UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

UPS SUPPLY CHAIN SOLUTIONS, INC.		
and	Cases No.	12-CA-26437 12-CA-26446 12-CA-26564
TEAMSTERS LOCAL UNION NO. 769, Affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS		

UPS SUPPLY CHAIN SOLUTIONS, INC. REPLY BRIEF TO GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ALJ'S DECISION

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Pursuant to Section 102.46(h) of the Rules and Regulations of the National Labor Relations Board, UPS Supply Chain Solutions, Inc. ("UPS SCS") hereby submits its Reply Brief to the General Counsel's Answering Brief, filed on January 28, 2011.

I. UPS SCS Established that Mr. Puig was Discharged for His History of Disruptive and Insubordinate Behavior for which he had been Disciplined Throughout his Employment.

The General Counsel mischaracterizes the facts surrounding Mr. Puig's discharge. The memorandum summarizing the meeting during which Mr. Puig was discharged states that Raul Echeverria received *complaints* that Mr. Puig's behavior had been "disruptive, hostile, negative and non-professional" and cited the July 23rd meeting where Mr. Puig became "very agitated and upset." *See* GC 20 (emphasis added)[1]. The General Counsel's argument that because UPS SCS offered no evidence to suggest that Mr. Puig engaged in any disruptive behavior between July 23 and his discharge on August 6 that Mr. Echeverria must have been referring to Mr. Puig's "union activity"[2] as the disruptive, hostile and negative and non-professional behavior in which he had engaged, completely mischaracterizes the facts in evidence. First, as quoted by the General Counsel, the memorandum states that Mr. Echeverria *received complaints* - obviously from other individuals - about Mr. Puig's behavior at the July 23rd meeting. Avelino Herrera, one of Mr. Puig's coworkers who attended the July 23rd meeting with him, testified that he complained about Mr. Puig's behavior at that meeting. Tr. 129, 531-32. Clara Polanco-Guzman also testified as to complaints she received from other employees. Mr. Echeverria was simply informing Mr. Puig of the type of complaints UPS SCS had received about his behavior at that

[1] Citation to the hearing transcript is cited as "Tr." followed by the page number. Exhibits introduced at the hearing by the General Counsel and Respondent, UPS SCS are cited as "GC" or "R" followed by the exhibit number. Citation to the Decision is cited as "Decision" followed by the page number.

[2] UPS SCS disputes any allegation made by the General Counsel that Mr. Puig was discharged for engaging in union activity. The ALJ did not find that Mr. Puig was discharged for his union activity and the General Counsel filed cross-exceptions regarding this issue. UPS SCS will respond fully to the General Counsel's cross-exceptions in its Answering Brief to the General Counsel's Cross- Exceptions filed simultaneously with this Reply Brief.

particular meeting. Next, the reference to the "consistent displayed behavior" is obviously referring to Mr. Puig's long history of disruptive and non-professional behavior about which numerous UPS SCS supervisors testified and which was described in detail in UPS SCS's Answering Brief. That Ms. Polanco-Guzman did not outline in the memorandum every incident of Mr. Puig's disruptive behavior during his entire employment UPS SCS in no way supports an inference or conclusion that he was discharged solely for his behavior at the July 23rd meeting.

Additionally, there is ample evidence in the record regarding Mr. Puig's discipline for his repeated insubordinate behavior. While the General Counsel focuses on the lack of an employee record form in Mr. Puig's file, this fact in no way establishes that Mr. Puig was never disciplined. Mr. Puig himself acknowledges receiving discipline and testified that he was sent home from work for his failure to wear his uniform. Tr. 174, 191, 302, 310. When Mr. Echeverria sent him home for the day, Mr. Echeverria had no knowledge that Mr. Puig was simply being purposefully insubordinate and actually had his uniform in his car. See Tr. 175. Simply because Mr. Puig returned to work the same day after he complied with UPS SCS's uniform policy does not negate the fact that he was instructed to leave the premises by his employer. Additionally, it is undisputed that Mr. Echeverria previously terminated Mr. Puig's employment for screaming defamatory statements in the UPS SCS lunchroom that UPS SCS stole his money. Tr. 607. Mr. Puig's subsequent reinstatement and suspension of one day without pay in no way erases the ultimate form of discipline - termination - that he received for his insubordinate behavior. These two incidents alone, not to mention the many hours of coaching, counseling and warnings Mr. Puig received over the years, clearly establish that Mr. Puig was disciplined by UPS SCS for his previous insubordinate behavior. Contrary to the

General Counsel's contention, the evidence overwhelmingly established that UPS SCS repeatedly disciplined Mr. Puig for his past conduct.

Lastly, the General Counsel makes much of UPS SCS's supposed "long tolerance" of Mr. Puig's behavior. As discussed above, Mr. Puig was terminated in 2009 for insubordinate behavior and served a one day suspension, contradicting any allegation by the General Counsel that UPS SCS tolerated his behavior.[3] Additionally, in 2008 a new Vice President of Human Resources, Charnley Conway, assumed responsibility for the Miami facility where Mr. Puig worked. Tr. 829. Mr. Conway had a different approach to management than his predecessor and believed that if an employee did not improve after management's efforts to work with the employee, the employee should be terminated. Tr. 434, 458. Mr. Conway was the ultimate decision maker as to Mr. Puig's termination. He considered Mr. Puig's long history of insubordinate conduct Mr. Puig's refusal to change his conduct after years of coaching, counseling and discipline, including suspension and termination, by management. UPS SCS put forth ample evidence that Mr. Puig's discharge would have occurred even in the absence of any protected activity. Mr. Puig's alleged concerted activity had no bearing on his termination. Tr. 620. The General Counsel's arguments that UPS SCS failed to discipline Mr. Puig prior to his termination and that Mr. Puig was terminated solely for his conduct at the July 23rd meeting are not supported by the record.

As discussed more fully in UPS SCS's Brief in support of its exceptions to the ALJ's decision, since Mr. Puig's behavior at the July 23rd meeting was not the sole reason for his discharge, the *Wright Line* analysis is applicable here. The General Counsel cannot meet its burden under *Wright Line* because Mr. Puig was not engaged in protected activity, UPS SCS was not aware of that activity, and because Mr. Puig was discharged for his repeated insubordinate

[3] As noted in the General Counsel's brief, Mr. Puig also received a warning letter.

behavior. Even if the Board somehow determines that *Wright Line* is not the applicable analysis, Mr. Puig's disruptive behavior supports a finding under the four factor *Atlantic Steel* analysis that his conduct caused him to lose the protection of the Act. *See Atlantic Steel Co.*, 245 NLRB 814 (1979). First, Mr. Puig unprofessional outburst occurred at a group meeting on working time where other employees were present. Secondly, the subject matter of his outburst was his own personal issues and he was not advocating on behalf of any other employees. Third, the nature of Mr. Puig's outburst was insubordination, directly in violation of UPS SCS's Professional Conduct Policy. Finally, as the ALJ found, the showing of the Little Card, Big Trouble video was not an unfair labor practice and therefore Mr. Puig cannot be found to have been provoked by an unfair labor practice of the employer. Therefore, under the *Atlantic Steel* analysis, Mr. Puig's conduct caused him to lose the protection of the Act.

II. UPS SCS's Desire to Remain Union-Free Cannot be Used as a Basis for a Finding of Union Animus.

The General Counsel wrongly claims that since UPS SCS held meetings discussing the benefits of remaining union free and showed the video Little Card, Big Trouble, it demonstrated union animus. It is clear that the Act itself protects UPS SCS's free speech regarding unionization. *See* 8(c) of the Act. The Board may not punish an employer simply because that employer is anti-union or desires to remain union-free. *BE & K Construction Co., v. NLRB*, 133 F.3d 1372, 1376 (11th Cir. 1997). As the 11th Circuit has stated: "It is fundamental that the Board has no authority to punish a company because it is against a union. Any company has a perfect right to be opposed to a union, and such opposition is not an unfair labor practice." Id. at 1377 (citations omitted). Not only did the ALJ correctly decide that UPS SCS's showing of the video Little Card, Big Trouble did not violate the Act, but the Board has expressly held that the video itself is protected by Section 8(c) of the Act. *Flying Foods Group, Inc.*, 345 NLRB 101,

106 (2005). As the Board stated, the video "merely sets forth the [employer's] privileged views about the potential consequences of signing an authorization card. It contains no threats against employees for signing an authorization card or any promises of benefit for not signing a card. . . .the [employer] has [the] right under Section 8(c) to convey this noncoercive message." Id. Accordingly, the General Counsel's argument that conducting meetings designed to illustrate the benefits of remaining union free and the showing the Little Card Big Trouble video demonstrated UPS SCS's alleged union animus is completely contrary to the law and the Board should reject these arguments.

Similarly, Clara Polanco-Guzman's statement during the July 23rd meeting is speech protected by the Act. As the ALJ correctly determined, Ms. Polanco-Guzman's statement to employees at the July 23, 2009 meeting "was lawful, because she never told, or implied to, the employees that the Respondent would terminate the employees on its own simply because they chose the Union, without regard to business necessity." Decision at 20. Her prediction of possible job loss was "couched in terms of the effect of unionization on the Respondent's customers, a factor outside of the Respondent's control." *Id.* Since her comment was protected by the Act, the ALJ dismissed the allegation that Ms. Polanco-Guzman threatened employees with discharge if they selected the union. It has long been established that an employer is free to communicate to its employees any of its general views about unionism or any specific views about a particular union, so long as the communications do not contain a threat of reprisal or force or promise of benefit. *See Gissel Packing Co. Inc. v. NRLB*, 395 U.S. 575, 618 (1969). As required by the Supreme Court in *Gissel Packing*, Ms. Polanco-Guzman's comment was phrased on the basis of objective fact - a clause in a contract - to convey consequences beyond the

employer's control. *Id.* As a result, Ms. Polanco-Guzman's lawful, protected statement cannot be used to show that UPS SCS harbored anti-union animus.

III. The Purported No-Solicitation Rule Contained in the July 17th PCM was not Fully Litigated or Closely Connected to the Subject Matter of the Complaint.

Without affording UPS the process of the law, the General Counsel attempts to broaden its claim to include the July 7 PCM as a violation of the Act. The Board, however, may only affirm the ALJ's finding of a violation of Section 8(a)(1) of the Act for the purported no-solicitation rule allegedly announced at the July 17 PCM if the Board concludes that UPS SCS was afforded the basic fairness of due process of law. No such evidence exists here. Indeed, the ALJ stated *"[t]o the extent that the complaint alleges* that the rule, as conveyed to employees on July 17, is overly broad, I agree." Decision at 6 (emphasis supplied). The emphasized portion of the ALJ's decision makes it absolutely clear that the ALJ did not address, let alone decide, one of the most important requirements of our legal system, whether due process existed to hold UPS SCS legally responsible for the purported violation. By failing to decide whether the Complaint alleged a violation of Section 8(a)(1) by reason of the no-solicitation rule announced at the July 17 PCM, and by further avoiding a determination of whether UPS SCS had notice and an opportunity to fully litigate this issue at the administrative hearing, the ALJ erred as a matter of law by finding a violation of Section 8(a)(1) based on the no solicitation rule purportedly announced by UPS SCS during the July 17 PCM because this finding denies UPS SCS due process.

Moreover, even if the Board conducts an independent evaluation of the record to determine whether due process existed with regard to this violation, the conclusion remains the same, that is, UPS SCS was not afforded due process with regard to this violation. Due process requires that a respondent have notice of the allegations against it so that it may present an

appropriate defense. *U.S. Postal Serv.*, 352 NLRB 923, 923 (2008). Such notice is usually furnished by the allegations set forth in the complaint. *Id.*; *see also Albertson's, Inc.*, 351 NLRB 254, 255 (2007). Here, the General Counsel admits that the "policy was not specifically alleged as unlawful in the Consolidated Complaint." As a result, the Board may affirm this violation only if "the issue is closely connected to the subject matter of the complaint and has been fully litigated." *U.S. Postal Serv.*, 352 NLRB at 923. The General Counsel cannot satisfy either of these requirements.

The General Counsel argues that the unalleged violation was closely connected to the violation alleged in the Complaint because both contain similar language and relate to solicitation. In addition, the General Counsel argues that the alleged announcement "falls within the timeframe contemplated by the Complaint" because it occurred some time after May 2009. As such, it is clear that the General Counsel's arguments focus on semantics and ignore the facts and the law, likely because the General Counsel's position is without legal or factual support.

The close connection prong of the due process analysis requires that the unalleged violation and the alleged violation "both plainly focus on the same set of facts." *KenMor Electric Co.*, 355 NLRB No. 173, 6 (2010). The ALJ found that the Complaint alleged the no solicitation rule in UPS SCS's employee handbook, "on its face," violated Section 8(a)(1) of the Act. Decision at 5. Accordingly, to determine whether the no solicitation rule violated the Act, the only evidence needed was the language of the written policy. *See* Decision at 5. Therefore, the July 17 PCM was not part of the same set of facts alleged in the Complaint. Moreover, the General Counsel's argument that the unalleged violation occurred "since May 2009" is unavailing. It is beyond dispute that the Complaint referred only to the no solicitation rule in UPS SCS's employee handbook. Therefore, it would be unreasonable to conclude that UPS SCS

had notice of any and all other unalleged violations merely because they occurred after May 2009. Due process requires more. Based on the foregoing, it is clear that the unalleged violation was not closely connected to the violation alleged in the Complaint.

The General Counsel's argument that the unalleged violation was fully litigated similarly falls short. A matter has been fully litigated when:

> the respondent's witness testified to the facts giving rise to the unalleged violation, no party has objected to the testimony, and the respondent has had an opportunity to further explore the issue during the hearing . . . .

Desert Aggregates, 340 NLRB 289, 293 (2003). And, "the Board has found that an unalleged violation is not necessarily fully litigated simply because the facts giving rise to it emerge incidentally during the hearing." *Id.* In this case, the General Counsel has asserted nothing more than incidental testimony, that the language giving rise to the unalleged violation was contained in a PCM script (out of the approximately 13 PCM scripts provided to the Board agent during investigation of the unfair labor practices at issue), and that employees of UPS SCS testified generally that they read the PCM scripts verbatim. This is insufficient to establish that the issue was fully litigated.

UPS SCS's witnesses did not testify to the facts giving rise to the unalleged violation, nor did UPS SCS have an opportunity to further explore the issue at the hearing or in briefing before the ALJ. Notably, no testimony was given at the hearing by any of the witnesses with respect to the no solicitation language contained in the July 17 PCM. Instead, Ricardo Arriaza, Dave Cole, and Raul Echeverria testified about the July 17 PCM only with regard to the allegation of threats of job loss. Tr. 359, 446, 598. Had UPS SCS been on notice that the unalleged violation was at issue, UPS SCS would have questioned these witnesses about the no solicitation language in the July 17 PCM.

More specifically, UPS SCS would have elicited testimony that the purpose of this language in the July 17 PCM was not to expand the written, lawful no solicitation policy contained in the employee handbook, but was to reiterate the written policy and to remind employees that the policy was posted throughout the workplace. Without an opportunity to present this additional evidence, this violation was not fully litigated and UPS SCS was not afforded due process. The Board may not make findings or order remedies on violations not charged in the complaint or litigated in the subsequent hearing. *M&M Backhoe Serv., Inc. v. NLRB*, 469 F.3d 1047, 1052 (D.C. Cir. 2006).

Moreover, a plain reading of the entire no solicitation language in the July 17 PCM establishes that UPS SCS intended only to reiterate its lawful written no solicitation policy.[4] In fact, the PCM referred employees to the written policy which "is posted in the building." An objective employee hearing these two statements together would reasonably believe that the written policy had not changed and he could solicit his co-workers when he and the other employees were not working. Accordingly, for the foregoing reasons, the Board should reverse the ALJ's finding that UPS SCS violated Section 8(a)(1).

IV. Mr. Echeverria did not threaten Mr. Puig on August 6, 2009.

In its brief, the General Counsel cites *Sands Hotel & Casino, San Juan*, 306 NLRB 172 (1992) as support for its contention that on August 6, 2009, Mr. Echeverria threatened Mr. Puig with discharge for his alleged protected concerted activities. However, in that case, the employer informed the employees that they were being discharged because of the content of their statements at a 90 minute protest meeting. *Id.* at 184. Contrary to the General Counsel's

[4] The entire no solicitation language contained in the July 17 PCM script is:

"UPS has a 'No Solicitation' policy, where no solicitation of any kind is allowed in the workplace. This policy is posted in the building."

assertion, the evidence does not show that Mr. Echeverria told Mr. Puig he was being discharged because of his *comments*. As described in the memorandum the General Counsel quotes in its brief, Mr. Echeverria informed Mr. Puig that he was being discharged because of his history of insubordinate *conduct* and violation of the Professional Conduct Policy, a signed copy of which was shown to him and discussed at the termination meeting. *See* GC 20. Mr. Echeverria did not inform Mr. Puig he was being discharged because of the substance of his comments, but because of his behavior. Thus, there can be no finding that Mr. Echeverria threatened Mr. Puig with discharge on August 6, 2009 in violation of the Act.

V. Conclusion.

For the reasons set forth herein and in UPS SCS's Initial Brief, The Board should reject the General Counsel's assertions that Mr. Puig was discharged solely because of his statements at the July 23rd meeting and reverse the ALJ's decision that Mr. Puig's discharge violated Section 8(a)(1) and 8(a)(3) of the Act. Next, the Board should disregard the General Counsel's arguments that lawful employer speech protected by the Act can be used as a basis for finding union animus, since such assertions are completely contrary to long established law. As to the July 17th PCM, the Board should find that the allegations regarding the purported solicitation rule announced at that PCM were not fully litigated at the hearing and are not closely related to the allegations in the complaint and thus cannot be the basis for a finding of a violation of Section 8(a)(1) of the Act. Lastly, the Board should find that Mr. Echeverria did not threaten Mr. Puig with discharge on August 6, 2009 and reverse the ALJ's findings to the contrary.

CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2011, a true and correct copy of the above was filed via e-filing and sent via email to:

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