

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

UNITED PARCEL SERVICE, INC.

and

Case 3-CA-20666

JOSEPH BRAINARD, An Individual

*Doren G. Goldstone, Esq.,*  
of Buffalo, New York  
for the General Counsel.

*Stephen Vollmer, Esq.,*  
(*Bond, Schoeneck & King*),  
of Syracuse, New York,  
for the Respondent.

*Carol R. Rosenthal, Esq.,*  
of Buffalo, New York,  
for the Charging Party.

DECISION

Statement of the Case

LEONARD M. WAGMAN, Administrative Law Judge. This case was tried in Buffalo, New York on July 9, July 10, August 3 and August 4, 1998. Upon a charge filed on April 30, 1997,<sup>1</sup> and an amended charge filed on July 14, by the Charging Party, Joseph Brainard an individual, referred to below as Brainard, the Regional Director for Region 3 issued a complaint on February 18, 1998. The complaint alleges that the Respondent, United Parcel Service, Inc., referred to as UPS, had violated Section 8(a)(3), (4) and (1) of the National Labor Relations Act, as amended, (29 U.S.C. 151, *et seq.*) by terminating Brainard on or about June 27. The complaint also alleges that UPS violated Section 8(a)(1) of the Act by informing an employee that it was discriminating against another employee because the second employee had sought contractual arbitration and had filed charges with the Board, by telling an employee that a second employee would be arrested if he entered UPS's premises and engaged in activities on behalf of Teamsters Local 449, referred to as the Union, and by implying that UPS had terminated an employee because he had sought contractual arbitration and had filed charges with the Board. UPS filed a timely answer denying that it had committed the alleged unfair labor practices. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and UPS, I make the following

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<sup>1</sup> All dates are in 1997, unless otherwise indicated.

## Findings of Fact

## I. Jurisdiction

5 UPS, a corporation, engages in the interstate delivery of packages at its distribution  
center in Buffalo, New York. During the 12-month period ending January 31, 1998, UPS in  
conducting its business operations at Buffalo, derived gross revenues exceeding \$50,000 from  
the transportation of packages from Buffalo, New York, directly to places outside the State of  
10 New York. UPS 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

## 15 A. The Facts

Brainard began working for UPS on July 17, 1989, as a casual feeder driver. His driving  
assignments were within a 250 mile radius of UPS's Buffalo hub. UPS's drivers are classified  
as either permanent, preferred casual or casual. Driving assignments are assigned on a  
20 priority basis. When there are more assignments than the hub's permanent drivers can  
perform during the assignment week, the surplus are assigned first to the preferred casual, and  
if there are any assignments remaining, they are given to the casuals. The preferred casuals  
enjoy seniority among themselves, which governs distribution of assignments, and transfers to  
permanent status. Under the Union's collective-bargaining agreement with UPS, a casual who  
25 works 90 days in a calendar year is entitled to be a preferred casual. By September 1995,  
Brainard had attained the top spot on the preferred casual list under that provision, which was  
in effect from August 1, 1993 through July 31.

30 In September 1995, Brainard had an accident while driving a UPS truck. He struck an  
unprotected pole and suffered injury. In October 1995, as a result of the accident, UPS  
discharged him. Brainard filed a grievance against UPS, seeking reinstatement. The Union  
took Brainard's grievance to arbitration. In a written decision, dated December 13, 1996, the  
arbitrator made the following award:

35 The employer [UPS] is directed to reinstate Mr. Brainard within TEN days after receipt  
of this award without any lost wages or benefits. He further orders that the grievant be  
placed on probation and final warning for a period of one year.

40 On January 8, Brainard attended a meeting with UPS management and Union  
representatives concerning his return to work under the arbitration award. Present for UPS  
were Western New York Labor Relations Manager Anthony Vendetti, District Security Manager  
William Busch, and Feeder Manager Greg Mohr. The Union's representatives were Business  
Agent Bruce LeRoy and Steward William Bagley.

45 The meeting was fraught with conflict over the interpretation of the arbitrator's award.  
The Union representatives argued that the award required UPS to reinstate Brainard within 10  
calendar days of the award. Vendetti insisted that "within 10 days" meant business days.  
Brainard and Bagley insisted that Brainard was entitled to backpay, as well as benefits,  
including health, welfare and pension contributions by UPS for the time he lost because of his  
discharge in October 1995. Vendetti argued that the award withheld backpay and benefits.

Brainard and Bagley argued that the reinstatement required by the arbitration award

meant that Brainard was entitled to permanent status, inasmuch as preferred casual drivers junior to Brainard had achieved that status during his absence. LeRoy suggested that Brainard was entitled to return to the top of the preferred casual list. UPS's Vendetti initially argued that Brainard had lost his preferred casual status because he had not worked 90 days during the  
 5 previous calendar year. In the ensuing discussion, Vendetti agreed to place Brainard at the bottom of the preferred casual list. The Union did not accept Vendetti's compromise, which was implemented. However, the parties agreed to seek clarification by the arbitrator of the reinstatement provision in his award.

10 The parties also explored the meaning of "probation and final warning" in the arbitrator's award. LeRoy sought UPS's agreement that those words did not mean that Brainard would be discharged for calling in sick or being late.<sup>2</sup> Vendetti, answering for UPS, assured LeRoy that Brainard would not be fired for "any bull shit." Bill Bagley and Joe Brainard pressed the Union and UPS to seek clarification of the disputed portions of the arbitration award. Vendetti  
 15 opposed clarification, insisting that the arbitrator, Joe Lipowski, the Union's attorney, Joe Giroux and UPS's attorney, Steve Vollmer "do not run UPS, okay? I do."<sup>3</sup>

20 I find from Brainard's testimony that Bagley continued his push for clarification of the meaning of "reinstate" and "probation" in the arbitration award. LeRoy suggested that UPS put Brainard back to work and that the Union and UPS seek clarification. At this point, the meeting ended. Immediately after the meeting, Feeder Manager Mohr invited Brainard to return to work on the following day. Brainard said he would be unavailable for work until Friday, January 10. Mohr agreed that January 10 would be Brainard's return date.

25 Brainard returned to work at UPS's Buffalo facility on January 10. He was the ninth and last driver on the preferred casual list. However during his employment at UPS after his return on January 10, he rose on the preferred casual list as drivers ahead of him on that list obtained permanent status.

30 On his first day back to work, Brainard received safety training under the supervision of Supervisor Chris Strell. After about five hours of training, Strell sought out Supervisor Ray Barczak to see if there was any further assignment for Brainard. The two supervisors conversed in an open doorway just outside the room in which Brainard was waiting. Brainard  
 35 heard Barczak say: "I don't give a shit. He can go scrub toilets for all I care." Strell returned to Brainard, and asked if he had heard Barczak's remark. When Brainard said he had, Strell stated that there was nothing else for Brainard to do, and asked if Brainard wanted to go home. Brainard answered: "That's enough for today." He left.

40 <sup>2</sup> Brainard testified that LeRoy gave calling in sick or being late as examples of conduct which should not warrant discharge. Vendetti, in response to a leading question, denied that either he or LeRoy gave specific examples of such misconduct. However, Vendetti's account of the exchange was sketchy, and he seemed tentative as he presented his recollection of this exchange. Brainard seemed more certain as he presented his account in a frank manner. Indeed, Brainard's testimony shows that Vendetti did not express agreement with LeRoy's  
 45 examples of misconduct not warranting discharge.

<sup>3</sup> My findings regarding Vendetti's response to Bagley's insistence upon seeking clarification of the award are based upon Brainard's full and forthright testimony. In response to a leading question by UPS's counsel, Vendetti denied saying that "Joe Lipowski doesn't run this company." However, Vendetti's testimony regarding his remarks in response to Bagley's request for clarification is sparse and leaves undenied the rest of Brainard's detailed account of this encounter.

5 During the following week, Strell continued giving safety training to Brainard. This training afforded them opportunities for conversation. During their exchanges, Strell repeatedly warned Brainard to be careful to “dot your I’s and cross your T’s because they’re out to get you, Joe. They don’t like you.”<sup>4</sup>

10 In a letter to Brainard, dated April 7, the Union notified Brainard that UPS had not agreed to seek clarification from the arbitrator regarding the three disputed elements of his award. The disputes focused on Brainard’s entitlement to backpay, the one-year probationary period, and where he was to be reinstated, either on the preferred casual list, or to regular, full time employment. With its letter, the Union enclosed a grievance seeking Brainard’s restoration to the top slot on the preferred casual list, and backpay and benefits from January 4.

15 Brainard rejected the Union’s proposed grievance. Later in April, Brainard submitted a grievance regarding his reinstatement, to the Union for filing. In his grievance, Brainard sought permanent status and backpay and benefits retroactive to August 22, 1996. The Union processed this grievance to the arbitration stage, at which point, on November 13, at Brainard’s request, the Union withdrew this grievance from arbitration.

20 On April 30, Brainard filed an unfair labor practice charge against UPS, in the instant case, alleging, *inter alia*, that his reinstatement on January 10 was discriminatory, in violation of Section 8(a)(3) and (1) of the Act. On the same date, Brainard also filed an unfair labor practice charge against the Union, alleging unfair representation. Thereafter, Brainard withdrew his charge against the Union. Later, by letter to Brainard, dated February 8, 1998, the  
25 Regional Director for Region 3 announced the dismissal of his allegation that his reinstatement in January violated the Act.

30 On Thursday, June 12, Brainard was scheduled to report for a shift scheduled to begin at 2:15 a.m. However, he did not wake up until 4:00 a.m. and immediately telephoned UPS Supervisor Robert Lewis to report. Brainard explained that a power outage in his neighborhood had shut off his alarm clock and that he had overslept and missed his starting time. Lewis told Brainard not to worry about it and that he Lewis had covered Brainard’s run. Lewis also told Brainard not to bother coming in. Thereafter, Brainard continued working as scheduled by  
35 UPS.

At about noon, on the same day, Feeder Manager Greg Mohr learned from his voice mail from Supervisor Lewis that Brainard had failed to show up for work that morning and had called in almost two hours after the start of his shift.

40 Mohr classified Brainard’s misconduct of June 12 as a “no call-no show” incident. I find from Mohr’s testimony that UPS considers such misconduct to be “a serious offense.” When confronted with such an offense, Mohr regularly reports it to the hub manager, John Gilday. Within a day or two of June 12, Mohr telephoned Gilday at home and told him about  
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<sup>4</sup> I based my findings regarding Strell’s and Barczak’s remarks upon Brainard’s uncontradicted testimony. Neither of these supervisors testified in this case.

Brainard's no call – no show conduct on June 12, and also revealed that Brainard had an availability problem.

5 On June 16, Mohr and Gilday conferred about Brainard's no call-no show. On this occasion, Mohr informed Gilday that Brainard was in a probationary-final warning status. Mohr said he wanted to give a break to Brainard by not discharging him. Gilday went along with Mohr's view.

10 On the following day, Mohr and Gilday obtained UPS's West New York Labor Relations Manager Vendetti's approval of their plan to refrain from discharging Brainard and to issue a written warning to him. Vendetti advised Mohr and Gilday to talk to Brainard and warn him that he might lose his job "unless he cleaned his act up."<sup>5</sup>

15 Mohr met with Brainard and another UPS driver on June 18.<sup>6</sup> Mohr told Brainard that he, Brainard, was "getting a major break," that his misconduct on June 12 warranted discharge, and that he would receive a written warning letter. Brainard explained that his alarm clock had failed to wake him up because of a power outage. Mohr advised Brainard to get a Big Ben wind up clock.<sup>7</sup>

20 Mohr drafted a warning letter and had it typed on June 19. That same day, he obtained Division Manager Gilday's signature on it and mailed it from a post office to Brainard's home address. Brainard testified that he did not receive that letter. Mohr's usual procedure is to mail a warning letter to the employee involved and submit the file copy of the letter for the employee's signature at the UPS facility. Mohr could not follow this procedure with Brainard's warning letter because of their differing schedules. Mohr's first opportunity to present the file copy to Brainard occurred on June 27.<sup>8</sup> The warning letter to Brainard stated:

On June 12, 1997, you failed to work at your scheduled start time.

30 <sup>5</sup> My findings of fact regarding Mohr's and Gilday's discussions on June 16 and their conference with Vendetti are based upon a composite of the testimony of the participants in these exchanges.

35 <sup>6</sup> Mohr first testified that UPS driver Chapman was present with Brainard. Chapman credibly testified that he was not present at this meeting. Upon further examination, Mohr testified with uncertainty that another driver, Stanton, might have been there, instead. Stanton testified, but was not examined upon this issue of fact. Brainard testified only that a UPS driver was present. I find it unnecessary to establish the identity of that driver.

40 <sup>7</sup> Brainard's account of his meeting with Mohr on June 18 differs substantially from Mohr's rendition. However, Brainard's demeanor during cross-examination by UPS's counsel caused me to doubt the reliability of his testimony in this regard. Brainard responded to several questions evasively and was at times argumentative. In sum, he appeared to be a reluctant witness under cross-examination. I also noted that he denied ever hearing the terminology "no call-no show" at UPS. Yet in his affidavit given to a Board agent, Brainard asserted that Mohr described his misconduct on June 12 in those terms. When confronted with his affidavit, 45 Brainard attempted to disassociate himself from that assertion. However, later in his testimony, Brainard admitted that Mohr used the words no call-no show in his presence on June 27. In contrast, Mohr impressed me as being a candid witness, who was trying to give his best recollection. Accordingly, here and elsewhere in my findings of fact, whenever confronted by a conflict in their testimony, I have credited Mohr.

<sup>8</sup> My findings of fact regarding the preparation and disposition of Brainard's warning letter are based upon Mohr's uncontradicted testimony.

On June 18, 1997, a meeting was held with you and your union representative to discuss this matter. It was determined that you would receive a written warning.

5 This is notice to you that in the future you will be expected to fulfill any and all of your employment obligations. Failure to do so will result in further disciplinary action.

10 Brainard was scheduled to begin a work shift at UPS at 12:01 a.m. on June 26. He overslept and called Supervisor Lewis at 1:10 a.m. Lewis told Brainard that the route was covered and that he should not bother coming in. Later that same day, Brainard received instructions from UPS to report to the Buffalo facility at 11:00 a.m., on Friday, June 27, and not to come in for work on the evening of June 26. On the same day, Brainard called Union Steward William Bagley and reported that he, Brainard had overslept, missed his assignment, and had been told not to report for work on June 27, but to see Division Manager Gilday.

15 On June 26, Mohr learned that Brainard had again overslept, missed a shift and called in to report that his alarm clock had failed to wake him on time. Mohr reported this incident to Gilday, and the two decided to discharge Brainard. In their view, Brainard had ignored the warning and was not entitled to another break. Gilday consulted Vendetti, who agreed that  
20 Brainard's discharge was warranted.

At about 8:00 a.m. on June 27, Bagley came to Gilday in the main complex, at the UPS facility to talk about Brainard. Bagley began by saying he wanted to see if there was anything he could do to save Brainard's job. Gilday answered that unless Bagley had new facts that  
25 Gilday was not aware of, the decision had been made to discharge Brainard that same day.<sup>9</sup>

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<sup>9</sup> According to Bagley, when he raised the subject of Brainard on the morning of June 27, Gilday responded with: "Fuck Joe Brainard. When he comes in, I'm going to discharge him." Continuing, Bagley testified that in the ensuing exchange, Gilday raised additional misconduct by Brainard, beyond the incidents on June 12 and June 26, and complained that Brainard had  
35 "an attitude," had cost UPS \$12,000 in attorney fees for the last arbitration, and was "trying to get into them for another 50 big ones downtown." However, Gilday's account of his conversation with Bagley did not include these excerpts from Bagley's testimony. Further, Gilday specifically denied making any reference to Brainard's attitude, his causing UPS to spend money, or his continuing effort to cost UPS more money. In reviewing these conflicting  
40 accounts, I noted Bagley's tendency to reduce Brainard's no call-no show misconduct to being late for work and to assert that oversleeping on June 12 was not Brainard's fault. I also noted that in his pre-hearing affidavit given to the General Counsel, Bagley declared that during the months following Brainard's reinstatement [on January 10], he, Bagley did not hear anyone from UPS's management "say anything that would indicate that they were out to get Brainard  
45 because he had rejected the settlement and had gone to arbitration." Thus, Bagley's affidavit was inconsistent with his account of Gilday's remarks to him on June 27. This factor, and my impression that Bagley was skewing his testimony to assist Brainard's case against UPS, caused me to doubt the reliability of his testimony about his encounter with Gilday on June 27. I also noted that Gilday seemed to be testifying in a frank and straightforward manner, both on direct and on cross-examination. Accordingly, I have credited Gilday where his testimony conflicted with Bagley's.

At noon, on the same day, Brainard met with Gilday, Mohr and a Union representative. Mohr did most of the talking. He spoke of the warning letter and submitted a copy for Gilday's and Brainard's signatures. Mohr recited Brainard's failure to come to work on June 12 and June 26, and also spoke of Brainard's "pattern of unavailability" during the period between  
 5 January 10 and June 27. Mohr said that Brainard had relinquished his job at UPS and was no longer a UPS employee.<sup>10</sup>

UPS's records showed that from January 20 until June 26, both dates included, Brainard  
 10 had been unavailable for driving assignments on 32 occasions, excluding the two no-shows on June 12 and June 26, respectively. At least twice before Brainard's discharge in October 1995, Mohr had counseled him about his nonavailability for work. Again, following Brainard's reinstatement on January 10, Mohr counseled him about his unavailability on at least two occasions in 1997, prior to June 26.<sup>11</sup>

After telling Brainard that he was no longer a UPS employee, Mohr, in accordance with  
 15 UPS's standard procedure, escorted him out of the building to a guard shed, a distance of about 300 ft. As the two walked they conversed, Brainard complained that he had been reinstated to the bottom of the preferred casual list. He said all he wanted was a job. Mohr replied that he liked Brainard, as a person, but that with his no show and attendance record, it  
 20 did not appear that he was cut out to be a UPS employee. Brainard revealed that he was having marital problems, "as a result of everything going on." When the two reached the guard shed, they shook hands and Mohr wished Brainard well.<sup>12</sup> Brainard departed.

By letter dated July 2, UPS advised Brainard in detail of the reasons for his discharge on  
 25 June 27. The letter stated that the arbitration award had placed Brainard on final warning and probation for one year. Continuing, the letter reviewed, no call-no show episodes of June 12 and June 26 and the written warning issued to him. The letter gave as a further reason for discharge, the 32 instances in which Brainard had been unavailable for work during six months following his reinstatement on January 10.<sup>13</sup>

The collective-bargaining agreement between the Union and UPS was scheduled to  
 30 expire on the night of July 31. I find from Gilday's testimony that UPS expected its employees at Buffalo to strike at midnight. However, the strike did not occur.

During the evening of July 31, Brainard drove his personal pick-up truck and trailer to  
 35 the vicinity of the UPS facility in anticipation of a possible strike at midnight. I find from Brainard's uncontradicted testimony that he went to the UPS site to support the anticipated strike. After arriving, he backed his truck and trailer into a parking area adjacent to Buffalo

40 <sup>10</sup> Brainard's version of his meeting with Mohr and Gilday on June 27, conflicts with Mohr's testimony regarding that event. However, for the reasons set forth in footnote 7, I have credited Mohr's testimony regarding the meeting of June 27 with Brainard.

45 <sup>11</sup> Brainard testified that from January 10 until June 27, no one from UPS's management counseled him about his availability. However, as Mohr impressed me as being the more candid witness, I credited his testimony that Brainard received such counseling.

<sup>12</sup> I based my findings regarding Mohr's and Brainard's exit conversation upon Mohr's testimony. See footnote 7.

<sup>13</sup> UPS records received in evidence show that as of June 26, Brainard had been unavailable for work on 36 occasions in 1997. Included in that count were the incidents of June 12 and June 26. The record does not show why UPS's letter of July asserted that Brainard was unavailable for work on only 32 occasions in 1997.

Games, a firm unrelated to UPS. However, the front of Brainard's truck partially obstructed UPS's driveway designated as "James E. Casey Drive."

5 Close to midnight, Greg Mohr noticed Brainard's truck partially blocking UPS's driveway and that a UPS tractor trailer driver had stopped to talk to Brainard. Mohr went from his office to Brainard's truck and observed that it was blocking two or three feet of driveway. Mohr told Brainard that there would not be a strike that night, that he had no business being there and that he should go home. Brainard drove away two or three minutes later.<sup>14</sup>

10 At about the same time, on the night of July 31, Gilday, looking out of his office window, saw Brainard's pick-up trucking parked at Buffalo Games and partially blocking UPS's driveway. Gilday went to find Bagley and, upon finding him, asked the steward to talk to Brainard about moving his truck. Gilday warned that if Brainard refused to move, he, Gilday, would request police assistance to move the vehicle.<sup>15</sup>

#### 15 B. Analysis and Conclusions

20 The General Counsel and Brainard urge findings that UPS violated Section 8(a)(1), (3) and (4) of the Act<sup>16</sup> by discharging Brainard because he utilized the contractual arbitration process adopted by UPS and the Union, and because he had filed unfair labor practice charges against UPS. UPS contends that the General Counsel has not sustained his burden of showing that Brainard's union activity, consisting of use of the arbitration procedure, which the collective-bargaining agreement between UPS and the Union provides, or his filing of an unfair labor practice charge against UPS played any role in UPS's decision to terminate him on June 27.

25 <sup>14</sup> My findings regarding Mohr's encounter with Brainard on the night of July 31 are based upon their testimony.

30 <sup>15</sup> According to Bagley's testimony on direct examination, Gilday threatened to have Brainard arrested if he came onto UPS's premises and "that would have looked good downtown." However, Bagley seemed uncertain as to when this encounter with Gilday occurred and thought that Brainard was at another UPS gate. I also considered Bagley's testimony in light of the factors I set forth, above, in footnote 9. Further, as Gilday appeared to be giving his best recollection in an objective manner, I have credited his account of his remarks to Bagley on the night of July 31.

35 <sup>16</sup> Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

Section 7 of the Act provides, in pertinent part, that :

40 Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

45 In pertinent part, section 8(a)(3) of the Act makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to . . .discourage membership in any labor organization."

Section 8(a)(4) of the Act makes it an unfair labor practice " to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act."

Under Board policy, where the record shows that an employer's hostility toward union activity or other activity protected by the Act was a substantial or motivating factor in a decision to discharge an employee, the discharge will be found unlawful, unless the employer  
 5 demonstrates, as an affirmative defense, that it would have discharged the employee even in the absence of the protected activity. *Manno Electric, Inc.*, 321 NLRB 278, 280 n.12 (1996). Where it is shown that the business reason or reasons advanced by the employer for the discharge were pretextual--that is, that the reason or reasons either do not exist or were not in fact relied upon---it necessarily follows that the employer has not met its burden and the inquiry  
 10 is logically at an end. *Wright Line, Inc.*, 251 NLRB 1083, 1084 (1980), enfd. on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

In the instant case, I find that the General Counsel has failed to show that either Brainard's resort to the Union's contractual grievance procedure, which includes arbitration, or his filing of an unfair labor practice charge against UPS on April 30 was a substantial or  
 15 motivating factor in UPS's decision to terminate him on June 27. Certainly, UPS made that decision with full knowledge of Brainard's pending grievance and unfair labor practice charge complaining about the terms of his reinstatement under the arbitrator's December 1996 decision, as implemented by UPS. However, contrary to the General Counsel's contentions, I  
 20 have not found that UPS engaged in any independent unlawful interference, restraint or coercion of Brainard in the exercise of his rights to seek arbitration against UPS or invoke the Act to remedy what he perceived to be unjust treatment. Nor do I find evidentiary support for the complaint's allegation that UPS 's John Gilday threatened Brainard with arrest if he, Brainard, entered upon UPS's premises and engaged in activity on behalf of the Union.  
 25 Accordingly, I shall recommend dismissal of these allegations.

Whatever hostility UPS may have harbored against Brainard because of the expenses it incurred from his resort to arbitration and the Board's process did not cause it to discharge Brainard on June 27. There is no showing that any member of UPS's management made any  
 30 remark to Brainard about his resort to arbitration or to the Board.

The remarks of Supervisors Barczak on January 10 that, as far as he was concerned, Brainard "can go scrub toilets. . ." were not accompanied by any reference to Brainard's implementation of the Union's grievance procedure in 1996, and came over three months  
 35 before he filed an unfair labor practice charge against UPS. Supervisor Strell's advice to Brainard, during the week of January 10, that he should be careful because "[t]hey don't like you" was not delivered in the context of remarks about Brainard's use of arbitration. Again, Strell's advice predated Brainard unfair labor practice charge against UPS. I also note that there was no showing that either of these supervisors participated in the discussions leading up  
 40 to Brainard's discharge on June 27.

Finally, the record suggests that, contrary to Strell's warning, UPS was not "out to get" Brainard. Thus, on June 18, after Brainard's no call-no show incident of June 12, Feeder Manager Mohr, with Hub and Feeder Division Manager Gilday's and Labor Relations Manager  
 45 Vendetti's approval, disregarded Brainard's status as a probationary employee on final warning, gave him a break, and did not discharge him. I find from Mohr's testimony, that UPS's policy is to discharge probationary employees for one incident of no call-no show. Further Bagley, a shop steward, admitted, in his testimony before me, that UPS treats such misconduct seriously. Mohr spoke to Brainard on June 19, told him he was getting "a major break," and that his misconduct of June 12 was a dischargeable offense for which he would receive a warning letter. Mohr also sought to help Brainard avoid a repetition of his no call-no show of June 12. Mohr advised him to obtain a wind-up alarm clock. The record shows that Brainard's no call-no

show on June 26 triggered Mohr's and Gilday's immediate decision on the same day to discharge him on the following day.

5 In sum, I am not persuaded that the General Counsel has shown that either Brainard's resort to the contractual arbitration or his filing of an unfair labor practice charge with the Board's regional office in Buffalo was a motivating factor in UPS's decision to discharge Brainard on June 27. Accordingly, I find the General Counsel has not shown by a preponderance of the evidence that UPS violated Section 8(a)(4), (3) and (1) of the Act when it discharged Brainard on June 27.

10 Conclusions of Law

1. United Parcel Service, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

15 2. Teamsters Local 449 is, and, at all times material to this case, has been a labor organization within the meaning of Section 2(5) of the Act.

20 3. United Parcel Service, Inc. has not violated Section 8(a)(1), (3) and (4) of the Act, as alleged in the complaint in this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>17</sup>

25 ORDER

The complaint is dismissed.

Dated, Washington, D.C. December 19, 1998.

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Leonard M. Wagman  
Administrative Law Judge

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<sup>17</sup> 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.