations, and that—you know, people would be unhappy.

Tr. 98–99.

I view Grant's testimony as corroborating Fisher's testimony that she discussed step increases as an example as what was meant by maintaining the status quo. Not only does his testimony indicate that Fisher discussed step increases, his use of the term "status quo" when he had not been asked about "status quo" strikes me as calculated. I infer Grant knew that whether "status quo" was discussed was an issue in this case and that he knew it was important to the Union's case to establish that Fisher did not tell employees that Respondent would maintain the "status quo" during negotiations or explain what the term meant. On cross-examination, Grant conceded that he could not recall whether or not Fisher used the term "status quo." He also recalled that Fisher did say that in negotiations employees could end up with more, less, or the same.

The 5:15 a.m. meeting session, November 16, 2006

Jennifer Morris testified that she attended the 5:15 a.m. meeting. Her testimony is largely consistent with Fisher's. Morris testified that when Fisher drew the pie chart she told employees that the pie can't get bigger and that if one slice of the pie gets bigger, another must get smaller. According to Morris all of the slices pertained to employee benefits; none were labeled management salaries, advertising, or capital improvements. I credit Morris' testimony. Fisher, who testified after Morris and who was in the courtroom when Morris testified,[17] did not specifically refute Morris' testimony that Fisher told employees that the pie could not get bigger and that gains from one piece of the pie must come from another slice. Addi-

[16] Fisher also spoke to employees on November 28. There is virtually no evidence in this record about the November 28 meeting sessions.

[17] Tr. 10–11.

tionally, Fisher was unsure as to whether a slice was labeled "all other" at any of the meetings and did not testify that a slice was so labeled at all the meetings.

Morris asked Fisher if employees would continue to get step increases at the time they received their performance evaluations. Fisher responded by saying that employees would continue to get such increases if they were not merit based, but not if they were merit based, Tr. 45–46.

I credit Morris' testimony in this regard. Fisher denied using the term "frozen," but her testimony not only doesn't refute Morris' testimony regarding merit-based step increases; it tends to corroborate it. Fisher testified:

> I didn't know at the time that DHL had a step increase program but I actually said, so for instance if you have step increases that are already, that are automatic at a certain time or if you have increases that where at certain time periods you're scheduled to get an increase, that continues.

Tr. 419.

Morris corroborated Fisher's testimony that she told employees that as a result of collective-bargaining negotiations, employees could end up with more, less, or the same benefits.

Rebecca Vandiver, who attended the 5:15 meeting, recalled that one of the slices of the pie chart contained a $ sign. She testified that Fisher did not explain what that meant. Vandiver did not recall any other slices that did not pertain to an employee benefit.

James Vandiver, Rebecca's husband, had a somewhat different recollection. He recalled one slice as being for "the company." On direct examination, James Vandiver testified that when an employee asked whether the money for increased employee benefits could come from the company slice, Fisher simply didn't respond. On cross-examination, he testified that Fisher responded by saying that money for employees could not come from the company slice. James Vandiver's testimony is so confusing and at times contradictory that I give it no weight.

Analysis

Respondent violated Section 8(a)(1) on or about September 15, 2006, as alleged in complaint paragraphs 5(a) & (c).

An employer's statement that wages will be frozen until a collective-bargaining agreement is signed violates Section 8(a)(1) of the Act if the employer has a past practice of granting periodic wage increases, *Jensen Enterprises,* 339 NLRB 877, 884–885 (2003), and cases cited therein; *Alpha Cellulose Corp.,* 265 NLRB 177 (1982), enfd. mem. 718 F. 2d 1088 (4th Cir. 1983).

Respondent cites to two earlier cases, *Montrose-Haeuser Co.,* 306 NLRB 377 (1992), and *Uarco,* 286 NLRB 55 (1987), which appear to me to be inconsistent and materially indistinguishable from *Jensen Enterprises* and the cases cited therein. In *Montrose-Haeuser*, however, the employer, unlike Respondent DHL, specifically told employees that its past practices of granting a Christmas bonus and annual merit increase would continue, while there is no evidence that Respondent in the instant case ever gave such assurances.[18]

Nevertheless, the decisions in *Uarco* and *Montrose-Haeuser* suggest that an employer, whose past practice includes regular scheduled wage increases, does not violate the Act if it says wages will be frozen 1 minute and says that it will maintain the status quo the next—at least so long as it does not violate the Act in other respects. Given the factual circumstances in *Jensen Enterprises,* those cases appear to have been overturned subsilento by the Board.[19] Thus, I conclude, pursuant to *Jensen,* that Respondent's memo, General Counsel's Exhibit 2 and Carla Ford's remarks on September 15, violated Sec. 8(a)(1).

Respondent, by Carolyn Fisher, violated Section 8(a)(1) by threatening employees that it would be futile for them to select the Union as their collective-bargaining representative.

An employer violates Section 8(a)(1) by threatening employees that attempts to secure union representation would be futile, *Wellstream Corp.,* 313 NLRB 698, 706 (1994). I find that Respondent, by Carolyn Fisher, violated Section 8(a)(1) on November 15–16, 2006. Fisher's use of the pie chart clearly was intended to communicate to unit employees that they could not gain anything by selecting the Union as their collective-bargaining representative. A reasonable person listening to Fisher would have clearly understood this to have been her message.

What was less clear from Fisher's presentation was whether Respondent could not increase any benefit without a corresponding decrease in a different benefit, or that Respondent, was as a matter of policy, unwilling to do so. She certainly made no attempt to convey to employees that there were objective facts beyond Respondent's control that would prevent it from increasing their benefits. A reasonable employee would have likely concluded that Respondent was threatening employees with a negotiating posture, i.e., that employees would not gain any increase in any benefit during collective-bargaining negotiations without an offsetting reduction in other benefits. I draw this inference because Fisher made no effort to explain why money for increased employee benefits could not come from sources other than employee benefits. Indeed, at the 5:15 meeting, she told employees that the pie, which only included employee benefits, could not get bigger.

While Fisher also told employees that they could gain, lose, or stay the same as the result of collective bargaining, I conclude that she did not cure, negate, or minimize the impact of her use of the pie charts on a reasonable employee, *Noah's New York Bagels,* 324 NLRB 266, 267 (1997).[20] The message from

[18] I do not equate Carolyn Fisher's hypothetical example of step increases to have the same import as a statement by Respondent that employees will continue to continue to receive their step increases during collective-bargaining negotiations. At the 5:15 a.m. meeting, her response to Jennifer Morris' question suggested that Respondent would not continue giving merit based step increases during collective-bargaining negotiations. Moreover, it has not been established that every employee who received Respondent's September 2006 memo heard Fisher's November 15–16 presentations. Attendance at these meetings was not mandatory (Tr. 325).

[19] But see *American Red Cross Missouri-Illinois Blood Services Region,* 347 NLRB 347 fns. 5 and 7, 364 (2006). Neither the Board's or Judge's decision in *American Red Cross* mentions the *Jensen Enterprises* decision.

[20] An employer may cure the impact of an unlawfully coercive statement by making an explicit, "unambiguous, specific" repudiation

her pie chart presentation, i.e., that collective bargaining would be a "zero sum game" was likely to be the most vivid and lasting impression left with employees, regardless of what else Fisher told them. Indeed, given Respondent's earlier communication to employees that the Union would bargain away benefits for such items as union security, Fisher's pie chart presentation would likely leave employees with the impression that if they selected the Union, collective bargaining would either end up without an agreement or a loss of benefits for employees. I therefore that Fisher's manner of utilizing the pie chart on November 15–16, 2006, violated Section 8(a)(1) in threatening employees that selection of the Union as their bargaining representative would be futile, *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618 (1969).[21]

Respondent, by Carolyn Fisher, violated Section 8(a)(1) in threatening employees that their wages would not increase during negotiations, as alleged in complaint paragraph 5(f)(ii).

The Board with court approval has consistently found that merit increase programs that are fixed as to timing are a term and condition of employment, notwithstanding an element of discretion retained by an employer in setting the amount of such raises, *Jensen Enterprises*, supra; *Oneita Knitting Mills,* 205 NLRB 500 fn. 1 (1973). Accordingly, if the Union won an election, Respondent could not lawfully discontinue its practice of granting merit increases, until it bargained to agreement or impasse with the Union. Carolyn Fisher responded to a question from Jennifer Morris at the 5:15 a.m. meeting session on November 16, by telling employees that they would not receive step increases during collective-bargaining negotiations, if these increases were merit based. This response amounted to a threat to unilaterally deprive employees of benefits because they supported the Union. Thus, the response violated Section 8(a)(1).

Respondent, by Rob Darner, violated Section 8(a)(1) by telling James Hamilton that if employees selected the Union, he would have to strictly enforce Respondent's rules requiring employees to be prompt in reporting to their work station.

It is unlawful to threaten stricter enforcement of rules or policies because employees may vote to have union representation. See, e.g., *Miller Industries Towing Equipment,* 342 NLRB 1074, 1082 (2004) (statement that rules would be enforced to the letter if the union came in held violative), citing *Mid Mountain Foods,* 332 NLRB 229, 237–238 (2000), enfd. 269 F.3d 1075 (D.C. Cir. 2001).

I find that Respondent, through Supervisor Rob Darner, threatened James Hamilton with stricter enforcement of its workrules regarding being late to his work station. As discussed on page 4 herein, I find that Darner did so regardless of whether he said he would have to mark Hamilton as tardy, or that he might have to mark Hamilton as tardy.

Summary of Conclusions of Law

1. Respondent violated Section 8(a)(1) by distributing to its employees in September 2006 a memorandum stating that wages, benefits, and working conditions would be frozen pending the outcome of negotiations if employees selected the Union as their collective-bargaining representative. This effectively constitutes a threat that employees will lose benefits if they chose union representation.
2. Respondent, by Carla Ford, violated Section 8(a)(1) in September 2006, by telling employees who reported to her that during collective bargaining there would be no step increases and that wages would be frozen.
3. Respondent, by Rob Darner, violated Section 8(a)(1) by threatening employee James Hamilton with stricter enforcement of Respondent's work rules if employees selected the Union as their collective-bargaining representative.
4. Respondent, by Carolyn Fisher, violated Section 8(a)(1) in using a pie chart in such a manner as to suggest to employees that selection of the Union would be futile in that Respondent would not and/or could not grant employees any greater benefits than they enjoyed without union representation.
5. Respondent, by Carolyn Fisher, violated Section 8(a)(1) in telling employees that they would not receive merit-based step increases during collective-bargaining negotiations.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

of it and assuring employees that no such violation will occur again, *Passavant Memorial Area Hospital,* 237 NLRB 138, 139 (1978). However, Respondent made no such repudiation of either its statements to employees that wages would be "frozen" or the threats/suggestions of futility communicated to employees during Ms. Fisher's use of her pie charts.

[21] Respondent's brief cites *Save Mart Supermarkets,* 326 NLRB 1146, 1150 (1998), for the proposition that it did not violate the Act in the manner it which it utilized the pie charts. In that case, the Judge found that the employer's use of a pie chart did not violate the Act. However, the judge directed a second election on the basis of other objectionable conduct. The General Counsel did not file exceptions to the Judge's decision, but the Respondent and the Charging Party did so. It is unclear from the Board's decision whether the Charging Party's objections covered the Judge's disposition of the pie chart issue, because the judge overruled other objections as well. Well-established Board policy is to adopt an administrative law judge's findings to which no exceptions are filed. However such findings are not considered precedent for any other case, *Colgate-Palmolive Co.,* 323 NLRB 515 fn.1 (1997).

Even assuming that the Charging Party's exceptions to the Judge's decision in *Save Mart* covered the pie chart ruling, it is not clear that his ruling on this issue was reviewed by the Board which affirmed the decision. It may be that Board did not deem that the union was aggrieved by the judge's ruling regarding the pie chart. I view *Save Mart* as having very limited precedential value on the pie chart issue.

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, DHL Express, Inc., Wilmington, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with a loss of benefits, specifically periodic wage increases, if they select the Union as their collective-bargaining representative.

(b) Threatening employees with stricter enforcement of its work rules, if they select the Union as their collective-bargaining representative.

(c) Threatening employees with statements suggesting that it would be futile to select the Union as their collective-bargaining representative because Respondent would not and/or could not grant them benefits that were more favorable than those employees already enjoyed.

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

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

(a) Within 14 days after service by the Region, post at its Wilmington, Ohio facility copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 15, 2006.

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

(c) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., June 21, 2007.

APPENDIX

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 threaten our employees with loss of benefits, specifically the loss of periodic wage increases if they select the Union as their collective-bargaining representative.

WE WILL NOT threaten our employees with stricter enforcement of our work and/or disciplinary rules if they select the Union as their collective-bargaining representative.

WE WILL NOT threaten our employees with statements indicating that it would be futile to select the Union as their collective-bargaining representative by suggesting to them that collective-bargaining negotiations will not and/or cannot result in improved wages, benefits, and/or working conditions.

DHL EXPRESS, INC.

[23] If this Order is enforced by a judgment of a 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."