DHL Express (USA), Inc. *and* American Postal Workers Union, AFL–CIO and American Postal Workers Union, Cincinnati, Area Local 164. Cases 09–CA–079842 and 09–CA–080777

April 30, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On April 22, 2013, Administrative Law Judge Mark Carissimi issued the attached decision. The Respondent filed exceptions and a supporting brief, the 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 and to adopt the recommended Order as modified.[2]

[1] 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.

We adopt the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging employee Joshua Flick. Like the judge, we infer that the Respondent harbored animus against Flick's union activities from the timing of the discharge, just 1 day after he drew the new general manager's attention to his prounion safety vest and informed the tug dispatch operations manager that he intended to keep wearing a prounion vest. In addition, we infer animus from the pretextual reason given for the discharge. The Respondent told Flick that he was terminated for insubordination because he responded to his supervisor's question about the daily safety message with an offensive remark in a manner mimicking a mentally impaired person. The record shows, however, that Flick and his supervisor often joked with each other in this manner and that his supervisor in fact laughed at Flick's response. Moreover, the other examples of employees terminated for insubordination, identified by the Respondent, all involved conduct that was far more serious and, as such, are readily distinguishable. Because the timing and pretextual reason for the discharge warrant an inference of animus, we find it unnecessary to pass on the judge's reliance on the Board's findings in *DHL Express*, 355 NLRB 1399 (2010), and *DHL Express, Inc.*, 357 NLRB No. 145 (2011), or on the Respondent's unlawful restriction on the distribution of union literature in this case.

[2] We have amended the judge's conclusions of law consistent with our findings herein. Specifically, we deleted the reference to other employees' union activities as we have found that the Respondent discharged Flick because of his own union activities. We shall conform the Order to our standard remedial language and shall substitute a new notice to conform to the Order as modified, and with *Durham School Services*, 360 NLRB No. 85 (2014).

AMENDED CONCLUSIONS OF LAW

Substitute the following for the Conclusion of Law 2.

"The Respondent has engaged in an unfair labor practice in violation of Section 8(a)(3) and (1) of the Act by discharging Joshua Flick because he engaged in union activities."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, DHL Express (USA), Inc., Erlanger, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Insert the following after paragraph 2(b) and reletter the following paragraphs.

"(c) Compensate Joshua Flick, for the adverse consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay to the appropriate calendar quarters."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. April 30, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Harry I. Johnson III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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 prohibit the distribution of union literature in our cafeteria, a nonwork area.

WE WILL NOT threaten to escort you from the facility unless you cease the lawful distribution of union literature in our cafeteria, a nonwork area.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the American Postal Workers Union or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Joshua Flick full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Joshua Flick whole for any loss of earnings and other benefits resulting from his unlawful discharge, less any net interim earnings, plus interest.

WE WILL compensate Joshua Flick for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Joshua Flick, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

DHL EXPRESS, INC.

The Board's decision can be found at www.nlrb.gov/case/09-CA-079842 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Daniel Goode, Esq., for the Acting General Counsel.
David Kadela, Esq., for the Respondent.
Lisa Manson, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Cincinnati, Ohio, on October 24 and 25, 2012, and February 12, 2013. The American Postal Workers Union, AFL–CIO filed the charge in Case 09–CA–079842 on April 30, 2012. The American Postal Workers Union, Cincinnati Area Local 164 filed the charge in Case 09–CA–080777 on May 10, 2012.[1] In this decision I will refer to the International Union and the Local Union collectively as the Union. The Acting General Counsel issued an order consolidating cases, consolidated complaint and notice of hearing (the complaint) on July 31, 2012. The complaint alleges that on April 26, 2012, the Respondent discharged employee Joshua Flick in violation of Section 8(a)(3) and (1) of the Act. The complaint also alleges that on or about May 2, 2012, the Respondent, by Brandon Lewis, at its Erlanger, Kentucky facility, violated Section 8(a)(1) of the Act by informing an employee, who was engaged in the distribution of union literature in the Respondent's cafeteria, that the employee could not distribute the literature in that area and by instructing the employee that if he did not cease doing so he would be escorted from the facility.

On the entire record, including my observation of the demeanor of the witnesses,[2] and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

FINDINGS OF FACT

JURISDICTION

The Respondent, a corporation, is engaged in the international, interstate and intrastate transportation of freight at its facility in Erlanger, Kentucky, the only facility involved in this proceeding. Annually, the Respondent in conducting its operations performs services valued in excess of $50,000 in states other than the Commonwealth of Kentucky. The 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 and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates are in 2012 unless otherwise indicated.

[2] In making my findings regarding the credibility of witnesses, I considered their demeanor, the content of their testimony, and the inherent probability on the record as a whole. In certain instances, I credited some, but not all, of what the witness said. I note in this regard, that "[N]othing is more common in all kinds of judicial decisions than to believe some and not all" of the witness' testimony. *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951); *J. Shaw Associates*, LLC 349 NLRB 939, 939–940 (2007).

ALLEGED UNFAIR LABOR PRACTICES

Background

The Respondent is a package freight company that concentrates on international shipping. Presently the Respondent has three hub locations worldwide: Leipzig, Germany; Hong Kong; and the Greater Cincinnati airport (CVG), which is located in northern Kentucky. The Respondent has operated the hub at GVG since 2009 when it relocated its operations from Wilmington, Ohio.[3] In 2009 the Respondent withdrew from the domestic shipping market and focused on import and export shipping. This decision resulted in the closure of 18 regional hubs located throughout the United States and the move of the international hub from Wilmington to CVG.

At the CVG facility, the Respondent processes packages on up to 49 flights that arrive and depart daily. At this facility, containers containing packages are unloaded from airplanes, sorted, and loaded back into containers to be loaded onto the planes for shipment to a final destination.[4] The Respondent's CVG facility operates on a 24-hour a day, 7-day a week basis and employs approximately 1600 employees. Approximately 30 percent of the Respondent's employees work on a full time basis, while the remaining employees work part time.

According to the Respondent's general manager of the CVG hub, Richard Eric Landers, the Respondent refers to the handling of aircraft as a ramp operation, while the sort operation is the loading and unloading of the freight. Approximately 700 employees work in the main sort area. The director of sort operations is Pasquale Scarizameni; reporting to him are two senior managers, Robert Thornburg and Brandon Lewis. Shane Paul is the director of ramp operations. Richard Armstrong is the operations manager of tug dispatch[5] and reports to Paul. Thomas Lee, Randy Aver, Carl Newman, and Kyle Rudolph are supervisors in the tug operations department and report to Armstrong. There are approximately 150 employees employed in the tug dispatch department and approximately 30 to 40 employees report to each supervisor.

The employees at the CVG facility are unrepresented, except for 14 maintenance employees who are represented by the Teamsters. The Union has been attempting to organize the remainder of the employees at the Respondent's CVG facility for a number of years. I have taken administrative notice of the Board's decision in *DHL Express, Inc*., (DHL II) 357 NLRB No. 145 (2011). In *DHL II*, the Board found that the Respondent violated Section 8(a)(1) of the Act at the CVG facility by enforcing its no distribution rule in a hallway near its offices and cafeteria. In so finding, a Board panel majority found that the hallway in which employees were distributing literature is not exclusively a work area, but rather a mixed use area, and accordingly the Respondent violated the Act by prohibiting distribution in that area. Id. at fn. 1.

The Alleged Discriminatory Discharge of Joshua Flick in Violation of Section 8(a)(3) and (1) of the Act

FACTS

Joshua Flick was hired by the Respondent as a part-time tug operator on November 15, 2010, and was made a full-time tug operator on June 14, 2011. As a tug operator, Flick hauled containers, which are also called "cans" from airplanes to the sort building. As noted, dollies are attached to the tug, therefore enabling the tug operator to transport a large volume of packages in one trip. Flick also moved packages in the sort building from one location to another and took packages to airplanes for reloading. A t the time of his termination on April 26, 2012, Flick worked on the third-shift; he generally began work around 12 a.m. and ended his shift between 7 and 9 a.m. He reported to Lee, his immediate supervisor, and also had contact with Armstrong, the tug dispatch operations manager.

Shortly after he was hired, Flick signed an authorization card on behalf of the Union. Thereafter, Flick often spoke to other employees about joining the Union. He always carried with him authorization cards, which he referred to as "petitions" and solicited other employees to sign such cards. He also distributed flyers on behalf of the Union to employees in the parking lot of the facility. In February 2012, Flick's name and picture appeared in an article he wrote in support of the Union, which appeared in a union flyer that was distributed throughout the plant. In his article, Flick claimed that he and other employees, at times, were not allowed to take a break. Flick's article also claimed that, under Kentucky law, employees were entitled to a 10-minute rest period. His article further stated that the employees needed a union to protect their legal rights and urged employees to support the Union (GC Exh. 5, p. 2.) While at work, Flick often wore a shirt that had the Union's name on it and, in cold weather, wore a stocking cap with the words "UNION MAN" on it.

As a tug operator, Flick was required to wear a reflective safety vest while performing his job. On the back of one of his vests he wrote in capital letters with a black magic marker the following expressions: "RESPECT IS EARNED NOT GIVEN"; RESPECT A MAN AN (sic) HE WILL DO MORE"; and "GIVE IT GET IT." (GC Exh. 2). According to Flick's credited testimony, he also wore another safety vest on which he wrote on the back "UNION MAN" and "GOT RESPECT " instead of the expressions referred to above.

Flick received four performance evaluations during his tenure at the Respondent. His first evaluation covered the period from January 1, 2011, through March 31, 2011, and indicated that Flick "meets expectations" with respect to safety. (GC Exh. 4A.) In Flick's second evaluation, which covered the period from April 1, 2011, to October 1, 2011, under the safety

[3] I have taken administrative notice of the Board's decision in *DHL Express, Inc. (DHL I*), 355 NLRB 1399 (2010), which indicates that in 2006 the Union conducted an organizing campaign at the Wilmington facility. In *DHL I,* the Board found that in 2006 Respondent violated Sec. 8(a)(1) of the Act by engaging in the following conduct: threatening employees with the loss of periodic wage increases if they selected the Union as their representative; threatening employees with stricter enforcement of work and/or disciplinary rules; and stating that it would be futile to select the Union as a representative.

[4] The containers vary substantially in size. Automobiles can be shipped in the largest one.

[5] The record establishes that a tug is a motorized vehicle which transports freight to and from airplanes and the sort operation located in the sort building. Tugs are also used to move packages within the sort building as part of the sort operations. A tug pulls a platform called a dolly on which the freight is carried.

standard Flick was rated as "does not meet." The narrative under safety indicates "Joshua has been involved in a safety violation during this review period. Joshua dropped a container off a dolly as a result of not securing the lock of the dolly. Joshua needs to continue to practice safe work acts and assist others." For this accident, Flick was given a final written warning that was effective for the period from August 20, 2011, the date of the accident, to November 18, 2011 (R. Exh. 7).

In the evaluation covering the period from October 1, 2011, to December 1, 2001, Flick was rated as "partially meets" expectations under the safety standard, as a result of the incident referred to in his previous evaluation (GC Exh. 4C). However, this evaluation, which was signed by Lee and Armstrong, indicates that "Joshua is able to take direction from leads and supervisors and adapt in any situation. Joshua follows safety rules and assist (sic) the department with changing assignments to improve the efficiency." Finally, in the performance evaluation for the period from October 1, 2011, to April 1, 2012, Flick was rated as "partially meets" the expectations under the safety standard (GC Exh. 4D). The narrative under safety category indicates "Joshua has been involved in one safety violation during this review period. Joshua turned his ankle while exiting his tug. Joshua needs to continue to practice safe work acts and assist others."

The incident referred to in Flick's last performance appraisal occurred on November 24, 2011. According to the injury report, when Flick exited his tug he turned his ankle. The injury report specifically indicates that no safety rules were broken nor was any discipline issued (R. Exh. 9).

On February 25, 2012, Flick was involved in an accident caused by another employee. In this incident, another tug operator hit Flick's dolly as he was loading it, causing Flick's dolly to hit his leg and scrape it. The tug operator that caused the accident was issued a final written warning that was to remain in effect for the year (R. Exh. 10). On March 8, 2012, Flick was again involved in an accident caused by another employee. While Flick was moving a container into position, a forklift operator pushed the container too early, and Flick's right knee was pinched between the container and loading area, causing an injury to his right knee (R. Exh. 11). Flick received medical care and was placed on restricted duty until April 11, 2012.

I note that in November and December 2010 Flick received scores ranging from 95 to 100 in a series of safety tests involving ramp safety and the handling of hazardous materials (GC Exh. 10a). On December 24, 2010, Flick received a score of 100 on a fourth quarter recertification assessment for hub/gateway ramp, sort and support personnel which included safety related questions (GC Exh. 10c.).

Although I find Flick's attendance was not material to the circumstances surrounding his discharge, I note that on January 19, 2012, Flick received a written verbal warning for violating Respondent's attendance policy (R. Exh. 7, p. 2). Flick was also given a written warning for attendance on March 6, 2012 (R. Exh. 7, p. 3). By its terms, the written warning was effective only until March 19, 2012.[6] Based on Lee's credited testimony, I also find that Flick received a "coaching note" on March 21, 2012, indicating that he did not clock out for his scheduled break. The coaching note indicated that Flick must take his break as outlined in the schedule, but specifically indicated that the note did not constitute discipline. The coaching note also indicated that Flick refused to sign the note. (R. Exh. 8.) I note, however, that Flick's performance evaluation for the period from October 1, 2011, to April 1, 2012, indicates in the overall assessment that he "fully meets" expectations (GC Exh. 4D).

On March 8, 2012, Richard Eric Landers was appointed as the general manager at the Respondent's CVG facility (Tr. 319). Shortly after he arrived, Landers reviewed the CVG hub's safety record and determined that too many work-related injuries and accidents were occurring and that additional measures should be taken to attempt to reduce the number of such incidents. In this connection, Landers implemented a policy regarding the Respondent's safety committee team conducting investigations to determine the root cause of work-related accidents and injuries.

The Respondent had a long-standing policy of issuing brief written safety guidelines to employees on a daily basis, which it referred to as "safety briefs." In an effort to reemphasize safety concerns, Landers instituted a practice, in approximately the third week of March 2012, of asking senior managers what the daily safety brief was. Landers also instructed his senior managers to require lower-level managers and supervisors to make inquiries of employees regarding the daily safety brief. The Respondent's safety security specialist, Gregory Riggin, also asked employees about the daily safety brief. Riggin provided employees who knew the answer a pin or a "cafeteria dollar." Those employees who did not know the answer were sent emails by Riggin asking why they did not know it. This renewed emphasis on safety, which the Respondent referred to as a "safety blitz," continued until approximately the end of May 2012.

As part of this process, Tug Dispatch Operations Manager

[6] I find that Lee testified credibly that he prepared the two warnings and gave them to Flick. The written warning dated March 5 (R. Exh. 7, p. 3), does not contain Flick's signature. Lee testified in a less than clear manner that Flick signed the original document, but that the document signed by Flick was "given to HR and then scanned to the corporate office." (Tr. 423–424.) The Respondent did not explain why the warning with Flick's signature on it was not produced. Flick denied receiving any warnings for attendance even though his signature appears on the January 19, 2012 verbal written warning. (R. Exh. 7 p. 2.) Lee's testimony that Flick received the January 19, 2012 warning is corroborated by the fact that I find that Flick's signature on a document that he admits receiving, the warning for not locking the dolly (R. Exh. 7, p. 1), looks like the same signature that appears on the written verbal warning for attendance dated January 19, 2012. While I am somewhat concerned as to why the Respondent it did not produce the version of the March 5 warning signed by Flick (R. Exh. 7, p. 2) that Lee testified he witnessed, on balance, I find that Lee's testimony that these warnings were in fact given to Flick is more persuasive than Flick's denial that he received them. While Flick appeared to genuinely not recall receiving any attendance warnings, I conclude otherwise, given the fact that his signature appears on one.

Armstrong instructed his supervisors to begin to ask employees about the daily safety brief. In the latter part of April, tug dispatch supervisors informed employees of the safety blitz and advised employees that the Respondent would begin to ask employees about the daily safety brief. In this connection, Flick credibly testified that he attended a meeting held in late April with all the tug dispatch employees present. This meeting was also attended by Armstrong and supervisors Lee and Newman. At this meeting, employees were advised that they would be asked about the daily safety brief. Both Flick and current employee Philip Leconte credibly testified that employees were not informed that discipline would result if they did not know the answer to questions put to them about the safety brief (Tr. 46; 294).

On the evening of April 18, 2012, the Respondent held what it referred to as a "tailgate meeting." At tailgate meetings, which were held on a quarterly basis, the Respondent updated employees on the state of its business and provided food. At the April 18 meeting approximately 1000 employees were present. At this meeting, Landers was introduced as the new general manager for the CVG hub. Landers stood on a large podium that was illuminated by floodlights. Flick attended the meeting and wore one of his reflective vests indicating his support for the Union. Flick yelled that a union was needed at the facility. However, I credit Landers' testimony that he did not see or hear Flick on that occasion. Landers testimony is inherently probable given the number of employees who attended the meeting and the fact that floodlights were shining on Landers, making it difficult for him to see individuals in the crowd of employees.

On April 25 at approximately 3 a.m., Flick parked his tug inside the sort building in order for his tug to be loaded. While he was waiting for his tug to be loaded, he left to take a smoke break, after receiving permission from a supervisor. While Flick was on his break in the smoking area outside the doors of the facility, he observed an individual move his tug. Flick began to walk quickly back to his tug. On that evening Flick was wearing his vest that had "UNION MAN" on it. As he was returning to his tug, Flick saw the individual who had been introduced as the new general manager at the tailgate meeting walking in the same direction.[7] As Flick was walking quickly, when their paths intersected, Flick was approximately 5 to 10 feet ahead of Landers. While Flick was walking ahead of Landers, Flick pulled on his vest attempting to get Landers to notice it.

When Flick arrived at his tug, Lee and Armstrong were standing there. Lee asked Flick why he had left the tug and Flick replied that he had taken a smoke break, with permission, while waiting for his tug to be loaded. Flick then walked onto the "ball deck" where containers are loaded to wait for the loading of his container to be finished. The ball deck is approximately 4 feet higher than the ground floor and Flick was approximately 10 feet from where Armstrong was standing. According to Flick's credited testimony, he saw Landers walk up to Armstrong and began speaking to him. Although the sort building is noisy, Flick was not wearing ear plugs and, while he could not hear the entire conversation, he heard Landers say "vest" as he was pointing to Flick.[8]

Flick continued performing his duties and about two hours later received a text message from Lee asking him to meet with Lee and Armstrong. At this meeting, held in the Respondent's administration building, Armstrong asked Flick if he knew that writing on his reflective vest was against company policy and that Flick would not be permitted to wear his vest in the future. Flick replied that other employees besides him had writing on their safety vests. Armstrong said that the Respondent would get to them and would be issuing new safety vests at a meeting to be held the next day. When Flick asked Armstrong if he could get his own vest and write on it, Armstrong replied that he could. Flick responded that he would do that and write "Union Man" on it because he would not stop supporting the Union because of this rule change. (Tr. 56–58; 128–129.)

Armstrong testified that he had a meeting with the tug operations supervisors at about 5:30 a.m. the morning of April 25 to discuss employees writing on safety vests. According to Armstrong, an employee named Arthur Rogers had written his nickname "Art Dog" on his vest in a way that Armstrong found offensive and thought was perhaps sexually harassing. Armstrong also knew that Flick and another employee had writing on their vests. Armstrong told the supervisors that they needed to inform employees that there would be no more writing on safety vests issued by the Respondent and that the Respondent would be issuing new vests. Armstrong testified that because of the arrival of the new general manager, Landers, and because of outside individuals touring the facility, he wanted to "clean up" the image of the tug dispatch department.[9] He instructed the supervisors to bring up Rogers, Flick, and the other employee to inform them that writing on their vests would not be permitted and that new vests would be issued. Rogers had left for the day and the other employee could not be located. According to Armstrong, when he met with Flick, he told Flick that he would be issued a new vest and that Flick replied that he knew why this was happening and walked out. (Tr. 382–385.)

To the extent that Armstrong's testimony conflicts with that of Flick regarding the substance of their meeting on April 25

[7] At the trial, Flick testified that he could not recall the new general manager's name.

[8] Landers testified that while he had a conversation with Armstrong that night, he did not recall speaking to Armstrong about employees who had written something on their vests. Armstrong testified that he left the area after Flick arrived at his tug and began speaking to Lee. According to Armstrong, he did not speak to Landers until approximately 15 minutes later and in a different area. Lee testified that he did not see Landers until approximately 15 minutes after speaking to Flick. I do not credit Landers, Armstrong, and Lee on this point as Flick's testimony was more detailed and more plausible when considered on the basis of the entire record.

[9] Landers testified that he was not aware of the "Art Dog" safety vest until it was taken from Rogers. According to Landers, it was reported to him by another manager that Armstrong wanted to remove writing from safety vests. Landers testified that he agreed and decided to implement that policy through the entire hub. (Tr. 359–361.) While Landers may not have been aware of the writing on Arthur Rogers' vest before Rogers turned it in, as I have found above, he was aware of the writing on Flick's vest indicating his support for the Union and spoke to Armstrong about it on April 25.

regarding Flick's safety vest, I credit Flick's testimony. Flick testified in a much more detailed manner and his testimony was consistent on both direct and cross examination. Armstrong's testimony on this point was brief and appeared perfunctory. I find that while Armstrong may have been considering eliminating the writing that some employees had put on their safety vests, I doubt that he would have made the decision and begin to implement it in the middle of a shift, unless Landers had indicated to him his displeasure over the writing on Flick's safety vest.

The following evening, Flick attended the preshift meeting that occurred before the April 26 midnight to 7 a.m. shift. Approximately 140 tug operations employees were present. Armstrong informed the employees that because customers were touring the hub, writing would no longer be permitted on safety vests and that they would have to turn in their old safety vests and would be issued new vests.[10] After Armstrong spoke, Newman gave the daily safety brief. Newman told employees they needed to be aware of their surroundings, pay attention while they were driving, and that accidents usually happen toward the end of the shift.

At approximately 3 a.m. on April 26, Flick was sitting in his tug waiting for a container to be placed on a dolly and hooked up to his tug. Flick was listening to music on his cell phone while he was waiting. Employee Phillip Leconte, who was also waiting for containers to be loaded onto dollies and attached to his tug, walked over to Flick and began speaking to him. Shortly afterwards, Lee approached Flick and asked him whether he knew what the safety message was for the day. Flick answered by responding, in a voice that mimicked that of a mentally impaired person, "Watch out for other retards."[11] According to Leconte's credited testimony, Lee and Flick both laughed at Flick's response. Leconte testified that Lee then appeared to become more serious and Leconte left the area.

Flick then asked Lee what he would receive if he answered the question correctly. When Lee responded that Flick would not receive anything, Flick then told Lee he did not know what the safety message was. Lee responded "okay" and then instructed Flick to help his coworkers load the container and Flick complied with his directive. It is undisputed that Lee did not say anything to Flick indicating that Flick's response to Lee's question regarding the safety message could result in discipline or discharge.

Lee then left the area and reported to Armstrong what had occurred. Armstrong instructed Lee to bring Flick to a conference room in the human resources office. Lee approached Flick while he was driving his tug and told him to shut it down and come with him. Flick asked Lee what was going on and asked "if he was getting fired or wrote up, because I was really just kidding" (Tr. 194). Lee did not respond to Flick's question. When Flick arrived in the conference room, Armstrong was present along with Carla Ford and Jama Basinger, who are both in the Respondent's human resources department.

According to Flick's credited testimony, Armstrong asked Flick what he had said to Lee; Flick responded that he told Lee that he did not know what the answer to the safety brief was. When Armstrong asked Flick what he had said before that, Flick replied that he had stated "Watch out for other retards." Flick added that he had said this in a joking manner and did not mean anything by it. (Tr. 67.) Armstrong stated that such conduct would not be tolerated in the workplace, as it was insubordinate. Armstrong then told Flick's services were no longer needed. Ford asked Flick if he understood that he was being terminated. Flick responded that he understood that he was getting terminated, but that he was not clear as to what the reason was. Ford merely responded by saying "okay." (Tr. 68.)[12] Lee then escorted Flick from the facility. Flick never received a written termination notice. At the trial, the Respondent did not produce any documents reflecting its reasons for terminating Flick.

Analysis

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981) cert. denied 455 U.S. (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983), the Board established a framework for deciding cases turning on employer motivation regarding an adverse employment action taken against an employee. To prove an employer's action is discriminatorily motivated and violative of the Act, the General Counsel must first establish, by a preponderance of the evidence, an employee's protected conduct was a motivating factor in the employer's decision. The elements commonly required to support such a showing are union activity by the employee, employer knowledge of the activity, and, at times, antiunion animus on the part of the employer. If the General Counsel is able to establish a prima facie case of discriminatory motivation, the burden of persuasion shifts "to the employer to

[10] The complaint does not allege that the Respondent's announcement of its new policy toward safety vests constituted a violation of the Act.

[11] Both Flick and Lee testified that this was the response that Flick initially made to Lee's inquiry. Their testimony is also consistent with the written statement prepared by Lee regarding this incident on April 26, 2012. (R. Exh. 20.) Leconte recalled Flick's stating "stay clear of the fucking drivers." (Tr. 299; 305–306.) I found Leconte, who is currently employed by the Respondent and testified at the trial pursuant to subpoena, to be generally a credible witness. However, on this point I find the mutually corroborative testimony of Lee and Flick to be the more reliable version of the exact language used by Flick in his initial response to Lee's inquiry.

[12] The testimony of Armstrong, Ford, and Lee conflict with that of Flick in certain material respects regarding this meeting. Armstrong and Ford testified that when Armstrong asked Flick what he had told Lee when asked what the safety brief was, Flick responded "watch out for the retards" and then asked "what's in it for me" before admitting that he did not know the answer. According to Armstrong and Ford, Ford asked Flick if he realized that he had been insubordinate and that was something that he could be terminated for. Flick responded that he absolutely did. According to their testimony, Ford also gave Flick an opportunity to make a written statement, which he declined. Lee's brief testimony regarding the meeting corresponds with that of Ford and Armstrong. Except for the collateral issue of his attendance warnings, I found Flick to be a credible witness. He appeared to attempt to answer all questions involving matters germane to his discharge in an open and honest manner. With respect to the termination meeting with Flick, the three management witnesses testified, in my view, in a manner that they felt would best support the Respondent's case.

demonstrate the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089.

As I have indicated above, Flick was very active on behalf of the Union. After signing an authorization card for the union, Flick often solicited other employees to join the Union and always carried authorization cards with him. In February 2012, Flick's name and picture appeared in an article he wrote in support of the Union which appeared in a union flyer that was distributed throughout the plant. In addition, while at work Flick often wore a shirt with the Union's name on it and had a stocking cap with the words "Union Man" on it. Finally, Flick had written on one of the safety vests the term "Union Man."

Both Armstrong and Lee admitted that they had observed Flick distribute union literature and wear union shirts and hats. Armstrong also acknowledged that Flick wore a safety vest with the word "respect" written on it. I note that neither Armstrong nor Lee denied seeing Flick wear a safety vest with the words "Union Man" written on it. Armstrong testified that Flick was the only employee in tug dispatch that openly supported the Union (Tr. 374). The Respondent does not dispute that Flick engaged in union activity and that the Respondent was aware of it.

I also find that the Respondent harbored animus toward the union activity of its employees. In this connection in *DHL I*, supra, the Board found that the Respondent committed several violations of Section 8(a)(1) during the Union's organizing campaign at the Respondent's Wilmington, Ohio facility in 2006. In that case, the Board found that Ford, who was involved in the decision to discharge Flick in the instant case, violated Section 8(a)(1) on behalf of the Respondent, when she threatened employees with the loss of a periodic wage increase for supporting the Union. Id. at sl. op. 1. *In DHL II*, the Respondent unlawfully restricted the distribution of literature in violation of Section 8(a)(1). In addition, as set forth in detail later, I find that on May 2, 2012, shortly after Flick's discharge, the Respondent again interfered with the Union's distribution of literature in violation of Section 8(a)(1) of the Act. Under the circumstances present in this case, I do not agree with the Respondent's contention that the violations of the Act the Board found that the Respondent committed in the prior cases are too remote to be considered in establishing the Respondent's animus toward the union activity of its employees in the instant case.

According to Armstrong, Flick was the only open and active union supporter in the tug dispatch department. On April 25, Landers observed Flick wearing his safety vest with the words "UNION MAN" on it and discussed it with Armstrong. Later in that shift, Armstrong decided that all employees writing on company safety vests in the tug dispatch department would no longer be permitted and that new vests would be issued to employees. When Armstrong advised Flick of the new policy, Flick indicated that he would buy his own safety vests and write "Union Man" on it and that the change in policy would not stop him from supporting the Union. The next evening, when Lee reported to Armstrong Flick's responses to Lee's question regarding the safety brief, Armstrong, in conjunction with Ford and Basinger, summarily discharged Flick. The abruptness of the discharge and the timing, shortly after Flick indicated to Armstrong that he would continue to be a strong union advocate, is persuasive evidence that the Respondent's motive in discharging Flick was his union activity. *Toll Mfg. Co*., 341 NLRB 832, 833 (2004). On the basis of the foregoing, I find that the Acting General Counsel has established a prima facie case under *Wright Line,* supra, and the burden shifts to the Respondent to establish that it would have taken the same action against Flick regardless of his union activities.

In order to meet the *Wright Line* burden, an employer must establish that it has consistently and evenly applied its disciplinary rules. *Septix Waste, Inc*., 346 NLRB 494, 495–496 (2006). The Respondent has discharged other employees for insubordination and, in one instance, an employee was discharged for insubordination coupled with a disregard for safety rules. However, I find that each situation involved conduct that was quite different from that of Flick. Thus, I find there is no evidence that the Respondent has discharged other employees for engaging in conduct similar to that of Flick. Accordingly, I find that the Respondent has not met its *Wright Line* burden in this case.

As I have indicated above, the Respondent produced no documents regarding its reasons for discharging Flick. According to Flick's credited testimony, Armstrong told him that his responses to Lee's questions were insubordinate and that he was being terminated for that conduct. Armstrong testified at the trial that when Lee reported to him Flick's answers to Lee's question regarding the safety brief, Armstrong concluded that Flick was being insubordinate and disrespectful to the safety program. (Tr. 388.) Armstrong then discussed the matter with Baisinger and Ford and they concluded that if what was reported was truthful it warranted termination (Tr. 389).

In assessing the Respondent's defense under *Wright Line*, I note that while Flick's initial responses to Lee's questions were somewhat flippant, it is important to consider the overall context in which those statements were made. According to the credited testimony of Flick and Leconte,[13] Flick and Lee had a friendly relationship at work and would often joke around about a variety of issues. At times this joking would be done in a voice that mimicked that of a mentally impaired person. The genesis of this voice was a character in a movie entitled "Scary Movie" that apparently both Flick and Lee were fans of. (Tr. 71–73; 295–297; 304–305; 312–314.)[14]

Although Lee testified that Flick's response to his question regarding the safety brief bothered him, he did not indicate that to Flick at the time. Although Lee reported to Armstrong the

[13] As a current employee who testified against the interest of his employer, it is unlikely that Leconte's testimony is false. *Bloomington-Normal Seating Co*., 339 NLRB 191, 193 (2003).

[14] While Lee admitted that he joked around with Flick during preshift meetings, Lee claimed that his relationship with Flick was no different than that of any other employees supervised. Lee testified that he did not recall either he or Flick speaking in a voice that mimicked that of a mentally impaired person. I do not credit Lee's testimony in this regard. His testimony was vague and generalized on this issue and he appeared uncomfortable discussing it. In contrast, the mutually corroborative testimony of Lee and Flick was detailed and consistent and delivered in a manner that reflected certainty.

manner and substance of Flick's responses to his questions regarding the safety brief, he did not recommend any disciplinary action be taken with respect to Flick.

In examining the Respondent's asserted reasons for the discharge of Flick, I note that Landers testified that employees are not terminated for failing to know the answer to questions about the safety briefing. Landers testified that the policy generally is that an employee needs to find out the correct answer and report it to their supervisor (Tr. 366). Lee testified that there were many employees who did not know the answer to questions regarding the safety briefing (Tr. 456–457). Lee testified that the instruction that he received on what to do if an employee did not know the answer to questions about the safety brief was to find out why they did not know and to ensure that they knew what the correct answer was (Tr. 457). Under the circumstances, it is not surprising that Lee did not recommend that discipline be imposed upon Flick for not knowing the answer to his question regarding the safety briefing. There is no evidence that the Respondent considered not knowing the answer to a question about the daily safety brief, in and of itself, to be a dischargeable offense.

In assessing the Respondent's contention that the discharge of Flick warranted termination, I first examine the circumstances surrounding the discharge of employee Joseph Miller. Miller was terminated on April 24, 2012, for "disregard of safety and insubordination." (GC Exh. 6.) According to the report, Safety Specialist Riggin gave to Operations Manager Brian Stewart, Riggin asked Miller if he was aware of the safety brief for the day. When Miller responded that he did not know, Riggin went on to ask other employees if they were aware of the safety brief and gave them an "AVI voucher" if they knew the answer. As Riggin was leaving the area, he overheard Miller say he had "more important things to do than worry about safety." Miller was asked by Riggin if he thought that safety was important, and Miller replied that he did not. When Riggin asked Miller if he believed that safety would be important if he was injured by another employee, Miller responded "I don't care." Riggin then asked Miller to follow him to Miller's supervisor (Brian Stewart) so they could have a discussion about the matter. However, Miller replied "No. I ain't going anywhere." When Riggin asked Miller his name, Miller shoved his arm close to Riggin's face and stated "There it is." Riggin then reported the matter to Stewart, who then recommended Miller's discharge.

Unlike Flick's situation, Riggin took no action when Miller indicated he did not know the answer to the safety brief. Rather, Riggin merely began to ask other employees if they knew what the safety brief was. It was only after Riggin heard Miller openly state that he had more important things to do than worry about safety, that Riggin returned an attempted to have a dialogue with Miller about the importance of safety. Miller repeated on two more occasions that he did not care about safety. He then adamantly refused Riggin's request to come with him to discuss the issue with Miller's supervisor. Finally, when Riggin asked Miller his name, Miller shoved his arm close to Riggins face, displaying his name tag and saying "There it is." As noted above, Miller was discharged for "insubordination and disregard of safety." In contrast, while Flick's original answer to Lee was delivered in a joking manner; his answer actually reflected some awareness that part of the safety message that evening was to pay attention while you were driving. Flick then asked what was in it for him if he knew the answer. This question could not be considered insubordinate under any objective standard since it is undisputed that the Respondent was giving pins or a dollar credit at the cafeteria to employees if they knew the answer to the safety brief. Finally, Flick simply admitted that he did not know the answer to the question regarding the safety brief. Importantly, Flick indicated, both to Lee on the way to his discharge meeting and to Armstrong, Basinger, and Ford when he arrived, that he was only joking when he made his initial responses. Notwithstanding Flick's explanation for his conduct and his cooperative attitude toward supervision throughout the whole matter, he was summarily discharged. In my view, the conduct of Miller and Flick is so different that Miller's discharge, which involved Miller's consistently stated disregard for safety expressed in a defiant and insubordinate manner, does not establish that the Respondent applied a consistent policy in discharging employees whose conduct was similar to that of Flick's.

In January 2012, the Respondent terminated John McBroom for insubordination and improper use of company email. McBroom had previously received a warning. (GC Exh.7; R. Exh. 21.) The report accompanying McBroom's discharge indicates that he sent an email to his supervisor telling him the way to run the area that McBroom worked in. The supervisor informed McBroom that he could not send such instructions to a supervisor. McBroom replied that he did not care because he did not want to work by himself anymore. The supervisor explained that, at times, McBroom would need to do so, but that the supervisor would send him help if necessary. McBroom repeated it was not going to work by himself. McBroom then raised a previous matter when, according to McBroom, his supervisor had found him sitting on the floor and threatened to write him up. The supervisor told McBroom that sitting on the floor involved a safety issue and that he had told McBroom to get up and lean on the work table behind him if he was not feeling well. McBroom persisted in attempting to discuss that issue, but the supervisor told him that he needed to drop it as the conversation was over. McBroom continued to discuss it "with attitude" and when the supervisor again told McBroom to stop it McBroom replied that the supervisor needed to go. (R. Exh. 21.) I find that the insubordinate refusal by McBroom to accede to his supervisor's direction is far different from the manner in which Flick responded to Lee's questions about the safety brief.

Michael Glacken was terminated for insubordination on February 25, 2012 (GC Exh. 8; R. Exh. 23). According to the report of Supervisor Michael Bush, on February 24, Glacken became upset with another driver, Daniel Dougherty, for allegedly not looking as Dougherty backed up. Glacken yelled at Dougherty and took the backup mirrors from Dougherty's lift. Bush approached Glacken and told him that he could not take the mirrors from lifts and yell at other drivers. Later that same shift, Bush saw Glacken another employee, Kasib Hasan, arguing about Hasan's driving. When Bush asked Glacken what was going on, Glacken said he "had it handled." Glacken told Bush that he was not his supervisor and that he did not have to

answer to Bush. Bush told Glacken he was a supervisor and that he wanted to know what was going on. Glacken said that he was told that he needed to stop the lift drivers from backing up without looking and that is what he was doing. He then left the area yelling and screaming (GC Exh. 8). Clearly, Glacken's insubordinate conduct toward Bush and his dangerous behavior regarding the removal of backup mirrors is substantially different than Flick's conduct in the manner in which he responded to Lee's questions about the safety brief.

On March 23, 2012, the Respondent discharged Thomas Schroerer. Schroerer had been warned several times about the Respondent's seatbelt policy while operating a forklift. When Riggin suspended him indefinitely from operating a forklift due to multiple violations of the seatbelt policy, Schroerer told Riggin "Merry Christmas Mother Fucker." When Riggins asked Schroerer what he had called him, Schroerer said "Merry Christmas, thank you very much." (GC Exh. 9.) I find the conduct that precipitated Schroerers' discharge to be substantially different from Flick's conduct. Schroerer was given repeated warnings about wearing a seatbelt, yet failed to comply. When Schroerer was finally suspended for his repeated refusal to abide by the safety policy, he called Riggin a mother fucker. Flick, of course, was given no warning regarding his conduct on April 26 and did not use any profane language toward his supervisor.

On February 4, 2010, employee Joshua Snowball was terminated for refusing to follow a supervisor's direct order to take containers to the unload area (R. Exh. 17; Tr. 394–395; 405). Similarly, on June 22, 2011, Christopher Anderson was discharged for refusing to follow the orders of Supervisor Nick Kline. When Kline ordered Anderson to hookup his tug to take containers to the forklift area, Anderson began to drive his tug away. When Kline told Anderson to come back and hookup, Anderson yelled "fuck you." As Kline walked toward Anderson's talk and said "excuse me," Anderson said that he had to go back to the unloading que. When Kline grabbed the door of the tug and told Anderson to turn off the engine and get out the tug, Anderson stepped on the gas and Kline had to jump to get out of the way so as not to get hit by the tug. (R. Exh. 19.)

On September 22, 2011, Michael Williams was terminated because he refused to follow the direction of a crew leader and then, when an argument ensued regarding the matter, Williams told the crew leader to "meet me in the parking lot and get in my face." Another employee then had to intervene and separate Williams and the crew leader. (R. Exh. 18.)

The conduct of Snowball, Anderson, and Williams involved a refusal to perform a direct order by a supervisor or a lead man. The conduct of Anderson involved both aggressive acts and profanity directed toward a supervisor. Williams' conduct involved attempting to instigate a fight with a lead man Flick, however, never refused to perform any orders from Lee, never used profanity, and never acted in any manner aggressively toward him.

It is clear that, after reviewing all the record evidence regarding the discharges of other employees for insubordination and disregard of safety, the offenses of those employees were different in kind than Flick's conduct. Flick's failed attempt at humor in answering Lee's question regarding the daily safety brief is far removed from the acts of insubordination that caused the Respondent to discharge other employees. With regard to Armstrong's claim that an alleged disrespect for the safety program was part of the reason for Flick's discharge, as noted above, Flick had only one chargeable accident during his employment and scored well on safety tests. There is no evidence that the Respondent discharged another employee with a similar safety record or discharged any other employee for not knowing the answer to a question about what the daily safety brief contained. Another difference between the discharge of Flick and that of the other employees noted above is the lack of any documentation regarding the Respondent's reasons for discharging Flick. This establishes his discharge did not occur according to the Respondent's normal processes. Under all of the circumstances, the Respondent has not met its burden of showing that other employees were discharged for engaging in conduct similar to that of Flick. See *Septix Waste*, supra, at 497 fn. 16. Thus, the Respondent has not met its burden under *Wright Line* to establish that it would have discharged Flick even if he had not engaged in union activity. Accordingly I find that his discharge violates Section 8(a)(3) and (1) of of the Act.

The Alleged Violations of Section 8(a)(1) of the Act

The complaint alleges that on or about May 2, 2012, the Respondent, by Brandon Lewis at its Erlanger, Kentucky facility, violated Section 8(a)(1) of the Act by informing an employee, who was engaged in the distribution of union literature in the Respondent's cafeteria, that the employee could not distribute the literature in that area and by instructing the employee that if he did not cease doing so he would be escorted from the facility.

While the Respondent does not dispute that the cafeteria at the CVG facility is a nonwork area where employees can distribute literature, it contends that, under the circumstances present in this case, any violation of the Act that occurred was de minimus in nature and does not require a remedial order.

Facts

Charles Teeters is employed by the Respondent as a service agent and works the third shift at the Respondent's CVG facility. The third shift generally begins between 12 a.m. and 1 am. Teeters has been an active supporter of the Union's organizing drive for approximately 2 years. In this connection, he has passed out union newsletters and handbills both inside and outside the facility and has solicited employees to sign authorization cards. Teeters testified that he generally arrives at work approximately 30 to 45 minutes before the shift and goes to the cafeteria where he displays union newsletters, union hats and buttons and speaks to employees about the Union. According to Teeters, the Respondent had previously informed union supporters that they were permitted to conduct such activity in the cafeteria. (Tr. 216–217.)[15]

[15] The Respondent's rule regarding solicitation and distribution contained in its current handbook provides "Solicitation by one employee of another employee is prohibited if either employee is on work time. You are prohibited from distributing advertising materials, handbills, or

On May 2, 2012, Teeters arrived in the cafeteria before his shift. Robert Woodyard, another employee union supporter, was with him. On a cafeteria table approximately 15 feet from the cafeteria door, Teeters and Woodyard laid out various items of union literature. One document had the title "GUILTY!" in bold capital letters and discussed the Board's decision in *DHL II* (GC Exh. 5A). Another document had the title in bold capital letters "DHL WORKERS DESERVE A BREAK." This document included Flick's article about breaktimes and contained his name and photograph. (GC Exh. 5A, p. 2.)

Before the shift began on May 2, Landers came into the cafeteria and stopped to look at the union literature displayed on the table. Teeters recognized Landers as the new general manager who had been introduced to employees at the April 18 tailgate meeting. Landers went to the cafeteria line to get something to drink and then stopped once again to look at the union literature before he left the cafeteria.

Approximately 10 minutes later one of the Respondent's senior managers, Brandon Lewis, came into the cafeteria along with Colin Beynon, a human resources manager. Lewis instructed Teeters to pick up the union literature and leave the cafeteria. When Teeter's asked why he had to leave, Lewis indicated that he and Teeters had had a similar conversation in the past. Teeters told Lewis that they had spoken about the right to distribute literature in the hallway.[16] Lewis again ordered Teeters to leave the cafeteria. Teeters told Lewis that the Respondent had been allowing employees to distribute union literature in the cafeteria. Teeters claimed that Lewis and Beymon were violating his right to pass out literature in the cafeteria and asked them what would happen if he refused to pick up his materials and leave. Lewis told Teeters that he would be escorted out of the building if Teeters refused to leave, but that "we do not want to do that." (Tr. 236.) At that point Teeters and Woodyard began to pick up the union literature. Before he left the cafeteria Peters shook hands with Lewis as they generally had a cordial working relationship. There were about 30 employees within approximately 7 feet of conversation between Teeters and Lewis while it was occurring. The next day, Teeters began a brief vacation. When Teeters returned to work on April 10, 2012, he resumed his practice of sitting at a table in the cafeteria before his shift began with union literature available for distribution. Teeters had continued this practice until the time of the trial without any further attempts by the Respondent to have him cease such activity.

Landers was the only witness called by the Respondent regarding this issue. According to Landers, when he went into the cafeteria before the start of the shift on May 2, he observed an employee sitting at a table with union literature. Landers walked up and looked at the literature. After Landers left the cafeteria he spoke to Beynon. Landers expressed his belief to Beynon that the employees were allowed to distribute union literature in the parking lot, but not in the building. Landers asked Beynon if it was permissible for employees to distribute literature in the cafeteria. Beynon replied that it was not and that he would handle the situation. It was later reported to Landers that Beynon and Lewis had asked the employees distributing the literature to leave the cafeteria.

After the incident occurred, Landers learned it was permissible for employees to distribute union literature in the cafeteria. A couple weeks after the incident in early May, Landers again observed employees distributing literature in the cafeteria and took no action to interfere with that activity.

There is no evidence that the Respondent ever announced to employees their right to distribute literature in the cafeteria after the May 2, 2012 incident, involving Teeters and Woodyard.

Analysis

In *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978), the Supreme Court indicated that "the right of employees to self organize and bargain collectively established by Section 7 . . . necessarily encompasses the right effectively to communicate with one another regarding self organization at the job site." It is a well-established principle that off-duty employees have the right under Section 7 of the Act to distribute union literature on company property during nonwork time in nonwork areas. *Golub Corp*., 338 NLRB 515 (2002); *New York New York Hotel & Casino*, 334 NLRB 762 (2001); *Nashville Plastics Products*, 313 NLRB 462, 463 (1993).

In the instant case, it is clear that Teeters and Woodyard were off duty as their shift had not yet started. It is equally clear that the Respondent's cafeteria is a nonwork area. Thus, Respondent violated Section 8(a)(1) of the Act when Teeters and Woodyard were instructed to pick up their union literature and leave the Respondent's cafeteria on May 2, 2012. By informing Teeters that he would be escorted from the facility if he refused to comply with that order, the Respondent additionally violated Section 8(a)(1). If Teeters was escorted from the facility he obviously would not be performing his work duties. Viewed objectively, that statement constituted an implied threat that Teeters would be suspended or discharged if he failed to comply with the Respondent's order to cease distributing union literature and to leave the cafeteria.

That the incident on May 2, 2012, may have resulted from Landers and Beynon's misunderstanding of the right of Teeters and Woodyard to distribute union literature in the cafeteria while they were off duty does not serve as a defense to the Respondent's conduct. The Board has long held that motive or intent is not a critical element in finding a violation of Section 8(a)(1). The test is whether the employer's conduct reasonably tends to interfere with the exercise of employee rights under the Act. *Golub Corp*., supra at 516. It is clear that under the circumstances present in this case, the Respondent unlawfully interfered with the right of employees to distribute union literature at a time and place where they are permitted to do so.

I do not agree with the Respondent's contention that its conduct on May 2 constituted, at most, a technical violation of the Act which does not require a Board remedial order and notice. In the first instance, the Respondent's interference with the protected right of Teeters and Woodyard to distribute union

printed and written literature of any kind in work areas. Working time does not include any break periods. (R. Exh. 3, p. 48.)

[16] *DHL II*, supra, involved the right of employee union supporters to distribute literature in the main hallway area of the Respondent's administration building at CVG.

literature in the cafeteria was witnessed by approximately 30 other employees. This conduct also occurred shortly after the Respondent discharged Flick, a leading union adherent in violation of Section 8(a)(3) and (1) of the Act. In addition, I note that the Board has previously found that the Respondent interfered with employees' attempts to lawfully distribute union literature in violation of Section 8(a)(1) at its CVG facility. *DHL II*, supra.

While the Respondent apparently informed Landers and other managers at the CVG facility that employees have the right to distribute union literature in the cafeteria while they were off duty, there is no evidence that employees were ever informed that the Respondent had acted unlawfully on May 2 by interfering with that right or were given assurances that such conduct would not occur again. In *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), the Board indicated that under certain circumstances an employer may relieve itself of liability for unlawful conduct by repudiating the conduct. To be effective, the repudiation must be "timely, unambiguous, specific in nature to the coercive conduct and free from other proscribed illegal conduct." In addition, there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication. Finally, the repudiation should give assurances to employees that in the future the employer will not interfere with the exercise of their Section 7 rights. Id. at 138–139. See also *Intermet Stevensville*, 350 NLRB 1349, 1350 fn. 6, 1382–1383 (2007); *River's Bend Health & Rehabilitation Services*, 350 NLRB 184, 193 (2007). It is clear that the Respondent did not meet the *Passavant* standards and accordingly I find that a Board remedial order and notice are necessary to properly remedy the violations of Section 8 (a) (1) that occurred here.

CONCLUSIONS OF LAW

1. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by:

(a) Prohibiting the distribution of union literature in its cafeteria, a nonwork area.

(b) Threatening to escort employees from the facility unless they ceased the lawful distribution of union literature in its cafeteria, a nonwork area.

2. The Respondent has engaged in an unfair labor practice in violation of Section 8(a)(3) and (1) of the Act by discharging Joshua Flick because Flick and other employees engaged in union activities.

3. The above unfair labor practices affect commerce within the meaning of Section 2 (2), (6), and (7) of the Act.

REMEDY

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

The Respondent, having discriminatorily discharged Joshua Flick, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, DHL Express (USA), Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting the distribution of union literature in its cafeteria, a nonwork area.

(b) Threatening to escort employees from the facility unless they cease the lawful distribution of union literature in its cafeteria, a nonwork area.

(c) Discharging employees, or otherwise discriminating against employees for engaging in union or other protected concerted activities.

(d) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed to 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 from the date of the Board's Order, offer Joshua Flick full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Joshua Flick whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Flick in writing that this has been done and that the discharge will not be used against him in any way.

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

(e) Within 14 days after service by the Region, post at its fa-

[17] 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.

cility in Erlanger, Kentucky, copies of the attached notice marked "Appendix."[18] 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. In addition to physical posting of paper notices, the 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 its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 26, 2012.

(f) 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., April 22, 2013.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
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 on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT prohibit the distribution of union literature in our cafeteria, a nonwork area.

WE WILL NOT threaten to escort employees from the facility unless they cease the lawful distribution of union literature in our cafeteria, a nonwork area.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the American Postal Workers Union or any other union.

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

WE WILL within 14 days from the date of this Order, offer Joshua Flick full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Joshua Flick whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Joshua Flick, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

DHL EXPRESS (USA), INC.

[18] 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."