

Nova Southeastern University and Service Employees International Union, Local 32B-32J. Cases 12–CA–025114, 12–CA–025290, and 12–CA–025298

August 26, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND PEARCE

The central question presented in this case is whether the Respondent, Nova Southeastern University (Nova), violated Section 8(a)(1) of the Act by prohibiting employees of its maintenance contractor, UNICCO Service Company (UNICCO), from engaging in organizational handbilling at their place of work—Nova’s campus.¹ The judge found the Respondent’s conduct unlawful, relying on *Fabric Services*, 190 NLRB 540 (1971), which held that a property owner violated Section 8(a)(1) by interfering with the Section 7 rights of its contractor’s employee.² The Board has considered the decision and

¹ On March 16, 2009, Administrative Law Judge John H. West issued the attached decision in this case. The Respondent filed exceptions and a supporting brief; the General Counsel and the Union each filed an answering brief; and the Respondent filed a reply brief to each answering brief. In addition, the General Counsel and the Union each filed cross-exceptions; and the Respondent filed an answering brief responding to both sets of cross-exceptions.

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

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 shall modify the judge’s recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). Consistent with *J. Picini*, the details of how the notice should be electronically posted can be resolved in compliance proceedings. Because the Respondent has terminated its contract with UNICCO, we shall also order the Respondent to mail a copy of the attached notice to the last known addresses of current and former UNICCO employees employed on the Respondent’s property in order to inform them of the outcome of this proceeding. In addition, we shall modify the judge’s recommended Order to conform to our findings and to the Board’s standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

² The judge also distinguished the Board’s decisions in *New York New York Hotel & Casino*, 334 NLRB 762 (2001), and 334 NLRB 772 (2001), *enf. denied sub nom.* *New York New York, LLC v. NLRB*, 313 F.3d 585 (D.C. Cir. 2002), and in *PNEU Electric, Inc.*, 332 NLRB 616 (2000), *enf. denied* 309 F.3d 843 (5th Cir. 2002). The Board’s analysis in those cases has been superseded by our recent decision in *New York New York Hotel & Casino*, 356 NLRB 907 (2011), which is discussed in detail below. For the reasons explained below, we do not find that the distinctions drawn by the judge between this case and *NYNY* serve to distinguish the two cases for the purpose of removing the present case from the scope of our recent holding in *NYNY*.

the record in light of the exceptions and briefs and has decided to adopt the judge’s findings that the Respondent violated Section 8(a)(1), consistent with our recent decision in *New York New York Hotel & Casino (NYNY)*, 356 NLRB 907 (2011).

In *NYNY*, we concluded that the rights of off-duty employees of the property owner’s contractor must be assessed under a test that considers both the specific Section 7 rights at issue and the property interests asserted, and that seeks an accommodation of the conflicting rights and interests. *Id.*, slip op. at 7–8. Our holding there applied to

the situation where . . . a property owner seeks to exclude, from nonworking areas open to the public, the off-duty employees of a contractor who are regularly employed on the property in work integral to the owner’s business, who seek to engage in organizational handbilling directed at potential customers of the employer and the property owner.

Id. at 12–13 (footnote omitted). Here, as in *NYNY*, an off-duty employee of the contractor, regularly employed on the property in work integral to the owner’s business, engaged in handbilling in nonwork areas open to the public on the owner’s property as part of an organizing campaign among the contractor’s employees. Although the handbills were directed to fellow employees rather than potential customers, we conclude, for the reasons explained below, that *NYNY* still controls. In *NYNY*, we held:

We conclude that the property owner may lawfully exclude such employees only where the owner is able to demonstrate that their activity significantly interferes with his use of the property or where exclusion is justified by another legitimate business reason, including, but not limited to, the need to maintain production and discipline (as those terms have come to be defined in the Board’s case law). Thus, any justification for exclusion that would be available to an employer of the employees who sought to engage in Section 7 activity on the employer’s property would also potentially be available to the nonemployer property owner, as would any justification derived from the property owner’s interests in the efficient and productive use of the property. . . .

We leave open the possibility that in some instances property owners will be able to demonstrate that they have a legitimate interest in imposing reasonable, nondiscriminatory, narrowly-tailored restrictions on the access of contractors’ off-duty em-

ployees, greater than those lawfully imposed on [their] own employees.

Id. at 13 (footnote omitted).

Applying *NYNY*, as explained below, we find that Nova violated Section 8(a)(1) by prohibiting the handbilling at issue.

Facts

On August 22, 2006,³ as part of a campaign to organize UNICCO's employees at Nova, UNICCO employee Steve McGonigle distributed flyers to his coworkers before the start of his work shift on the Nova campus. McGonigle distributed the flyers, which promoted Charging Party SEIU Local 32B-32J's "Justice for Janitors" campaign, in the campus parking lot near the physical plant/central services building, out of which UNICCO's employees worked.⁴ After McGonigle had been distributing the flyers for 5 to 10 minutes, Nova's public safety officer, David Neely, approached McGonigle and directed him to stop. Neely cited Nova's campus safety rule, which stated that "[n]o solicitation is allowed on any NSU campus or facility without the permission of the NSU Executive Administration." After asserting that he had the right to handbill during non-working hours, McGonigle complied with Neely's request and entered the central services building where he was to report for work.

Once inside, McGonigle discussed his conversation with Neely with several other UNICCO maintenance employees. McGonigle then left the building and drove to Nova's public safety department, located in another campus building, to complain that his right to handbill had been violated. At the public safety department, various Nova officials informed McGonigle that he was prohibited from soliciting on campus.

Soon thereafter, Nova brought McGonigle's handbilling to the attention of McGonigle's direct supervisor, Jack Sado, and UNICCO manager Tony Todaro. On August 24, 2 days after the handbilling, Todaro called McGonigle and Sado into his office,⁵ read Nova's and UNICCO's no-solicitation rules to McGonigle, gave him copies of those rules, and issued him a disciplinary warning for violating the rules.⁶

³ All dates are in 2006, unless specified otherwise.

⁴ Because many UNICCO employees parked in this lot and then entered the central services building, the location of UNICCO's timeclock, we presume that the UNICCO employees who received flyers in the parking lot were off duty, as McGonigle was. Nova does not contend otherwise. McGonigle and other UNICCO employees regularly arrived at work before their shifts began.

⁵ Sado's supervisor, Eugene Vladoiu, was also present.

⁶ UNICCO's no-solicitation policy states that "[s]olicitation and distribution of unauthorized materials at the job location" is prohibited.

Application of *NYNY*

We apply the holding in *NYNY* here because McGonigle was exercising rights protected under Section 7 of the Act by distributing a flyer promoting SEIU's "Justice for Janitors" project. We conclude that by handbilling, McGonigle exercised core, nonderivative Section 7 rights, analogous to those that the contractor's employees exercised in *NYNY*. McGonigle's distribution of the flyers was part of a campaign seeking union representation for himself and his UNICCO coworkers; thus, McGonigle was exercising his own Section 7 right to self-organization, as the contractor's employees did in *NYNY*. *NYNY*, supra, slip op. at 8. In addition, as in *NYNY*, McGonigle and his coworkers were off duty at the time of the handbilling, which took place in an exterior, nonwork area at the location on the Nova campus where McGonigle was most likely to encounter other UNICCO employees, his target audience. Indeed, McGonigle's protected interest in exercising his Section 7 rights at this location was even greater than the interest of the employees in *NYNY* because UNICCO, unlike the food service contractor in *NYNY*, had no leasehold on the campus. There was no other location that could be more appropriately understood as McGonigle's workplace. Although the employees in *NYNY* sought to communicate with customers and potential customers of their employer rather than with fellow employees, unlike the judge, we do not find that factual difference distinguishes *NYNY* where, as in *NYNY*, "the location of the expressive activity here—the very threshold of the employees' own workplace—has been a central site of protected Section 7 activity since the passage of the Act." Id. at 9–10. Thus, the Section 7 right at issue here is analogous to that presented in *NYNY* in all material respects: the type of protected activity, its purpose, and the factual circumstances in which it occurred. As explained in *NYNY*, we next consider Nova's asserted interests in maintaining and enforcing its rule, which prohibited solicitation (including the distribution of literature) without the permission of Nova's administration. *NYNY*, supra, slip op. at 10.

First and foremost, Nova contends that its prohibition of solicitation is justified by its need to ensure security on its open campus. We recognize both the validity and the importance of this goal, but fail to understand how a

The General Counsel did not allege here that UNICCO's rule was unlawful.

During the August 24 disciplinary meeting, Todaro also issued McGonigle a warning for leaving his work area without permission, in violation of UNICCO's rules. That disciplinary warning is discussed separately, below.

prohibition of distribution in any way advances the goal.⁷ Nova invites UNICCO and its employees onto its campus to perform campus maintenance and does not prohibit the employees from entering the campus before the start of their shifts or require that the employees leave the campus immediately after their shifts. As the judge specifically found, what was proscribed here was the distribution of literature, not trespassing or unauthorized entry. Nova failed to show or even persuasively explain why the campus would be any less safe if the UNICCO employees, while on the campus but off duty, either before or after their shifts, distributed union flyers to fellow employees. Furthermore, Nova maintained a broad range of controls over UNICCO and its employees that addressed any such security risks.⁸

Nova further relies on the need to ensure that its contractors' employees remained in their work areas. But the challenged rule governs distribution of literature, not the access or location of contractors' employees. Moreover, the handbilling at issue took place in the parking lot used by UNICCO employees to access their work areas, and the prohibition at issue is far broader than necessary to ensure that contractors' employees do not stray throughout the campus while off duty.⁹ Finally, Nova asserts a need to control litter that could be a byproduct of literature distribution. This concern could be addressed by a narrow ban on littering. Moreover, this concern is not limited to contractors' employees or college campuses and, thus, if accepted as grounds for a broad proscription on distribution, would swallow this central Section 7 right. Finally, because UNICCO's employees performed the janitorial functions on campus, it seems unlikely that they would themselves litter.

Ultimately, we find that Nova's asserted security and other interests, although legitimate, are not likely to be adversely affected when contractors' employees, lawfully

on the premises, also pass out flyers in the exercise of their organizational rights in exterior, nonwork areas.¹⁰ Thus, these interests do not support Nova's blanket restriction on handbilling by UNICCO's employees.

Considering the importance of McGonigle's interest in exercising his fundamental right to distribute handbills to coworkers for organizational purposes at the very threshold of his workplace, and the utter lack of evidence connecting Nova's asserted interests with a prohibition on such handbilling by UNICCO employees, we conclude that Nova violated Section 8(a)(1) when public safety officer Neely ordered McGonigle to stop handbilling on August 22. For the same reasons, we agree with the judge that the reiterations of the handbilling prohibition by four additional Nova officials later that same day, and by Todaro on August 24, also violated Section 8(a)(1).

Other Allegations

1. We adopt the judge's finding that Nova violated Section 8(a)(1) when Todaro issued discipline to McGonigle for violating Nova's and UNICCO's handbilling restrictions. Because Nova's enforcement of its rule against McGonigle's handbilling was unlawful, McGonigle plainly could not lawfully be disciplined for his violation of the rule.¹¹ Nova contends, nonetheless, that it cannot be held liable for Todaro's issuance of discipline at a time when it did not employ him. But the record demonstrates that McGonigle violated Nova's no-solicitation rule; that Nova knew and disapproved of McGonigle's violation of its rule; that UNICCO's contract with Nova required UNICCO to ensure its employees' compliance with Nova's rules; that Nova informed UNICCO (and specifically Todaro) of McGonigle's rule violation; and that Todaro promptly disciplined McGonigle for his rule violation.¹² Based on this undisputed sequence of events, we conclude that Todaro acted

⁷ The judge reasonably rejected Nova's argument that school campuses are subject to a "unique threat of violence." As the judge observed, none of the campus shootings that Nova cites was perpetrated by employees (of the colleges or their contractors) and, of course, none was in any way connected to handbilling by such employees.

⁸ Nova's contract with UNICCO required UNICCO employees who would be working on Nova's campuses to undergo both a background check (including a security report from Nova's own public safety department) and preemployment drug testing. The contract also required UNICCO to enforce Nova's safety policies, including its drug and alcohol prohibitions. More generally, the contract required UNICCO to agree that "it, its agents and employees will abide by all rules, regulations, and policies of [Nova] during the term of this Contract." Further, the contract's broad indemnification clause—which applied to any and all costs Nova might incur arising out of acts by UNICCO's employees—would seem to bolster UNICCO's interest in ensuring that its employees did not engage in misconduct, let alone serious crimes.

⁹ We note that the UNICCO employees, as maintenance and janitorial employees, worked throughout the campus.

¹⁰ In contrast to the property owner in *NYNY*, Nova does not contend that McGonigle's handbilling interfered in any way with operations or discipline on its campus. *NYNY*, supra, slip op. at 10. In any event, we see no reason why McGonigle's distribution of flyers to coworkers in the parking lot would interfere with Nova's operations.

¹¹ We note that the rule at issue here, unlike that at issue in *NYNY*, applied to both contractors' employees and Nova's own employees. As applied to the latter, the rule was presumptively unlawful and the judge correctly concluded that Nova failed to prove special circumstances sufficient to overcome that presumption. *Republic Aviation Corp.*, 324 U.S. 793 (1945); see also *TeleTech Holdings, Inc.*, 333 NLRB 402, 403 (2001) (rule requiring employees to obtain employer's permission to solicit was unlawful). Had the General Counsel advanced the theory, we would hold that the discipline of McGonigle pursuant to the overbroad rule was also unlawful under *Continental Group, Inc.*, 357 NLRB No. 39 (2011).

¹² Although we do not adopt the judge's analysis of this allegation in full, we agree with his finding that Nova's no-solicitation rule, not UNICCO's, was the actual basis of the disciplinary action.

as Nova's agent when he disciplined McGonigle for handbilling in violation of Nova's rule.

2. We also adopt the judge's dismissal of the allegation that Nova violated Section 8(a)(1) by Todaro's issuance of a separate warning to McGonigle for leaving his work area without permission, but *only* because the record does not demonstrate that Todaro acted as Nova's agent in issuing that discipline. It is undisputed that this disciplinary action related to McGonigle's visit to the public safety building to complain about Neely's order that he stop handbilling, an order that McGonigle correctly viewed as a violation of his Section 7 rights. We do not rely on the judge's finding that McGonigle should have waited until his break or obtained his supervisor's permission to challenge the unlawful handbilling prohibition. We do, however, agree with the judge that this discipline was "between McGonigle and UNICCO," and "was not an issue which directly involved Nova."¹³

3. Finally, we adopt the judge's finding that Nova violated Section 8(a)(1) when Todaro asked laid-off UNICCO employee Jose Sanchez whether he had supported the Union and then sarcastically suggested that Sanchez might be able to get paid by the Union for picketing. At the time of this incident in February 2007, Nova had terminated its contract with UNICCO, had replaced UNICCO with several successor contractors, and had hired Todaro as Nova's manager overseeing those contractors. Sanchez was seeking Todaro's help in getting hired by one of those contractors. Without deciding whether Todaro's statements to Sanchez constituted an unlawful interrogation and an unlawful implied threat, as the General Counsel alleged and the judge specifically found, we conclude that they were coercive and therefore violated Section 8(a)(1) in the context of Sanchez's request for assistance in gaining employment. Cf. *Mathews Readymix, Inc.*, 324 NLRB 1005, 1007 (1997) (citations omitted) (reiterating Board law that "questions involving union membership and union sympathies in the context of a job interview are inherently coercive").

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Nova Southeastern University, Ft. Lauderdale, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(f).

¹³ The pleadings and record in this case do not answer the question whether the discipline at issue was separately alleged as an 8(a)(1) violation by UNICCO.

"(f) Coercively linking a former UNICCO employee's union support to his lack of employment."

2. Substitute the following for paragraph 2(c).

"(c) Within 14 days after service by the Region, post at its Ft. Lauderdale, Florida campus, copies of the attached notice marked "Appendix."²⁵ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2006. Further, because UNICCO's contract to perform work on the Respondent's property has been terminated, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to the last known addresses of all current and former UNICCO employees working on the Respondent's property at any time since the commencement of the unfair labor practices on March 1, 2006."

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

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 maintain and enforce the following rule in our campus safety and traffic handbook: “No solicitation is allowed on an NSU campus or facility without the permission of the NSU Executive Administration.”

WE WILL NOT interfere with your distribution of union literature during nonworking time and in a nonworking area.

WE WILL NOT tell you that you cannot distribute union literature on our property.

WE WILL NOT tell you that you cannot engage in solicitation at any campus or facility of Nova Southeastern University without our permission.

WE WILL NOT issue a disciplinary warning to you for violating our unlawful no-solicitation policy.

WE WILL NOT coercively link former UNICCO employees’ union support to their lack of employment.

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 rescind the following rule in the Nova Southeastern University campus safety and traffic handbook: “No solicitation is allowed on an NSU campus or facility without the permission of the NSU Executive Administration.”

WE WILL, within 14 days from the date of the Board’s Order, remove from our files, and ask UNICCO to remove from its files, any reference to the unlawful warning issued to Steve McGonigle, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the warning will not be used against him in any way.

NOVA SOUTHEASTERN UNIVERSITY

Susy Kucera, Esq. for the General Counsel.

Charles Caulkins, Esq. and *David Gobeo, Esq. (Fisher & Phillips LLP)*, of Fort Lauderdale, Florida, for the Respondent.

Katchen Locke, Esq., of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. This case was tried in Miami, Florida, on November 17 and 18, 2008. The original charge in Case 12–CA–025114 was filed by Local 11, Service Employees International Union (the Charging Party, the Union, or SEIU)¹ on August 29, 2006, the amended charge was filed on December 28, 2006, and a complaint was issued

¹ At the outset of the trial, Katchen Locke, who is associate general counsel of Service Employees International Union, AFL–CIO, CLC, moved to change the name of the Charging Party indicating that as of August 2008 SEIU Local 11 merged with SEIU Local 32 BJ and therefore Local 11 no longer exists. The merger agreement was received as CP Exh. 1 and the Charging Party’s motion was granted.

on January 26, 2007. The charge in Case 12–CA–025290 was filed by the Union on February 20, 2007, the charge in Case 12–CA–025298 was filed by the Union on February 22, 2007, the first amended charge in Case 12–CA–025298 was filed by the Union on March 5, 2007, and the second amended charge in Case 12–CA–025298 was filed on June 13, 2007. An order consolidating case, consolidated complaint and notice of hearing (the complaint) issued on August 28, 2008. The complaint alleges that Nova Southeastern University (Respondent or Nova) violated Section 8(a)(1) of the National Labor Relations Act (the Act), by (1) since on or about March 1, 2006, maintaining and enforcing the following rule in the Nova Southeastern University Campus Safety and Traffic handbook: “No solicitation is allowed on an NSU campus or facility without the permission of the NSU Executive Administration;” (2) on or about August 22, 2006, by David Neely, outside the maintenance shop on its Fort Lauderdale campus, interfered with the distribution of union literature by employees of UNICCO² to their coworkers during nonworking time and in a nonworking area; (3) on or about August 22, 2006, by Ian Vincent and Marie Lemme, at the public safety building at its Fort Lauderdale campus, told employees of UNICCO that they could not distribute literature at any time on Respondent’s property; (4) on or about August 24, 2006, by Tony Todaro, at the physical plant at its Fort Lauderdale campus, told employees of UNICCO that they could not engage in solicitation at any campus or facility of Respondent without the permission of Respondent; (5) in or about August 2006 by Tony Todaro instructed UNICCO to issue two disciplinary warnings to UNICCO employee Steve McGonigle pursuant to its no-solicitation policy; (6) on or about February 19, 2007, on or near University Avenue in Fort Lauderdale, by Tony Todaro, interrogated employees concerning their union activities and implicitly threatened that employees would not be hired because of their union activities; and (7) on or about February 19, 2007, at the Fort Lauderdale campus, by Thai Nguyen, threatened that employees would not be hired because of their union activities. Respondent denies violating the Act as alleged in the complaint.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Florida not for profit corporation, with an office and place of business in Fort Lauderdale, Florida, has been engaged in the operation of a private not for profit university.

² The complaint alleges that UNICCO Services Company is a Massachusetts corporation, with offices and places of business at various locations throughout the United States, including its corporate office in Newton, Massachusetts, and its Florida office in Miami Lakes, Florida, and has been engaged in the business of providing janitorial and landscaping services to customers throughout the United States, including customers in Florida, where it has provided services to Respondent at Respondent’s Fort Lauderdale, Florida campus.

Where, during the 12-month period before the complaint issued, (1) it derived gross revenues, excluding contributions which, because of limitations by the grantor, are not available for operating expenses, in excess of \$1 million; (2) it received at its Fort Lauderdale campus gross revenues, excluding contributions which, because of limitations by the grantor, are not available for operating expenses, in excess of \$50,000 directly from points located outside the State of Florida; and (3) it purchased and received at its Fort Lauderdale campus goods valued in excess of \$50,000 directly from points located outside the State of Florida. 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.

II. ALLEGED UNFAIR LABOR PRACTICES

When called by counsel for the General Counsel, John Santulli, who is Respondent's vice president for Facilities Management, testified that General Counsel's Exhibit 3 shows Respondent's different campuses, namely the Main campus, the East Campus, the Oceanographic Campus, and the North Miami Beach Campus; that he works on the Main campus; that General Counsel's Exhibits 4 and 5 are maps of the Main campus; that the Physical Plant operation, which includes the people who maintain, clean, and repair equipment on Respondent's campuses, is located in the Central Services Building; that in 2006 the Physical Plant personnel were the contract employees of UNICCO; that the hourly employees of UNICCO punched a timeclock at Nova; that in 2006 there was a timeclock in the Central Services Building; that UNICCO employees were authorized to park in the Nova parking lot next to the Physical Plant; that the UNICCO employee staff included two painters, one of whom was McGonigle, who worked at Nova in 2006; that UNICCO landscaping and maintenance employees worked out of the Physical Plant Building; that Nova has web site and General Counsel's Exhibit 6 is the current web page for Facilities Management; that General Counsel's Exhibit 7 is the web page for the Office of Facilities Management in 2006; that the Facilities Management web page also had a directory for the executive (management and some administrative assistants) staff of Facilities Management, General Counsel's Exhibits 8 (printed out "11/16/2008" which, as here pertinent, lists Todaro as the director of Physical Plant and indicates "Nova Southeastern University © 2005-2007"), 9 (printed out "2/16/2007" which, as here pertinent, lists Todaro as the director of Physical Plant and indicates "Nova Southeastern University © 2004"), and 10 (printed out "12/20/2006" which, as here pertinent, lists Todaro as the director of Physical Plant and indicates "Nova Southeastern University © 2004"); that General Counsel's Exhibit 10 is the web page for the year 2006; that not all of the personnel listed on General Counsel's Exhibits 8 and 9 speak for the Facilities Management Department; that the Security Operations Center is located in building 11 on General Counsel's Exhibit 5 and the Central Services Building is building 17 on General Counsel's Exhibit 5; that General Counsel's Exhibit 11 is an undated organizational chart for Facilities Management; that General Counsel's Exhibit 12 is the Public Safety web page for the year 2008 (printed out

"11/16/2008" and indicates "Nova Southeastern University © 2005-2007") which has a picture of Bronson Steve Bias, who is the executive director of protective services; that General Counsel's Exhibit 13 is the management staff of the public safety department as of the year 2008 (printed out "11/16/2008" which, as here pertinent, lists Bronson Steve Bias as the executive director of protective services, Ian Vincent as coordinator, and indicates "Nova Southeastern University © 2005-2007"); that General Counsel's Exhibit 14 is the administrative staff of the public safety department as of the year 2006 (printed out "12/20/2006" which, as here pertinent, lists Bronson S. (Buck) Bias as the executive director of protective services, Ian Vincent as coordinator, and indicates "Nova Southeastern University © 2005"); that General Counsel's Exhibit 15 is the Campus Safety and Traffic handbook for Nova for 2006-2007, which handbook is also posted on Nova's website via the Public Safety page; that General Counsel's Exhibit 16 is the Campus Safety and Traffic handbook for Nova for 2008-2009, which handbook is also posted on Nova's website; that the policies in the handbook must be followed by any individual entering the Nova property, including the faculty, Nova staff, students, and employees of contractors working for Nova; that if a Nova contractor is aware that the policies in the handbook are being violated, they have an obligation to alert Nova so that Nova can address the issue; that Bias reports to him; that public safety uses officers to police the campus; that public safety officers report to coordinators; that "No solicitation is allowed on any NSU campus or facility without the permission of the NSU Executive Administration" appears on page 3 of the Campus Safety and Traffic handbook 2006-2007 under the topic heading "Campus Personal Safety and Security"; that this policy was in place between 2006 and 2008; that he is included in the NSU Executive Administration; and that the same prohibition appears on page 2 of the 2008-2009 Campus Safety and Traffic handbook under the same topic heading.

When called by the Respondent, Santulli testified that as vice president of Facilities Management, his office and his staff oversee all of the contract operations; that this was the situation when UNICCO was on campus and it was the situation when he testified at the trial; that there is an understanding that contractor employees are managed by the contractors, and if the University has an issue with a contractor employee, it is dealt with either by the contractor ownership or the designated representative for the contractor; that the solicitation policy which was in place in 2006 was first put into effect by Nova approximately 20 years ago; that Nova's Campus Safety and Traffic handbooks do not contain all of the University's rules, policies, and procedures; that there are six driving access points to Nova's main campus and none are secured or controlled; that there are no pedestrian barriers controlling access to the campus; that Respondent's Exhibits 6-8 are incident reports collectively involving situations in 2006 where SEIU representatives were passing out flyers on Nova's campus or UNICCO flyers were found on a Nova campus bulletin board; that the contractors which work on Nova's campus on a daily basis are advised about what work they need to perform by a work order; and that Todaro's name was not included on General Counsel's Exhibits 8, 9, and 10 to show that he was an employee of Nova

but rather the website pages were an attempt to direct someone trying to get information to the correct manager or administrative assistant.

On cross-examination, Santulli testified that, with respect to the individuals listed on General Counsel's Exhibit 8—if Todaro is not considered, all of the people listed are employees of Nova and most would be considered members of the management of Nova; that the coordinators listed are really staff or administrative assistants; and that these directories, which are posted on Nova's website, have listed individuals that speak for the departments.

Counsel for the General Counsel and the Respondent stipulated to General Counsel's Exhibit 17. It is the "SERVICE CONTRACT FOR FACILITIES MAINTENANCE" entered into on May 15, 2001, between Nova and UNICCO. The following is found on page 6 of the contract under the topic heading "COMPLIANCE WITH APPLICABLE LAWS AND REGULATIONS": "Further, Contractor agrees that it, its agents and employees will abide by all rules, regulations, and policies of NSU during the term of this Contract, including any renewal periods."

Todaro testified that when he worked for UNICCO, before he was hired by Nova on February 18, 2007, work was performed according to the contract UNICCO had with Nova; that when he worked for UNICCO (a) Nova did not play a role in directing or disciplining UNICCO employees, and (b) Nova did not pay UNICCO's employees directly; that he first became aware of the unionization at UNICCO when the picketing started; that UNICCO had a no-solicitation policy in their general policy and procedure manual; that on "7-28-06" James Canavan, the vice president of labor relations with UNICCO signed a "NOTICE TO EMPLOYEES," Respondent's Exhibit 3, which was posted pursuant to a settlement agreement approved by a Regional Director of the National Labor Relations Board (the Board)³; that the notice was posted for 60 days; that Nova had nothing to do with the incident which resulted in the posting; that UNICCO's attitude with respect to union activities was that they were instructed to not get involved with anything that the Union was doing there itself, they were allowed to pass out flyers, there was not a problem with passing out flyers during the lunch hour, break hours, and management was not to interfere; that in 2006 Nova had authorized requestors who would put in work orders; that, as here pertinent, in 2006 he was an authorized requestor; that sometimes someone who is not a requestor called in about a problem, which might involve a safety issue, and the dispatcher would use his name as the requestor because the work order would not generate unless there is a requestor listed; that if he sees an issue while he is out in

³ In part the notice reads:

WE WILL NOT tell you that you must wait until 4:20 p.m. to return to the Physical Plant/shop for clean-up and to complete paperwork at the end of the work day, in order to discourage you from supporting SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 11, (the Union) or because of your activities for the Union.

WE WILL NOT threaten to closely check your work orders in order to discourage you from supporting the Union or because of your activities for the Union.

the field, he will call it in and ask the dispatcher to do a work order, and in that instance he would be the requestor; that generally every building on campus has an authorized requestor and he is not sure of the exact number of authorized requestors there are; that when he worked for UNICCO, he had no authority to purchase parts for Nova, and Nova's Facilities Management had to authorize the purchase of parts; that General Counsel's Exhibit 34 is a print out of a page which summarizes five work orders on January 2, 2006 (Todaro is not the requestor on any of these.); that General Counsel's Exhibits 35, 36, and 37 are work orders dated January 3, 2006, which list Todaro as the requestor; that he did not recall the work order received as General Counsel's Exhibit 35, he did not request this work which involved installing a shelf in their shop, and this job was closed out by the Assistant Director Gene probably because it was not needed; that General Counsel's Exhibit 36 involves a situation where a sprinkler company did its annual inspection of Nova's systems, a deficiency was found, a work order was submitted to correct the deficiency, and he may or may not have been the one who submitted the work order; and that while he is named as the requestor on General Counsel's Exhibit 37, which is a work order to replace belts on an air-conditioning unit in the kitchen in the "SON" building, this is probably something that he did not do.

When called as a 611(c) witness, Santulli testified that he believed that in August 2006 public safety Officer Neely advised McGonigle that he could not pass out or post flyers at the facility. More specifically, Santulli gave the following testimony:

Q. . . .

At that time [August of 2006], Public Safety Officer Neely advised Mr. McGonigle that he could not pass out or post flyers at the facility, is that right?

A. I believe so.

Q. Believe so? Isn't that the truth?

A. If that's what our written documentation or our incident report says, I would agree with you, but I was not there when that occurred.

Q. You were informed of the situation, correct?

A. I'm typically informed of public safety incidents.

Q. That doesn't answer my question.

You were informed of this particular incident regarding Steve McGonigle?

A. Oh, I'm sure I was.

Q. You're sure you were?

A. Like I said, I'm informed of—

Q. It's a yes or no.

A. Okay, fine. Yes.

Q. And Mr. McGonigle was prohibited from distributing any leaflets pursuant to the policies in place in the handbook, right?

A. I believe so.

Q. You believe so? Yes or no? It calls for a yes or no answer.

A. Yes. [Tr. 63 and 64.]

Counsel for the General Counsel and the Respondent stipulated to General Counsel's Exhibit 18. It is an "Incident Re-

port” of Nova, with a “Security Level” of “Classified.” More specifically, the report reads as follows:

Occurred from date: 8/22/2006 Occurred From Time: 7:26.00AM
 Reported Date: 8/22/2006 Reported Time: 7:30.00AM
 Reporting Person: Neely, David Supervisor: Alberto, Maria
 Building Name: Central Services Building

Location: Main campus
 Incident Summary:

On Tuesday, August 22nd, 2006, at approximately 7:30am Public Safety Officer David Neely met with Unicco employee Steve McGonigle in reference to a report of Mr. McGonigle that it is against NSU policy to hand out flyers and to refrain from doing so in the future. Mr. McGonigle stated that he would comply but that he was going to file an official complaint. Mr. McGonigle filed a complaint at the Security Operations Center at approximately 8:20am stating that his rights have been violated. Mr. McGonigle was given a copy of NSU’s no solicitation policy and asked by Public Safety to please follow the policy in the future. The director of the Physical Plant Tony Todaro and Mr. McGonigle’s supervisor Jack Sado were notified of the incident. Public Safety Field Operations Manager Shane Lam, Public Safety Compliance Manager Jim Ewing and Public Safety Coordinator Maria Alberto were notified of the incident as well.

Employee Steve McGonigle was seen handing out flyers in the Central Service Parking Lot. When asked to desist he complied but stated he was doing nothing wrong and that Public Safety was violating his constitutional rights after he was informed of NSU’s no solicitation policy.

Narrative

On Tuesday August 22nd, 2006 at approximately 7:30 am Public Safety Officer David Neely met with Unicco employee Steve McGonigle at the Central Services Building. Officer Neely observed pink flyers in Mr. McGonigle’s back pocket. Officer Neely advised Mr. McGonigle of the policy regarding the passing out or posting of flyers on NSU property. Mr. McGonigle stated that he would comply but that he was going to file an official complaint. Mr. McGonigle filed a complaint at the Security Operations Center at approximately 8:20am stating that his state and federal rights had been violated and that he would file a complaint with the National Labor Relations Board. Mr. McGonigle was given a copy of NSU’s no solicitation policy and asked by Public Safety to please follow the policy in the future. NSU Davie Policy Officer JoAnn Carter met with Mr. McGonigle at the Security Operations Center. The director of the Physical Plant Tony Todaro and Mr. McGonigle’s supervisor Jack Sado were notified of the

incident. Public Safety Field Operations Manager Shane Lam, Public Safety Compliance Manager Jim Ewing and Public Safety Coordinator Maria Alberto were notified of the incident as well.

A number of other incident reports involving the handing out or posting of flyers were received, General Counsel’s Exhibits 19–24.⁴ Counsel for the General Counsel and the Respondent stipulated “that these are incident reports regarding the public safety of Nova.” (Tr. 67.)

McGonigle, who was hired by UNICCO in May 2003, testified that he was lead painter on the Nova main campus; that while he was supposed to punch in at 7:53 to 8 a.m. he generally arrived at building 17 on General Counsel’s Exhibit 5, which is the Central Services Building or the Physical Plant on Nova’s main campus, at approximately 7:15 a.m. so that he could get some coffee, read the paper, and talk with the maintenance workers; that his immediate supervisor was Sado who reported to Gene Vladioiu, who was the supervisor of maintenance and HVAC, and Todaro, who was the director of Physical Plant; that he parked on the north side of the parking lot outside building 17; that the approximately 10 UNICCO maintenance employees he worked with parked in the lot outside building 17; that on August 22, 2006, he stood outside building 17 in the west parking lot (see GC Exh. 28) and he passed out a few flyers, General Counsel’s Exhibit 29, to his coworkers as they came into work;⁵ that he saw a couple of janitorial supervisors

⁴ Taken chronologically, they include (1) a report dated “3/31/2006” involved two men (One was apparently UNICCO staff member Anthony Iovino.) handing out flyers which “were related to UNICCO’s and SEIU laborer dispute” in a parking lot of Respondent, the men were notified it was against NSU policy to hand out flyers without authorization, and the men left the area; (2) a report dated “4/3/2006” involved five individuals identified as “FAU” students who were handing out flyers on Respondent’s Main campus referring to UNICCO and SEIU laborer dispute, and who were “trespassed . . . from NSU property . . . without incident;” (3) a report dated “6/27/2006” involving the discovery of SEIU flyers on bulletin boards in the Health Professions Assembly 1 Building on the Main campus; (4) a report dated “10/17/2006” involving the discovery of various UNICCO flyers posted in the Parker Building on the Main campus; (5) a report dated “10/27/2006” involving the discovery of SEIU flyers in vehicles, and Coordinator Jonette Baker speaking to the individual who was placing flyers on vehicles on the NSU campus advising him that NSU does not allow solicitation on its property, and escorting the individual off campus; and (6) a report dated “11/17/2006” involving the discovery of numerous UNICCO flyers posted in the Parker Building on the Main campus.

⁵ The flyer is an SEIU flyer which, as here pertinent, indicates as follows:

Want to Make a Difference?

Join hundreds of students and others on the Justice for Janitors listserv. Find out how to send a message to Nova President Ray Ferrero.

You have the chance to make a difference for the janitors at Nova Southeastern University who earn as little as \$6.40 an hour and are not provided with benefits.

Ray Ferrero can change the lives of hundreds of janitors by supporting responsible contractors who pay living wages.

You can help:

in the area when he was distributing the leaflets; that after he distributed the leaflets for about 5 to 10 minutes he was approached by a Nova public safety officer, Neely, who drove up and told him that he needed to stop leafleting; that he had leaflets in his back pocket at the time; that he asked Neely who instructed him to stop the passing out of leaflets and he told Neely that he was doing it during nonworking hours and he felt he had the right to do it; that he ceased leafleting; that he then went into the shop in building 17 and told the maintenance employees what had happened; that he then punched in, got in his van and drove over to public safety, which is building 11 on General Counsel's Exhibit 5; that he told a woman in the receptionist area what had happened and she directed him to the coordinator's office; that he started to enter the coordinator's office and he spoke with an unnamed woman and Ian Vincent telling them about his conversation with Neely; that Vincent left and the woman called Facilities Management and handed him the telephone; that he spoke with Marie Lemme who works in Facilities Management, telling her about his conversation with Neely; that Lemme told him that she would call him back; that Vincent returned and told him that he had spoken with Steve Bias, the director of public safety, who said that he was not allowed to pass out a leaflet on campus; that when Vincent returned he was holding a copy (reduced in size) of the flyer; that Lemme called back and "[s]he told me that she had spoken to Mr. John Santulli and that I was not supposed to be leafleting on the campus" (Tr. 112); that he told Lemme that he felt like he had a right to do this in that he was doing it during nonworking hours, and he felt it was a violation of his rights; that Vincent was about 5 feet away when he spoke with Lemme over the telephone; that Lemme and Vincent told him that it did not matter that he was doing it on his own time since Nova was a private university and he was not allowed to leaflet; that he said that he felt it was a violation of his rights and he was going to make a complaint with the National Labor Relations Board (the Board); that the coordinator wrote down what he said; and that he went back to work.

1. Text message to . . . to learn more about the campaign.

. . . .

Send a message to Nova Southeastern:

Chalk it up

More than 48 million workers in this country are uninsured—including hundreds of UNICCO janitors at Nova Southeastern University.

Janitors such as Jocelyn Doussou who makes \$8 an hour and now faces more than \$75,000 in medical bills from her daughter's treatment for life threatening kidney and heart problems.

Eighteen thousand workers die each year because of a lack of health insurance; and UNICCO janitors, since they are uninsured, are at risk of being part of this statistic.

You can help janitors at Nova Southeastern University and their families get the health care they need so they don't become another statistic.

Join us August 22 and Rally for Health Care—Chalk It Up!

Corner of SW 36th Street and University Drive in the Town of Davie. Time: 4:30 pm

. . . .

*Americans
for Health Care*

On cross-examination, McGonigle testified that he did not have any leaflets in his hand when Neely drove up but he did have them in his back pocket; that before August 22, 2006, he had handed out leaflets on Nova's campus to his coworkers; that in the past he has handed out union buttons and union authorization cards; and that in his October 17, 2006 affidavit to the Board he indicated "I did recently distribute union buttons at the UNICCO time clock and the Physical Plant and was not prohibited from doing so. I believe that the UNICCO janitor supervisor saw me." (Tr. 124.)

General Counsel's Exhibit 30 is a "PROGRESSIVE DISCIPLINE NOTICE" dated "8-24-2006" which indicates that it is a verbal for a minor policy/procedure violation issued by Sado to McGonigle regarding an incident which happened on August 22, 2006. The document indicates that "Mr. Steve was handing out (solicitation and distribution) of unauthorized materials at the job location. (without permission from Nova Univ. and UNICCO Co.). . . . This practice must stop immediately." General Counsel's Exhibit 31 is a "PROGRESSIVE DISCIPLINE NOTICE" dated "8-24-2006" which indicates that it is a verbal for a minor violation, namely leaving assigned work area without permission, issued by Sado to McGonigle regarding an incident which happened on August 22, 2006. This document indicates that "Mr. Steve left his assigned work area to another area without permission from his supervisor. . . . Must not leave assigned areas for other than work related issues without permission from supervisors."

McGonigle testified that he, Sado, and Eugene Vladoiu signed General Counsel's Exhibits 30 and 31; that he received both of these writeups on August 24, 2006, at the same time; that at about 4 p.m. on August 24, 2006, he was paged on his Nextel telephone by Sado who told him that he wanted to see him before he left at the end of the day; that he went to Sado's office, Sado asked him to close the door, and then Sado told him that Todaro wanted to see him and he was being written up, but Sado did not get into specifics; that they went to Todaro's office; that sitting at the conference table in Todaro's office was Todaro and Vladoiu; that he and Sado sat down; that Todaro "explained that I had been written up. He had read the progressive discipline reports and also read the policies of Nova . . . and UNICCO from the handbooks" (Tr. 117); that Todaro gave him a copy of a page from the UNICCO handbook, General Counsel's Exhibit 32;⁶ that Todaro gave him a copy of a page from the Nova Handbook for Safety, General Counsel's Exhibit 33;⁷ that Todaro told him that he had left in a "huff" (Id. at 118) and he told Todaro that he was angry but as always he was polite and courteous at all times; that he told Todaro that he felt that it was a violation of his rights and he told Todaro that he was going to file a complaint with the Board because he felt that it was a violation of his rights; that Todaro told him that he could not distribute anything on Nova property because it was private property; and that he never distributed literature

⁶ As here pertinent one entry on the page reads as follows: "Solicitation and distribution of unauthorized materials at the job location."

⁷ As here pertinent, one sentence on the page reads: "No solicitation is allowed on any NSU campus or facility without the permission of the NSU Executive Administration."

on the Nova campus to anybody other than UNICCO employees.

On cross-examination, McGonigle testified that he did not recall if he ever handed out union literature, buttons, or propaganda after August 24, 2006, on the Nova campus; that in his October 17, 2006 affidavit to the Board he indicated that he did recently distribute union buttons at the UNICCO timeclock in the Physical Plant and was not prohibited from doing so, and he believed that the UNICCO janitor supervisor saw him; and that during his August 24, 2006 meeting with Todaro he either told him or read to him that no solicitation was permitted on any NSU campus or facility. On redirect, McGonigle testified that to his knowledge he had not seen the Nova policy on solicitation before Todaro gave it to him during their meeting on August 24, 2006.

Todaro testified that he “heard of something [about the incident on August 22, 2006 regarding Mr. McGonigle soliciting on campus] . . . I’m not even sure of the total details” (Tr. 188); that he might have seen General Counsel’s Exhibits 30 and 31, the two disciplines given to McGonigle on August 24, 2006; that “I don’t recall [having] a conversation [with McGonigle about this discipline]” (Ibid); and that if discipline was given to McGonigle he might have been made aware of it at the time, “I might have been in the counsel—brought into the loop before this was given to him by his supervisor or his manager” (Id. at 189). Todaro then gave the following testimony:

Q. BY MR. GOBEO [one of Respondent’s attorneys]; Having looked at these documents, do you recall this discipline going to Mr. McGonigle at the time?

A. *Honestly*, I don’t remember this. Like I said, I would have most likely had a conversation, but I don’t remember.

Q. Do you recall giving Mr. McGonigle a copy of UNICCO’s solicitation policy?

A. I don’t recall giving him a copy.

Q. Did anyone from Nova tell you to give Mr. McGonigle discipline?

A. No. [Tr. 190 with emphasis added.]

On cross-examination, Todaro testified that after the incident involving McGonigle passing out some flyers he became aware of and read Nova’s policy regarding no solicitation on campus; that on page 6 of the contract between UNICCO and Nova, General Counsel’s Exhibit 17, it is agreed that “[f]urther, Contractor agrees that it, its agents and employees will abide by all rules, regulations, and policies of NSU during the term of this Contract, including any renewal periods”; that this contract continued until UNICCO’s last day at the Nova campus; that on page 3 of Nova’s Campus Safety and Traffic handbook 2006–2007, General Counsel’s Exhibit 15, it is indicated “[n]o solicitation is allowed on any NSU campus or facility without the permission of the NSU Executive Administration”; that before the McGonigle August 22, 2006 incident he had access to this policy but he did not know that it was there; that when the SEU organizing campaign commenced he and others were advised that they were not allowed to stop anybody from passing out leaflets as long as they were on their lunch hour, or break times; and that they were allowed to pass out leaflets

during lunch and break times. Todaro gave the following testimony about McGonigle’s discipline:

Q. Now, you testified about General Counsel’s 30 and 31. Do you remember those? Those were the disciplinary policies—notices that were given to Mr. McGonigle, do you remember that?

A. I *guess* I don’t remember those, but—

Q. Do you want to take a look at them again?

A. Well, I seen them earlier, but I don’t remember recalling that time.

Q. And the notice—if you want to take a look at them now, I’d like to direct you to 30.

A. (Reviews document.)

Q. At the bottom of the notice—Jack Sado, wasn’t he one of your supervisors?

A. Yes.

Q. And under that is Mr. Gene Vladioiu. Is that his signature?

A. Yes.

Q. And he was your supervisor too? They reported to you?

A. Yes.

Q. And they were supposed to bring matters to your attention regarding issues that arose with your employees, correct?

A. Yes.

Q. It’s your testimony that they did not advise you of this situation when it occurred and that you are not certain that these were issued, that you may or may not have seen them.

A. No, I says [sic] I don’t recall this.

Q. So you don’t recall what your supervisors were doing concerning an incident that occurred on your campus regarding solicitation during a union organizing campaign—

A. That’s right.

Q. —is that your testimony?

A. That’s correct.

...

Q. So it’s your testimony that Mr. Sado and Mr. Vladioiu took it upon themselves to come up with these disciplines and issue them to Mr. McGonigle?

A. I’m just saying I don’t remember this. However, I’m sure they came and approached me because they do with such matters, but I don’t recall this.

Q. This didn’t stick out in your mind at all?

A. No.

Q. You were aware at that time, during August of ‘06, that Mr. Steve McGonigle was an active union supporter, weren’t you?

A. I know he was involved, yes.

Q. You’re—was he an active union organizer?

A. I—yes, he was involved. I know he was.

Q. And you’re aware that he participated in picket line conduct, don’t you?

A. I believe so, yes.

Q. And you're aware that he distributed leaflets, correct?

A. Yes. [Tr. 202–204.]

Todaro testified further on cross-examination that he was given instructions by UNICCO to permit people to leaflet so long as it was on breaktime; that he did not know whether McGonigle's discipline was contrary to UNICCO's instructions regarding leafleting because he did not know if it was established that McGonigle was on his worktime or not; that McGonigle's discipline for soliciting, General Counsel's Exhibit 30 reads "Mr. Steve was handing out (solicitation and distribution) of unauthorized materials at the job location. (without permission from Nova Univ. and UNICCO Co.)," and the notation does not indicate that McGonigle did it while he was on the clock or that he handed out materials to someone else who was on the clock; that UNICCO has maintenance contracts all over the United States and in some areas, like Boston, Massachusetts, they have union contracts; that he would not think that UNICCO would have a problem with being unionized in the involved area in Florida; that he did not know if Nova opposed the Union; that he believed that UNICCO ultimately agreed to recognize the Union; and that he did not think that this resulted in UNICCO losing its contract with Nova in that he thought it was a performance issue but "I don't know exactly for sure" (Id. at 207).

On redirect, Todaro testified that he did not tell Sado or Vladoiu to give the August 24, 2006 disciplines to McGonigle; and that if he had done that, he may have recalled that "Yes, I probably would have recalled it." (Id. at 208.)

Subsequently, Todaro testified that UNICCO's vice president labor relations, Canavan, was the one who spoke to him with respect to what UNICCO could or could not do regarding union activity, and this occurred way before Canavan signed the above-described Board notice which is dated July 28, 2006; that, therefore, he was advised well in advance of the August 22, 2006, McGonigle incident what UNICCO could or could not do with respect to union activity; and that he believed that Vladoiu was also advised by Canavan what UNICCO could or could not do with respect to union activity but he did not think Sado had direct contact with Canavan, in that he thought that Canavan spoke more or less with him, Vladoiu, the management staff, some of the directors, and some of the assistant directors. Todaro then gave the following testimony:

JUDGE WEST: And notwithstanding that, he [Vladoiu] did not discuss, specifically discuss these two disciplines before they were issued with you?

THE WITNESS: I just don't remember. I seem—most likely they had a conversation with *him*, yes, but I don't remember this whole episode here with this—these write-ups.

JUDGE WEST: Looking as you did before at General Counsel's Exhibit 30, that runs contrary to what your Vice President of Labor Relations advised you with respect to UNICCO, doesn't it, that someone would need permission from UNICCO?

THE WITNESS: I think, and I can only speculate. And if you would like me to speculate, I can only tell you what I think they were trying to say on this piece of paper.

JUDGE WEST: I don't want you to speculate, no. [Tr. 210 with emphasis added.]

When called by Respondent, Santulli testified that if the university has an issue with a contractor's employee, it is dealt with either by going to the contractor ownership or the designated representative for the contractor; that he typically dealt with one of Todaro's supervisors, Ken Gomulka; that he himself has never told any contractor that he wanted one of their employees disciplined or a specific employee of a contractor discharged; that he is not aware of any supervisor or management of Nova instructing a contractor to discipline or fire one of the contractor's employees; that when Todaro was an employee of UNICCO he did not ever instruct Todaro regarding what he should or should not do with respect to disciplining or firing any of his employees; that he is not aware of any Nova employee who instructed Todaro to discipline or fire one of UNICCO's employees; and that he never told any UNICCO employees that Todaro was acting on behalf of Nova University.

On cross-examination, Santulli testified that Todaro was the designated representative for UNICCO in some respects but typically he, Santulli, dealt with Gomulka, who was Todaro's supervisor.

According to the testimony of Santulli, UNICCO's last day at Nova was February 17, 2007, in that Nova hired W. H. Massey (Massey) as a contractor for general maintenance; that TCB Systems took over the janitorial and the subcontractor Green Source took over the landscaping work; that UNICCO employees performing those services were given an opportunity to apply for jobs with the new contractors; that at the time he approved the hiring of several of UNICCO's former supervisors and managers as employees of Nova; that one of those individuals was Sado, who was the maintenance manager for UNICCO and was hired in February 2007 by Nova as the general maintenance supervisor; that Nova also hired Vladoiu, who was UNICCO's maintenance manager/HVAC manager, as the assistant director of general maintenance; that Nova currently employs Todaro as the director of Physical Plant⁸; that in 2006 Todaro reported to Nova's executive director of facilities management, who was Arlene Morris at that time; that Morris reported to him in 2006; that when Todaro worked for UNICCO his title was also director of Physical Plant⁹; that Todaro has the same phone number, and office in the Central Services building (building 17 on GC Exh. 5, which is often referred to as Physical Plant) at the time of the trial as he had when he worked for UNICCO; that when Todaro worked for UNICCO he, Santulli, would authorize recommendations made by Todaro regarding Nova's maintenance operation; and that Todaro hired employees when he was a UNICCO employee and as a Nova employee Todaro hires individuals.

⁸ GC Exh. 25 is Respondent's position description for director—Physical Plant for 2008. GC Exh. 27 was introduced to show Todaro's email address on May 22, 2007, namely "anthony@nova.edu."

⁹ GC Exh. 26 is Respondent's position description for director—Physical Plant for 2007 and 2006. Santulli testified that the email address of Todaro set forth in GC Exh. 27, described above, was the same email address for Todaro in 2006.

McGonigle testified that UNICCO lost its contract with Nova, and as a result he was laid off on February 16, 2007.

Todaro testified that before February 18, 2007, he worked for UNICCO at the Nova campus and he was the Physical Plant director; that after February 18, 2007, he worked for Nova and he is the Physical Plant director; that when he worked for UNICCO he (a) supervised approximately 300 UNICCO employees but he did not supervise any Nova employees at the time; (b) used employee evaluations and he reviewed vacation and leave requests of upper-management personnel; (c) occasionally had to look at employee warnings; (d) reviewed the UNICCO paperwork for UNICCO employee suspensions and discharges; and (e) would have been one of the signers on a requisition form for equipment or materials before it went up to the Nova employee to be signed off and approved; that after February 18, 2007, as the Nova Physical Plant director he (1) sees about 3 or 4 out of about 6000 a month E-Maint system work orders; (2) has done written evaluations for about six of either assistant directors or managers; (3) has reviewed or approved quite a few vacation or leave requests; (4) has seen a couple of written warnings to Nova employees come across his desk but he has not written any warnings to his supervisors or managers; and (5) was involved in discharging someone from the Nova campus; that he learned a little bit before February 2007 that UNICCO was no longer going to have a contract with Nova; that he applied for a position with Nova, Respondent's Exhibit 4, he was interviewed, and he was hired, Respondent's Exhibit 5; that prior to February 18, 2007, he was never directly employed by Nova; that his pre and post February 18, 2007 jobs differ in that before the employees were his employees and now he oversee the contractors that work on campus; and that he does not directly discipline Green Source employees following Nova's policy.

Leszier Bazile, who started working for UNICCO in June 2002, utilizing the services of an interpreter¹⁰ testified pursuant to a subpoena that he worked as a landscaper on Nova's Main campus; that he punched a timeclock in the Eddie Griffin cafeteria; that his immediate supervisor was Nguyen, who is the athletic grounds supervisor; that UNICCO lost its contract with Nova; that he continued to work at Nova after UNICCO lost the contract; that he started working for Green Source on February 18, 2007, as a landscaper on the Main campus; that Green Source did not hire all of the landscapers who formerly worked for UNICCO; that Green Source hired some new employees to work at Nova in that when he came to work on February 19, 2007, he saw a lot of new employees; and that he, together with his former UNICCO fellow landscapers Jacques Jean Louis, Jean Fabre, and Dennis McGriff spoke with Nguyen in the Eddie Griffin cafeteria about the new employees. Brazile testified as follows regarding this conversation:

Q. Does Mr. Nguyen speak Creole?

A. No.

Q. Was your conversation with Mr. Nguyen in English?

A. Yes, in English.

Q. Can you testify in English about your conversation?

A. Yes.

Q. Tell me in English what happened during the conversation?

A. (In English) I asked them why didn't you call the old employees to come to work and then you hired the new employees? And then he said, no because—

Q. Who said?

A. Thai [Nguyen]. Thai said no because they make part of the union. That's why they didn't call them. [Tr. 79.]

On cross-examination, Bazile testified that he gave an affidavit to the Board in April 2007; that he looked at his affidavit before testifying at the trial; that he can read English; that he did not notice that anything was incorrect in his affidavit; that in his affidavit he indicates that Jean Fabre asked the question to Thai about why new people, why other employees weren't called; that he indicates in his affidavit to the Board "Jean Fabre, a coworker, asked why they—asked why did they hire new people to do the job and they didn't call the other employees" (Tr. 85); that Fabre asked the question; that Fabre asked the question in English; that at the time no one translated that question into Creole for him, Bazile; and that he was a supporter of the SEIU Union.

Nguyen testified that he has been Respondent's athletic fields manager since February 18, 2007; that before February 18, 2007, he held the same position for UNICCO and he had four employees working for him; that Nova did not have any role with respect to disciplining UNICCO employees in that they were disciplined "through a UNICCO handbook"; that when he worked for UNICCO he reported to Todaro; that he became aware of the unionization that was going on at UNICCO and he explained to his employees that they had to make their own decision; that he did not tell his employees that they would get fired if they were involved with the Union; that he learned in January or February 2007 that UNICCO was no longer going to have a contract with Nova; that he applied for a position with Nova and was hired, Respondent's Exhibits 1 and 2; that all four of his UNICCO employees, who had been with him for 6 years, were hired by the new contractor which replaced UNICCO, after he recommended them to Green Source; that after he was hired by Nova there were no general conversations with his guys about the Union; that he did not tell any of his guys that they would not be hired because of union activity; and that he recalled a conversation with Bazile and Fabre in the Eddie Griffin shed during the first week he was hired by Nova. Nguyen testified as follows regarding this conversation:

They had come to me, and . . . they were worried about their jobs, and I said, . . . I would recommend you, . . . to the company that's going to be doing the grounds on there, and that's what I told them. [Tr. 179.]

Nguyen further testified that he did not remember what else was said during this conversation; that he did not "say to any of . . . [his] employees that other people weren't getting hired

¹⁰ Bazile testified that he is from Haiti; that Creole is his native language; that he speaks some English; and that he is more comfortable speaking Creole.

because they were involved with the Union” (Id. at 179–180); and that he is not fluent in Creole.

On cross-examination, Nguyen testified that the four UNICCO employees who were hired by Green Source were McGriff, Jean Louise, Leszier, and Fabre; that he did not see any new people working on the Nova campus in the athletic fields when Green Source took over the contract; that there were a few new employees that were hired by the new subcontractor working at Nova in the grounds department; and that when he spoke with his four man crew he spoke to them in English and they were able to communicate with him in English.

Jose Sanchez, who was subpoenaed, testified that he was employed by UNICCO Service Company since 1999 doing maintenance work on Nova’s main campus; that his immediate supervisor was Sado; that he no longer works for UNICCO; that UNICCO lost its contract at Nova; that Nova hired another subcontractor to do the maintenance work, namely Massey; that he applied for a job with Massey about 2 weeks before he was laid off by UNICCO; that he gave his application to Vladoiu who supervises Sado and reports to Todaro; that he was not hired by Massey at Nova; that the day after he was laid off by UNICCO he spoke with Todaro, who was “working for Nova at that time” (Tr. 89); and that he “saw him [Todaro] in his truck and he wave on me” (Tr. 89); and that he followed Todaro to the coffee shop across campus and when Todaro came out he spoke with him. Sanchez testified as follows regarding his conversation with Todaro:

Q. What did you talk to him about?

A. I asked him if I was going to have a job and what was going on? And he said no [sic] at this moment. Then he asked me if I was for the union? I tell him yes and then he tell me—

Q. I’m sorry; I didn’t understand that. Can you repeat that?

A. Which one?

Q. What you just said?

A. When I ask him—well, he ask me if I am for the union.

JUDGE WEST: He asked you what?

Q. BY MS. KUCERA: What did he ask you?

A. Oh, he ask [sic] me if I was with the union.

Q. Did you respond?

A. Yes. I say yes, and he make [sic] a comment after that. You with the union, right, but he say you was with the union, right? I say yes. And then he told me why you no go on the line? They might pay you with your friend Steve. And I tell him that I don’t think they will pay me for it.

Then, after that, he ask [sic] me—I ask him, I need to work, you know. Then he tell [sic] me to call him like in three months to see what’s going on. He will know better what’s going on. Then I tell him that I will call him around like in a month, but I really never call him back.

Q. Do you know what—you testified about Steve. Do you know what Steve Mr. Todaro was talking about?

A. Yes.

Q. Who was that?

A. Steve, the painter.

Q. Did he work for UNICCO?

A. Yes. [Tr. 90 and 91.]

Sanchez further testified that there were picket lines in front of University Drive in front of the Nova campus before UNICCO lost the contract; that he went to one and he saw McGonigle there; and that he did not participate in the first picket line but he did go to the second one.

On cross-examination, Sanchez testified that before he worked for UNICCO he did work for Massey; that Sado gave him the Massey application and told him that he should fill it out; that sometime before that Todaro told UNICCO employees at two meetings that its contract with Nova was going to be terminated and they should apply for positions; that he participated in one of the two picket lines, the second one, in front of the Nova campus, which was about 3 months before he was laid off, and it was a strike; that instead of going to work he went out and picketed; that he was a UNICCO employee at the time; that when he went out on strike he carried a broom; and that a lot of people told him that they saw him on the strike line or picket line.

Todaro testified he did not recall any general conversation with his employees about the Union. He further testified as follows:

Q. Do you recall a conversation with Jose Sanchez near a coffee shop around that first week that you were hired?

A. No, I do not. [Tr. 194.]

On cross-examination, McGonigle testified that between April 2007 and the end of September 2008 he worked for SEIU as a union organizer; that he was laid off in September 2008; and that he also worked for SEIU for approximately 3 weeks on the campaign of then Senator Barak Obama.

John George, who at the time of the trial had worked for Nova for approximately 4 months and who is Respondent’s director in the public safety department, testified that Nova has the current rule requiring permission to solicit in its policy because “it gives the university the opportunity to register and record and notify public safety that there is some *outsider* on the campus conducting business.” (Tr. 138 with emphasis added.) On cross-examination, George testified that he did not have any personal knowledge of the incidents involved in this proceeding.

Analysis

Paragraph 6 of the complaint alleges that since on or about March 1, 2006, Respondent has maintained and enforced the following rule in the Nova Southeastern University Campus Safety and Traffic handbook: “No solicitation is allowed on an NSU campus or facility without the permission of the NSU Executive Administration.”

Counsel for the General Counsel contends on brief that the Board holds that it is unlawful for an employer to prohibit employees from engaging in union solicitation and/or distribution on their employer’s property on nonworking time in nonworking areas, in the absence of special circumstances making the

rule necessary in order to maintain production or discipline, *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 fn. 10 (1945); that Respondent's rule as written and as enforced is overbroad because it restricts its own, as well as subcontractor's employees from solicitation and distribution among coworkers; and that Respondent has not proven that there are any special circumstances requiring its overbroad and invalid rule.

Respondent on brief argues that Nova is an educational institution whose unique circumstances require a strict solicitation policy to protect its distinctive security needs; that while the maintenance of a rule that reasonably tends to chill Section 7 rights even absent evidence of enforcement violated Section 8(a)(1), *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), Nova's solicitation rule at issue is not contained in its employee manual and contains no reference to employees; that the rule is part of a safety program that has been in place for over 2 decades and is "not generally applied to management of Nova employees. (Tr. 214–215)" (R. Br., p. 10, with emphasis added); and that "educational campuses experience a unique threat of violence, as demonstrated by the shootings at Virginia Tech, Texas Tech, and Columbine High School" (Id. at 10).

Contrary to the assertion of Respondent on page 10 of its brief, (a) nowhere on pages 214 and 215 of the transcript of the trial did Santulli testify that Nova's involved solicitation rule "is not generally applied to management of Nova employees,"¹¹ and (b) sadly, what Respondent labels as a "unique threat" is something which has occurred, among other places, in businesses, in post offices, on hospital property, in law offices, in a Texas cafeteria, in shopping malls, in at least one stock brokerage that I am aware of, and in courthouses resulting in the deaths of, among others, judges. Respondent has not shown that any of the three instances it cites involved employees of subcontractors who were stationed on and were working on school grounds. Rather, if in referring to Texas Tech, Respondent means the University of Texas in Austin, Texas in 1966, in each of the instances cited by Respondent, the alleged perpetrator(s) was (were) a student(s) at the involved school.¹² Respondent does not show how its argument is relevant to the matter at hand. As correctly contended by counsel for the General Counsel, Respondent has not proven that there are any special circumstances requiring its overbroad and invalid rule. There is no evidence of record that the involved rule was actually communicated to employees in such a way as to convey an intent clearly to permit solicitation in nonworking areas when employees were not actively at work. The rule at issue is overly broad and discriminatory on its face. As the Board pointed out in *Brunswick Corp.*, 282 NLRB 794, 795 (1987):

... any rule that requires employees to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee's free time and in non-

¹¹ Indeed, when he testified as a 611(c) witness, Santulli testified that the policies in Nova's Campus Safety and Traffic handbook must be followed by any individual entering Nova property, including—as here pertinent—Nova staff and faculty.

¹² It appears that the alleged perpetrator in the University of Texas Austin shooting was a former student of that school.

work areas is unlawful. Further, the Board held in *Schnadig Corp.*, 265 NLRB 147, 157 (1982) . . . that the mere existence of an overly broad rule tends to restrain and interfere with employees' rights under the Act even if the rule is not enforced. We find, accordingly, that the Respondent's promulgation and maintenance of its no solicitation/no distribution rule constituted a per se violation of Section 8(a)(1).

The Board in *Teletech Holdings, Inc.*, 333 NLRB 402, 403 (2001), indicated as follows:

... any distribution rule that requires employees to secure permission from their employer prior to engaging in protected concerted activities on an employee's free time and in non-work areas is unlawful. . . .

When a rule of this kind is found presumptively unlawful on its face, the employer bears the burden to show that it communicated or applied the rule in a way that conveyed a clear intent to permit distribution of literature in nonworking areas during nonworking time. *Ichikoh Mfg. Inc.*, 312 NLRB 1022 (1993), *enfd.* 41 F.3d 1507 (6th Cir. 1994). A clarification of an ambiguous rule or a narrowed interpretation of an overly broad rule must be communicated effectively to the employer's workers to eliminate the impact of a facially invalid rule. *Laidlaw Transit, Inc.*, 315 NLRB 79, 83 (1994). Any remaining ambiguities concerning the rule will be resolved against the employer, the promulgator of the rule. See *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992).

The rule at issue is unlawful on its face. Respondent did not show that it communicated effectively to employees to eliminate the impact of this facially invalid rule. Respondent violated the Act as alleged in paragraph 6 of the complaint.

Paragraph 7 of the complaint alleges that on or about August 22, 2006, Respondent, by David Neely, outside the maintenance shop on its Fort Lauderdale campus, interfered with the distribution of union literature by employees of UNICCO to their coworkers during nonworking time and in a nonworking area.

Counsel for the General Counsel contends on brief that the Board has long held that employers may not maintain or enforce rules denying their off-duty employees access to parking lots, gates and other outside nonworking areas, except where justified by business reasons, *Tri-County Medical Center*, 222 NLRB 1089 (1976); that here McGonigle was prohibited from leafleting outside the Physical Plant building and in the parking lot, nonworking areas, before the start of the workday, a nonworking time; that Respondent unlawfully enforced its unlawful no-solicitation policy against McGonigle; that the Board holds that a subcontractor's employees may engage in solicitation and distribution among coworkers even while working on the property of a contractor, *Southern Services*, 300 NLRB 1154, 1155 (1990), *enfd.* 954 F.2d 700 (11th Cir. 1992) (janitors working for subcontractors at a Coca-Cola plant entitled to distribute union materials to coworkers); that since McGonigle leafleted only coworkers, this case is distinguishable from *New York New York Hotel & Casino v. NLRB*, 313 F.3d 585 (D.C. Cir. 2002), denying enforcement and remanding *New York New*

York Hotel & Casino, 334 NLRB 762 (2001), and *New York New York Hotel & Casino*, 334 NLRB 772 (2001); that *New York New York Hotel & Casino* involves the access rights of a subcontractor's off-duty employees when a subcontractor's employees distribute or solicit the general public; that Respondent cannot require a subcontractor's employees to request permission prior to the distribution of union literature on non-working time and in nonworking areas; that Respondent would have the discretion to eliminate an employee's Section 7 rights by arbitrarily refusing to allow or limit distribution of solicitation; and that Santulli, who would make the decision whether to grant permission, admitted that he would suggest to a subcontractor's employee, like McGonigle, making a request to distribute union literature during nonworking time and in nonworking areas, to distribute in the public swale.

Respondent argues on brief that it is not required to allow nonemployees to solicit on its campus; that its solicitation policy does not violate the rights of employees of contractors; that it is well settled that a property owner/employer has substantial rights to limit activities by outsiders on its private property, *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and *Lechmere v. NLRB*, 502 U.S. 527 (1992); that Nova's rule is not contained in its employee manual and contains no reference to employees;¹³ that given the broad authority of a property owner to restrict outsiders, it is clear that Nova is permitted to prohibit the distribution of literature by McGonigle on its property; that McGonigle was an "invitee" to be on Nova's property solely and exclusively to perform his duties as a UNICCO employee; that if McGonigle exceeds the scope of this invitation for any reason he becomes a trespasser, and as such, Nova had a right to request McGonigle cease distributing literature in the parking lot area; that McGonigle's discipline had no negative effect on him; that "after this verbal warning McGonigle was allowed to distribute union paraphernalia (Tr. 124)" (R. Br., p. 11 with emphasis added);¹⁴ that *Southern Services*, 300 NLRB 1154 (1990), enfd. 954 F.2d 700 (11th Cir. 1992) (holding that subcontractor employees have a right to distribute literature where the workplace is exclusively on contracting employer's premises) is not otherwise controlling in that this case was decided before *Lechmere*, supra,¹⁵ and has been discredited by the D.C. Circuit Court in *New York, New York, LLC v. NLRB*, 313 F.3d 585 (D.C. Cir. 2002), *NLRB v. Pneu Electric, Inc.*, 309 F.3d 843, 853–855 (5th Cir. 2002), and *ITT Industries, Inc. v. NLRB*, 251 F.3d 995 (D.C. Cir. 2001); that while the court in *New York, New York, LLC*, supra, noted that the United States

Supreme Court has never addressed the issue of whether a contractor working on property under another employer's control can distribute literature, the D.C. Circuit Court of Appeals specifically discredited *Southern Services*, supra, reasoning at page 589 that *Southern Services* was contrary to the opinion of the Supreme Court's holding in *Lechmere*; that the court in *New York, New York, LLC*, noted at page 589 that the Restatement states "a 'conditional or restricted consent to enter land creates a privilege to do so only insofar as the condition or restriction is complied with'"; that "[w]hile *Southern* could not identify why the subcontractor's employees would be trespassers while soliciting but employees would not be, the point of *Lechmere* is that the Section 7 rights of employees entitles them to engage in organizing on its employer's premises—'nonemployees do not have comparable rights.' Id." (R. Br., p. 12); and that, accordingly, McGonigle is not afforded the same rights as Nova employees with respect to union solicitation on campus.

In my opinion Respondent violated the Act as alleged in paragraph 7 of the complaint. Neely did not testify at the trial. Consequently, the testimony of McGonigle is unchallenged. McGonigle's testimony about what happened with Neely is credited.

Section 7 of the Act guarantees employees "the right to self-organization, to form, join or assist labor organizations. . . ." And Section 8(a)(1) of the Act specifies that "[i]t shall be an unfair labor practice for an employer—. . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. . . ."

McGonigle worked on the involved Nova campus on a continuous, regular, and exclusive basis for years. When he hand billed in the Nova parking lot on the campus on August 22, 2006, it was a working day but McGonigle had not yet punched in on the timeclock. Relying on the no-solicitation rule found above to be unlawful, Nova prohibited McGonigle from giving flyers to his UNICCO coworkers in a nonworking area while he and they had not yet clocked in.

Fabric Services, 190 NLRB 540 (1971), involved an employee of Southern Bell who was an installer repairman being dispatched to Fabric Services' plant to perform work on Southern Bell's telephone communications located at the plant. He arrived at the plant wearing a pen pocket protector which carried the legend, "CWA [Communication Workers of America], IT DOESN'T COST—IT PAYS, JOIN CWA-AFL-CIO." After the Southern Bell repairman began working, he was told by Fabric Services' personnel manager that he could not work at the plant while wearing the pocket protector. The repairman left and returned to Southern Bell's repair center. His supervisor told him to remove the pocket protector and return to his assignment at Fabric Services. He did. In deciding whether both Southern Bell and Fabric Services violated the Act, the trial examiner (now administrative law judge, and for ease of reference will henceforth be referred to as such) rejected the defense of Fabric Services that since it was not the repairman's employer, it cannot, as a matter of law, be found to have violated Section 8(a)(1) of the Act by its actions toward him. The judge at pages 541–542 concluded as follows:

¹³ As noted above, Santulli testified when called as a 611(c) witness that the policies in the Campus Safety and Traffic handbook must be followed by any individual entering the Nova property, including—as here pertinent—Nova staff and faculty.

¹⁴ As indicated above, McGonigle testified that in his October 17, 2006 affidavit to the Board he indicated that he recently distributed union buttons at the UNICCO time clock in the Physical Plant, he was not prohibited from doing this, and he believed that the UNICCO janitor supervisor saw him. Whether this amounts to "allowed" is questionable.

¹⁵ While the Board's decision in *Southern* was decided before *Lechmere*, the Eleventh Circuit's decision in *Southern* was decided after *Lechmere*.

. . . I find no basis, either in the declared policy of the Act or in any delineating provision of it for construing Section 8(a)(1) as safeguarding employees in the exercise of the Section 7 rights only from infringements at the hands of their own employer. To the contrary, the specific language of the Act clearly manifests a legislative purpose to extend the statutory protection of Section 8(a)(1) beyond the immediate employer-employee relationship. Thus Section 8(a)(1) makes it “an unfair labor practice for an employer—to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7.” And Section 2(3) declares, “The term employee shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise” Moreover, Section 2(9), which defines “labor dispute” as including “any controversy . . . regardless of whether the disputants stand in the proximate relationship of employer and employee” further discloses a statutory aim to give the Act’s various prohibition a broad rather than a narrow reading, except, of course, where the prohibition is limited in its internal context or is specifically restricted by other express language of the Act. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 192. [Emphasis in original.]

. . . .

It is true that Section 8(a)(3), like Section 8(a)(1), speaks of “an employer” rather than *the* employer. But the very nature of the conduct proscribed by Section 8(a)(3) provides internal justification for imparting a more restrictive construction to the words “an employee” as there used. Section 8(a)(3) is directed to “discrimination with regard to hire or tenure of employment or any term or condition of employment.” Action of that kind can only be effectively accomplished (or rectified) by the one who has actual and ultimate control of the hire, tenure, or terms and conditions of employment of employees affected thereby. No similar justification exists for giving a like restrictive construction to Section 8(a)(1) in a situation where only employee Section 7 rights and no discrimination in employment is involved. In such a situation the absence of a proximate employer-employee relationship may still have a relevant bearing on the factual question as to whether the conduct complained of was an interfering, coercive, or restraining kind. But it does not itself supply a statutory mandate for dismissal. [Emphasis in original.]

. . . .

To exonerate Fabric Services from statutory responsibility in these circumstances simply because . . . [the Southern Bell repairman] was not its employee, would, I believe, subvert the clear policy and intent of the Act. Having “knowingly participate[d] in the effectuation of an unfair labor practice, [Fabric Services] place[d] itself within the orbit of the Board’s corrective jurisdiction.” *NLRB v. Gluck Brewing Co.*, 144 F.2d 847, 855 (C.A. 8)[.]

The Board adopted the findings and conclusions of the judge.¹⁶ This Nova Southeastern University case only involves Section 8(a)(1) of the Act; it does not involve Section 8(a)(3) of the Act.

As pointed out by the court in *Southern Services, Inc. v. NLRB*, 954 F.2d 700, 704 (11th Cir. 1992) “[t]he modern practice of subcontracting for services does not automatically curtail Section 7 rights.” Instead of having its own onsite employees doing the painting, landscaping, maintenance, and janitorial work, Nova, as here pertinent, entered into a contract with UNICCO in 2001 (effective from July 1, 2000) to provide certain of these services. Under the terms of the contract, Nova furnished “all supplies necessary to completely and effectively perform all work defined in this Contract.”¹⁷ In effect, UNICCO employees who work continuously, exclusively, and regularly at the Nova jobsite as janitors, painters, and landscapers, etc., replace or do the work which could be done by employees of Nova. Undoubtedly, one of the considerations with this approach is that Nova does not have the expense of full benefits for these employees. As noted above, from the flyer that McGonigle was handing out to his coworkers on August 22, 2006, General Counsel’s Exhibit 29, it appears that UNICCO’s janitors did not have health insurance.

Also, as pointed out by the United States Court of Appeals, Eleventh Circuit in *Southern Services, Inc.*, supra at 704:

¹⁶ In a dictum footnote the judge in *Fabric Services* indicated that his view of the case would have been different had it involved, as here pertinent, a prohibition against employee solicitation instead of a prohibition against the wearing of union insignia. The judge pointed out that the wearing of union insignia is a form of self-expression protected by Sec. 7, rather than a form of employee solicitation, and as a corollary to its right to bar outside organizers from coming on its property, Fabric Services could have legitimately insisted, without any showing of special circumstances, that the Southern Bell repairman as an invitee on its property for a limited purpose confine himself to the purpose for which he had been allowed to enter its premises and refrain from attempts to organize field services’ employees. In the case at hand, McGonigle was not soliciting Nova’s employees. Additionally, the UNICCO employees were not outsiders on Nova’s property on a short-term basis to do Bell communications repair work. The contract between Nova and UNICCO was entered into in May 2001 (effective from July 2000). UNICCO employees, including McGonigle, had worked on the jobsite at Nova continuously, exclusively, and regularly for years. Other factors discussed below also distinguish the UNICCO/Nova situation from the dictum situation described in the judge’s footnote.

¹⁷ The following appears on p. 9 of the contract, which was entered into in May 2001, which continued for 3 consecutive years, and which Nova renewed:

13. EQUIPMENT, MATERIALS, AND SUPPLIES

A. NSU shall furnish all supplies necessary to completely and effectively perform all work defined in this Contract.

B. A list of all items required to be used by Contractor shall be submitted to the Administrator prior to the use of the item in the performance of the work.

The following appears on p. 1 of the contract:

2. CONTRACTOR’S PERFORMANCE

A. Contractor shall furnish all necessary management, supervision, labor, technical support and other accessories and services for the cleaning and maintenance of the Facility, and other services as described in the Specifications.

The right of employees “to self organize and bargain collectively established by § 7 . . . necessarily encompasses the right effectively to communicate with one another regarding self organization at the jobsite.” *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491, 98 S.Ct. 2463, 2469, 57 L.Ed. 2d 370 (1978) [emphasis added] [footnote omitted]. And the workplace “is a particularly appropriate place for the distribution of § 7 material, because it ‘is the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life. . . .’” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 570–573, 98 S.Ct. 2505, 2515–2516, 57 L.Ed.2d 428 (1978)] 98 S.Ct. at 2517 (quoting *Gale Products*, 142 NLRB 1246, 1249 (1963). In this case, [Respondent] Coca-Cola’s [fenced in and guarded] [c]omplex was . . . [the contracting employee’s] exclusive workplace, and provided the only practical site where . . . [the contracting employee] and other . . . [of the contracting] employees assigned to the same subcontract could distribute union literature and discuss union organization among themselves. [Emphasis in the original.]

When the relationship situates the subcontract employee’s workplace continuously and exclusively upon the contracting employer’s premises, the contracting employer’s rules purporting to restrict that subcontract employee’s right to distribute union literature among other employees of the subcontractor must satisfy the test of *Republic Aviation Corp. v. NLRB*, 324 U.S. 79, 65 S.Ct. 982, 89 L.Ed. 1372 (1945).

In *New York New York Hotel & Casino*, 313 F.3d 585, 587–590 (D.C. Cir. 2002) (hereinafter referred to as *NYNY*), the court concluded, in part, as follows:

In *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372 (1945), the Court sustained the Board’s rulings that off-duty employees have § 7 rights to engage in organizing activities on their employer’s premises in non-work areas—rights the employer may not infringe absent a showing that the ban is necessary to maintain workplace order and discipline. *id.* at 803, 65 S.Ct. 982. On the other hand, the Court held in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, . . . (1956), that “an employer may validly post his property against nonemployee distribution of union literature” to employees, at least if the nonemployee union organizers may reach the employees through other means. *Id.* at 112. . . . Highlighting the difference between the rights of employees and nonemployees, the Court explained in a later case that a “wholly different balance [is] struck when the organizational activity [is] carried on by employees already rightfully on the employer’s property, since the employer’s management interests rather than his property interests [are] there involved.” *Hudgens v. NLRB*, 424 U.S. 507, 521–522 fn. 10. . . . [Brackets in original.]

This court’s opinion in *ITT Industries, Inc. v. NLRB*, 251 F.3d 995, 1000–1003 (D.C. Cir. 2001), thoroughly analyzed these Supreme Court decisions and others. There, we explained that although there were suggestions in Supreme Court opinions that the controlling distinction for §

7 purposes was between invitees and trespassers, see *Eastex, Inc. v. NLRB*, 437 U.S. 556 . . . ; *Hudgens*, 424 U.S. at 521–522 . . . , the Court’s most recent pronouncement in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 . . . , reaffirmed the principle announced in *Babcock & Wilcox* that the National Labor Relations Act confers rights upon employees, not nonemployees, and that employers may restrict nonemployees’ organizing activities on employer property. See *ITT*, 251 F.3d at 1002–03; see also *United Food & Commercial Workers v. NLRB*, 74 F.3d 292, 295 (D.C. Cir. 1996)[.]

The Supreme Court has never addressed the § 7 rights of employees of a contractor working on property under another employer’s control. . . .

As the Restatement puts it, a “conditional or restricted consent to enter land creates a privilege to do so only in so far as the condition or restriction is complied with.” RESTATEMENT (SECOND) OF TORTS § 168 (1965). The union organizers in *Lechmere* were in a similar position. They were handing out leaflets in a shopping center parking lot jointly owned by *Lechmere*, which had a store in the center. No one doubted that the organizers were trespassers because they violated *Lechmere*’s no solicitation policy. See 502 U.S. at 530, 540, The *Southern* court could find no principled reason why, if the subcontractor’s employee were a trespasser, employees of Coca-Cola [the property owner] would not also be trespassers when they handed out union literature on company property. But that is the very point of *Lechmere*, as we explained in *ITT Industries*: the § 7 rights of employees entitle them to engage in organization activities on company premises.¹⁸ See 502 U.S. 537. . . . Nonemployees do not have comparable rights.

¹⁸ Obviously, the right is not absolute in that the employer can have a lawful no solicitation rule, the employees can be prohibited from engaging in handbilling on company time and in a work area and, as indicated above, a company could show that a ban is necessary to maintain workplace order and discipline. It is noted that in *ITT Industries, Inc. v. NLRB*, 251 F.3d 995, 1004 (D.C. Cir. 2001), the court refers to access rights enjoyed by “on-site employee invitees.” If an employee of the property owner engaged in handbilling in violation of these prohibitions, would that employee lose his or her “invitee” status and become a trespasser since the involved Sec. 7 right is not absolute?

Also in *ITT Industries, Inc.*, which involved employees of the property owner who worked at a location other than the one involved in that proceeding, the D.C. circuit court remanded the case to the Board to determine that Sec. 7 indeed extends nonderivative access rights to offsite employees of the property owner, and to adopt a balancing test that takes proper account of an employer’s predictably heightened property concerns. As pointed out in *Hudgens*, 424 U.S. 507, 522 fn.10 (1976), “A wholly different balance was struck when the organizational activity was carried on by employees already rightfully on the employer’s property, since the employer’s management interests rather than his property interests were there involved. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793. . . . This difference is ‘one of substance.’ *NLRB v. Babcock & Wilcox Co.*, 351 U.S. at 113. . . .” It appears, therefore, that property interests would not have to be considered for employees already rightfully on the employer’s property. It also appears that there is a question as to whether just being an employee of the employer is sufficient for Sec. 7 rights to attach with respect to an employer’s prop-

... the critical question in a case of this sort is whether individuals working for a contractor on another's premises should be considered employees or nonemployees of the property owner. Our analysis of the Supreme Court's opinions, unlike the Board's in *Southern* [300 NLRB 1154] and *Gayfers* [324 NLRB 1246 (1997)], yields no definitive answer.

No Supreme Court case decides whether the term "employee" extends to the relationship between an employer and the employee of a contractor working on its property. No Supreme Court case decides whether a contractor's employees have rights equivalent to the property owner's employees—that is, *Republic Aviation* rights to engage in organizational activities in non-work areas during non-working time so long as they do not unduly disrupt the business of the property owner—because their work site, although on the premises of another employer, is their sole place of employment.

The facts in *NYNY* and the case at hand differ in significant ways. First in *NYNY* the casino, *NYNY*, leased space on its property to an independent management company, Ark Las Vegas Restaurant (Ark), to run a food service facility. Here, UNICCO did not lease space from Nova. UNICCO's employees worked out of a Nova building, just like a Nova employee would do if Nova used its own employees to perform the jobs involved. Second, there is no showing in *NYNY* that the property owner supplied everything Ark needed to operate the two restaurants and several fast food outlets in a food court on *NYNY*'s premises. It is just the opposite with Nova in that Nova supplied UNICCO employees with what they needed to work at the Nova premises. Third, in *NYNY* the food operations of Ark were complementary to the casino operation of *NYNY*. In Nova, the work performed by UNICCO employees was not complementary to the function of Nova. Rather, the work performed by UNICCO employees on Nova's property was work that normally would be performed by the employees of the property owner. UNICCO did not provide food for visitors to the owner's property. Rather, UNICCO provided for the continuous smooth operation of the function of the property owner, Nova. Fourth, in *NYNY* it was not shown that the property owner's policy against solicitation was unlawful. In Nova, the property owner's no-solicitation rule has been found above to be unlawful. Fifth, in *NYNY* the off-duty Ark employees stood at the main entrance on *NYNY*'s property distributing union handbills to customers entering and exiting, and the handbills stated that Ark paid its employees less than comparable unionized workers and urged the customers to tell Ark to sign a union contract. In Nova the off-duty UNICCO employee, McGonigle, did not handbill anyone other than his UNICCO coworkers while they were off-duty coming into work, the hand billing was done in a parking lot on Nova's campus, and McGonigle did not try to involve nonUNICCO employees on Nova's campus (like the Ark employees who appealed to casino customers in *NYNY*) in the attempt to convince the president of Nova that the janitors employed on the Nova campus should have living wages and

erty if the employer's employee does not work on that property but rather is an off-site employee.

health care. Sixth, in *NYNY* a *NYNY* security supervisor, joined by a member of *NYNY*'s management, told the Ark employees that they were trespassing and that they were not allowed to distribute literature on *NYNY*'s property. When the Ark employees refused to leave, local law enforcement officers issued trespass citations to the handbillers. Trespass citations were issued to Ark employees on two other occasions. In Nova the security guard, Neely, who spoke to McGonigle instructed McGonigle to stop passing out leaflets. Neely did not tell McGonigle that he was trespassing. No one mentioned anything to McGonigle about trespassing. Notwithstanding that McGonigle officially complained to Nova's management, Vincent, Bias (through Vincent), Lemme, and Santulli (through Lemme) did not even mention trespassing to McGonigle. Documentation introduced at the trial in Nova shows that Nova did "trespass" individuals other than McGonigle who hand billed on the Nova campus. So Nova was aware that this remedy was available to it and it used this remedy with respect to individuals other than McGonigle. In other words, Nova did not treat McGonigle as some who should be "trespassed" for leafletting his coworkers in the parking lot while they all had not yet clocked in. Nova treated McGonigle as it would one of its own employees. If theoretically McGonigle was an invitee and his failure to abide by Nova's unlawful no-solicitation policy changed his status to that of a trespasser, Nova did not take this approach since Nova did not take any advantage of any theoretical change in the status of McGonigle occasioned by his remaining on Nova's property after he was stopped from hand-billing. If the theoretical trespass approach is even a valid approach in the circumstances of this case, Nova waived its theoretical opportunity to treat McGonigle as a trespasser. In actuality, Nova never intended to treat McGonigle as a trespasser. McGonigle was not an outsider seeking access to Nova's property. McGonigle was not on Nova's property as an invitee doing short-term work as was the Southern Bell repairman in *Fabric Services*. With respect to access, McGonigle was treated as an employee of Nova would be. Indeed, as shown by General Counsel's Exhibit 18, Nova's incident report, "Mr. McGonigle was given a copy of NSU's no solicitation policy and asked by Public Safety to please follow the policy in the future." As held in *Fiber Services*, for purposes of Section 8(a)(1) of the Act the statutory protection of that section can be extended beyond the immediate employer-employee relationship to remedy a situation where the employee's Section 8(a)(1) rights have been infringed at the hands of a property owner. As noted above, Section 2(3) of the Act declares that "The term employee shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise. . . ." Also, as pointed out in footnote 3 of *Hudgens v. NLRB*, 424 U.S. 507, 510 (1976),

[w]hile Hudgens [the property owner] was not the employer of the employees involved in this case [which involved primary picketing within the confines of a privately owned shopping center], it seems to be undisputed that he was an employer engaged in commerce within the meaning of §§ 2(6) and (7) of the Act, 29 U.S.C. §§ 152(6) and (7). The Board

has held that a statutory ‘employer’ may violate § 8(a)(1) with respect to employees other than his own. [Citations omitted.]

Nova admits that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. In the language—modified in the indented quote below solely to reflect the names of those involved—of *Fabric Services*, supra at 542,

To exonerate . . . [Nova] from statutory responsibility in these circumstances simply because . . . [McGonigle] was not its employee, would, I believe, subvert the clear policy and intent of the Act. Having “knowingly participate[d] in the effectuation of an unfair labor practice, . . . [Nova] place[d] itself within the orbit of the Board’s corrective jurisdiction.” *NLRB v. Gluck Brewing Co.*, 144 F.2d 847, 855 (C.A. 8) [Bracketed material other than the names of those involved herein appears in original][.]

In *NLRB v. Pneu-Electric, Inc.*, 309 F.3d 843, 853–855 (5th Cir. 2002), the court concluded, in part, as follows:

Babcock and *Lechmere* involved non-employee union organizers trespassing on employer property and attempting to organize the employer’s employees by leafleting and other means. *ITT Indus.* involved off-site employees not employed at the site of the organizing effort. Neither situation is close to the circumstances here, where bona fide employees of an employer operating a distinct work site on the property of another statutory employer, by contract, are the subjects at issue. On its face, the situation appears more closely related to that in *Republic Aviation*, in which the Court upheld employees’ rights under the Act to conduct union solicitation and organizing activities on their own time, subject to reasonable rules, even on the employer’s property. 324 U.S. at 804 and n. 10. . . .

. . . While addressing the rule of *Babcock* and its progeny, and emphasizing the distinction between trespassers and non-trespassers implied in *Babcock* and discussed more fully in later cases, the Eleventh Circuit [in *Southern Service, Inc. v. NLRB*, 954 F.2d 700 (11th Cir. 1992),] did not address the more recent *Lechmere* case, decided the previous month, with its greater emphasis on the difference in access rights between employees and nonemployees.

. . . . Here, the Board relies on *Gayfers* and *Southern Serv.* to determine that Pneu-Elect employees Zylks and Aycok “worked exclusively for Pneu-Elect at the Nan Ya site and had full employee rights.” See 332 N.L.R.B. [616] No. 60 We defer to the Board’s reasonable interpretation of the Act. *Lechmere*, 502 U.S. at 536. . . . “When it is unclear under established law whether a category of workers enjoys free-standing, nonderivative access rights [as opposed to rights derived through the § 7 rights of the employees of the property owner], then a court is obligated to defer to *reasonable* judgments of the Board in its resolution of cases that have not as yet been resolved by the Supreme Court.” *ITT Indus.*, 251 F.3d at 1003 (emphasis in original). We agree with the D.C. circuit and are concerned that the Board’s determination that *Republic Aviation* controls the contractor-employee situation before us

has not provided a sufficiently reasoned analysis in light of *Lechmere* regarding why the Pneu-Elect employees should also be considered employee as to Nan Ya for the purposes of the Act. The Board did not address the issue at all in *Southern Serv.* and did not provide a detailed analysis in *Gayfers* to “establish the *locus* of accommodation,” *Lechmere*, 502 U.S. at 538 . . . due to a contractor-invitee by a contracting employer. In the Board’s Order before us, there is no further analysis. This is a category of workers not previously addressed in Supreme Court precedent. *Republic Aviation* may well be the correct standard to employ as against the contracting employer, considering that a statutory employer may violate § 8(a)(1) with respect to employees other than his own. *Hudgens*, 424 U.S. at 510 n. 3. . . . [Emphasis in original.]

Regardless, the Board must first determine, considering *Lechmere*, explicitly whether the term “employee” encompasses this relationship between an employer and a contractor-invitee for the purposes of the Act. That will establish the appropriate locus of accommodation.

The facts in *NLRB v. Pneu-Electric, Inc. (Pneu)*, and the case at hand differ in significant ways. First, in *Pneu* the business of the property owner involved a plastic plant. Pneu was an electric contracting company bought onto the property to do electrical work such as working on a transformer, installing electrical conduit, pulling wire, etc. Unlike the situation in *Nova*, this is not something one would expect that your average worker in a plastic plant would be able to do. This was more akin to the telephone repairman in *Southern*. In other words, people who do commercial or industrial electrical work normally have special training and are normally licensed to do the work. Pneu employees were not doing painting, janitorial, or landscaping work like UNICCO’s employees on *Nova*’s campus. Second, with respect to the duration of the work, Pneu’s contract was short-term in that it ran from the spring to December of the same year. UNICCO’s contract with *Nova* ran from 2001 (effective in 2000) to 2007, which could be described as long term. It ended after the union issues arose allegedly because of a performance issue. The performance issue was never specifically described. Third, the two Pneu employees who were trying to organize other Pneu employees during worktime and in a work area on the plastic plant jobsite were not only forced to leave the jobsite after they refused to stop but they were told they were fired by a member of the management of the property owner.¹⁹ As noted above, with respect to the assertion of property rights, *Nova* asked McGonigle not to hand out leaflets to his coworkers—while they were in the parking lot and they were off the clock—any more, and he was given a copy of *Nova*’s no solicitation policy. Fourth, *Pneu* involved both Section 8(a)(1) and (3). *Nova* involves only Section 8(a)(1).

Both the Fifth Circuit in *Pneu* and the D.C. Circuit in *ITT* and *NYNY* fault the Eleventh Circuit’s *Southern* decision (decided February 28, 1992) for not addressing the United States Supreme Court decision in *Lechmere* (decided January 27, 1992). The Fifth Circuit indicates that *Lechmere* should have

¹⁹ Later, the two employees were told by the owner of Pneu that the landowner did not have the authority to fire them.

been addressed because of its greater emphasis on the difference in access rights between employees and nonemployees. In *ITT* the D.C. Circuit indicates that the Eleventh's Circuit's decision in *Southern* does not account for *Lechmere's* express reaffirmation of the employee/nonemployee distinction, particularly its reliance on the statutory mention of the term "employee." The D.C. Circuit at 1005 in *ITT* also indicates as follows:

Lechmere makes clear that, even as to on-site employees, the Board *must* balance the conflicting interests of employees to receive information on self-organization on the company's property *from fellow employees* during nonwork time *with the employer's right to control the use of his property*. See *Lechmere*, 502 U.S. at 534, 112 S.Ct. 841. [Emphasis added.]

The Court at 534 in *Lechmere* does not "make . . . clear that, even as to on-site employees, the Board *must* balance the conflicting interests of employees to receive information on self-organization on the company's property *from fellow employees* during nonwork time *with the employer's right to control the use of his property*." (Emphasis added.) Indeed, such a holding in *Lechmere* would have overruled the Court's prior conclusion in note 10 in *Hudgens* that "[a] wholly different balance was struck when the organizational activity was carried on by employees already rightfully on the employer's property, since the employer's management interests rather than his property interests were there involved. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793. . . . This difference is "one of substance." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. at 113. . . ." And the Court in *Eastex, Incorporated*, 437 U.S. 556, 573 (1978), indicated "petitioner's reliance on its property right is largely misplaced. Here, as in *Republic Aviation*, petitioner's employees are 'already rightfully on the employer's property,' so that in the context of this case it is the 'employer's management interests rather than [its] property interests' that primarily are implicated. *Hudgens*, supra, 424 U.S. at 521–522, n. 10." At page 537 in *Lechmere*, which involved nonemployee (outsiders, strangers to the property) union organizers entering the employer's property, the majority indicates as follows:

In *Babcock* [which was decided almost 20 years before *Hudgens* and over 22 years before *Eastex*], as we explained above, we held that the Act drew a distinction 'of substance,' 351 U.S. at 113, 76 S.Ct. at 684, between the union activities of employees and nonemployees. In cases involving *employee* activities, we noted with approval, the Board "balanced the conflicting interests of employees to receive information on self-organization on the company's property from fellow employees during nonworking time, with the employer's right to control the use of his property." *Id.* at 109–110, 76 S.Ct. at 682–683. [Emphasis in original.]

This quoted dictum—to the extent it refers to employee activities—on page 537 of *Lechmere*, which decision is discussed more fully below, does not, contrary to the assertion in *ITT*, "make . . . clear that, even as to on-site employees, the Board *must* balance the conflicting interests of employees to receive information on self-organization on the company's property

from fellow employees during nonwork time *with the employer's right to control the use of his property*." (Emphasis added.) This language in *Lechmere* refers to what the Board itself did decades ago in *LeTourneau Co. of Georgia*, 54 NLRB 1253 (1944), long before *Hudgens* and *Eastex*. The Board's decision in *LeTourneau Co. of Georgia* was reached over a decade before *Babcock*. More importantly, the Board's decision in *LeTourneau Co. of Georgia* was reached over 1 year before the Court decided *Republic Aviation*. In *Republic Aviation* the Court considered both of the situations which occurred in *LeTourneau* and *Republic* but the Court in *Republic Aviation* did not specifically approve the approach taken by the Board in *LeTourneau Co. of Georgia*, namely to factor in the employer's property rights when dealing with onsite employees of the employer already rightfully on the property. In *Babcock*, supra at 111, the Court acknowledged "[t]he Board has applied its reasoning in the *LeTourneau* case without distinction to situations where the distribution was made, as here [in *Babcock*], by nonemployees." After *Republic Aviation*, *Hudgens*, and *Eastex*, it was clear, as pointed out by the court in *NYNY*, supra at 587–588, that "when the organizational activity [is] carried on by employees already rightfully on the employer's property, . . . the employer's management interests rather than his property interests [are] there involved. *Hudgens*. . ." While at page 537 the majority in *Lechmere* indicates "we noted [obviously past tense] with approval," and cites pages 109–110 of the decision of the Court in *Babcock*—which was dealing with a nonemployee situation—for the quote following this language, it does not appear that the Court specifically indicated on pages 109 and 110 of its decision in *Babcock* that it approved the Board's approach in *LeTourneau Co. of Georgia*, namely not to differentiate between situations which involved employees versus nonemployees and utilize a balancing test involving the employer's property rights even when the property owner's onsite employees are already rightfully on the property. I do not believe that "we noted with approval" supra at 537 in *Lechmere* equates with "must" in *ITT* or the specific overruling of *Hudgens* and *Eastex* to the extent they refer to what is to be considered in a balancing exercise when the case involves on-site employees of the landowner already rightfully on the property. Indeed, the same court which decided *ITT* (Chief Judge Edwards, and Circuit Judges Williams and Sentelle, with the opinion filed by Chief Judge Edwards) subsequently decided *NYNY* (Circuit Judges Edwards, Randolph, and Tatel, with Judge Randolph designated as the author of the opinion) and in its decision in *NYNY*, as noted above, the court indicated at 587–588 as follows:

Highlighting the difference between the rights of employees and nonemployees, the Court explained in a later case that a "wholly different balance [is] struck when the organizational activity [is] carried on by employees already rightfully on the employer's property, since the employer's management interests rather than his property interests [are] there involved." *Hudgens v. NLRB*, 424 U.S. 507, 521–522 n. 10. . . .

In my opinion, this case, which involves McGonigle soliciting only his coworkers (during nonworktime in a nonwork area) and not the employees of Nova, which involves

McGonigle punching a timeclock in one of the buildings on the Nova campus and working on a continuous, regular, exclusive, long-term (years) basis on the Nova campus pursuant to an employment relationship doing work which could be done by a Nova employee, which involves a situation where Nova contracted to provide the following:

13. EQUIPMENT, MATERIALS, AND SUPPLIES

A. NSU shall furnish all supplies necessary to completely and effectively perform all work defined in this Contract.

B. A list of all items required to be used by Contractor shall be submitted to the Administrator prior to the use of the item in the performance of the work. . . . [.]

which involves work being performed by McGonigle, as here pertinent, on the basis of a daily work order from Nova, and which involves only Section 8(a)(1) of the Act, can and should be decided under *Fabric Services*, supra. Relying on *Fabric Services*, I conclude that Nova violated the Act as alleged in paragraph 7 of the complaint.

I believe that if it were necessary to go beyond *Fabric Services*, the case should be decided under *Republic Aviation Corp.* In my opinion, both the Board and the Eleventh Circuit decisions in *Southern* reached the correct result. The case at hand, Nova, presents even more compelling reasons for concluding that Nova violated the Act in denying McGonigle his Section 7 right to handbill his coworkers. In *Southern* the complaint did not allege that Coke unlawfully promulgated or maintained its solicitation or distribution policy. Here, Nova's solicitation policy has been found to be unlawful. In *Southern*, with respect to property rights (which, as noted above, should not be a consideration if the case is decided under *Republic*), the involved property was, for the most part, surrounded by a fence, the subcontractor's employees had badges (unlike the Coke employees' badges) which identified them as subcontractor's employees who work on Coke's premises, and the subcontractor's employees had to enter the fenced-in Coke complex through a specific gate which was manned by a guard who checked the badges of the subcontractor's employees. All persons entering the complex must show a badge or otherwise obtain permission to enter. The Nova campus is open to the public. There are no pedestrian barriers and the six vehicle access points to Nova's main campus are not secured or controlled.

I do not believe that *Lechmere*, supra, changes the outcome reached by the Board and the Eleventh Circuit in *Southern*. In *Lechmere* the court was faced with nonemployee union organizers (technically outsiders, strangers to the property) entering Lechmere's shopping plaza parking lot and placing handbills on the windshields of cars parked in a corner of the lot used mostly by Lechmere's associates (employees). Lechmere's no solicitation policy reads: "[n]on-associates are prohibited from soliciting and distributing literature at all times anywhere on Company property, including parking lots. Non-associates have no right of access to the non-working areas and only to the public and selling areas of the store in connection with its public use." The handbillers left when asked to by Lechmere's

manager. This exercise was repeated on several subsequent occasions. Justice Thomas wrote the majority opinion. On the issue before it, the Court held at 538 that "[i]t is only where . . . [reasonable access to employees outside an employer's property] is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level, balancing the employees' and employers' rights as described in *Hudgens* dictum." (Emphasis in original and citations omitted.)

In 1971 in *Fabric Services*, the Board adopted the following, which is based on language utilized by Justice Frankfurter, who delivered the opinion of the majority of the Court in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 191-192 (1941):²⁰

[Language could not be found] either in the declared policy of the Act or in any delineating provision of it for construing Section 8(a)(1) as safeguarding employees in the exercise of the Section 7 rights only from infringements at the hands of their own employer. To the contrary, the specific language of the Act clearly manifests a legislative purpose to extend the statutory protection of Section 8(a)(1) beyond the immediate employer-employee relationship. Thus Section 8(a)(1) makes it "an unfair labor practice for an employer—to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7." And Section 2(3) declares, "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise. . . ." Moreover, Section 2(9), which defines "labor dispute" as including "any controversy . . . regardless of whether the disputants stand in the proximate relationship of employer and employee" further discloses a statutory aim to give the Act's various prohibitions a broad rather than a narrow reading, except, of course, where the prohibition is limited in its internal context or is specifically restricted by other express language of the Act. See *Phelps* . . . [at 191-] 192. [Emphasis in original with dictum in fn. 11 of the underlying decision in *Fabric Services* distinguished above.]

Also, the court in *NLRB v. Gluek Brewing Co.*, 144 F.2d 847, 855 fn. 7 (8th Cir. 1944), indicated as follows:

. . . disputes . . . might involve "employees (who) are at times brought into an economic relationship with employers who are not their employers." In this light, the broad language of the Act's definitions which in terms reject conventional limitations on such conceptions as "employee," "employer," and "labor dispute," leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by pre-

²⁰ At pp. 191-192 in *Phelps*, Justice Frankfurter wrote: "[t]he term 'employee,' the section reads, 'shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act (chapter) explicitly states otherwise. . . ." He went on to indicate: "[t]he broad definition of 'employee,' 'unless the Act (chapter) explicitly states otherwise', as well as the definition of 'labor dispute' in § 2(9) expressed the conviction of Congress 'that disputes may arise regardless of whether disputants stand in the proximate relation of employer and employee, and that self-organization of employees may extend beyond a single plant or employer.'" H.R. Rep. No. 1147, 74th Cong., 1st Sess., p.9; see also, S. Rep. No. 573, 74th Cong., 1st Sess., pp. 6, 7.

viously established legal classifications. . . . [Citations omitted.]

Hence “technical concepts pertinent to an employer’s legal responsibility to third persons for the acts of his servants” have been rejected in various applications of this Act both here. . . . [Citations omitted.] and in other federal court . . . [Citations omitted.] There is no good reason for invoking them to restrict the scope of the term “employee” sought to be done in this case. That term, like other provisions, must be understood with reference to the purpose of the Act and the facts involved in the economic relationship. “Where all the conditions of the relation require protection, protection ought to be given.” *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), 64 S.Ct. 851.

The Court at 124–131 in *Hearst Publications* concluded as follows:

The word [employee] “is not treated by Congress as a word of art having a definite meaning. . . .” Rather “it takes color from its surroundings . . . (in) the statute where it appears,” *United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 545, 60 S.Ct. 1059, 1065, 84 L.Ed. 1345, and derives meaning from the context of that statute, which “must be read in the light of the mischief to be corrected and the end to be attained.” [Citations omitted.]

. . . .
Hence the avowed and interrelated purposes of the Act are to encourage collective bargaining and to remedy the individual worker’s inequality of bargaining power by “protecting the exercise . . . of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.” 49 Stat. 449, 450, 29 U.S.C.A. § 151.

. . . .
To eliminate the causes of labor disputes and industrial strife, Congress thought it necessary to create a balance of forces in certain types of economic relationships. These do not embrace simply employment associations in which controversies could be limited to disputes over proper “physical conduct in the performance of the service.”²⁷ On the contrary, Congress recognized those economic relationships cannot be fitted neatly into the containers designated “employee” and “employer” which an earlier law had shaped for different purposes. Its Reports on the bill disclose clearly the understanding that “employers and employees not in proximate relationship may be drawn into common controversies by economic forces,”²⁸ and that the very disputes sought to be avoided might involve “employees (who) are at times brought into an economic relationship with employers who are not their employers.”²⁹ In this light, the broad language of the Act’s definitions, which in terms reject conventional limitations on such conceptions as “employee,” “employer,” and “labor dispute”,³⁰ leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by

previously established legal classification. [Citation omitted.]

. . . .
Where all the conditions of the relation require protection, protection ought to be given.³³

It is not necessary in this case to make a completely definitive limitation around the term “employee.” That task has been assigned primarily to the agency created by Congress to administer the Act. Determination of “where all the conditions of the relation require protection” involves inquires for the Board charged with this duty. Everyday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, “belongs to the usual administrative routine” of the Board. [Footnote and citations omitted.]

. . . .
. . . where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court’s function is limited.

. . . .
. . . the Board’s determination that specified persons are “employees” under this Act is accepted if it has “warrant in the record” and a reasonable basis in law.

. . . .

²⁷ Control of “physical conduct in the performance of the service” is the traditional test of the “employee relationship” at common law. Cf., e.g., Restatement of the Law of Agency §220(1).

²⁸ Sen. Rep. No. 573, 74th Cong., 1st Sess. 7.

²⁹ Sen. Rep. No. 573, 74th Cong., 1st Sess. 6.

³⁰ Cf. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 61 S.Ct. 845, 85 L.Ed. 1271, 133 A.L.R. 1217; and compare *Milk Wagon Drivers Union Local No. 753 v. Lake Valley Farm Products Co.*, 311 U.S. 91, 61 S.Ct. 122, 85 L.Ed. 63, with Sen. Rep. No. 573, 74th Cong., 1st Sess. 7.

. . . .
³³ *Lehigh Valley Coal Co. v. Yensavage*, [218 Fed. 547, 552 (2d Cir. 1914)].

Here, McGonigle was already rightfully on Nova’s property reporting to work pursuant to the employment relationship. McGonigle was not a stranger to Nova’s property. McGonigle was not an outsider to Nova’s property. Nova did not use a trespass approach in any attempt to convert McGonigle’s status. As noted above, the right of an onsite employee of the landowner to handbill on the property of the landowner can lawfully be limited; it is not an unlimited absolute right. In that light, I agree with the Eleventh Circuit’s language at 704 in *Southern* that “. . . the conduct of distributing union literature [to subcontractor coworkers does not] transform the status of a subcon-

tract employee . . . [in the circumstances of McGonigle found herein] from that of a business invitee to that of a mere trespasser.” Moreover, actuality trumps the theoretical. Nova did not actually “trespass” McGonigle as it did with outsiders who came onto the campus to pass out leaflets. Consequently, even if one attempted to take a theoretical trespass approach with the facts here, the waiver of that right on the part of Nova with respect to McGonigle would have to be overcome. Nova did not attempt to show that its management interests would be prejudiced in any way by the Section 7 right involved here. Nova did not demonstrate that a restriction is necessary to maintain production or discipline. While property interests should not be a factor under a *Republic Aviation* analysis, as noted, Nova’s campus is open to the public and Nova has not shown how McGonigle, who was rightfully on the property handbilling only his coworkers in a nonwork area during non-worktime, infringed in any meaningful way on Nova’s property right. Again, the correct balancing test here is management interests not property rights.

Certain portions of the decision of the Eleventh Circuit in *Southern* should be repeated here:

The right of employees “to self organize and bargain collectively established by § 7 . . . necessarily encompasses the right effectively to communicate with one another regarding self organization at the jobsite.” *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491, 98 S.Ct. 2463, 2469, 57 L.Ed 2d 370 (1978) (emphasis added) (footnote omitted). And the workplace “is a particularly appropriate place for the distribution of § 7 material, because it ‘is the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life. . . .’” *Eastex*, 98 S. Ct. at 2517 (quoting *Gale Products*, 142 NLRB 1246, 1249 (1963). [Emphasis in original.]

It is very meaningful that the involved Section 7 right has been denied for years (and would have continued to be denied if Nova had its way and it continued to use the approach it is taking) to individuals who, in effect, substitute for Nova’s employees; who do the work that Nova employees could be doing. As noted above, I have concluded that Nova’s no-solicitation rule is unlawful. Whether or not Nova takes the approach it does so as to avoid having to hire and pay certain “benefits [such as] health care [and] living wages” (GC Exh. 29),²¹ Nova

²¹ It is noted that the following appears on p. 2 of the contract between Nova and UNICCO, GC Exh. 17:

5. CONTRACTOR’S COMPENSATION FOR ROUTINE WORK

A. For complete performance of the routine work, in compliance with the Specifications, NSU shall pay to Contractor monthly, after approval of the invoice, an amount equal to the *approved direct labor costs* paid by Contractor to Contractor’s employees engaged in work at NSU *plus payment for payroll taxes/insurance, fringe benefits, other approved direct costs, overhead, and profit* as derived from Contractor’s Bid Proposal [Emphasis added.]

While the contract does speak to “fringe benefits,” they are not specified in the contract. It appears that under the terms of this contract, Nova exercised a degree of control of what the UNICCO employees

should not be allowed, in violation of Section 8(a)(1) of the Act, to unlawfully reap the benefit of being able to deny the Section 7 right to handbill only his or her contractor coworkers by employees like McGonigle who punch a timeclock in one of Nova’s buildings and work on Nova’s campus on a long-term (years), continuous, exclusive, regular basis under a contract where Nova furnished “all supplies necessary to completely and effectively perform all work defined in this Contract,” and where the work is performed on the basis of a daily work order from Nova. In my opinion, even if the *Fabric Services* approach is not taken, it has been demonstrated—especially considering the narrow and compelling facts of this case—that Respondent violated the Act as alleged in paragraph 7 of the complaint.

Paragraph 8 of the complaint alleges that on or about August 22, 2006, Respondent, by Ian Vincent and Marie Lemme, at the public safety building at its Fort Lauderdale campus, told employees of UNICCO that they could not distribute literature at any time on Respondent’s property.

Counsel for the General Counsel contends on brief that Respondent further violated the Act when Lemme told McGonigle that she had spoken with Santulli and McGonigle could not leaflet on campus, when Vincent told McGonigle that he had spoken with Bias and McGonigle was not allowed to pass out a leaflet on campus, and when Lemme and Vincent told McGonigle that it did not matter that he was doing it on his own time since Nova was a private university and he was not allowed to leaflet.

Three admitted supervisors and agents of Respondent, Bias, Vincent, and Lemme, were not called by Respondent to testify at the trial. And while Santulli testified, he did not specifically deny the testimony of McGonigle that on August 22, 2006, Lemme, the acting director of facilities management, told him that “she had spoken to Mr. John Santulli and that I was not supposed to be leafleting on the campus.” (Tr. 112.) McGonigle impressed me as being a credible witness. McGonigle’s unchallenged testimony regarding what Vincent, Bias (conveyed by Vincent), Lemme, and Santulli (conveyed by Lemme) said on August 22, 2006, is credited. Vincent, Bias, Lemme, and Santulli told McGonigle that he was not allowed to leaflet on campus, and Vincent and Lemme told McGonigle that it did not matter that he was doing it on his own time since Nova was a private university; he was not allowed to leaflet. As concluded above, in my opinion McGonigle had the Section 7 right to handbill his coworkers in a nonwork area during nonworktime on Nova’s campus, and Respondent, through Neely, violated the Act when it precluded this activity. Respondent also violated the Act as alleged in paragraph 8 of the complaint when the above-named four members of Nova’s management affirmed Nova’s position to McGonigle with respect to what McGonigle did.

Paragraphs 9 and 10 of the complaint collectively allege that on or about August 24, 2006, Respondent, by Tony Todaro, at the physical plant at its Ft. Lauderdale campus, told employees of UNICCO that they could not engage in solicitation at any campus or facility of Respondent without the permission of

working on the Nova campus were paid.

Respondent, and Todaro instructed UNICCO to issue two disciplinary warnings to UNICCO employee Steve McGonigle pursuant to its no-solicitation policy.

Counsel for the General Counsel contends on brief that Respondent violated the Act when Todaro read the warning to McGonigle and stated Nova's no-solicitation policy, and by instructing Sado and Vladioiu to issue the warnings to McGonigle; that McGonigle could reasonably believe that Todaro was acting as Respondent's agent when he gave McGonigle the warnings and read Respondent's solicitation policy to McGonigle; that the warning regarding solicitation clearly states that it was issued because McGonigle violated both Respondent's and UNICCO's solicitation policies; and that the other warning issued to McGonigle, General Counsel's Exhibit 31, for leaving his work area is intertwined with Respondent's unlawful no-solicitation rule and would not have been issued but for the unlawful rule.

Respondent argues on brief that Nova is not liable for any actions taken by Todaro prior to February 19, 2007, because he was not employed by Nova, he did not act as an agent of Nova, and Todaro did not have apparent authority; that generally an independent contractor will not subject an employer to liability for unauthorized acts, *Tarheel Coals, Inc.*, 253 NLRB 563, 566 (1980); that any role Todaro had in coordinating the efforts of UNICCO did not give him authority to act on behalf of Nova; that the burden of proving any type of agency relationship is on the party asserting the relationship, *Dick Gore Real Estate, Inc.*, 312 NLRB 999 (1993); that an employer's effort to monitor, evaluate, and improve the result of a contractor's performance does not mean the employer has control over the manner and means of performance, *Ready Mix*, 337 NLRB 1189 (2002); that the standard for establishing agency for purposes of Section 2(13) of the Act is whether the individual had been placed in such a position by management that employees could reasonably believe that the individual spoke for management, *Zimmerman Plumbing Co.*, 325 NLRB 106 (1997); that to demonstrate apparent authority, the General Counsel needs to show "a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question," *Dick Gore Real Estate, Inc.*, supra; that no one, including McGonigle, testified that they believed Todaro was authorized to speak for Nova; that determining whether a contractor is an agent is not the same as determining whether an employee acted as an agent in making statements to other employees, compare *D&F Industries*, 339 NLRB 618, 619 (2003); that the evidence that Todaro retained the same phone number, email address, and desk when he was hired by Nova, and when he worked for UNICCO he was listed on Nova's website is insufficient to establish agency by itself; that even if agency is assigned to Todaro, his actions did not violate the Act; that McGonigle did not testify that Todaro was the one who was issuing him the warnings and, therefore, any allegation that Todaro issued discipline himself should be dismissed,²² that

"Nova was not aware of the discipline issued to McGonigle by UNICCO prior to the hearing. . . ." (emphasis added) and "[h]ad Nova been given knowledge of the verbal warning, it would have been able to clarify the circumstances on the record by having a UNICCO employee testify to it" (R. Br., p. 17); that since counsel for the General Counsel did not offer any evidence that Todaro instructed UNICCO to "order" (R. Br., p. 17) discipline, this allegation of the complaint should be dismissed; that even if the verbal warnings issued to McGonigle were improper, they are not sufficient to rise to the level of a violation of the Act by Nova; that Nova does not have the authority to remove any warnings from McGonigle's UNICCO file; that McGonigle admitted that he clocked in and subsequently on worktime complained to public safety at the security operations center; and that the solicitation allegation should be viewed as de minimis and should not require any corrective action, *Dieckbrader Express, Inc.*, 168 NLRB 867 (1967).

Respondent's argument that "Nova was not aware of the discipline issued to McGonigle prior to the hearing. . . ." and "[h]ad Nova been given knowledge of the verbal warning, it would have been able to clarify the circumstances on the record by having a UNICCO employee testify to it" (R. Br., p. 17) is a red herring. While the first complaint in this proceeding, which was issued on January 26, 2007, did not refer to McGonigle's disciplines, the August 28, 2008 consolidated complaint, General Counsel's Exhibit 1(cc) alleges in part as follows:

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On a date in or about August 2006, a more precise date being unknown to the undersigned, Respondent, by Tony Todaro, instructed UNICCO to issue two disciplinary warnings to UNICCO employee Steve McGonigle pursuant to its no-solicitation policy.

In its answer dated September 10, 2008, General Counsel's Exhibit 1(ee), Nova denied the allegations of paragraph 10 of the August 28, 2008 consolidated complaint. Additionally, counsel for the General Counsel, in her October 21, 2008 Opposition to Respondent's Motion for More Definite Statement of the Consolidated Complaint and Memorandum of Law in Support Thereof, General Counsel's Exhibit 1(gg), gave the following information: "[f]urther, Counsel for General Counsel hereby advises Respondent that based on information available to the General Counsel, it appears that the instructions were given to UNICCO supervisors Jack Sado and Gene Vladio[i]u." Respondent's motion was subsequently denied, General Counsel's Exhibit 1(hh). Nova had sufficient information about the disciplinary warnings to McGonigle and it had the names of the three UNICCO supervisors/managers involved, Todaro, Sado, and Vladioiu, well before the November 18, 2008 trial. To argue otherwise is disingenuous at best. All three of these individuals were hired by Nova in February 2007. All three of these individuals should have been available to Nova to call as witnesses in the trial. Nova called just one, Todaro, and with respect to the allegations in paragraphs 9 and 10 of the complaint, Todaro

²² While Todaro did not sign the disciplines, McGonigle testified that on August 24, 2006, Todaro was the one who (1) gave him the disciplines; (2) read the policies of Nova and UNICCO to him from the

handbooks; (3) gave him a copy of the policies; and (4) told him that he could not distribute anything on Nova property because it was private property. McGonigle's unrefuted testimony is credited.

pleaded ignorance. Notwithstanding this, Nova still did not call Sado or Vladioiu.

As noted, the unrefuted testimony of McGonigle with respect to what occurred and what was said on August 24, 2006, is credited. Todaro lied under oath. In my opinion a reasonable person would not forget, in a span of 27 months, disciplining an employee based on Nova's policy, which was contrary to what at least Todaro and Vladioiu were told by UNICCO's vice president of labor relations was lawful as far as UNICCO was concerned. Todaro was doing the bidding of Nova with respect to this discipline, and it is not something a reasonable individual would easily forget. Todaro admitted that he was first made aware of Nova's solicitation rule over this incident. So he remembered that but he falsely claims he does not remember the conversation he had with McGonigle about this discipline. Todaro testified that he remembered that no one from Nova told him to give McGonigle the discipline, and Todaro testified that he remembered that he did not tell Sado or Vladioiu to give the August 24, 2006 disciplines to McGonigle (if he had done that, he may have recalled that "[y]es I probably would have recalled it).²³ But when asked if he remembered the discipline to McGonigle, Todaro answered "*Honestly*, I don't remember this (Tr. 190 with emphasis added) and "I guess I don't remember those [the two disciplines to McGonigle]. . . ." (Tr. 202.) In my opinion, someone decided that the better approach in the circumstances existing here was for Todaro to plead ignorance. The fact that Sado and Valdoiu were not called to fill the void tells me that this was a tactical approach not orchestrated by Todaro alone. The false claim advanced by Nova that it did not know about the role of Sado and Vladioiu in this discipline before the trial is nothing more than a smoke screen utilized in an attempt to explain why Nova did not call Sado and Vladioiu when Todaro pleaded ignorance.

As indicated above, in the language—modified in the indented quote below solely to reflect the names of those involved herein—of *Fabric Services*, supra at 542:

To exonerate . . . [Nova] from statutory responsibility in these circumstances simply because . . . [McGonigle] was not its employee, would, I believe, subvert the clear policy and intent of the Act. Having "knowingly participate[d] in the effectuation of an unfair labor practice, . . . [Nova] place[d] itself within the orbit of the Board's corrective jurisdiction." *NLRB v. Gluck Brewing Co.*, 144 F.2d 847, 855 (C.A. 8) [Bracketed material other than the names of those involved herein appears in original.]

Nova does not deny that on August 22, 2006, five of its representatives told McGonigle that he could not handbill his contract coworkers while they all were not working and they were in a nonwork area on Nova's campus. As found above, this itself was a violation of the Act. Nova's incident report, General Counsel's Exhibit 18, which is dated "8/22/2006," indi-

cates that Todaro and Sado were notified of the McGonigle August 22, 2006 handbilling incident.

While the contract between UNICCO and Nova did not give Nova the authority to discipline UNICCO's employees who work on Nova's campus, it is noted that the discipline given to McGonigle for handbilling without permission, General Counsel's Exhibit 30, really only speaks to Nova's solicitation rule in that even though UNICCO's rule is referred to in the discipline, Todaro and Vladioiu were told even before July 28, 2006, by UNICCO's vice president of labor relations that UNICCO management was not allowed to stop anybody from passing out leaflets as long as they were on their lunch hour or break times, and UNICCO employees were allowed to pass out leaflets during lunch and break times. The citing of the UNICCO rule in the solicitation discipline was false and misleading. It was misdirection. UNICCO apparently did not want it to be obvious that McGonigle was being disciplined just for violating Nova's unlawful no solicitation rule. If the relationship was strictly contractual, Nova should have sought a remedy under the terms of the contract. Here, Nova went beyond that in that McGonigle was disciplined after Nova notified Todaro and Sado of its unlawful solicitation rule and of McGonigle's conduct.

With respect to the discipline for leaving his work area without permission, General Counsel's Exhibit 31, this was not an issue which directly involved Nova. This issue was between McGonigle and UNICCO. While General Counsel's Exhibit 30 refers to Nova's solicitation rule, General Counsel's Exhibit 31 only refers to UNICCO. Does the fact that Nova, through Neely, engaged in unlawful conduct on August 22, 2006, with respect to McGonigle, excuse McGonigle's subsequent conduct? In my opinion, while it explains why McGonigle did what he did, it does not excuse it. McGonigle could have waited until he had a break or he could have asked his supervisor for permission to go to public safety in building 11. It is noted that the flyer refers to a rally that was being held at 4:30 p.m. on August 22, 2006. In other words, McGonigle was handing out leaflets for a rally being held later that same day. This may have engendered a sense of urgency on the part of McGonigle. Nonetheless, it appears that McGonigle could have attempted to give out this leaflet earlier than Tuesday August 22, 2006. I do not believe that Nova violated the Act regarding the discipline to McGonigle for leaving his assigned work area for other than work related issues, without permission from his supervisor. Respondent violated that Act as alleged in paragraphs 9 and 10 of the complaint, except with respect to McGonigle's discipline for leaving his assigned work area for other than work related issues, without permission from his supervisor.

Paragraph 11 of the complaint alleges that on or about February 19, 2007, on or near University Avenue in Fort Lauderdale, Respondent, by Tony Todaro, interrogated employees concerning their union activities and implicitly threatened that employees would not be hired because of their union activities.

Counsel for the General Counsel contends on brief that with respect to Todaro's conversation with Sanchez on February 19, 2007, the Board holds that an interrogation is unlawful if, under the totality of the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, *Mathews Readymix, Inc.*, 324 NLRB 1005, 1007

²³ Since Todaro gave the disciplines to McGonigle on August 24, 2006, there may be some truth in Todaro's assertion that he did not tell Sado and Valdoiu to give the disciplines to McGonigle, although he had Sado and Vladioiu sign the disciplines and sit in on the meeting when he gave McGonigle the disciplines.

(1997), enfd. in part 165 F.3d 74 (D.C. Cir. 1999); that the Board considers whether the interrogated employee was an open or active union supporter, whether proper assurances were given concerning the questioning, the background and timing of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of interrogation, *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984), enfd, 760 F.2d 1006 (9th Cir. 1985); that Todaro was Sanchez’ highest-level supervisor before the Sanchez layoff; that given that (a) Todaro continued to be a high-level supervisor after being hired by Respondent; (b) “Sanchez was seeking employment by Respondent when the interrogation occurred” (p. 20 of counsel for the General Counsel’s brief); and (c) Todaro asked Sanchez if he was a union supporter and implied that Sanchez should go on the picket line in lieu of “obtaining employment by Respondent” (Ibid), the totality of circumstances reflect that Todaro’s interrogation was coercive; and that even assuming arguendo that Todaro knew that Sanchez had participated in a picket line, an employer cannot question an open union supporter when done in the context of unlawful threats, reprisals or conduct that is otherwise coercive, *Diamond Electric Mfg. Corp.*, 346 NLRB 857, 891 (2006) (employer violated the Act by interrogating open union supporter at the same time employer threatened employee with plant closure).

Respondent argues on brief that where the inquiry is “innocuous” or part of a normal response to a conversation initiated by an employee, it does not rise to the level of coercion; that as the Board stated in *Rossmore House Hotel*, supra at 1178 fn. 20 “[t]o hold that any instance of casual questioning concerning union sympathies violates the Act ignores the realities of the workplace”; that the General Counsel did not clearly establish that Todaro was employed by Nova at the time of his alleged conversation with Sanchez since (a) although Sanchez claimed that Todaro worked for Nova at the time of their conversation, Sanchez claimed that the conversation occurred the day after he was laid off; (b) Sanchez testified that he was laid off on January 17, 2007, or somewhere around that time; and (c) the record is clear that Todaro was not hired by Nova until February 18, 2007; that Todaro’s question to Sanchez was not illegal; that Sanchez’ support for the Union was open in that he walked the picket line with a broom in his hand; that Todaro’s question would not have been posed for the purpose of ascertaining Sanchez’ union sentiments; that Todaro was simply suggesting how Sanchez could make money while he was looking for work; that Todaro’s limited and casual remarks could not reasonably be construed as tending to restrain or interfere with the exercise of Sanchez’s rights; and that Todaro’s comments were isolated and inconsequential.

With respect to Respondent’s argument that the General Counsel did not clearly establish that Todaro was employed by Nova at the time of his alleged conversation with Sanchez, it is noted that Sanchez testified that he was not sure of the date of his layoff, Sanchez testified unequivocally that Todaro was working for Nova when he had the involved conversation with him, and Sanchez gave the following testimony on cross-examination by one of Respondent’s attorneys:

Q. All right. And isn’t it true that Nova—I mean excuse me. Isn’t it true that UNICCO supervisors attempted to help you get hired by Massey?

A. I turn the application to Gene.

Q. Who gave you the application?

A. Jack Sado.

Q. And that was in *February* before you were laid off?

A. Yes.

Q. Shortly before you were laid off?

A. Yes, like two weeks before. [Tr. 95 with emphasis added.]

On cross-examination, Respondent’s attorney understood that Sanchez was laid off in February 2007. Again, Respondent is disingenuous.

Todaro is not a credible witness. He does not deny the conversation involved here. Rather he equivocally testified that he did not recall such conversation. Sanchez impressed me as being a credible witness. His testimony about his conversation with Todaro on February 19, 2007, is credited.

Sanchez was an open union supporter in that he was on the picket line carrying a broom before UNICCO lost its contract at Nova, and a lot of people told him that they saw him on the picket line. During the involved conversation, which appears to have been initiated by Sanchez after Todaro waved Sanchez on to follow him, Todaro was not trying to ascertain whether Sanchez supported the Union. Rather, Todaro was driving the point home that he knew that Sanchez was with the Union. Then sarcastically, Todaro asked him why he did not go on the line and “[t]hey [the Union] might pay you with your friend Steve [McGonigle].” When Sanchez then told Todaro that he needed work, Todaro told Sanchez to call him back in 3 months. One of the new contractors, Massey, had taken over the maintenance work, which is the work Sanchez did with UNICCO. Todaro did not tell Sanchez that he should be dealing with Massey. Rather, Todaro told Sanchez that he, Todaro, would see what was going on. This would mean that, if Todaro was sincere, he was willing to look into work for Sanchez. Whether this would mean speaking to Massey on Sanchez’ behalf or seeing if Nova had something else for Sanchez was not made a matter of record. But Todaro is not a credible witness. When he spoke with Sanchez, Todaro was not sincere. While Sanchez was looking for employment Todaro linked his knowledge of Sanchez’ union activity with the possibility of Sanchez being hired to work on Nova’s campus. Todaro’s questioning Sanchez ostensibly to confirm what Todaro undoubtedly already knew was coercive in that Todaro was, in effect, telling Sanchez you made your bed now go sleep in it; you supported the Union now go and see if the Union will pay you to go on the line. The “call me back in three months” was nothing more than a dismissal of a man who needed immediate employment. Todaro was telling Sanchez that he would not be hired anytime soon, if ever, at Nova in view of his union activities. This amounted to an implicit threat that employees would not be hired because of their union activities. Questions involving an individual’s union support in the context of that individual seeking employment are inherently coercive and therefore

interfere with Section 7 rights. Respondent violated the Act as alleged in paragraph 11 of the complaint. Compare *Mathews Readymix, Inc.*, supra.

Paragraph 12 of the complaint alleges that on or about February 19, 2007, at the Fort Lauderdale campus, Respondent, by Thai Nguyen, threatened that employees would not be hired because of their union activities.

Counsel for the General Counsel contends on brief that when taken as a whole, Bazile's mistake regarding who asked Nguyen the question was a result of a misuse of a pronoun when Bazile testified in English, rather than any indication that he testified inaccurately or did not testify truthfully; that when confronted with this discrepancy on cross-examination, Bazile, without hesitation, admitted that it was Fabre, rather than him, who asked Nguyen about the new employees; that while Nguyen testified that during the conversation he told two of his employees, Bazile and Fabre, that he would recommend them for jobs, at the time of the conversation described by Bazile, both he and Fabre had already been hired by Green Source; and that Nguyen admitted that he saw new employees working in the grounds department when Green Source took over the landscaping operation, and it is more credible that Bazile and his coworkers were asking about the new hires, *Bay Harbor Electric, Inc.*, 348 NLRB 963 (2006).

Respondent argues on brief that even if Bazile's testimony is credited, the isolated discussion does not rise to the level of an unlawful interrogation or threat; that the ultimate question is whether the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act, in light of surrounding circumstances; that Bazile's testimony is a fabrication; that he first testified that he asked Nguyen the question; that Nguyen remembered the conversation but adamantly denied Bazile's recollection that he commented on the union involvement of the workers who were not hired; that Nguyen did in fact recommend to the new contractor that his entire crew be hired; that although Bazile gave two different recollections of the conversation with Nguyen, at best it indicates that Nguyen believed the Union was responsible at some level for why certain employees did not have jobs; that Nguyen did not imply that his former crew members would lose their jobs with Green Source if they became involved with the Union; that Bazile did not testify that Nguyen's comments led him to fear that his union activities would lead to his termination; and that considering the totality of the circumstances, Nguyen's comments could not be construed as coercing or interfering with the rights of "his employees." (R. Br., p. 20.)

On the one hand, Bazile first testified that he asked Nguyen the question when he and three other employees met with Nguyen in the Eddie Griffin cafeteria and asked him about the new employees they saw when they came to work for Green Source on February 19, 2007. Then Bazile conceded on cross-examination that Fabre was the one who asked the question. On the other hand, Nguyen testified that he was hired by Nova starting on February 18, 2007, and during the first week he was hired by Nova he had a conversation with just Bazile and Fabre in the Eddie Griffin shed during which he only remembered telling them that he would recommend them to the company (Green Source) that was going to be doing the grounds work.

So, with these two versions, the total number of people involved is different, the location of the conversation is different, and what was allegedly said is different. First, it must be determined what was said. Then it must be determined whether what was said violated the Act. With respect to the former, of the four employees allegedly present during this conversation only Bazile was subpoenaed to testify about the conversation. Nguyen's testimony appears to be contradictory in that he testified that this conversation occurred during the first week he was hired by Nova and during this conversation he told Bazile and Fabre that he would recommend them to Green Source. Nguyen was hired by Nova on February 18, 2007. This conversation took place on February 19, 2007, which would be during the first week that Nguyen was hired by Nova. The problem with Nguyen's version is that on February 19, 2007, he would not have been telling Bazile and Fabre that he would be recommending them to Green Source. On February 19, 2007, Bazile and Fabre were already working for Green Source. Also, with respect to Nguyen's denial, namely that he did not "say to any of his employees that other people weren't getting hired because they were involved with the Union" (Tr. 180) it is noted that when the involved conversation allegedly took place the four or two (depending on which version is credited) employees involved in the conversation were not "his" employees. At the time of the alleged conversation they were employees of Green Source. The two or four were former employees of UNICCO. They were not employees of Nova when this alleged conversation is asserted to have taken place. In my opinion, the testimony of Bazile is more credible than that of Nguyen. Bazile's testimony is credited. Accordingly, it is concluded that Nguyen did make the statement attributed to him by Bazile. But I do not believe that the statement violated the Act. When the statement was made Nguyen was not a supervisor or a manager with Green Source. Indeed, it was not shown that he was ever a supervisor or manager with Green Source. It appears that Nguyen's only role in the hiring by Green Source was his recommendation that the four employees on his grounds crew at UNICCO be hired by Green Source. They were. It was not shown that the "old" employees who were not hired by Green Source were supervised by Nguyen or that he would have been in a position to recommend to Green Source whether they should or should not be hired. On its face the statement by Nguyen as to why the "old" employees were not hired appears to be speculation on his part. The four former UNICCO employees initiated this conversation. There was no interrogation on the part of Nguyen. Nguyen's statement was not accompanied by any explicit or implicit threat. And the statement itself does not, in my opinion, constitute a threat in that Nguyen was working for Nova and not Green Source at the time the statement was made and the four employees were not working for Nova. In my opinion, it has not been shown that Respondent violated that Act as alleged in paragraph 12 of the complaint.

CONCLUSIONS OF LAW

By engaging in the following conduct Nova Southeastern University has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act:

(a) Maintaining and enforcing the following rule in the Nova Southeastern University Campus Safety and Traffic handbook: "No solicitation is allowed on an NSU campus or facility without the permission of the NSU Executive Administration."

(b) Interfering with the distribution of union literature by an employee of UNICCO to his coworkers during nonworking time and in a nonworking area.

(c) Telling an employee of UNICCO that he could not distribute union literature at any time on Respondent's property.

(d) Having Tony Todaro tell an employee of UNICCO that he could not engage in solicitation at any campus or facility of Nova Southeastern University without the permission of Nova Southeastern University.

(e) Having Tony Todaro issue a disciplinary warning to UNICCO employee Steve McGonigle for violating the unlawful no-solicitation policy of Nova Southeastern University.

(f) Through Tony Todaro, interrogating a former employee of UNICCO concerning his union activities and implicitly threatening him that employees would not be hired because of their union activity.

REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁴

ORDER

The Respondent, Nova Southeastern University, Fort Lauderdale, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing the following rule in the Nova Southeastern University Campus Safety and Traffic handbook: "No solicitation is allowed on an NSU campus or facility without the permission of the NSU Executive Administration."

(b) Interfering with the distribution of union literature by an employee of UNICCO to his coworkers during nonworking time and in a nonworking area.

(c) Telling an employee of UNICCO that he could not distribute union literature at any time on Respondent's property.

(d) Telling an employee of UNICCO that he could not engage in solicitation at any campus or facility of Nova Southeastern University without the permission of Nova Southeastern University.

(e) Issuing a disciplinary warning to a UNICCO employee for violating the unlawful no-solicitation policy of Nova Southeastern University.

(f) Interrogating a former employee of UNICCO concerning his union activities and implicitly threatening him that employees would not be hired because of their union activity.

²⁴ 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.

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

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

(a) Rescind the following rule in the Nova Southeastern University Campus Safety and Traffic handbook: "No solicitation is allowed on an NSU campus or facility without the permission of the NSU Executive Administration."

(b) Within 14 days from the date of the Board's Order, remove from its files, and ask UNICCO to remove from its files, any reference to the unlawful discipline of Steve McGonigle for violating Nova Southeastern University's unlawful solicitation rule, and within 3 days thereafter notify the employee in writing that this has been done and that the discipline will not be used against him in any way.

(c) Within 14 days after service by the Region, post at its main campus in Fort Lauderdale, Florida, copies of the attached notice marked "Appendix."²⁵ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2006.

(d) 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.

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

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

²⁵ 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."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain and enforce the following rule in our Campus Safety and Traffic handbook: "No solicitation is allowed on an NSU campus or facility without the permission of the NSU Executive Administration."

WE WILL NOT interfere with the distribution of union literature by you during nonworking time and in a nonworking area.

WE WILL NOT tell you that you can not distribute union literature on Respondent's property.

WE WILL NOT tell you that you can not engage in solicitation at any campus or facility of Nova Southeastern University without the permission of Nova Southeastern University.

WE WILL NOT issue a disciplinary warning to you for violating the unlawful no-solicitation policy of Nova Southeastern University.

WE WILL NOT interrogate you concerning your union activities and implicitly threaten you that you would not be hired because of your union activity.

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

WE WILL rescind the following rule in the Nova Southeastern University Campus Safety and Traffic handbook: "No solicitation is allowed on an NSU campus or facility without the permission of the NSU Executive Administration."

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

NOVA SOUTHEASTERN UNIVERSITY