

UPS Supply Chain Solutions, Inc. and Teamsters Local Union No. 769, affiliated with International Brotherhood of Teamsters. Cases 12–CA–026437, 12–CA–026446, and 12–CA–026564

November 4, 2011

DECISION AND ORDER

BY MEMBERS PEARCE, BECKER, AND HAYES

On December 3, 2010, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent and the General Counsel filed exceptions and cross-exceptions respectively and supporting briefs. The General Counsel filed an answering brief to the Respondent's exceptions, and the Respondent filed an answering brief to the General Counsel's cross-exceptions, as well as a reply brief to the General Counsel's answer.

The National Labor Relations Board has considered the decision and the record¹ in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,² and conclusions as modified, to amend the remedy, and to adopt the recommended Order as modified and set forth in full below.

The consolidated complaint alleges, among other things, that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing an overly broad no-solicitation rule in its employee handbook, and by threatening employees with discharge and job loss if they selected the Union as their collective-bargaining representative. The complaint also alleges that the Respondent violated Section 8(a)(1) and (3) by discharging employee Irving Puig because of his union and otherwise protected activities. The judge dismissed the complaint allegations concerning the Respondent's handbook rule and the threats of job loss, but found that Puig was engaged in protected concerted activities that were supportive of the Union, and that the Respondent unlawfully discharged him for those activities. In addition, the judge found that the Respondent violated Section 8(a)(1) by announcing an overly broad no-solicitation rule at a prework meeting.

For the reasons explained below, we adopt the judge's finding that the Respondent violated Section 8(a)(1) and

(3) when it discharged Puig for engaging in union and other protected concerted activities.³ Contrary to the judge, however, we find that the Respondent's handbook's no-solicitation rule was unlawful and that the Respondent unlawfully threatened employees with job loss.⁴ We further find it unnecessary to pass on the judge's finding concerning the alleged overly broad no-solicitation rule announced at a prework meeting.

Facts

The relevant facts are fully set forth in the judge's decision. Briefly, the Respondent provides fully-integrated logistical support to other companies' supply chains. A 2009 union organizing campaign took place at one of the Respondent's warehouses in Miami, Florida—the relevant facility in this proceeding. Soon thereafter, the Respondent began conveying an antiunion message to employees at meetings conducted by its supervisors.

At a July 23, 2009⁵ meeting, the Respondent's human resources supervisor, Clara Polanco-Guzman, showed employees an antiunion video. Following the video, Polanco-Guzman stated that some of the contracts that the Respondent has with its clients require that it maintain a nonunion work force. Polanco-Guzman further stated that employees could lose their jobs by supporting a union because the Respondent could lose those clients, resulting in loss of business. At the conclusion of her remarks, she asked employees whether they had any questions.

Employee Irving Puig raised his hand and stated that if there were rumors about employees supporting a union, these rumors were caused by employee unhappiness and that the Respondent would need to address that unhappiness. He cited numerous personal experiences with the Respondent that exemplified the types of concerns that, in his opinion, cause employees to support a union. After the meeting, Polanco-Guzman reported to the Respondent's divisional operations manager, Alina Fernandez, that Puig's comments were disrespectful and disruptive and that he should be disciplined for insubordination. On August 6, Supervisors Raul Echevarria and Polanco-Guzman informed Puig that he was being discharged for a history of insubordination that included his conduct at the July 23 meeting.

¹ The Respondent has requested oral argument and the General Counsel filed an opposition. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

² 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.

³ As stated in fn. 10, Member Hayes would reverse the judge's 8(a)(3) finding.

⁴ As stated in fn. 11, Member Hayes would not reverse the judge's dismissal of the job loss threat allegation.

⁵ All dates refer to 2009, unless otherwise indicated.

Analysis

1. The handbook no-solicitation rule

The Respondent's no-solicitation rule, as written in its employee handbook and distributed to all employees, provides that:

Employees of the company may not solicit or distribute literature during work time or in work areas for any purpose.

Work areas are all areas where employees perform work.

Work time: Does not include break periods and meal times or other periods during the work day when employees are not engaged in performing their work tasks. Work time includes the time of both the employee doing the solicitation or distribution and the employee to whom the solicitation or distribution is directed.

It is undisputed that this rule was posted at various locations in the Respondent's warehouse, and that the Respondent reminded its employees of the rule. The judge found the rule to be permissible because "[a] plain reading of the entire rule . . . establishes that the rule did not prohibit employees from soliciting other employees 'on their own time.'" Accordingly, the judge dismissed this complaint allegation.

We find, contrary to the judge, that the Respondent's no-solicitation rule violates Section 8(a)(1).⁶ Employers may ban solicitation in working areas during working time but may not extend such bans to working areas during nonworking time. See, e.g., *Restaurant Corp. of America v. NLRB*, 827 F.2d 799, 806 (D.C. Cir. 1987) ("[A]n employer may not generally prohibit union solicitation . . . during nonworking times or in nonworking areas.") (citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112–113 (1956); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797–798 (1945)).⁷ In discussing the Re-

⁶ As noted above, the judge found that the Respondent violated Sec. 8(a)(1) when Raul Echevarria, a supervisor, orally stated at a July 17 prework meeting that "[the Respondent] has a 'No Solicitation' policy, where no solicitation of any kind is allowed in the workplace." The judge reasoned that this oral statement of the no-solicitation rule was overly broad because it stated an absolute prohibition on solicitation, without any accommodations for nonworking times. Because we find that the no-solicitation rule in the employee handbook violates Sec. 8(a)(1), we find it unnecessary to pass on the judge's finding that Echevarria's statement at the July 17 meeting was unlawful, as that finding would be cumulative and would not materially effect the remedy.

⁷ There are, however, exceptions, not relevant here, such as for retail stores, restaurants, and hospitals, where solicitation in working areas might interfere with sales, service, or care. See, e.g., *Restaurant Corp.*

spondent's no-solicitation rule, the judge focused solely on the restrictions placed on employees' worktime. However, the Respondent's rule also prohibits solicitation in work areas, and does so without qualification. Fairly read, an employee would reasonably understand the rule to ban solicitation in work areas even during nonwork time. The rule is therefore impermissibly overbroad and violates Section 8(a)(1).⁸

2. Puig's discharge

The judge found that Puig's conduct at the July 23 meeting was protected, concerted activity, and that this conduct was the sole motivating factor in the Respondent's decision to discharge him. Therefore, the judge applied the test articulated in *Atlantic Steel*, 245 NLRB 814, 816 (1979), to determine whether Puig's conduct at the July 23 meeting caused him to lose the Act's protection. The Respondent argues that Puig's history of insubordination combined with his conduct at the July 23 meeting provided a dual motivation for his discharge and that the judge should have applied *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). We disagree and find that the judge properly applied *Atlantic Steel*.⁹

Among the factors considered by the Board in applying the *Atlantic Steel* test is whether the outburst was provoked by an employer's unfair labor practice. *Atlantic Steel*, supra. Despite finding that the Respondent committed no unfair labor practice during the July 23 meeting, the judge found that the Respondent's campaign opposing the Union constituted sufficient provocation under the *Atlantic Steel* test. As discussed below, we do not rely on that reasoning because we conclude that Polanco-Guzman's statements regarding possible job losses constituted an unlawful threat in violation of Section

of America, supra; *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 492–493 (1978).

⁸ In the alternative, the Respondent argues that because it does not enforce the no-solicitation rule, the rule is permissible despite being overbroad. The Respondent's argument is flawed, because mere maintenance of the rule, even without enforcement, violates the Act. See *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 349 (2000) ("Evidence of enforcement of the rule is not required to find a violation of the Act . . . mere maintenance of an ambiguous or overly broad rule tends to inhibit or threaten employees.") (citations omitted), enfd. sub nom. *Beverly Health & Rehabilitation Services v. NLRB*, 297 F.3d 468 (6th Cir. 2002).

⁹ Even if *Wright Line* were applicable, Member Becker would find that the Respondent failed to carry its burden of establishing that it would have discharged Puig absent his protected activities. The simple fact is that all of the other activities cited by the Respondent took place before Puig's protected concerted and union activities at the July 23, 2009 meeting and the Respondent had not considered discharging Puig much less actually done so prior to his protected activities. In other words, the Respondent's prior conduct proves conclusively that it would not have discharged Puig based on his prior conduct.

8(a)(1), and that Puig's conduct was provoked by that threat rather than the Respondent's antiunion campaign.¹⁰ In all other respects, we agree with the judge's application of the *Atlantic Steel* test and adopt his finding that Puig's discharge violated Section 8(a)(1) and (3).¹¹

3. Threat of job loss

The judge found lawful Polanco-Guzman's statements regarding the possibility of job loss due to client contracts requiring the maintenance of a nonunion work force, because the statements were couched in terms of business necessity and did not imply that the Respondent would terminate employees simply for voting in favor of the Union. Contrary to the judge, we find that the statements made by Polanco-Guzman were unlawful.

Under *NLRB v. Gissel Packing Co.*,¹² an employer's predictions of job loss as a result of unionization are not privileged under Section 8(c) unless the statements are "carefully phrased on the basis of objective fact to convey [the] employer's belief as to demonstrably probable consequences beyond [the employer's] control."¹³ At the hearing, Polanco-Guzman could name only one client that allegedly imposed such a contractual provision. She was, however, unfamiliar with even the general terms of that contract and admitted a general lack of knowledge of any of the Respondent's current client contracts, including the named client. Moreover, it is impossible to determine whether the contract of the named client actually provides support for Polanco-Guzman's claim, because the Respondent failed to offer it into evidence. In short, because the record does not provide objective support for Polanco-Guzman's prediction or, alternatively, indicates that, at most, only one named client had a contract that required the Respondent to remain nonunion, Polanco-Guzman's statement that multiple clients' contracts require a nonunion work force was overbroad, unsupported by objective fact, and therefore not protected as a lawful

expression of opinion under Section 8(c).¹⁴ Accordingly, we reverse the judge and find that Polanco-Guzman's statements violated Section 8(a)(1).¹⁵

AMENDED CONCLUSIONS OF LAW

1. The Respondent, UPS Supply Chain Solutions, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Teamsters Local Union No. 769, affiliated with the International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following acts and conduct the Respondent violated Section 8(a)(1) of the Act:

(a) Maintaining an overly broad rule prohibiting employees from engaging in protected solicitation during nonworktime in work areas, and announcing that rule at its July 17, 2009 meeting.

(b) Threatening employees with discharge and job loss if they selected the Union to represent them.

4. By the following act and conduct the Respondent violated Section 8(a)(3) and (1) of the Act:

Discharging employee Irving Puig on August 6, 2009, because he engaged in protected concerted and union activities at the July 23, 2009 meeting.

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

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Respondent will be ordered to rescind, insofar as it has not already done so, its overly broad no-solicitation rule, and it will be ordered to inform employees in writing that it has done so.¹⁶

¹⁰ Member Hayes adopts the judge's *Atlantic Steel* analysis as to the first three prongs. He does not, however, find that Puig's outburst was provoked by the Respondent. He nonetheless agrees that the weight of the *Atlantic Steel* factors favor finding that Puig's conduct did not lose the protection of the Act, and that his discharge, therefore, violated Sec. 8(a)(1).

¹¹ In finding that the discharge of Puig was unlawful under Sec. 8(a)(1) and (3), the judge stated that "Puig's conduct . . . was supportive of the Union." We reaffirm that Puig's conduct at the July 23 meeting constituted union activity, in addition to constituting protected concerted activity, and that the Respondent's discharge of Puig because of his union and protected concerted activity violated Sec. 8(a)(1) and (3). Though he agrees that Puig's discharge violated Sec. 8(a)(1), Member Hayes would find that Puig's activity did not constitute union activity, and would therefore reverse the judge's finding that the discharge violated Sec. 8(a)(3).

¹² 395 U.S. 575 (1969).

¹³ *Id.* at 618.

¹⁴ See, e.g., *Eldorado Tool*, 325 NLRB 222, 223 (1997); *Tellepsen Pipeline Services Co.*, 335 NLRB 1232, 1233 (2001), *enfd.* in relevant part 320 F.3d 554, 564 (5th Cir. 2003).

¹⁵ Member Hayes would adopt the judge's finding that Polanco-Guzman's statements did not violate Sec. 8(a)(1). First, the statement regarding job loss was permissible because it was phrased as a possibility resulting from a loss of clients, not from the act of unionization itself. Polanco-Guzman stated that the Respondent *could* lose clients as a result of unionization of the work force, and that such client loss *could* lead to job loss. Additionally, the General Counsel did not offer any evidence that contradicts the Respondent's claim that some of its client contracts, including the one Polanco-Guzman identified, required a nonunion environment. In Member Hayes' view, the uncontradicted statements were statements of opinion about a possible outcome, and were therefore lawful under Sec. 8(c) rather than unlawful threats.

¹⁶ Consistent with *Guardsmark, LLC*, 344 NLRB 809, 812 fn. 8 (2005), *enfd.* in relevant part 475 F.3d 369 (DC Cir. 2007), the Respondent may comply with our Order by rescinding the unlawful provision and republishing its employee handbook without it. However,

Having found that the Respondent violated Section 8(a)(1) and (3) by discharging an employee because he engaged in union activity and protected concerted activity, we shall order the Respondent to offer him full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privilege previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in according with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondent shall also be required to remove from its files any and all references to the unlawful discharge of the employee, and to notify him in writing that this has been done and that the discharge will not be used against him in any way. The Respondent will be ordered to post and distribute an appropriate notice.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, UPS Supply Chains Solutions, Inc., Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and announcing an overly broad no-solicitation rule prohibiting employees from engaging in protected solicitation during nonworktime in work areas.

(b) Threatening employees with job loss because they supported the Union.

(c) Threatening employees with discharge because they engaged in union or other protected concerted activities.

(d) Discharging or otherwise discriminating against an employee for supporting Teamsters Local Union No. 769, a/w International Brotherhood of Teamsters, or any other union or for engaging in any protected concerted activity.

(e) 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.

because republishing the handbook could entail significant costs, the Respondent may supply the employees either with handbook inserts stating that the unlawful rule has been rescinded, or with a new and lawfully worded rule on adhesive backing which will cover the old and unlawfully broad rule, until it republishes the handbook without the unlawful provision. Thereafter, any copies of the handbook that are printed with the unlawful rules must include the new inserts before being distributed to employees.

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

(a) Rescind the overly broad no-solicitation rule prohibiting employees from engaging in protected solicitation during nonworktime in work areas.

(b) Furnish all current employees with inserts for the current employee handbook that (1) advise that the unlawful no-solicitation provision has been rescinded, or (2) provide the language of a lawful provision; or publish and distribute to all current employees a revised employee handbook that (1) does not contain the unlawful provision, or (2) provides the language of a lawful provision.

(c) Within 14 days from the date of this Order, offer Irving Puig full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(d) Make Irving Puig whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest, in the manner set forth in the remedy section of this decision.

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

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

(g) Within 14 days after service by the Region, post at its facility in Miami, Florida, copies of the attached notice marked "Appendix"¹⁷ in both English and Spanish. 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

¹⁷ 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."

intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.¹⁸ Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 17, 2009.

(h) 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.

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 an overly broad no-solicitation rule prohibiting employees from engaging in protected solicitation during nonworktime in work areas.

WE WILL NOT threaten you with job loss because you support the Union.

WE WILL NOT threaten you with discharge because you have engaged in union or other protected concerted activity.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Teamsters Local Union No. 769, or any other union or for engaging in protected concerted activity.

¹⁸ For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB 11 (2010), Member Hayes would not require electronic distribution of the notice.

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 from our employee handbook the overly broad no-solicitation rule prohibiting employees from engaging in protected solicitation during nonworktime in work areas.

WE WILL furnish all of you with inserts for the current employee handbook that (1) advises you that the unlawful provision above has been rescinded, or (2) provides the language of a lawful provision; or we will publish and distribute to all of you a revised employee handbook that (1) does not contain the unlawful provision, or (2) provides the language of a lawful provision.

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

WE WILL make whole Irving Puig for any loss of earnings and other benefits suffered as a result of his unlawful discharge, with interest.

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

UPS SUPPLY CHAIN SOLUTIONS, INC.

Nicholas M. Ohanesian, Esq., and *John F. King, Esq.*, for the General Counsel.
Kelly-Ann G. Cartwright, Esq. and *Christine Fuqua Gay, Esq.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Miami, Florida, on April 5–8, 2010. Teamsters Local Union No. 769, affiliated with International Brotherhood of Teamsters (the Union) filed the charge in Case 12–CA–026437 on August 7, 2009, and amended it on September 18, 2009.¹ The Union filed the charge in Case 12–CA–026446 on August 20 and amended it three times, September 18, October 30, and November 30. The Union filed the charge in Case 12–CA–026564 on November 30 and amended that charge on December 23. Based on these charges, as amended, the General Counsel issued an order consolidating cases, consolidated complaint and notice of hearing on February 25, 2010.

The consolidated complaint alleges, *inter alia*, that UPS Supply Chain Solutions, Inc., the Respondent, violated Section

¹ All dates are in 2009, unless otherwise indicated.

8(a)(1) of the Act in various ways, during July and August 2009, in response to the Union's nascent organizing campaign. Specifically, it is alleged that the Respondent maintained and enforced an overly broad no-solicitation rule, that several of the Respondent's supervisors told employees that they could not possess nonwork-related literature at work and not to sign union authorization cards unless they spoke with the Respondent's supervisors, and threatened them with discharge and job loss if they selected the Union as their collective-bargaining representative. The complaint also alleges that the Respondent violated Section 8(a)(1) of the Act by showing employees a video entitled "Little Card Big Trouble," which is alleged to contain threats of plant closure and advice to employees to report the union activities of their coworkers. Finally, the consolidated complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Irving Puig on August 6 because of his union activities and support.

On March 9, 2010, the Respondent filed its answer to the consolidated complaint, which it amended on March 29, 2010. The Respondent has denied the unfair labor practice allegations and raised several affirmative defenses, including a *Wright Line* defense to the 8(a)(3) allegation.² In addition to the factual and legal issues raised by the pleadings, there is a dispute over which version of the "Little Card, Big Trouble" video was shown, whether a 1997 edition allegedly containing unlawful statements, or later versions that the parties apparently agree are free of any unlawful statements.³

On the entire record,⁴ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the business of parcel and cargo handling at its facility in Miami, Florida, where it annually derives gross revenues in excess of \$50,000 for the transportation of freight in interstate commerce under arrangements with and as agent for various common carriers, including United Parcel Service Inc., each of which operates between various States of the United States. In addition, the

² *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 988 (1982).

³ It appears from the General Counsel's efforts to prove that the 1997 copyrighted version was shown, and the absence of any allegation that the later versions contain unlawful statements, that the General Counsel concedes that the latter do not run afoul of the Act's proscriptions.

⁴ On April 22, 2010, after the close of the hearing, General Counsel and the Respondent filed separate motions to receive into evidence agreed-upon translations of exhibits in Spanish that had been received at the hearing. By Order dated April 26, 2010, I received the translations as Jt. Exhs. 1-8. Also on April 22, 2010, the General Counsel filed a motion for a protective order with respect to videotapes that were received at the hearing as GC Exhs. 28-30. I granted this unopposed request in a separate order on April 26, 2010. Copies of my two orders are made part of the record and attached to this decision as appendices A & B, respectively.

Respondent annually purchases and receives at its Miami facility goods and services valued in excess of \$50,000 directly from points located outside the State of Florida. Based on these admitted facts, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. See *United Warehouse & Terminal Corp.*, 112 NLRB 959, 960 fn. 1 (1955); *Siemons Mailing Service*, 122 NLRB 81, 85-86 (1958).

Based on the undisputed testimony of Eduardo Valero, the Union's business agent, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent is a fully-integrated logistical support company that manages other companies' supply chains (i.e., product inventories) from the assembly line to their customers' physical locations, performing all intermediate functions related to moving and storing goods for its customers. Although the Respondent has facilities throughout the country, the only one involved in this proceeding is a warehouse located at 10000 N.W. 25th Avenue in Miami, Florida. Approximately 125 employees work in the warehouse facility. Unlike the larger UPS, to which the Respondent is related, the Respondent is a non-union enterprise. The record reveals that the Union has unsuccessfully tried to organize the employees at the Miami facility on at least two occasions before the 2009 campaign involved here.

The uncontradicted testimony of Business Agent Valero, discriminatee Puig and former employees Mario Lopez and Ricardo Arriaza establishes that the Union's organizing campaign began sometime in June or early July after Lopez contacted Valero. According to Lopez, he got Valero's phone number from Puig. Lopez became the lead employee organizer until he was discharged by the Respondent on July 15. Arriaza replaced Lopez as lead employee organizer until he was fired a short time later. The Union alleged in Case 12-CA-026437 that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Lopez and Arriaza. Neither discharge is alleged to be unlawful in the consolidated complaint before me, the Regional Director having dismissed the allegation regarding Lopez, after investigation, and the Union having withdrawn the allegation regarding Arriaza.

Puig assumed the leadership role after Arriaza's discharge. There is no dispute that Puig was also discharged on August 6. His discharge is the subject of the instant complaint. Valero testified that, with Puig's assistance, he arranged a meeting with several of the Respondent's employees that took place on August 1, a Saturday, in a park not far from the Respondent's warehouse. Valero and Puig also testified that, before his termination, Puig solicited a number of union authorization cards. There is no evidence in the record that the Respondent had any direct knowledge of Puig's union activities before his termination.⁵

⁵ The question whether the Respondent was aware of his union "sympathies" will be addressed later in this decision.

The Respondent has an employee handbook that it distributes to employees which includes the following statement as part of its “Employee Relations Philosophy”:

UPS SCS is in favor of maintaining a union-free environment. Our past experience has shown that a third party is not able to accomplish anything that we cannot accomplish by working together as a team. We believe that this direct approach—without interference by an outside party—is the best way to maintain positive relationships.

The Respondent, at page 2 of the handbook, further explains the basis for this philosophy in a section entitled, “A Word About Unions”:

UPS Supply Chain Solutions works hard to maintain an employee relations environment that promotes personal development and achievement. Open communications, fair treatment, competitive compensation are hallmarks of our company. Our compensation and benefits plans are reviewed annually and necessary changes are made to ensure fairness and that our employees are provided wages and benefits that are competitive within the logistics and global industry. In addition, we provide a workplace where all employees are treated with fairness, dignity, and respect.

We do not believe that our employees would benefit from outside union representation. Our employees do not need to deal with cumbersome union rules; to assume the financial costs and other obligations of union membership; or to face the possibility of costly work stoppages to be fairly compensated and be treated fairly at UPS SCS. We already have processes in place such as our Open Door Policy, Employee Dispute Resolution Program (EDR), Employee Opinion Survey (EOS), and other opportunities that allow our employees to have a critical voice in our company and give them an opportunity to resolve concerns quickly and fairly.

Our customers entrust us with significant portions of their business.

They expect a business partner whose employees can adapt to their changing needs and provide uninterrupted service.

Our business and the jobs we provide depend upon our employees’ ability to fulfill our service commitments. Union work rules and work stoppages could prevent us from meeting our customers’ expectations.

Although UPS is unionized, it operates in a different industry and was unionized in a different era. Its relationship with the union began in the 1920’s, before laws guaranteed minimum wages, overtime, safety, and non-discrimination. This relationship demonstrated UPS’ commitment to fair treatment of its people. UPS was able to grow with limited competition for decades.

In contrast, UPS SCS began operations in a different, highly competitive industry and in a time when laws and company policies protect employees’ rights. Like UPS, we are committed to treating our people fairly. But a union is no longer necessary to demonstrate this commitment.

In summary, we don’t believe that a union could gain anything more for our employees than what we can accomplish through our direct and open working relationship. We believe strongly that the interests of our employees, our customers and our company are best served without union intervention.

There is no dispute that the Respondent became aware of the Union’s organizing efforts sometime in mid-July and that it conducted a campaign to convince its employees that, as stated in the handbook, a union was not needed. David Cole, the Respondent’s director of human resources for the Americas Region, testified that he provided training to the Respondent’s supervisors in July regarding what they could say legally to the employees during the campaign. He referred to this training as “TIPS,” an acronym for “threats, interrogation, promises and surveillance,” essentially what the Act proscribes. According to Cole, he also instructed supervisors that, if employees came to them with questions, to discuss it with human resources before answering the question.

The testimony and documents in the record show that the Respondent conducted its campaign through a series of pre-work communications meetings, or PCMs. The Respondent has had a practice of communicating information to employees on a regular basis through these PCMs, which are conducted by front-line supervisors using scripts prepared by management to ensure consistency. Beginning about July 17 and continuing until the beginning of August, the subject of most of these PCMs was the Union. The General Counsel has alleged that some of the statements made by supervisors during these PCMs violated the Act. In addition to the PCMs, as noted above, the Respondent held a series of meetings around the same time at which a video, “Little Card Big Trouble,” was shown to employees in small groups. Clara Polanco-Guzman, a human resources supervisor at the Miami facility, conducted most if not all of these meetings. As noted previously, the General Counsel alleges that the video contains two statements that violate the Act. Finally, according to the General Counsel’s theory of the case, the Respondent’s campaign culminated with the discharge of Puig on August 6, effectively ending the Union’s organizing efforts.

A. No-Solicitation Rule

The Respondent’s handbook contained the following no solicitation rule, as it applies to employees:

In order to maintain and promote efficient operations, discipline, and security, UPS SCS has established rules applicable to all employees regarding solicitation, distribution of written material and entry into buildings and work areas. All employees are expected to comply strictly with these company rules

....

Employees of the company: Employees of the company may not solicit or distribute literature during work time or in work areas for any purpose.

Work areas are all areas where employees perform work.

Work time: Does not include break periods and meal times or other periods during the work day when employees are not engaged in performing their work tasks. Work time includes the time of both the employee doing the solicitation or distribution and the employee to whom the solicitation or distribution is directed.

The policy also applies to solicitation for personal interests such as the sale of goods, subscriptions, products and food.

*United Way is the only exception for the No Solicitation Policy.

There is no dispute that, during the Union's organizing campaign, this rule was posted at various locations in the warehouse. In addition, the Respondent had reminded employees of the rule by memo and at PCMs conducted by the supervisors on February 19. The PCM script quoted the rule verbatim as it appeared in the handbook.

The Board has held almost since the Act's inception that an employer may, in normal situations, make and enforce a rule prohibiting employees from engaging in solicitation during "worktime," but that a broad rule barring such activity during nonworking time is presumptively unlawful. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 617-618 (1962). The Supreme Court long ago affirmed the Board's approach to such rules. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-804 (1945), citing *Peyton Packing Co.*, 49 NLRB 828, 843 (1943). Although there had been some disagreement among Board members over the years over what precise language would pass muster, in *Our Way, Inc.*, the Board held that a rule barring solicitation during "worktime" would be found valid as long as it states with sufficient clarity that employees may solicit on their own time. 268 NLRB 394, 395 (1983). This is the standard applied by the Board in recent years. See *Cardinal Home Products*, 338 NLRB 1004, 1005-1006 (2003), citing *Grandview Health Care Center*, 332 NLRB 347, 349 (2000), *enfd. sub nom. Beverly Health & Rehabilitation Services v. NLRB*, 297 F.3d 468 (6th Cir. 2002).

The complaint alleges that the above rule, on its face, violates Section 8(a)(1) of the Act because it is overly broad. I disagree. The portion of the handbook rule quoted in the complaint and relied on by the General Counsel is taken out of context. A plain reading of the entire rule, including its definitions of work areas and worktime establishes that the rule did not prohibit employees from soliciting other employees "on their own time." An objective employee reading the entire rule in the handbook would reasonably believe that he could solicit his co-workers when he and the other employee were not "performing work tasks," i.e., working. Accordingly, I shall recommend dismissal of this allegation.

The Respondent also referenced the no-solicitation rule during the July 17 PCM, which was the first conducted after the Respondent became aware of the Union's campaign. The script for this series of PCMs deviates from the handbook version of the rule by stating:

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

According to the Respondent's witnesses, and its established practice with regard to PCMs, the supervisors were expected to read this script verbatim and not deviate or improvise. I am thus constrained to find that the Respondent's supervisors in fact told employees on July 17 that "no solicitation of any kind is allowed in the workplace." In contrast with the rule contained in the handbook and reiterated in February, this version of the Respondent's policy is not limited to worktimes or work areas and seems to apply whether or not the employees are working at the time. To the extent the complaint alleges that the rule, as conveyed to employees on July 17, is overly broad, I agree. Accordingly, I find that the Respondent, on or about July 17, violated Section 8(a)(1) of the Act when its supervisors, including Operations Manager Raul Echeverria, during PCMs, broadened the scope of its existing no-solicitation rule to prohibit solicitation during nonworktimes.

B. 8(a)(1) Allegations Related to the Respondent's PCM Campaign

As noted above, the first PCMs conducted by the Respondent's supervisors that addressed the Union were held on or about July 17. The script prepared for these meetings is in evidence. The General Counsel also offered testimony from an employee, Miguel Osorio, who was present at the July 17 PCM delivered by Operations Manager Echeverria, one of the top managers at this facility. The complaint alleges that Echeverria violated the Act in the course of this meeting by telling employees that they could not possess nonwork-related material at work, and by threatening employees with job loss if they selected the Union as their bargaining representative.⁶

Osorio has been employed at this facility for about 3 years, the first two as a temporary employee. In summer 2009, he worked in the SPL department, supervised by Eduardo Diaz. Osorio recalled attending meetings with his supervisor at which the Union was discussed almost on a daily basis over a 2-week period. These were PCMs at which Diaz read from a paper, in English and then in Spanish. Osorio could not recall the dates of any of these meetings and his recollection as to other specific details was poor. He did recall that the very first meeting about the Union was conducted by Echeverria and that it came about suddenly, at the end of the workday. He and his fellow employees in the SPL department were called together with employees in the Sony Ericsson and Intel departments.⁷ The meeting took place in the Intel department with about 30 employees present. The only other employee Osorio recalled by name was Juan Millet. Osorio recalled that two other men from management were there with Echeverria but he did not know them by name. He recalled that Echeverria had a paper that he read from in English, translating what he read into Spanish as he went along. He also recalled that Echeverria spoke "with passion."

⁶ The complaint, as drafted, does not clearly specify the date or meeting at which these allegedly unlawful statements were made. It appears from the evidence cited in counsel for the General Counsel's brief that these violations are alleged to have occurred during the July 17 meeting.

⁷ The Respondent's departments are named after the customers each services.

When asked to recount what Echeverria said, Osorio testified that Echeverria told them that there were rumors of an organization forming in the place and that the company was not going to permit a union to form.⁸ Echeverria told the employees to think carefully about what they were going to do because “if a union came, we could lose our jobs.” According to Osorio, Echeverria also said that, because of the type of clients the Respondent had in that building, the Company could not permit a union to form or they would lose clients. In response to a leading question, Osorio added that Echeverria said they could close the building if the Company lost clients. Osorio testified that Echeverria was speaking Spanish when he said these things.

Osorio was also asked if he ever kept nonwork-related literature at his workplace and responded that he did not because he knew it was not permitted under the company policies. When questioned further about this, Osorio testified that Echeverria also told the employees at this meeting that it was not permitted to have union cards or flyers in their workplace. He then added that he didn’t remember anyone else saying this, but it was a “done deal.”

Although Osorio testified that Millett was at this meeting and Millett testified as a witness for the General Counsel, he was not asked about this meeting. Instead, Millett was asked about statements his supervisor, Eduardo Diaz, made regarding authorization cards. Millett testified that he did not recall any meetings with supervisors about the Union. On cross-examination, he testified that he did not recall being told by any supervisors that work would decline or jobs be lost if the Union came in.

The July 17 PCM text, which is in English, does not contain any explicit threat of job loss upon the formation of a union nor any reference to possession of nonwork-related material.⁹ The text of the meeting opens with an explanation of the purpose of the meeting, i.e., to answer questions from employees about the recent efforts by the Union to organize them. In addition, the text discusses the uncertainty of economic conditions and the steps that the Respondent has and is taking to grow the business. There is also a discussion of union authorization cards and the disadvantages of having a union, including the costs of dues and fees. The text also reiterates many of the themes contained in the handbook’s statement about unions, i.e., the Respondent’s preference for dealing directly with employees and its commitment to fair treatment. The General Counsel does not cite any specific language in the script for this PCM as being violative of the Act and I can find none.

Echeverria denied making the statements attributed to him by Osorio. These denials were elicited through leading questions from the Respondent’s counsel. With respect to the meeting itself, Echeverria testified that he read the script verbatim and did not expand on its contents. He also claimed that he translated the script into Spanish word for word without any

deviation.¹⁰ The Respondent also called as a witness employee Avellino Herrera.¹¹ Herrera, a 5-year employee, was present at the same meeting with Echeverria that Osorio attended. According to Herrera, Echeverria read from a script in English, then repeated what he had said in Spanish. Another Human resources representative, whose name Herrera did not know, was there and assisted with the translation. When asked directly what Echeverria said at the meeting, Herrera recalled that he told the employees there was talk of a union in the facility and that Echeverria wanted everybody to make sure they knew what they were doing, not to let people mislead them into something they did not want to do. In response to leading questions from the Respondent’s counsel, Herrera denied that Echeverria said anything about the building closing or the company losing customers if the employees selected a union. Herrera did not recall anything that was said about union authorization cards. Herrera confirmed Osorio’s testimony that employees were not permitted to have any outside literature in their work areas. He did not, however, recall Echeverria mentioning this at the July 17 meeting. As Herrera recalled, the meeting was “extensive” and it was at the end of the day when the employees were getting ready to go home. His memory of what was said was really no better than that of Osorio.¹²

1. Alleged prohibition of nonwork-related material

The complaint alleges that the Respondent violated the Act at this meeting by Echeverria telling the employees that they could not possess nonwork-related literature at work. The General Counsel cites *Brooklyn Hospital*, 302 NLRB 785 fn. 3 (1991), in support of this allegation. However, in that case, the Board held that employees generally have a Section 7 right to possess and display union materials at their workplace, absent evidence that the employer restricted possession of other personal items. Thus, it would not be unlawful if the Respondent had a policy prohibiting the possession of nonwork-related materials in the work area, as long as it was not discriminatorily promulgated or enforced. Here, both employees who testified, Osorio and Herrera, apparently believed that the Respondent had such a policy even before attending the meeting on July 17. In fact, Osorio called it a “done deal.” The only evidence that Echeverria attempted at the July 17 meeting to restrict only the possession of union materials is the uncorroborated testimony of Osorio, which I find insufficient to meet the General Counsel’s burden of proof.

The text of the July 17 PCM makes no mention of this subject. Both Echeverria and Herrera testified that Echeverria merely read the text and did not deviate from it, even when translating the text into Spanish. Although General Counsel called one other employee who was at this meeting to testify, he did not corroborate Osorio’s version of the meeting. I credit the testimony of Echeverria that he did not deviate from the

⁸ Osorio, as did almost all the other witnesses for the General Counsel, testified in Spanish with the aid of a translator.

⁹ As noted above, the text does refer to the no-solicitation rule but says nothing about literature or other printed material.

¹⁰ There is no dispute that, unlike later PCMs, there was no Spanish version at the time Echeverria met with the employees. The text of this PCM was translated into Spanish at a later time.

¹¹ Herrera testified without an interpreter.

¹² Herrera also recalled attending two or three other meetings with his immediate supervisor, Pedro Garcia, on the subject of unions. These meetings will be discussed later.

text. Considering his position in the Respondent's management hierarchy and his experience having worked in a unionized environment, it is highly unlikely that he would have deviated from the script. There is no question that the Respondent reacted to the Union's campaign quickly, but it did so in a carefully orchestrated manner. The Respondent's managers, and Echeverria in particular, certainly knew how not to violate the Act. Accordingly, I find that the Respondent did not tell employees on July 17 that they could not possess union, or other nonwork-related material at their workplaces and shall recommend dismissal of this allegation.

The complaint alleged that Supervisor Eduardo Diaz also told employees that they could not possess nonwork-related literature at their workplace. As with most of the allegations, the complaint is vague and nonspecific as to where and when this is supposed to have occurred. In his brief, counsel for the General Counsel concedes that there is no evidence that Diaz ever said this to any employee.¹³ Instead, according to counsel, this allegation is based on the testimony of former employee Miguel Villarroel regarding a statement made by his supervisor, Sam Rios, at a PCM held about 2 months before Villarroel left the company.¹⁴

Villarroel testified that Rios conducted the meeting in the area outside his office and that there were about 15–18 employees there. He also recalled that a man whose name he did not know but was with the company was present as well as either Belkis Cruz or Polanco-Guzman from Human Resources. According to Villarroel, Rios told the employees that he knew there were employees who were unhappy with the Company and that there was an organization being formed to bring a union into the Company. Rios also talked about union authorization cards, telling the employees that they were a legal document. He remembered Rios telling the employees not to sign the union card. On cross-examination, Villarroel admitted that, in his pretrial affidavit, he stated that he did not recall being told not to sign a card unless he spoke to management first. Villarroel testified that Rios also explained the disadvantages of having a union, such as the loss of direct communication with the Respondent and the intervention of a third party. It was in this meeting, according to Villarroel, that Rios told employees that the Respondent had a zero tolerance policy for people having nonwork literature and that employees would be disciplined if they were found to have any. Rios was called as a witness by the Respondent. Although he denied telling employees that they had to check with management before signing union authorization cards, or otherwise threatening them, he did not specifically deny making the statement about nonwork-related materials in the workplace.

¹³ As noted above, even if he did tell employees they could not possess nonwork-related materials at work, this would not be per se unlawful. There would need to be evidence that the prohibition was discriminatorily promulgated or applied only to union materials.

¹⁴ Villarroel was employed by the Respondent at this facility from December 1, 2003, until August 17, 2009. His memory was about as poor as that of Osorio and Herrera. Thus, he recalled first hearing about the union campaign 5 months before he left, which would have been in March. The earliest any witness placed the beginning of any organizing activity was in June.

Counsel for the General Counsel seeks, in his brief, to amend the complaint to allege that Rios violated the Act by telling employees that they could not possess nonwork-related material in the work place and by telling employees not to sign union authorization cards. Counsel argues that such a late amendment is proper because the Rios' allegations are similar to allegations already in the complaint attributed to other supervisors and because the issue has been fully litigated, citing *Yellow Ambulance Service*, 342 NLRB 804, 824 (2004). As noted previously, the complaint, generally, is vague and nonspecific as to the time and place of the independent 8(a)(1) allegations. But it is specific as to the Respondent agent liable for committing the alleged violation. Under these circumstances, I find that it would be prejudicial to the Respondent to find a violation based on Villarroel's testimony regarding Rios' PCM. Although the Respondent's counsel called Rios as a witness, she did not ask any questions regarding these two statements allegedly made by Rios. Instead, she had him generally deny making the threats and other statements alleged in the complaint to have been committed by the Respondent's supervisors. Ordinarily, one might draw an adverse inference from a parties' failure to address a specific allegation in the complaint. In this case, however, there was no allegation in the complaint attributed to Rios. Counsel for the Respondent may have called him in an overabundance of caution, not knowing what exactly he was alleged to have done. Counsel for the General Counsel could have moved at the hearing to amend the complaint, as soon as he became aware that the wrong supervisor was named in the complaint. Such a motion would have given the Respondent time to object or otherwise respond to the new allegation. At a minimum, a motion made at the hearing would have put the Respondent's counsel on notice what exactly was being claimed by the General Counsel and she could have tailored her examination to address that. Under these circumstances, I cannot find that the allegations were fully and fairly litigated. Accordingly, I shall deny General Counsel's posthearing motion to amend the complaint.

2. Threat of job loss

My decision to credit Echeverria's testimony also disposes of the other allegation arising out of the July 17 meeting, i.e., that he threatened employees with job loss and plant closure if they selected the Union to represent them. Again, the only evidence to support this allegation is Osorio's uncorroborated testimony. As with the above allegation, there is nothing in the printed text of this PCM that remotely resembles a threat of job loss and plant closure. Although the text does describe the economic uncertainty within which the Respondent operates and the Respondent's efforts to attract and keep business to ensure its employees have jobs, there is no linkage between these efforts and the Union in the text of Echeverria's speech. To find a violation here, I would have to find that he deviated from the text. As noted above, without some corroboration, I find it doubtful that a savvy manager like Echeverria would have done so in order to make such a baldfaced unlawful threat. Accord-

ingly, I shall also recommend that this allegation be dismissed.¹⁵

In addition to the testimony of Osorio regarding the July 17 PCM with Echeverria, counsel for the General Counsel cites language in several of the PCM scripts as conveying a message to the employees that unionization would lead to job loss. Specifically, counsel cites the following excerpts from the PCM scripts in evidence:

*The July 15 PCM entitled "We are committed to working with you!"*¹⁶

UPS has announced several initiatives this year to ensure that we remain a strong and financially sound company that is able to continue:

Securing non-union jobs by proactively managing costs and aggressively growing the business.

For non-union employees, we have been able to secure their job by creating opportunities for areas where they are needed.

....

Providing the UPS Retirement Plan **for all non-union employees.**

....

We are proud to be one of the very few companies as large as ours to have not had to announce lay-offs.

(Emphasis supplied by the General Counsel.) The General Counsel omits the portions of the PCM in which the Respondent discusses business results since the first of the year and the specific steps the Respondent has taken to increase work opportunities for employees.

July 17 PCM, discussed above, entitled "Questions from employees regarding Unionization

Why is a union trying to organize us—is it because of the uncertainty in the economy and that employees are concerned about their jobs?

The PCM indicates that this is a question that had been asked by employees. The General Counsel omits the response, in which the Respondent factually describes the efforts it had made to provide job security to the employees at this facility.

July 20 PCM entitled "Our SCS Customers"

A union environment will impose limitations that could prevent us from meeting our customers' expectations.

....

¹⁵ I have noted, as General Counsel argues, that Osorio, as a current employee was testifying against his economic interest and have weighted this factor in assessing credibility. However, I also noted the poor state of his memory and the absence of any corroborating testimony, which makes this testimony unreliable. I do not believe that Osorio fabricated the testimony. On the contrary, I believe his memory was simply mistaken and he may have been testifying as to the message he carried away from the meeting, rather than what was actually said.

¹⁶ This PCM makes no reference to the Union's organizing campaign.

In a unionized environment, there is an expected rise in the time and resources required, in addition to running a day-to-day business, which will put the company at a competitive disadvantage.

Customer confidence may suffer.

Our entire business at SCS, the jobs we provide, and the growth here at 25th street, depends on our ability to be flexible and to provide quality, uninterrupted service to our customers.

(Emphasis in original.) Again, these statements are taken out of context. The entire script is a specific explanation of the impact unionization may have on the Respondent's ability to satisfy its customers' requirements.

July 20 PCM "Re: Job Security"

Job security is very important to all of us ... through all of the economic challenges thrown at us so far, we have had zero layoffs in this operation. Others have not been so fortunate.

....

Again, the link between customers and job security is strong. That has been demonstrated here in this workgroup, hasn't it? Zero layoffs.

As with the above quotes, the General Counsel has selected these two statements out of a two-page document that describes in detail the Respondent's position regarding the issue of job security.

July 31 PCM entitled "Our Customers and You."

Our ability to retain our customers and grow the business is directly related to the operational flexibility a union free environment provides.

This one sentence is taken out of a longer presentation full of specifics regarding the Respondent's position on the issue of unions and operational flexibility and how that impacts customer service.

Contrary to General Counsel's suggestion, I find that none of the Respondent's written PCMs, either individually or considered as a whole, conveys a threat of job loss if the employees select the Union to represent them. It is well established that an employer is free to communicate to employees its views regarding the effects the employer believes unionization will have on the business, as long as such statements are "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences of unionization beyond his control." Only if there is an implication that the employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to the employer, does the statement become a threat of retaliation. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). The statements quoted by the General Counsel here do not cross the line between protected and unlawful speech by an employer.

The only witness for the General Counsel, other than Osorio, to testify regarding any alleged threats of job loss was discriminatee Puig, who recalled such threats being made by his supervisor, Pedro Garcia, during a PCM, and by Polanco-Guzman,

during the meeting at which “Little Card Big Trouble” was shown.¹⁷ Puig testified that he attended approximately 15 meetings, including the one with Polanco-Guzman, at which the Respondent’s supervisors talked about the Union. He recalled that these meetings occurred during the period from early July until the date he was discharged. According to Puig, the discussion of the Union took place during PCMs that were conducted by Garcia. In the beginning, Garcia held such meetings every day, but later the frequency diminished to two or three times a week. Puig recalled that Echeverria was present for these meetings on two or three different occasions. All of the meetings conducted by Garcia were conducted within his department. Puig testified that Garcia spoke in Spanish at these meetings.

Puig testified that Garcia said essentially the same thing at all 14 or 15 meetings he attended. When asked specifically what Garcia said at these meetings, Puig testified as follows:

He was saying that—there’s more, but he was saying that the unions were good [sic], that there would be consequences, that the clients would take away the accounts because they would be uneasy about strikes forming, and that there would be loss of jobs. He also talked about a fee that had to be given to the Union, between 200 and 300 dollars. And then you had to pay a monthly quota, to ask them in writing for the promises that they were making and not to trust the Union, and as a consequence we could lose our job because the clients would be afraid that there would be strikes.¹⁸

Puig also testified that Garcia always asked, at the conclusion of his presentation, if there were any questions. According to Puig, he spoke up at several meetings, including one time when he challenged Garcia’s assertion that the Respondent would lose customers if the Union were selected. Puig testified that he questioned why the customers would be unhappy since UPS already had a union with the drivers and some of the warehouse workers and “why hadn’t the clients left that operation.” Puig did not testify as to Garcia’s response, if any. Garcia testified that he also raised personal issues that he had with the Respondent in the past and that he had never received a written response to concerns he submitted in writing. According to Puig, these PCMs lasted about 20–30 minutes and discussion generated by his remarks typically consumed 5 to 7 minutes. Although Puig recalled that another employee, Avellino Herrera also spoke up at these meetings, Puig did not relate what Herrera said.

Garcia was called to testify by the Respondent and, as General Counsel points out, his denial of this allegation was elicited by leading questions. However, Garcia also testified that, at the PCMs he conducted regarding the Union’s campaign, he merely read the script provided by the Respondent and did not deviate from it. Avellino Herrera, an employee called to testify by Respondent, corroborated Garcia.¹⁹ A review of the written PCMs in evidence reveals that a theme of the Respondent’s

campaign was the importance of customer satisfaction to ensuring job security. However, none of the written PCM’s makes an explicit threat that the Respondent will lose customers if employees become unionized, or that jobs will be lost because of the Union. This may have been how Puig interpreted Garcia’s statements, but it is not in the written documents. To find a violation based on Puig’s testimony, I would have to find that Garcia deviated from the text to make the statements attributed to him.

Having considered the evidence in the record, I cannot find that General Counsel has met his burden of proving that Garcia threatened employees with job loss if they selected the Union as their bargaining representative. The only evidence offered in support of this allegation is Puig’s uncorroborated testimony. I credit Herrera and Garcia that Garcia merely read the written text of the PCM. As noted above, none of the written PCMs contains even an implicit threat of job loss. On the contrary, they are lawful expressions of the Respondent’s views of the effect of unionization on its business based on objective facts. In reaching this conclusion, I also note that Puig’s testimony was vague as to exactly when such a threat was made and he failed to identify any other employees, other than Herrera, who were present when the threat was made. Accordingly, I shall recommend that this allegation be dismissed as well.

3. Advising employees not to sign union authorization cards without speaking to the Respondent’s supervisors

The complaint also alleges that employees were told not to sign union authorization cards unless they spoke with the Respondent’s supervisors. The complaint, although vague as to time, specifically attributes these statements to Belkis Cruz, a human resources supervisor, and Eduardo Diaz. In his posthearing brief, counsel for the General Counsel seeks to add Polanco-Guzman to the list of supervisors making this statement, based on former employee Villaruel’s testimony.²⁰ Counsel for General Counsel also implicitly amended the allegation in his brief by arguing that the Respondent’s supervisors violated the Act by simply telling employees not to sign union cards. This was apparently based on the failure of General Counsel’s witnesses to establish that employees were told to speak with their supervisors before signing a card.

Current employees Osorio and Millett testified regarding the allegation involving Diaz. Osorio recalled that after the meeting with Echeverria on July 17 Diaz held PCMs in the department almost daily for 2 weeks at which the Union was discussed. According to Osorio, all of the employees in his department, about 9 or 10 including Millett, were present for these PCMs. When asked what Diaz told employees at the meetings, Osorio testified that Diaz said, at several meetings, that it was not good to sign the union card, that the Company helped employees to enjoy the benefit of bringing money home in an honorable fashion, and to just think it over carefully before joining a union because that was not good. When asked specifically what Diaz

¹⁷ The allegation regarding Polanco-Guzman will be discussed later in connection with other allegations related to the showing of the video.

¹⁸ This is the English translation of what Puig testified in Spanish.

¹⁹ On cross-examination, Puig acknowledged that Garcia read from a folder at these PCMs.

²⁰ As previously discussed, counsel for the General Counsel moved, in his posthearing brief, to amend the complaint to add Sam Rios as another supervisor who made this statement to employees, based on Villaruel’s testimony. I have already denied this motion.

said about authorization cards, Osorio testified that Diaz told the employees that the Company would not permit the signing of cards within the building under no circumstances.²¹

Millett testified that Diaz told employees at a PCM that before signing a union card to be sure about what they were signing, “to see if we were for it or against it.” In response to several leading questions from counsel for the General Counsel, Millett recalled that employees were told “to check and be sure of what we were signing before signing the card.” When asked by General Counsel who employees were to check with, Millett finally recalled that Diaz said the office, meaning human resources. Millett’s memory about these meetings was generally poor.²²

Diaz recalled giving 6 to 10 PCMs on the subject of the Union. He recalled that they were prepared by management and he was given English and Spanish versions to read to the employees. Although he specifically denied other allegations attributed to him, in response to leading questions, he did not specifically deny this allegation. Although several of the written PCMs in evidence urge employees to think carefully about what they were doing in signing a union authorization card, none explicitly requests employees to check with a supervisor or human resources before doing so.

The General Counsel cites one case in support of this allegation. In *Modern Mfg. Co.*, 261 NLRB 534 (1982), enfd. 723 F.2d 902 (4th Cir. 1983), an administrative law judge found that an employer’s “advising employees not to sign Union cards” amounted to restraint and coercion within the meaning of Section 8(a)(1) of the Act. In that case, the “advice” occurred in the context of pervasive unfair labor practices which resulted in the issuance of a bargaining order remedy. That case is thus distinguishable from the present one.

I find that General Counsel has failed to meet his burden of proving that Respondent, through Diaz, told employees to speak with a supervisor before signing a union authorization card, as alleged in the complaint. Only Millett testified to anything approaching such a statement. His testimony was not corroborated by Osorio, who worked in the same department and attended the same PCMs as Millett. In addition, General Counsel was only able to elicit this testimony through a series of leading questions because of Millett’s generally poor recollection of the meetings. In addition, the PCMs in evidence show that the Respondent merely advised employees to carefully consider what they were doing before signing a union card and to make sure this is what they wanted. That is consistent with Osorio’s testimony that Diaz told the employees to think carefully about it and to be sure they knew what they were signing. Such “advice” is not unlawful. Accordingly, I shall recommend that this allegation be dismissed.²³

²¹ This may have been a reference to the overly broad no-solicitation rule contained in one of the PCMs, as noted above.

²² Both Osorio and Millett testified in Spanish with the aid of an interpreter.

²³ As noted, counsel for the General Counsel sought to broaden the allegation to cover any statement in which a supervisor told an employee not to sign a card. Even assuming such an explicit instruction was given, I find that this “amended” allegation has not been fully and fairly litigated.

The allegation that Belkis Cruz told employees not to sign a union authorization card unless they spoke to a supervisor is based solely on the testimony of Ricardo Arriaza, the second lead employee organizer who was fired on July 21. Arriaza testified that this statement was made during a meeting with about 20 employees held in the conference room at the beginning of July. According to Arriaza, Cruz showed the employees a video and explained that the union authorization card was a legal document and not to sign the cards because it was a legal document. Arriaza recalled that the video showed people trying to get other people to join the union, portraying the way the Union acted to get people to sign. Arriaza testified that they said that the Union was not good for the Company because there was no guarantee that they could give the employees what they wanted. After the video ended, according to Arriaza, Cruz again told employees not to sign the union card without first speaking to management. On cross-examination, Arriaza acknowledged that in his affidavit he stated that this meeting occurred in the mid-June. Although Cruz was called as a witness by the Respondent, she was not asked any questions about this allegation.

Ordinarily, uncontradicted testimony would be sufficient to establish that a statement was made. However, in this case, the testimony is of doubtful reliability. There is no other evidence in the record to support the testimony that such a meeting occurred in early July, or in the mid-June, as Arriaza claimed in his testimony and affidavit, respectively. Nor is there any other evidence that Belkis Cruz was involved in showing any videos to employees as part of the Respondent’s campaign. Moreover, I note that the evidence in the record indicates that the Respondent did not even become aware of the Union’s organizing campaign until the mid-July, shortly before Lopez and Arriaza were terminated, and did not begin its “antiunion” campaign until July 17. The attendance sheets in evidence also show that the earliest showing of the video, presented by Polanco-Guzman, occurred on July 23, after Arriaza was terminated. Based on the above, I do not credit Arriaza’s testimony that Belkis Cruz told employees not to sign union authorization cards unless they spoke with Respondent’s supervisors. I shall recommend dismissal of this allegation of the complaint.

The new allegation regarding Polanco-Guzman was based solely on the testimony of former employee Villaroel. Villaroel testified that, before he was terminated, he attended a meeting with about 8 to 10 employees at which Polanco-Guzman showed a video depicting how an employee would approach another employee to sign a card. After the video, Polanco-Guzman asked if there were any questions and there were none. According to Villaroel, Polanco-Guzman then gave a brief explanation about what was in the video and told employees not to sign cards, that they were legal documents, not just cards. He recalled she also said that signing the card did not mean the Union was going to come in, that it would only lead to an election. During cross-examination, Villaroel acknowledged that, in his pretrial affidavit, he stated that he “did not recall them saying that you shouldn’t sign an authorization card unless we spoke with them first.” Polanco-Guzman, in response to a leading question from the Respondent’s counsel denied telling em-

ployees that they had to check with management or human resources before signing a union authorization card.

I find that Villaroel's testimony, if credited, fails to establish that Polanco-Guzman told employees not to sign a union card unless they speak with a supervisor. On the contrary, Villaroel denied she said this. At most, crediting Villaroel, General Counsel has established that, in the context of the video presentation, to be discussed later, and while describing the legal significance of signing a card, Polanco-Guzman told employees not to sign. Such a statement contains no threat of reprisal, implicit or explicit. Accordingly, I shall recommend dismissal of this newly added allegation as well.

C. "Little Card Big Trouble"

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act, on various dates in July and August, through a video entitled "Little Card Big Trouble," by threatening employees with plant closure and job loss if they selected the Union as their collective-bargaining representative, and by advising employees to report the union activities of other employees to the Respondent. There is no dispute that the Respondent showed employees the video "Little Card Big Trouble" as part of its response to the Union's campaign. The video was shown at a series of 13-14 meetings, conducted by Polanco-Guzman, on July 23, 24, 27, and 29 and August 3. The attendance sheets showing which employees attended these meetings are in evidence. All but three or four of the meetings were in Spanish. Polanco-Guzman had an English and a Spanish version of the video to show to the employees. Although there is only one Spanish version, there are two English versions, one from 1997 and another from 2000. The parties have stipulated to the written transcripts of all three versions of the video.

The General Counsel's complaint allegations are based on the following two statements from the 1997 English version:

NARRATOR:

So if you're harassed or threatened by Union supporters; if they try to make you do something you're not willing to do, or if you see acts of vandalism or sabotage, report it to your management immediately. The Union's rights do not include infringing on other people's rights.

Shortly after this statement, which appears about midway through the video, another scene has employees talking with a union organizer. One of the employees makes the following statement:

Some [employees] are saying they don't want to lose their jobs if the company closes down or moves; and they think a Union might cause that.

General Counsel concedes that these two statements are not contained in the 2000 English version or the Spanish version of the video. Thus, it is crucial that General Counsel establish that the 1997 English version was shown to at least some of the Respondent's employees.²⁴

There is no dispute that, at the time the video was shown, the Respondent had in its possession both the 1997 and 2000 English language versions of "Little Card Big Trouble." There is also no dispute that, during the General Counsel's investigation of the unfair labor practice charges, the Respondent's counsel submitted the 1997 version in response to a request from the General Counsel's investigating agent to see the video that was shown to the employees. The Respondent contended at the hearing that this was an inadvertent error that was corrected within a couple months when counsel sent the 2000 version and informed the General Counsel's office of the error.

None of the witnesses called by the General Counsel saw the English language version of the video. The only evidence as to which version was shown is the testimony of the Respondent's Human Resources Supervisor, Polanco-Guzman, who was assigned the task of showing the video to employees by Regional Human Resources Director David Cole, who also testified for the Respondent. According to Polanco-Guzman, Cole gave her two videocassettes to show to the employees, one in English and one in Spanish. She testified that she was the only management representative involved in showing the video to the employees and that she kept both versions of the video in her possession during the period in which she showed the videos. At the conclusion of this task, she returned both copies to Cole. Polanco-Guzman testified with certainty that the only English language version she showed was the 2000 edition. She did not know how it came to be that counsel sent the earlier version to the General Counsel's office because she was not involved in responding to that request. Cole, for his part, testified that he had three copies of the video in his possession, two in English and one in Spanish. He admitted that he was not aware that the two English language versions were different until it was brought to his attention during the investigation. He did not testify specifically regarding which version he gave Polanco-Guzman when he assigned her the task of showing the video to the employees. He did testify that, when the issue was brought to his attention, he asked Polanco-Guzman which version she showed and she responded that she showed the 2000 version.

The General Counsel argues that the Respondent's October submission of the 1997 version of the video to the General Counsel's office, with the representation that this was the video shown to the employees, constitutes an admission that should be credited over the testimony of Polanco-Guzman that she showed only the later 2000 version, of the video. Counsel for General Counsel notes, correctly, that Cole did not corroborate Polanco-Guzman's testimony because he never testified precisely which version of the video he gave her to show to the employees. In fact, it is doubtful Cole could testify with any certainty as to which version he gave Polanco-Guzman because he admittedly did not realize there was any difference between the two English language videos until months later. Polanco-Guzman did testify that she knew she was given the 2000 English version of the video because it was in the same white con-

²⁴ In *Flying Foods*, 345 NLRB 101, 105 (2005), a majority of the Board found that it was not unlawful for an employer to show the 2000 version of "Little Card Big Trouble" to employees. See also *Sodexo*

Marriott Services, 335 NLRB 538, 547, 555 (2001), in which an administrative law judge reached the same conclusion as to the 1997 version. Because no exceptions were filed to that portion of his decision, it is of no precedential value.

tainer with the title and a picture as the Spanish language version. The packaging for the 1997 English version is markedly different and would be noticeable. This testimony rebuts the General Counsel's assertion that Polanco-Guzman could not have differentiated the two English language versions of the video because their content is so similar.

After having carefully considered the matter, and despite some reservations, I find that Polanco-Guzman's testimony that she showed the 2000 English language version of "Little Card Big Trouble" is credible. The representation made by Respondent's counsel when it submitted the earlier version to the General Counsel's office is troubling, but I accept the representations of counsel and the witnesses that this was done in error due to Cole's mistake in providing counsel with the wrong version of the videotape. Neither counsel for the Respondent, nor Cole, showed the video to the employees. Only Polanco-Guzman did and her testimony was not contradicted by any witness for the General Counsel. In fact, the General Counsel made no effort to call any English speaking employee who would have been shown the video to testify as to what was shown. While such a witness may not have been able to testify as to the date of the video, such an employee might have recalled hearing the statements upon which the General Counsel relies to prove a violation. Absent such evidence, I am reluctant to find an unfair labor practice based on what may very well have been an inadvertent error by Respondent in gathering evidence to respond to the investigation. Were a violation to be found based solely on the October submission by counsel, it is likely that employer's would not wish to cooperate during an investigation by the General Counsel in the future. Such a result would essentially lead to issuance of complaints based on a one-sided presentation of evidence and create more litigation like that involved here.

Having found that the Respondent showed its employees the 2000 English language and the Spanish language versions of "Little Card Big Trouble" video, and noting the absence of any allegation that these versions contain unlawful statements, I shall recommend dismissal of the complaint allegations related to the video.²⁵

D. Discharge of Irving Puig

Irving Puig, a native of Cuba, was 69 years old when he testified at the hearing. He had been employed at this facility since 1997. Prior to 2002, the facility was operated by Fritz Companies, Inc., which was acquired by the Respondent. Puig continued his employment with the Respondent until he was discharged on August 6. Although Puig appeared to speak and understand English, he testified through a translator. As previously noted, uncontradicted testimony in the record indicates that Puig gave Lopez the Union's phone number so that Lopez could initiate the organizing campaign. Puig also became the lead employee organizer around July 20, after both Lopez and Arriaza had been terminated. Puig organized the August 1

meeting at Tropical Park, introduced the employees there to Union Organizer Valero, and solicited about five union authorization cards before his discharge. Puig signed a card himself on July 13. As previously noted, there is no evidence that the Respondent was aware of this activity before Puig's termination. There is also evidence that Puig was involved in at least one earlier organizing attempt, but there is no evidence that the Respondent had knowledge of this earlier activity.

As demonstrated by the Respondent's evidence, and detailed in counsel's brief, Puig's employment with the Respondent was marked by a series of conflicts. Puig could be characterized as the proverbial squeaky wheel, frequently complaining about perceived injustices and demanding a response from the Company's managers, including the CEO. His complaints were expressed verbally at PCMs conducted by his immediate supervisors, and in writing to managers and human resources representatives. Although his complaints would often be couched as general complaints of unfair treatment of employees, they invariably arose out of a personal concern Puig had about the Respondent's conduct toward him. There is no dispute that, in early 2008, Echeverria fired Puig when Puig was overheard him loudly disparaging the employer to employees in the lunch room and office area over a pay dispute. Echeverria's decision was reversed by his boss, Alina Fernandez, the Respondent's divisional operations manager responsible for, inter alia, the Miami warehouse involved in this proceeding. Fernandez testified, credibly, regarding her efforts over the years to placate Puig, working with him and her supervisors and managers to try to resolve his many complaints. In fact, it is clear from the testimony in the record that the Respondent's supervisors and managers bent over backward for Puig, perhaps out of respect for his age. Puig, in his testimony, did not really contradict Respondent's evidence regarding his employment history. Instead, he and the General Counsel attempted to show that all of his complaints had merit and that he frequently caught the Respondent's supervisors violating company policies. I need not recite here all of the evidence in the record regarding this history. Suffice it to say that Puig was a "thorn in the side" of management and an employee the Respondent's managers would be happy to see gone. However, aside from the incident with Echeverria, Respondent had essentially tolerated his behavior for years, without issuing him any discipline, giving him favorable employee evaluations and raises, and failing to document all of the incidents relied on by the Respondent's witnesses. The record before me shows clearly that the tipping point for the Respondent, and what led to Puig's discharge, was his conduct at the July 23 presentation of the "Little Card Big Trouble" video by Polanco-Guzman.

The sign-in sheets for Polanco-Guzman's meetings show that Puig attended the first meeting she conducted, on July 23 at 11 a.m. Three other names appear on the sheet for this meeting, including Avellino Herrera, who testified for the Respondent.²⁶ The sign-in sheets also show that Polanco-Guzman's next meeting was at 11:30 a.m. The parties stipulated that the Span-

²⁵ The complaint alleges that the Respondent violated the Act, through Polanco-Guzman, during one of these meetings by threatening employees with job loss. As this allegation is based on the testimony of Puig, I shall address it in the next section of the decision.

²⁶ Although Puig testified there were five or six employees at this meeting, he conceded he did not remember exactly how many were there.

ish language version of “Little Card Big Trouble” that was shown at the meeting lasts 20 minutes. After the video was shown, Polanco-Guzman asked the employees if there were any questions. It is undisputed that, as was his custom, Puig spoke up at the meeting. The only language spoken at the meeting was Spanish. Based on the sign-in sheet, Puig’s exchange with Polanco-Guzman, which is at the heart of this case, and any other discussion between her and the employees lasted no more than 10 minutes.

Puig testified that, after showing the video, Polanco-Guzman told the employees to think about what they were going to do because the Union didn’t always keep the promises it made. According to Puig, she also said that, if a union was formed, the clients could be unhappy and jobs could be lost, that if the Respondent lost accounts, employees would lose their jobs and be out in the street.²⁷ After concluding her remarks, which Puig estimated lasted about 5 minutes, she asked if there were any questions. Puig responded to this invitation by saying that if there were rumors about a union, it would be because the employees were unhappy. He continued by saying that the company would need to see what was happening and give answers to the employees’ unhappiness and uneasiness because “I, for one, had presented some concerns that I had in writing and never received a response.” Puig did not testify regarding any response to his comments. He estimated that his comments lasted about 2 or 3 minutes. According to Puig, none of the other employees at the meeting appeared uncomfortable when he spoke and none complained to him afterward about his conduct at the meeting. He specifically denied that he told Polanco-Guzman at this meeting that he did not personally support the Union, a claim made by Polanco-Guzman in her written report of the meeting.

Polanco-Guzman testified twice regarding this meeting, first as an adverse witness called by the General Counsel under FRE 611(c) and later as one of the Respondent’s witnesses. She testified that the meeting lasted 30–40 minutes and that the video presentation consumed only 10 minutes of this time. According to Polanco-Guzman, Puig was the only employee to respond to her requests for questions or comments and his response dominated the meeting and extended it beyond the time it should have taken. As shown above, this testimony was contradicted by the sign-in sheets in evidence.

With respect to the alleged threat of job loss, Polanco-Guzman denied making such a threat but admitted that, in response to one of Puig’s comments, she told the employees that she was aware, from her experience in 2005, that the Respondent had some customers whose contracts with the Respondent stipulated that the Respondent maintain its nonunion status. On cross-examination, while claiming that she was not familiar with the details because she no longer worked in operations, she testified that she was aware, at the time of the campaign, of at least one major customer, Proctor & Gamble, whose contract contained such language. Had Polanco-Guzman merely cited this fact, as she claimed, her statement would not be a violation because an employer is free to inform employees of the demon-

strably probable consequences of unionization base on objective facts. See *NLRB v. Gissel Packing Co.*, supra. Crediting Puig, I find that Polanco-Guzman went further and told the employees that they could lose their jobs if they formed a union because the Respondent could lose customers. While close to crossing the line, I nevertheless find that even this version of Polanco-Guzman’s statement was lawful because she never told, or implied to, the employees that the Respondent would terminate the employees on its own simply because they chose the Union, without regard to business necessity. Rather, her statement, or prediction, of possible job loss was couched in terms of the effect of unionization on the Respondent’s customers, a factor outside the Respondent’s control. Accordingly, I shall recommend dismissal of this allegation.

Polanco-Guzman initially testified that Puig expressed his disagreement with the contents of the video and with company procedures. Although she testified that he provided examples of his disagreements, she did not elaborate until she was cross-examined later by the General Counsel. The complaints he voiced at the meeting, as described by Polanco-Guzman, were the same he had repeatedly raised with the Respondent’s management over the years. She admitted that he said that these types of concerns might be a reason employees would support a union. Polanco-Guzman characterized Puig’s demeanor at the meeting as agitated, and disruptive, not allowing her or anyone else to speak. According to Polanco-Guzman, Puig became more agitated as the discussion continued, resisting her efforts to re-direct the conversation and save his complaints for another time. At one point, he raised his voice and started shaking. Polanco-Guzman claimed she became concerned for his physical well being. She also testified that she observed that other employees appeared uncomfortable as the meeting progressed and Puig became more agitated. She claimed that two employees, Herrera and Gonzalo Alvarez, complained to her after the meeting that the meeting was unnecessarily long because of Puig’s rehashing his old complaints. She admitted that, despite her concerns about Puig’s conduct, she never felt threatened by him.

Herrera was the only one of the two employees who complained to Polanco-Guzman to testify at the hearing. According to Herrera, when Polanco-Guzman asked the employees if they had any questions or comments, Puig spoke up. Herrera testified that Puig got “real agitated and real nervous and he started shaking and getting all worked up.” When Polanco-Guzman asked Puig to calm down and wait until after the meeting to discuss his concerns, Puig persisted and did not stop until Polanco-Guzman finally told him that they had to move on. Herrera’s estimation that the meeting lasted 45 minutes to an hour is contradicted by the sign-in sheets and was clearly an exaggeration. Herrera did confirm that he complained to Polanco-Guzman after the meeting about Puig’s behavior at this and other meetings. On cross-examination, Herrera denied feeling intimidated or threatened by Puig’s conduct. He merely felt “concerned” about Puig’s reaction to the video. Only on re-direct examination, and in response to a leading question, did Herrera say that Puig raised his voice during the meeting.

Polanco-Guzman testified that, after the meeting, she expressed her concerns about Puig’s behavior to Alina Fernandez.

²⁷ The complaint alleges that this statement by Polanco-Guzman violated Sec. 8(a)(1).

She told Fernandez that Puig “had been very disruptive, very disrespectful in his comments about management and the company overall, and that [she] felt he should be disciplined.” Fernandez asked Polanco-Guzman to write up what had happened at the meeting, which she did. The written report in evidence is not entirely consistent with Polanco-Guzman’s testimony at the hearing. In her later testimony, during Respondent’s presentation of the case, Polanco-Guzman testified that she also expressed her concerns about Puig to Divisional Human Resources Director Cole. As a result of her report, Cole conducted an investigation that led to the decision to discharge Puig. Cole testified that he reviewed Puig’s employment history with the company, including whatever documentation the Respondent had concerning the issues Puig had raised in the past and managements efforts to resolve them, and then discussed the matter with Charnley Conway, the Respondent’s vice president for human resources for the America Regions. Cole recommended that Puig be terminated. This conversation occurred over the phone. Conway testified that he relied solely on the information provided by Cole and agreed with his recommendation. Significantly, Operations Manager Echeverria, whose displeasure with Puig was palpable on the witness stand, was on vacation and absent from the warehouse for 2 weeks beginning July 23. He returned in time to carry out the decision to discharge Puig on August 6.²⁸

On August 6, Echeverria and Polanco-Guzman met with Puig to inform him of the termination. This is the first notice Puig had that his job was in jeopardy. According to Puig, Echeverria said that Polanco-Guzman had complained that Puig spoke badly about the company at her meeting and that other employees had complained about what he said and that this could not be permitted. Puig responded that he had been asked for an opinion at the meeting and it was not his fault if his opinion was not in accord with theirs. Puig also told Echeverria that no one had complained to him at the meeting or afterward that he was bothering them. Puig recalled further that Echeverria said they were tired of him and that they were not going to put up any longer with his speaking up “and things like that.” Puig was then terminated and escorted out of the building. When asked by the General Counsel if Echeverria gave him a reason he was being fired, Puig testified that Echeverria said that Puig was a person who caused conflict in the company, that he was a “bad influence.”

Echeverria testified that he told Puig on August 6 that he was being fired because of his outburst at the July 23 meeting and because of his long history of insubordination. Echeverria claimed that, when informed of the decision, Puig was “very quiet” as if he was expecting it. This testimony is contradicted by Polanco-Guzman, who was also present, who testified that Puig was upset and expressed the opinion that the Respondent was wrongfully terminating him. In addition, a written report of this meeting, apparently prepared by Polanco-Guzman, corroborates Puig’s testimony regarding his response to being in-

formed of his discharge. Polanco-Guzman also confirmed this on cross-examination.

Despite the Respondent’s efforts to portray the decision to discharge Puig as one based on a history of insubordination and unprofessional conduct, all of the Respondent’s witnesses, when pressed on cross-examination, conceded that it was his conduct at the July 23 meeting that was the motivating factor in the decision, or as Echeverria acknowledged, “the straw that broke the camel’s back.” Employees who speak up at group meetings conducted by their employer are generally protected by Section 7 of the Act. *Chromalloy Gas Turbine Corp.*, 331 NLRB 858, 863 (2000), enf. 262 F.3d 184 (2d Cir. 2001); *Whittaker Corp.*, 289 NLRB 933 (1988). The Board has historically permitted some leeway for impulsive behavior when employees are engaged in such activity. *Tampa Tribune*, 351 NLRB 1324 (2007), enf. denied 560 F.3d 181 (4th Cir. 2009); See also *CKS Tool & Engineering, Inc. of Bad Axe*, 332 NLRB 1578, 1585–1586 (2000). The issue here is whether Puig crossed the line between protected and unprotected activity during the July 23 meeting.

Contrary to the Respondent’s assertions, the fact that the concerns raised by Puig at the meeting may have originated as personal issues he had with the Company over the years, does not mean his conduct was not “concerted.” His grievances were cited as reasons employees might be unhappy and desire union representation. Moreover, his comments were made immediately after the Respondent had shown employees a video warning of the dangers of signing a union authorization card and were a direct response to Polanco-Guzman invitation to address the issues raised by the video. Accordingly, I find that Puig’s “outburst” at the July 23 meeting was concerted activity within the meaning of the Act.

In *Atlantic Steel*, 245 NLRB 814 (1979), the Board set forth a four-factor analysis for determining whether an employee’s conduct in the course of Section 7 activity is so opprobrious as to lose the Act’s protection. Under that analysis, the Board considers (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice. *Id.* at 816. Applying this analysis to the facts here, I conclude that Puig’s conduct, while it may have been “unprofessional” under the Respondent’s policies, was not so outrageous as to lose the Act’s protection.

Puig’s “outburst” occurred in a conference room where he and three other employees were being shown a video as part of the Respondent’s campaign to dissuade employees from signing a union authorization card. The only management representative present was Human Resources Supervisor Polanco-Guzman. The subject matter of the discussion was the reasons an employee might choose to sign a card, despite the warnings contained in the video. In relaying his personal experiences dealing with the Respondent, Puig did not use any profanities, did not verbally attack Polanco-Guzman personally, made no threats toward her or the Company, and did not become physically intimidating toward anyone in the room. Moreover, he did not disrupt the showing of the video and only spoke when he was invited to do so during the question and answer session after the video. Finally, although I have not found that any un-

²⁸ Although Echeverria claimed not to be involved in making the decision to terminate Puig, he acknowledged being consulted about it, after the decision had been made by Conway, and that he agreed with the decision.

fair labor practices were committed during this meeting or as a result of the video presentations generally, Puig's outburst was provoked by the Respondent's campaign opposing union representation among its employees.

Having found that the Respondent discharged Puig because of his conduct at the July 23 meeting that was protected by the Act, I must find that the discharge violated Section 8(a)(1) and (3) of the Act. See *Network Dynamics Cabling*, 351 NLRB 1423, 1429 (2007); *CKS Tool & Engineering, Inc. of Bad Axe*, supra, and cases cited therein.²⁹ Because I have found that protected activity was the sole motivating factor in the Respondent's decision to discharge Puig, it is unnecessary to apply the *Wright Line*³⁰ analysis applicable to mixed motive cases.³¹ Because Echeverria told Puig during the meeting that he was being discharged for activity that was protected by the Act, I find further that this statement constituted an independent violation of Section 8(a)(1) of the Act, as alleged in the complaint.

CONCLUSIONS OF LAW

1. By announcing an overly broad no-solicitation rule on or about July 17, 2009, and by threatening employees with discharge for engaging in union and protected concerted activities on August 6, 2009, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discharging Irving Puig on August 6, 2009, because of his protected conduct at a meeting on July 23, 2009, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. Respondent has not violated the Act in any other manner alleged in the complaint.

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. To remedy the overly broad no solicitation rule announced as part of the July 17 PCM, I shall recommend that the Respondent rescind the rule and notify employees that it has done so.

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest to be compounded daily in accordance with the Board's decision in *Kentucky River Medical Center*, 356 NLRB 6, 9-10 (2010).

²⁹ The discharge violated Sec. 8(a)(3) as well as Sec. 8(a)(1) because Puig's conduct at the meeting was supportive of the Union.

³⁰ 251 NLRB 1083 (1980).

³¹ I am not unsympathetic to the Respondent's sense of exasperation in dealing with an employee like Puig. However, the Respondent had ample opportunity to address the situation before the onset of union activity. It was only after Puig undermined the Respondent's campaign by speaking up at Polanco-Guzman's meeting that the Respondent decided it had had enough.

Because the majority of the Respondent's employees speak Spanish as their primary language, I shall recommend that the notice be posted in English and Spanish. Although there is no evidence in the record before me that the Respondent customarily communicates with its employees electronically, I shall recommend that the attached notice be distributed electronically if, at the compliance stage, it is determined that the Respondent utilizes that means of communicating with its employees. See *J. Picini Flooring*, 356 NLRB 11, 13-14 (2010).

[Recommended Order omitted from publication.]

APPENDIX A

ORDER RECEIVING EXHIBITS AND ACCEPTING TRANSLATIONS OF EXHIBITS ALREADY ADMITTED

During the hearing in the above-captioned case, the parties offered into evidence various documents that were in Spanish. The undersigned directed the parties to have such documents translated into English so that any reader of the record who was not fluent in Spanish could consider them in making findings of fact or otherwise disposing of issues in the case. By separate motions dated April 22, 2010, counsel for the General Counsel and the Respondent have submitted agreed-upon translations of the following exhibits that are already in evidence:

R. Exh. 43 February 19, 2009 PCM¹

R. Exh. 44 July 15, 2009 PCM

R. Exh. 45 July 17, 2009 PCM

R. Exh. 46 July 22, 2009 PCM

R. Exh. 47 July 27, 2009 PCM

R. Exh. 48 July 31, 2009 PCM

R. Exh. 49 May 3, 2008 letter from Irving Puig to Alina Fernandez.

R. Exh. 50 December 13, 2006 letter from Puig to Belkis Cruz.

Having considered the matter and noting the agreement of the parties, I shall receive the proffered translations as Joint Exhibits 1-8, respectively.²

APPENDIX B

PROTECTIVE ORDER

The unfair labor practice hearing in the above-captioned case closed on April 8, 2010. By motion dated April 22, 2010, Counsel for the General Counsel has requested that copies of three versions of a videotape entitled "Little Card, Big Trouble," that were received in evidence as General Counsel Exhibits 28, 29, and 30, be received under seal and subject to a protective order to protect the copyright of the producer of the videos.¹ Respondent does not oppose this motion. Having con-

¹ PCM refers to pre-work communication meeting.

² Counsel for the General Counsel proffered two of the translations as GC Exhs. 34 and 35, while Respondent's counsel attached all of the translations to her motion as Composite Exh. A. I have decided that marking them as joint exhibits will make for a cleaner record.

¹ When the videos were received in evidence at the hearing, General Counsel was given permission to withdraw them for the purpose of making sufficient copies for the record and for the parties.

sidered the matter and noting the absence of any objection, I shall grant General Counsel's motion and issue the following

ORDER

The following exhibits received into evidence as General Counsel Exhibits 28, 29, and 30 shall be placed under seal

GC Exh. 28: *Little Card, Big Trouble* (1997 edition in English)

GC Exh. 29: *Little Card, Big Trouble* (2001 edition in English)

GC Exh. 30: *Little Card, Big Trouble* (2000 edition in Spanish)

Counsel for General Counsel may only make additional copies of these videos sufficient for the record and to provide a copy to the Respondent, and for use in connection with the litigation of *Diaz v. UPS Supply Chain Solutions, Inc.*, Case No. 1:10-cv-21038-JEM in the U.S. District Court for the Southern District of Florida.

No other copies shall be made or retained by the General Counsel without the authorization of the undersigned or the District Court, or by permission of the holder of the copyright to the videos.