Atlas Logistics Group Retail Services (Phoenix) LLC *and* Joshua Graves. Case 28–CA–23178

August 5, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND HAYES

On February 22, 2011, Administrative Law Judge William G. Kocol issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief, and the Acting General Counsel filed a reply brief. The Respondent filed cross-exceptions and a supporting brief. The Acting General Counsel filed an answering brief, and the Respondent filed a reply brief.

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 and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified[2] and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Atlas Logistics Group Retail Services (Phoenix) LLC, Tolleson, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(a).

"(a) Within 14 days after service by the Region, post at its Tolleson, Arizona facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 28, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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

[1] There are no exceptions to the judge's finding that the Respondent unlawfully disparaged the Union and threatened that employees' union activity would be futile when, on July 24, 2010, Supervisor Tyler Biggs told an employee that employees did not have any good shop stewards and that shop stewards could not do anything. The Acting General Counsel has excepted to the judge's failure to find additional instances of unlawful disparagement in violation of Sec. 8(a)(1) based on other comments made by Biggs. We find it unnecessary to address those exceptions, as any such additional 8(a)(1) violations would not affect the Order.

In his exceptions, the Acting General Counsel argues that the judge should have passed on the lawfulness of the Respondent's work rules 14, 21, and 22. We find it unnecessary to address this exception because we agree with the judge that the Respondent effectively repudiated these rules under *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). Member Hayes does not necessarily endorse all elements of the *Passavant* test, but agrees that the Respondent effectively repudiated any arguably unlawful conduct.

[2] We affirm the judge's finding that the Respondent violated Sec. 8(a)(1) when Supervisor Tyler Biggs told employee Joshua Graves that there would be problems if Graves did not return to work in 10 minutes. At the time, Graves was participating on behalf of the Union in a workplace time study and reasonably believed, based on a contemporaneous statement by Union Business Agent Frank Mendoza to Biggs, that he was entitled to continue with that protected union activity. Biggs did not contradict Mendoza on this point. Consequently, when Biggs said there would be problems if Graves did not return to work, Graves would also reasonably believe that he was being threatened with unspecified reprisals if he did not cease engaging in union activity. See *Belle of Sioux City, L.P.*, 333 NLRB 98, 106 (2001) (employer's statement must be viewed from employees' perspective in determining whether the statement was an unlawful threat). Such a statement tends to interfere with the free exercise of Section 7 rights, in violation of Sec 8(a)(1) of the Act. See *SKD Jonesville Division L.P.*, 340 NLRB 101, 101–102 (2003).

Member Hayes notes that the conversations between Biggs and Graves arose from a mutual union-management misunderstanding of the permitted scope of Graves' participation in the time study. Under the circumstances, he would not find that Biggs's statement about unspecified "problems" constituted an unlawful threat.

[3] We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 24, 2010."

Dated, Washington, D.C. August 5, 2011

Wilma B. Liebman,	Chairman
Craig Becker,	Member
Brian E. Hayes,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Sandra Lyons, Esq., for the General Counsel.
Kelvin C. Berens and *Jill L. Poole, Esqs. (Jackson Lewis LLP),* of Omaha, Nebraska, for the Respondent.
Joshua Graves, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Phoenix, Arizona, on January 5, 2011. The charge and amended charge were filed by Joshua Graves on September 10 and November 29, 2010,[1] respectively and were served on Atlas Logistics Group Retail Services (Phoenix) LLC (herein Atlas).[2] The complaint was issued November 30, 2010. The complaint alleges that Atlas violated Section 8(a)(1) by maintaining work rules that restricted activity protected by Section 7 of the Act. The complaint also alleges that Atlas violated Section 8(a)(1) by unlawful statements made by its supervisor, Tyler Biggs, to Graves. Atlas filed a timely answer that admitted the filing of the charges, interstate commerce and jurisdiction, labor organization status of the General Teamsters (excluding Mailers), State of Arizona, Local Union No. 104, an affiliate of the International Brotherhood of Teamsters (herein the Union), and supervisory status. The answer denied the substantive allegations of the complaint and also plead affirmatively that Atlas had remedied the work rule violations.

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

FINDINGS OF FACT

I. JURISDICTION

Atlas, a corporation, is engaged in the business of third party logistics warehousing at its facility in Tolleson, Arizona, where it annually purchases and receives goods valued in excess of $50,000 directly from points outside Arizona. Atlas 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 and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Atlas operates a warehouse of about 1.3 million square feet that houses goods and products sold by Fry's Food Stores. Atlas employs about 600 persons at that facility. Levi Abel is general manager of the facility and is in overall charge of operations. At times material to this case Tyler Biggs was supervisor of the freezer, deli, and meat department.

The Union represents the warehouse employees. Apparently the Union called a strike against Atlas in 1999. Since that time relations between the Union and Atlas have generally been amicable. They have been parties to successive collective-bargaining agreements and, for the most part, they settle grievances before arbitration. Joshua Graves works for Atlas as a reach driver. Graves is also a union steward. The perception is that Graves has filed more grievances than other union stewards. Graves also filed an earlier charge with Region 28. That charge was deferred to the grievance-arbitration procedure. Graves later withdrew the charge after Atlas assured Graves that the matters alleged in the charge would not occur again.

B. Credibility Observations

The General Counsel presented the testimony from Graves, Carlos Lamadrid, Richard Colley, David Gan, and Joseph Gaona. All were still employed by Atlas at the time they testified. The last four were long-term employees, having worked for Atlas for 18, 15, 5, and 9 years, respectively. In addition, the General Counsel presented the testimony of Frank Mendoza, president of the Union. All these witnesses impressed me as credibly attempting to relate the facts as they knew them. All gave testimony concerning statements made by Biggs. Importantly, Atlas did not call Biggs to rebut their testimony. I infer that Biggs' testimony would not have been helpful to Atlas' case. I therefore generally credit the testimony of the General Counsel's witnesses. These witnesses generally corroborated each other. To the extent there are differences in the testimony, I credit Graves' testimony. Based on my observation of the relative demeanor of the witnesses, I conclude that Graves was the most likely to remember and relate the details of the conversations he had with Biggs and others. In its brief Atlas challenges the credibility of these witnesses, but its arguments might have been more persuasive had it presented Biggs as a witness, permitted him to be cross-examined, and allowed me to assess his credibility.

Both the General Counsel and Atlas presented testimony from Levi Abel, Atlas' general manager. I conclude that his testimony was also credible and largely uncontradicted; I rely on it, especially for background matters. Finally, Atlas presented the testimony of Andrew Marshall, the Union's secretary treasurer. Although Marshall did not present evidence that concerned the core issues in this case, he did provide background information that I conclude is credible.

[1] All dates are in 2010, unless otherwise indicated.

[2] In its answer Atlas did not admit service of the charges, but it did not object to the introduction into evidence of the formal papers and those papers show the charges were served as alleged in the complaint.

C. Alleged Unlawful Statements

The complaint alleges on about May 24 that Atlas, through Biggs, unlawfully disparaged the Union and union representatives. By way of background, Atlas has a policy of having employees who commit certain errors undergo retraining for a week. A consequence of this is that the employee is not eligible for incentive pay for that week. And, in order to get the incentive pay back the following week, the employee has to reach 100 percent production with no errors during that retraining week. On May 24, Graves was summoned to the office of his supervisor, Scott Bryden; Biggs was also present in the office. After Graves inquired why he was summoned, Bryden gave him a retraining week write-up. Graves then requested the presence of a union steward. Bryden then summoned Carlos Lamadrid, another steward, to his office. After Lamadrid arrived, he and Graves discussed the write-up. Biggs then said that it was pretty sad when a union steward needs another union steward to represent him. Graves replied that he just wanted to make sure that they followed the contract. Biggs replied that all Graves did was represent liars. Biggs walked away; Graves signed the write-up and then returned to work. About a week or two earlier, Graves had filed a grievance on behalf of an employee who had allegedly asked for Graves to represent him but was denied that request.

Analysis

An employer's disparagement of a union or its officials alone does not violate the Act; rather the disparagement must be sufficiently serious to reasonably interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Sears, Roebuck & Co.,* 305 NLRB 193 (1991). For example, in *Trailmobile Trailer, LLC,* 343 NLRB 95 (2006), the Board held:

> 1. The judge found, inter alia, that the Respondent violated Section 8(a)(1) of the Act by making various statements to union supporters and officials that were degrading and demeaning. Contrary to the judge, we find that these statements were not unlawful.
>
> The record establishes that on October 14, 1999, the Respondent's manufacturing manager, Michael Thornton, approached a group of employees engaged in handbilling and remarked that he could teach monkeys to weld, and that he could replace all the painters within 10 minutes. In addition, Thorton told employee Jerry Hardin that people in the Union were stupid, and Thorton told Union Steward James Baker that the Union was "using" him, and that Union Representative Ronnie Crider was "worthless and no good." Thereafter, in mid-November, as Union Steward Verna Haggins delivered grievance documents to Human Resources Manager Rick Sparks, Sparks asked Haggins if she was International Representative Crider's "messenger boy," and commented that he hoped that she was not doing something "underhanded." Sparks then asked Union Steward Lisa Fry, who was also present with Haggins, if she was present because Haggins needed a bodyguard. Further, in December, about a week before the election, Sparks commented in front of a group of employees that "fat ass Ronnie Crider [was] living it up at the Holiday Inn on the employees' dues."
>
> The judge found that these statements violated Section 8(a)(1) because they were demeaning and conveyed the impression that the employees' union activities were futile. We disagree.
>
> It is well settled that the Act countenances a significant degree of vituperative speech in the heat of labor relations. Indeed, "[w]ords of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1)." *Sears, Roebuck & Co.*, 305 NLRB 193 (1991). Rather, "flip and intemperate" remarks that are mere expressions of personal opinion are protected by the free speech provisions of Section 8(c) of the Act. Id. Here, the comments of Thornton and Sparks, while disparaging, did not suggest that the employees' union activity was futile, did not reasonably convey any explicit or implicit threats, and did not constitute harassment that would reasonably tend to interfere with employees' Section 7 rights.[4]
>
> [4] In support of his finding that Thornton's demeaning comments violated Sec. 8(a)(1), the judge noted that in *Bonanza Sirloin Pit*, 275 NLRB 310, 311, 314 (1985), the Board found that a supervisor's reference to a union employee as a "piece of shit" violated Sec. 8(a)(1). The judge failed to note, however, that the supervisor's comment in *Bonanza* was immediately followed by an additional comment in which he vowed to get rid of that employee. Here, Thornton's comments were not made together with any threats to terminate employees for their union activity, and accordingly are distinguishable from the comment at issue in *Bonanza*.

The General Counsel cites *Domsey Trading Corp.,* 310 NLRB 777, 793 (1993), but in that case the derogatory comments were so severe that employees could reasonably seek to avoid them by restricting their union activity.[3] Nonetheless, that case does indicate that I should examine the nature of the disparagement not in isolation but in its cumulative effect.

Biggs' remarks on May 24 belittled Graves' effort to seek union assistance in handling the discipline he had been given. Biggs' comments also indicated that he felt that employees who sought Graves' assistance were liars. Remember Biggs is a supervisor; employees could reasonably wonder whether these harsh words would translate into subtle actions against them. These were not comments of general disparagement about a union or union supporters; rather they were directed at the exercise of the Section 7 right to have union assistance and therefore may have a reasonably tendency to interfere with those rights. The Board, however, has not made such a distinction. *Rogers Electric, Inc.,* 346 NLRB 308 (2006). The cases cited above compel the dismissal of this allegation.

Next, the complaint alleges that on about July 24, Biggs again unlawfully disparaged the Union and its representatives,

[3] In his brief the General Counsel quotes from the judge's decision in *Perth Amboy Hospital,* 279 NLRB 52 (1986), but incorrectly attributes those remarks to the Board. In fact, the Board expressly disavowed those comments and supplied its own rationale. Id. at 52 fn. 2.

threatened employees by telling them that it would be futile for them to seek to enforce the collective-bargaining agreement, and threatened employees with unspecified reprisals if they attempted to require Atlas to comply with the terms of the collective-bargaining agreement. On that day Graves was standing near the timeclock waiting to clock in. Biggs was also in the area speaking with employee Richard Colley. Colley was complaining to Biggs about a matter that was depressing his production level—and compensation. Biggs replied that there was nothing he could do so Colley told Biggs "Don't make me get my shop steward." Biggs replied "You don't have any good shop stewards and your shop steward can't do anything." Colley answered that they had plenty of good stewards. Biggs then looked at Graves and then said "Hey, what's up Josh." Biggs then raised his hand and shook it, saying that he shakes hands every time Graves came to his office. Later that same day some employees complained to Graves that they were unfairly denied the opportunity to leave work early; Atlas allows employees to do so when work loads are less than expected. So Graves went to Biggs' office and asked Biggs if there would be any early outs on that shift. Biggs answered that there would not be, that he would give all the early outs to the next shift. Graves asked that the early outs be split between the shifts so that the first shift employees would not feel like they were getting screwed. Graves pointed out to Biggs that in the past they had let floaters go home early before the full-time employees but the Union had protested that practice and Atlas had then agreed to use seniority in deciding who was allowed to leave work early. Biggs replied that he was going to let all the floaters go home and then tell the employees that it was their steward's idea to do so. Graves answered that they had already solved that problem. Biggs then said that he would only get another slap on the wrist (if he did so). Graves said that if he had to go over Biggs' head to make the slap a little harder that's what he would do. Graves returned to work after they exchanged more words. A few days later Graves raised this incident with Abel.

During July 24 conversations Biggs disparaged the nature of the representation that the Union provided to employees by telling Colley that there were not any good shop stewards. But Biggs also indicated the futility of seeking the assistance of a union steward by saying that the stewards could not do anything. Biggs heightened the sense of futility by repeating the mantra that he could do as he pleased because he would only get a "slap on the wrist" from his superiors. These statements went beyond merely making derogatory comments about the Union or Graves; they threatened that the union activity on the part of employees to rectify perceived wrongs in their working conditions would be futile. Atlas argues that Board law requires proof of antiunion animus and that this element is missing in this case. Atlas is incorrect on both points. The test in cases such as this is whether, under all the circumstances, the conduct reasonably tends to interfere with the free exercise of the rights of employees under Section 7. *American Freightways Co.,* 124 NLRB 146, 147 (1959). While it is true that the Union and Atlas have a mature collective-bargaining relationship at the higher levels of their organizations, the same is not true at the frontline supervisory level, at least concerning Biggs. Rather, the record conclusively shows Biggs' animus towards the Union and toward the exercise of rights accorded to employees under the law. And Atlas, at a minimum, tolerated Biggs' conduct. By denigrating the Union in a manner that impugns the Union's representational abilities and threatens that continued representation by the Union will be futile, Atlas violated Section 8(a)(1). *Regency House of Wallingford,* 356 NLRB No. 86, slip op. at 5–6 (2011). The General Counsel also argues that Biggs' comment that he would let the floaters leave earlier and blame it on Graves was unlawful because:

A statement such as this threatens to turn employees against each other is extremely coercive. Graves takes his position as shop steward very seriously, not only to for his fellow employees but to enforce the Agreement. Here, [Atlas] is giving Graves a choice—either he can enforce the Agreement and be retaliated against by the very same people he is looking out for, or he can allow [Atlas] to ignore the Agreement and do as it wishes. The totality of the circumstances in this case makes it obvious that [Atlas] is threatening to use the Agreement as a weapon to cause strife between the employees and Graves.

However, Biggs' comments were the type of disparagement that the Board has held are lawful. *Trailmobile Trailer,* supra. I dismiss this portion of the allegation in the complaint.

Continuing, the complaint alleges that on about August 24, Biggs threatened employees with unspecified reprisals because they engaged in union activities. On that day the Union's engineer was at the facility to do a time study to ascertain the accuracy of the labor standards set for employees by Atlas; Graves accompanied the engineer during portions of that time study. Atlas did not pay Graves for the time he accompanied the engineers; instead the Union paid him for that time. Among those also present were Atlas' engineer and Frank Mendoza, the Union's business agent. The day before, August 23, Mendoza and Abel met to discuss the impending time study; they agreed that Graves would participate in the time study process in the reach area and other employees would participate in other areas of the warehouse. However, they inadvertently omitted to designate anyone for the freezer area.

During the time study Graves noticed a broken case on the floor and he told the reach driver to pick it up. Atlas' engineer objected to Graves' instruction. Graves answered that if they were going to do a time study, they should do an accurate one. Graves explained that it was part of the job of a reach driver to remove the case: it was in their training packet and if a supervisor would have walked by the supervisor would have instructed the reach driver to remove it. Atlas' engineer appeared upset by this interaction; he left the group and made a telephone call. A few minutes later Biggs appeared and told Graves that he had 10 minutes to clock in and get back to work. By this time they had completed the time study for the reach area (Graves' designated area) and were about to start on the freezer area. At this point Mendoza told Biggs that Graves would continue to participate in the time study and would not be returning to work. Graves and Mendoza went to the breakroom; the Union's engineer was already there as were all the order selecting employees. The employees, who were on their break, were asking questions about the time study. Biggs then walked in and again told Graves that he had 10 minutes to clock in and get to work

or there was going to be problems. Mendoza again intervened and told Biggs that Graves was being paid by the Union and that Biggs should leave Graves alone. Biggs again left. Mathew Hacker, a manager for Atlas, then arrived and he and Mendoza spoke outside the breakroom. Abel then joined them. Mendoza explained the situation and Abel said that Graves was not going to continue with the time study process as it was moving into the freezer area and Graves was only supposed to do the reach area. Mendoza asked why Graves could not continue into the freezer area; Abel responded that Graves just could not do it, that he did not want it to look to the other employees like Graves was getting his way. Abel said that Graves had to get back to work, but that Graves could do it the following day. Mendoza protested that the next day was Graves' day off, but Abel remained adamant. Mendoza then came in the breakroom and informed Graves that he had to go back to work and Graves did so. Graves came in the next day and completed the time study process.

On August 24 Biggs told Graves that there would be consequences if he did not stop assisting the Union and return to work. Keep in mind that Graves was not on working time; rather, he was being paid by the Union. And Atlas presented no evidence that there were production related reasons why it was necessary for Graves to resume working rather than continuing to assist the Union. In short, this was a threat to take action against Graves if he did not stop engaging in union activity. *Bay Area Los Angeles Examiner,* 275 NLRB 1063, 1081 (1985). By threatening to take action against an employee if he continued to engage in union activity, Atlas violated Section 8(a)(1).

D. Work Rule Allegations

The complaint alleges that certain work rules maintained by Atlas are unlawful.[4] Since on or about April 10, 2010, and prior thereto, Atlas has maintained the following work rules:

> The following are examples of actions that the Company feels would necessitate disciplinary measures up to or including termination. However, the Company reserves the right to determine the appropriate level of discipline for any action, based upon the individual circumstances.
>
> The following are offenses that will normally result in immediate termination on the first offense.
>
> Group I Rule 14: Possession of classified Company information without authorization or revealing confidential information about the Company to unauthorized persons, or removal of such information from the warehouse.

On or about November 12, 2010, Atlas promulgated, and since then has maintained, the following work rule:

> The following are examples of actions that the Company feels would necessitate disciplinary measures up to or including termination. However, the Company reserves the right to determine the appropriate level of discipline for any action, based upon the individual circumstances.
>
> The following are offenses that will normally result in immediate termination on the first offense.
>
> Group I Rule 14. Possession of classified Company information without authorization or revealing confidential information about the Company to unauthorized persons, or removal of such information from the warehouse. Information considered to be confidential under this work rule includes customer lists and other information concerning our customers, bid amounts, marketing strategies, financial information (such as profits and losses), labor standards information, research and development strategies, pending projects and proposals and employee medical information.

Since on or about April 10, 2010, Atlas has maintained the following work rule:

> The following are examples which normally result in disciplinary action, but may lead to immediate termination. In certain situations, however, depending upon all the circumstances, the Company retains the sole right to determine whether immediate termination is necessary.
>
> Group II Rule 21: Entering or remaining on plant premises when not scheduled for work or when not on Company-related business.

On December 20, 2010, Atlas revised these work rules. This time it did so in a manner the General Counsel concedes does not violate the Act. At the same time Atlas posted the following notice on its bulletin boards:

> 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; and
> - Choose not to engage in any of these protected activities.
>
> **WE WILL NOT** do anything that interferes with these rights. More particularly:
>
> **WE WILL NOT** promulgate or maintain Written Work rules prohibiting you from:
>
> (1) Discussing wages, hours and working conditions. We will continue to have a work rule that prohibits you from possessing classified Company information without authorization or revealing confidential information about the Company, that does not relate to wages, hours and working conditions, to unauthorized persons, or removal of such information from the workplace.
>
> (2) Entering or remaining on plant premises when not scheduled to work or when not on Company related business. We will continue to have a work rule that prohibits you from entering or remaining in the interior of the warehouse or other work areas when not scheduled for work; or
>
> (3) Conducting personal business during breaks or meal times. We will continue to have a work rule that

[4] The General Counsel motion to withdraw allegations 5(b) and (d) from the complaint is granted. There is no evidence in the record to support those allegations.

prohibits you from conducting personal business during working time of any employee. "Working time" does not include breaks or meal times.

WE WILL rescind and give no effect to the rules described above, and **WE WILL** post the revised Written Work Rules that do not contain the unlawful rules, and provide the language of the lawful rules.

ATLAS LOGISTICS GROUP RETAIL SERVICES (PHOENIX) LLC

The notice was dated and signed by Levi Abel as General Manager.

Atlas argues that it has effectively remedied the allegations in the complaint concerning the work rules. I agree. *Passavant Memorial Area Hospital,* 237 NLRB 138 (1978). Atlas revised its rules so that they now comply with the Act and it properly notified the employees that it had done so and assured them of their rights under the Act as they pertained to the rules. The General Counsel argues that Atlas' remedial action was not timely. It is true that the allegedly unlawful rules were maintained for a long period of time. But I note that there is no evidence that the rules were ever enforced. And the challenge to their legality was first brought to Atlas' attention in the first amended charge filed in this case by Graves on November 29. Taking into account the task of revising the rules, publishing the revised rules, and posting the notice, Atlas' remedial action was reasonably prompt. The General Counsel also contends that the remedial action did not occur in a context free of unremedied unfair labor practices. While this is true it is not dispositive. The unremedied unfair labor practices described above are entirely unrelated to the work rules at issue. They are not of a nature that would tend to undermine the assurances that Atlas gave to employees concerning the work rules. Employers should be encouraged to undertake voluntary remedial action of the type that Atlas has taken in this case. Accordingly, I dismiss these allegations of the complaint.

CONCLUSIONS OF LAW

Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by

1. Denigrating the Union in a manner that impugns the Union's representational abilities and threatens that continued representation by the Union will be futile.
2. Threatening to take action against an employee if he continued to engage in union activity.

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[5]

ORDER

The Respondent, Atlas Logistics Group Retail Services (Phoenix) LLC, of Tolleson, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denigrating the Union in a manner that impugns the Union's representational abilities and threatens that continued representation by the Union will be futile.

(b) Threatening to take action against employees if they continue to engage in union activity.

(c) 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 facility in Tolleson, Arizona, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 28, 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 July 24.

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.

Dated, Washington, D.C. February 22, 2011

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

[5] 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.

[6] 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."

Choose not to engage in any of these protected activities.

WE WILL NOT denigrate the Union in a manner that impugns the Union's representational abilities and threatens that continued representation by the Union will be futile.

WE WILL NOT threaten to take action against employees if they continue to engage in union activity.

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

ATLAS LOGISTICS GROUP RETAIL SERVICES (PHOENIX) LLC