

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SUBREGION 24**

UPS SUPPLY CHAIN SOLUTIONS, INC.

and

Case No. 12-CA-159257  
12-CA-168819

UNION DE TRONQUISTAS DE PR, LOCAL 901,  
INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF  
IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE  
LAW JUDGE**

**Carlos J. Saavedra-Gutiérrez  
Counsel for the General Counsel  
National Labor Relations Board  
Region 12, Sub-Region 24  
525 F.D. Roosevelt Avenue  
San Juan, PR 00918-1002**

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## **I. STATEMENT OF THE CASE**

This brief is submitted in support of the Counsel for the General Counsel's exceptions to the Decision of Administrative Law Judge Michael A. Rosas (the ALJ or Judge Rosas) in Cases 12-CA-159257 and 12-CA-168819, issued on April 13, 2016. This matter was heard by Judge Rosas on March 8, 2016.

This case involves bargaining for an initial collective-bargaining agreement between UPS Supply Chain Solutions, Inc. (Respondent) and Union de Tronquistas de PR, Local 901, International Brotherhood of Teamsters (the Union) with respect to a unit of approximately 15 warehouse employees employed by Respondent in Caguas, Puerto Rico. The ALJ properly found that Respondent violated Section 8(a)(1) and (5) of the Act, by refusing to meet and bargain with the Union for an initial collective-bargaining agreement from December 10, 2015 through March 2016. However, the ALJ erroneously determined that Respondent's insistence that the Union pay to translate its initial contract proposal from Spanish to English was a mandatory subject of bargaining, and further erred by failing to find that Respondent violated the Act by conditioning bargaining on the Union's payment of that cost as a threshold matter, and by failing to make significant counterproposals to the Union's bargaining demands. [ALJD 10:41-46].<sup>1</sup> Judge Rosas mistakenly concluded that Respondent could lawfully demand that the Union translate the proposed collective-bargaining agreement from Spanish to English because this document affects the "terms and conditions of employment" contained in the document itself. [ALJD 10:1-5]. The ALJ further erred by finding that principals of Respondent would not be

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<sup>1</sup> As used herein, the numbers following abbreviation "ALJD" refer to page and line numbers of the Administrative Law Judge's Decision. For example, ALJD 2:1-7; "Tr." refers to page and line numbers of the transcript. For example, "Tr. 1:1-5"; "GC Ex." references are to the General Counsel's Exhibits; and "J Ex." references are to the Joint Exhibits.

able to understand the Union's proposals and hence, would not be able to bargain with the Union, notwithstanding the lack of evidence to that effect. [ALJD 9:37 to 10:6 and fn. 29].

## **II. STATEMENT OF ISSUES**

The central issues presented are:

1. Did the ALJ err by (a) finding that there are company officials based in Georgia who were involved in the bargaining process through Silva-Cofresí, (b) inferring that those officials have some indirect role in bargaining with the Union and that they would later have some direct role in bargaining with the Union, (c) inferring that Silva-Cofresí was referring to a company official or officials with some role in the collective-bargaining agreement approval process, and (d) finding that at least one of those company officials is not fluent in Spanish? (Exception 1).

2. Did the ALJ err by failing to find that Respondent conditioned bargaining on a permissive subject of bargaining in a threshold negotiating ground rule, by insisting that the Union pay for the cost of translating its initial collective-bargaining proposal from Spanish to English, notwithstanding that all persons involved in negotiations, including Respondent's two representatives – its counsel and Human Resources Manager – communicated in Spanish, and that the claimed need for translation to English was solely for Respondent's convenience with respect to a claim that other unnamed Respondent officials who **might** later become involved in negotiations, but who never appeared at the bargaining table or otherwise communicated with the Union, would need an English translation, and that Respondent thereby violated Section 8(a)(1) and (5) of the Act? (Exceptions 2, 4 and 5).

3. Did the ALJ err by failing to find that Respondent did not make significant counterproposals to the Union's contract proposals, and that by this conduct, in view of the

totality of the circumstances of its conduct in this matter, Respondent violated Section 8(a)(1) and (5) of the Act? (Exception 3).

4. What is the appropriate remedy for Respondent's unlawful conduct? (Exception 6).

### **III. STATEMENT OF FACTS**

#### **A. Background**

Respondent's principal place of business is in Atlanta, Georgia, and Respondent operates at various locations throughout the United States, including a facility in Caguas, Puerto Rico. Respondent provides transportation and logistics services worldwide, and its parent corporation is United Parcel Service, Inc. [ALJD 2: 30-37; GC Ex. 1(e), paragraphs 2(a) – 2(d) and GC Ex. 1(r), paragraph 2].

On July 29, 2014, the Union was certified as the exclusive collective-bargaining representative of all regular full-time and regular part-time warehouse employees who work at the Respondent's facility in Caguas, Puerto Rico (the Unit). The unit is composed of approximately 15 employees. [ALJD 3:5-8; GC Ex. 1(e) paragraphs 5(a) through (c)]. The unit members speak Spanish. [Tr. 21:5-10]. Since certification, the parties have not signed an initial collective-bargaining agreement. [Tr. 21:11-13].

On December 16, 2014, Union Representative Lucas Alturet (Alturet) sent a letter to Respondent's Human Resources Director Ilka Ramón (Ramón), requesting available dates to begin bargaining. [ALJD 3:24-26; J Ex. 1]. In the same letter, Alturet informed Ramón that the Union would be forwarding its initial full collective-bargaining proposal promptly. On December 19, 2014, Respondent's legal representative, José Silva Cofresí (Silva), replied via email that Respondent would schedule bargaining as soon as the Union provided it with the Union's initial

contract proposals. [ALJD 3: 26-28; J Ex. 2]. There is no evidence that Respondent requested that the proposal be written in English or translated to English at that time.

On February 18, 2015, Union Representative Carrillo sent a letter to Ramón attaching the Union's initial proposals for a collective-bargaining agreement and making himself available for bargaining the last week of February. [ALJD 3: 30-32; J Ex. 3; GC Ex. 2]. The Union's 67 pages of proposals, covering the full range of items the Union sought in a collective-bargaining agreement, were in Spanish.<sup>2</sup> [ALJD 3:30-32; GC Ex. 2; Tr. 21:14 to 22:4].

In this regard, Spanish (along with English) is an official language of the Government of Puerto Rico.<sup>3</sup> In addition, the U.S. Census Bureau's American Community Survey for Puerto Rico for the year 2014 shows that of the total population of Puerto Rico, 99.0% are of Hispanic or Latino origin, 94.9% speak a language other than English at home, and 79.4% speak English less than "very well."<sup>4</sup> [ALJD 3:fn 5].

On March 25, 2015, Respondent counsel Silva notified Union Representative Carrillo that due to the loss of an important client, the Employer would be forced to lay-off several

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<sup>2</sup> Ironically, for trial, General Counsel was required to translate the Union's initial collective-bargaining proposals from Spanish to English, and they are in evidence as GC Ex. 2(b). For all exhibits in which the original was in Spanish, (a) is the Spanish version and (b) is the English translation prepared for introduction at the trial.

<sup>3</sup> See, 1 L.P.R.A. sec. 59. The Board is requested to take administrative notice of this statute pursuant to Fed. R. of Evid. 201. The Board is empowered to take administrative notice of state and local statutes and regulations. See, *Greenlawn Funeral Home, Inc.*, 243 NLRB 673, 674 at fn. 2 (1979). It must be noted that Judge Rosas cited Section 59(a) of the Puerto Rico statute which provides that "[w]hen necessary, written translations and oral interpretations shall be made from one language to the other so that the interested parties can understand any proceeding or communication in said languages." 1 L.P.R.A. sec. 59(a). Judge Rosas did not mention that the statute only applies to proceedings by the Government of Puerto Rico and government dependencies. 1 L.P.R.A. sec. 59

<sup>4</sup> See, United States Census Bureau, [2014 American Community Survey for Puerto Rico](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_5YR_S0501&prodType=table), available at [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_14\\_5YR\\_S0501&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_5YR_S0501&prodType=table). The Board is requested to take administrative notice of this Census Bureau survey. Fed. R. of Evid. 201(b) provides that such notice may be taken of a fact that is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Reliable federal government sources, such as the aforementioned Census Bureau survey, can be used to take administrative notice. See, *San Manuel Indian Bingo*, 341 NLRB 1055, 1055 at fn. 3 (2004).

employees. Silva invited the Union to meet and bargain concerning these lay-offs and the effects on the bargaining unit. [ALJD 3:34-36; J Ex. 4]. The meeting was scheduled by mutual agreement, to be held at the Union's office that same month. The meeting was attended by Ramón, Silva and Union Representative Carrillo. [ALJD 4:1-3; Tr. 68:11-16]. At the meeting, the parties communicated in Spanish, and did not engage in any bargaining concerning an initial collective-bargaining agreement. [ALJD 4:1-3; Tr. 69:14-20]. However, they reached an agreement regarding the lay-offs. [ALJD 4:1-3; Tr. 45:9-20].

**B. The parties' three collective-bargaining meetings and Respondent's insistence on the translation of the Union's initial proposal into English**

On April 9, 2015, the parties held their first bargaining meeting regarding an initial collective-bargaining agreement. This first meeting was held at Silva's office and was attended by Ramón and Silva, representing Respondent. Silva served as the spokesperson for Respondent. The Union was represented by Carrillo and employee Janytza Jiménez (Jiménez). [ALJD 4:5-12; Tr. 25:1-21]. Carrillo served as the spokesperson for the Union. At the first meeting the Union explained its proposal to Respondent. [Tr. 24:10-16; 26:3-7; 50:4-7]. The parties did not agree concerning any provisions to be incorporated in an initial collective-bargaining agreement, and Respondent did not submit any counterproposals despite the fact that it had been in possession of the Union's proposals since February 18, 2015, for over seven weeks. [ALJD 4:34-36; Tr. 28:10-13].

Bargaining at this first meeting, as in all subsequent meetings, was conducted solely in Spanish. All written communications between the parties were also in Spanish, with only one exception, Respondent's ground rules proposal, which was written in English. [ALJD 4:5-6; Tr. 25:22 to 26:2; J Ex. 1-20; Respondent's ground rules proposal – J Ex. 5(a)]. Respondent provided the ground rules proposal to the Union at the first meeting and there was some

discussion of it at that time, but specific discussion of Respondent's proposed Ground Rule #3, that the parties' bargaining proposals and counterproposals be made in English, was not discussed until the parties' second meeting on July 15, 2015. [ALJD 4:5-12; Tr. 26:3 to 28:9].

On July 15, 2015, the parties met for a second time to continue with the negotiations for a first contract. [ALJD 4:27-32; Tr. 28:18-21]. The meeting was again held at Respondent counsel Silva's office and the same persons who attended the first meeting were present during this second meeting. Silva served as spokesperson for Respondent and Carrillo for the Union. [Tr. 28:22 to 29:8]. All discussions were again conducted in Spanish. [ALJD 4:5-6; Tr. 28:9-11]. During this second meeting, the parties further discussed Respondent's proposed ground rules. [ALJD 4: 27-32; Tr. 28: 1-5; J Ex. 5]. These included rule #3:

3. The proposals and counterproposals will be made in writing, in English, duly identified by date and the name of the proposing party. It may be done in handwriting. [JX 5(a)].

Carrillo told Silva that he did not agree with proposed ground rule #3, and that if the Employer needed the Union's initial proposals translated to English, Respondent had to pay the total cost of translation. [ALJD 4:27-32; Tr. 29:22 to 30:4]. In response, Silva proposed that each party pay 50% of the cost of translating the Union's initial proposals into English. [ALJD 4:27-32; Tr. 30: 8-13]. The Union rejected this offer, and again informed Silva that the Union would not agree to proposed ground rule #3. [Tr. 30:14-22]. During the second meeting, the parties did not reach agreement on any terms of an initial collective-bargaining agreement. [ALJD 4:34-36; Tr. 31: 1-4].

That same day, Carrillo sent Respondent Human Resources Manager Ramón a letter requesting several documents as part of the negotiations. [J Ex. 6]. On July 20, 2015, Respondent

responded to the Union's request for information. [ALJD 5:1-4; J Ex. 7]. This exchange was in Spanish. [J Ex. 6(a) and 7(a)].

On July 24, 2015, the parties met for a third time. [ALJD 5:6-15; Tr. 51:10-11]. The meeting was held at Silva's office and the same persons present at the prior two meetings were in attendance. [Tr. 31:7-20]. Conversations at this meeting were again in Spanish. [ALJD 4:5-6; Tr. 31:21-23]. At this final meeting, Carrillo requested Respondent's counterproposals for a collective-bargaining agreement. [Tr. 32:2-4]. However, Respondent still did not submit a counterproposal. [ALJD 5:6-15; Tr. 74:2-4]. Silva told Carrillo that bargaining could not continue until they agreed on the issue of the translation of the Union's initial proposal into English, as required by Respondent's proposed ground rule #3. [ALJD 5:11-15; Tr. 33:13-21]. Silva explained that rule #3 was based on instructions from "somebody in the United States." [Tr. 33:16-18]. Again, during this third and final bargaining meeting, the Union rejected proposed ground rule #3. [ALJD 5:11-15; Tr. 33:22-24].

During the July 24, 2015, meeting, the parties discussed several provisions of the Union's initial contract proposals. Carrillo took notes of these discussions, including a handful of verbal language proposals regarding the Union's initial proposals made by Respondent at that meeting, most of which were relatively inconsequential. [ALJD 5:8-10; Tr. 70:16-21]. Respondent verbally proposed the following: moving part of Article V, Maintaining Employment Conditions, Section 1 concerning layoffs to Article 15, Seniority [Tr. 52:2-12; GC Ex. 2(a) and 2(b), p.8, 32]; changing the term "country manager" to "facility manager" in Article V, Section 4 [Tr. 52:25 to 55:3; GC Ex. 2(a) and 2(b), p.10]; a six month rather than 30 day probationary period in Article 6, Probationary Period [Tr. 55:6-19; GC Ex. 2(a) and 2(b), p.11]; providing that written notification may be made by electronic mail in Article IX – Release of Liability, Section

5 [Tr. 56:6 to 57:2; GC Ex. 2(a), p.10; GC Ex. 2(b), p.18]; adding a sentence requiring prior notification and approval by Respondent to Article X - Inspection Privileges, Section 1 [Tr. 57:3-19; GC Ex. 2(a) and 2(b), p.20]; adding insubordination and dishonesty to the list of reasons for discharge that do not require progressive discipline and changing from five to four steps of progressive discipline in Article XII – Disciplinary Actions<sup>5</sup> [Tr. 57:20 to 58:10; GC Ex. 2(a) and 2(b), p.24-26]; requiring that arbitration decisions be “in accordance to law” in the Union’s proposed Article XIII, Grievance and Arbitration Procedure [Tr. 58:14 to 59:2; GC Ex. 2(a) and 2(b), p.27]; and reduce the number of holidays from 13 to 7 in Article XXX [Tr. 62:3-16; GC Ex. 2(a), p.59; GC Ex. 2(b), p.57].

However, the parties did not agree on any term or sign any agreement concerning any section of an initial collective-bargaining agreement. [ALJD 5:6-8; Tr. 71:17-20]. There is no evidence that Respondent reduced any of its verbal proposals to writing, contrary to the requirements of its own proposed ground rule #3, which required that proposals and counterproposals be made in writing. [J Ex. 5(a)].

Respondent’s chief spokesperson Silva admitted in Respondent’s affirmative defenses in the answers to the complaints in this matter that Respondent insisted that the Union pay for half of the cost of translating its contract proposal. [GC Exs. 1(e) and 1(q), page 3, paragraph 16].

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<sup>5</sup> However, the Union’s proposal already effectively included the reasons of insubordination and dishonesty as grounds for discharge that do not require progressive discipline. Thus, the Union’s proposal included the following reasons for summary discharge that fall within the definition of dishonesty, “Illegal appropriation of assets belonging to the Company or under Company custody ...Robbery, theft, or falsifying Company or client documents; ...” and the following reason for summary discharge that fits the definition of insubordination: “Whenever an employee refused to perform a task or follow a supervisor’s instruction, as long as [the instruction] does not endanger the employee’s health and/or safety; ....” [GC Ex. 2(b), p.24].

**C. The lack of evidence that Respondent had a “behind the scenes” or potential future negotiator who was not fluent in Spanish**

At the hearing, Respondent failed to present either Silva or Ramón, its other negotiator, as witnesses. Nor did Respondent present any other witnesses. In fact, Respondent presented no evidence at all, except for the Joint Exhibits submitted by all parties.

There is no evidence that Respondent ever unequivocally, or with any degree of certainty, informed the Union that non-Spanish speaking persons would directly participate in the bargaining process with the Union. There is no evidence that any such persons communicated with the Union representatives at any time in connection with contract negotiations and, as described above, the evidence shows that communications between the parties were almost exclusively in Spanish, and that all of those involved in bargaining were fluent in Spanish. [ALJD 4:5-8; Tr. 25:22 to 26:2; 28: 9-11]. There is no evidence that Respondent provided the Union with the name or position of any non-Spanish speaking bargainer who was or would be involved in negotiations either at, or away from, the bargaining table. In addition, despite Silva’s representation to the Union, there is no probative evidence that a Respondent official “in the United States” instructed Respondent to propose ground rule 3 or any other ground rules, or that contract proposals would be reviewed or approved by someone who was not at the bargaining table and/or who was not fluent in Spanish.

**D. The Union’s attempts to continue bargaining; Respondent’s continued insistence that the Union pay for half of the cost of translating its contract proposals**

On August 6, 2015, Carrillo sent a letter to Ramón asking about the status of the negotiations and requesting dates to continue bargaining. Carrillo also wrote that if Respondent failed to suggest dates to continue bargaining, the Union would take immediate action due to

Respondent's unlawful requirement that the Union bear half the cost of translating its initial proposal into English. [ALJD 5:17-23; J Ex. 8].

On August 7, 2015, Silva responded to Carrillo's letter. He wrote that since the beginning of negotiations Respondent had requested that the Union submit its proposal in the English language because the Union's proposals had to be "verified by people in the United States who only speak English." Silva further wrote, "Also, as part of the negotiation team, people from the U.S. who only speak English **may** come down."<sup>6</sup> [ALJD 5:23-36; J Ex. 9, emphasis supplied]. Finally, Silva invited Carrillo to continue bargaining. [ALJD 5:25-36; J Ex. 9]. However, Silva did not provide dates to meet and bargain. [J Ex. 9].

After receiving this letter, on September 2, 2015, the Union filed the charge in Case 12-CA-159257 against Respondent at the NLRB. [ALJD 5:38-39; GC Ex. 1(a); Tr. 35:10-18].

While this charge was pending investigation, on November 19, 2015, Silva sent a letter to Carrillo inviting the Union to continue negotiations for an initial collective-bargaining agreement. However, Silva did not offer any dates. [ALJD 6:4-10; J Ex. 10]. On November 20, 2015, Carrillo replied to Silva's letter, requesting Respondent to provide dates to continue bargaining, and he asked Silva whether the November 19 invitation to continue bargaining meant that Respondent was abandoning its condition that the Union translate its initial proposal into English. [ALJD 6:4-10; J Ex. 11]. However, Respondent failed to reply to Carrillo's letter. [Tr. 36: 12-14].

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<sup>6</sup> The letter in evidence, J Ex. 9, is rank hearsay as to the truth of the matters asserted therein by Silva. Thus, there is no probative evidence that there were unspecified "people in the U.S. who only speak English" who in fact were involved in the review of negotiations or who might later become directly involved in the bargaining process.

**E. Respondent's failure to meet and bargain with the Union at all since December 10, 2015**

On December 8, 2015, Carrillo sent another letter to Silva, requesting again that Respondent provide dates to continue bargaining. [ALJD 6:4-10; J Ex. 12]. Silva replied on December 10, requesting Carrillo to call him to coordinate the dates. [ALJD 6:12-17; J Ex. 13]. According to Carrillo, he then called Silva, and Silva explained that the Respondent's business was, at the time, experiencing high season, and thus, they would be unable to provide bargaining dates for December. However, rather than offering dates for bargaining after December, Silva told Carrillo that when the high season was over, Respondent would provide the Union with available dates to bargain. [ALJD 6:12-17; Tr. 37: 5-9].

At around the end of December 2015 or the beginning of January, 2016, Carrillo called Silva to inquire about potential bargaining dates now that Respondent's high season was over. This time, Silva said that Respondent's bargaining committee member Ramón was out on annual leave, and would return the next week. [ALJD 6:19-26]. Accordingly, Silva promised to get back to Carrillo to provide bargaining dates. [Tr. 37:5-19]. However, Silva failed to contact Carrillo to provide dates. [Tr. 37:20-22].

Not having heard from Silva, on January 27, 2016, Carrillo sent a letter to Silva and again requested that Respondent provide dates to meet and bargain without conditioning the meetings to the Union submitting its initial proposal in English. [ALJD 6:19-26; J Ex. 14]. Silva replied to Carrillo's letter that same day, but he did not provide any dates to meet and bargain, and merely stated that there appeared to have been a misunderstanding between them, because the last time that they had spoken, they had agreed to wait for the outcome of the case pending before the Board (12-CA- 159257) and to continue bargaining afterwards. Silva ended the letter stating that he would be contacting Carrillo soon. [ALJD 6:28-33; J Ex. 15]. However, Carrillo never

agreed with Silva to postpone further bargaining or to make any bargaining contingent upon the outcome of the case pending before the Board. [ALJD 6:35-37; Tr. 38:10-22].

On February 5, 2016, Silva sent a letter to Carrillo reiterating Respondent's offer to cover 50% of the costs of translating the Union's proposal.<sup>7</sup> In the same letter Silva invited the Union to continue with the bargaining process on February 24, 2016, at 10:00 a.m. at Silva's office. [ALJD 7:1-5; J Ex. 16].

By letter sent via email and mail on February 8, 2016, Carrillo replied to Silva confirming his agreement to meet on February 24. In addition, regarding Respondent's offer to pay for half of the cost to translate the Union's contract proposal (to English), Carrillo stated that Respondent had conditioned the bargaining process upon the Union's translation of its initial proposal into English. Carrillo reminded Silva that the Union had offered to exchange subsequent proposals in English as well as to have the final contract written in English, and to split the translation costs of the same. In this letter, Carrillo stated that notwithstanding his offer, Respondent had insisted on conditioning further bargaining on (the Union's payment for half of the cost of) the translation of the Union's initial proposal. Finally, Carrillo again confirmed that the Union would attend the February 24<sup>th</sup> meeting, stating, "We will be there on the day that you offered to see how the conditions that were imposed by the company have changed ....". [ALJD 7:4-19; J Ex. 17].

The bargaining meeting proposed by Respondent for February 24, 2016 did not take place. [Tr. 40:21-23]. Rather, on the morning of February 23, the day before the scheduled meeting, Silva sent a text message to Carrillo, at 11:28 a.m., asking if he was coming to bargain the following day, and Carrillo replied "yes." Six hours later that same day, at 5:30 p.m., Silva

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<sup>7</sup> This offer is another example of Respondent's chief spokesperson Silva's admitted insistence that the Union pay for the other half of that cost. [GC 1(e) and GC1(q), page 3, paragraph 16 of Respondent's affirmative defenses].

sent another text message to Carrillo, canceling the February 24<sup>th</sup> meeting and requesting Carrillo to contact him to schedule other dates for bargaining. In the text message, Silva asserted that the reason for the cancelation was that Carrillo had not confirmed his willingness to attend until that day and, as a result, Ramón was not available to meet on the February 24, 2016. Carrillo replied that Silva had Carrillo's written confirmation of attendance for a while, and that he would consult his attorneys to determine the next steps in the process. [ALJD 7:21-32; J Ex. 18]. Later on the evening of February 23, 2016, Carrillo sent an email to Silva, expressing surprise about the cancelation of the February 24 meeting, and again clarifying that the Union had confirmed its attendance well in advance of February 24. [ALJD 7:21-32; J Ex. 19].

On February 24, 2016, Silva sent an email to Carrillo, inviting the Union to meet and bargain on March 22 and 23, 2016, at his office. [J Ex. 20]. As of the date the hearing, March 8, the Union had not confirmed these proposed dates because Carrillo had made arrangements to bargain on those same dates with another employer concerning another unit and he was waiting for a reply from that other employer before contacting Silva regarding the need for alternative bargaining dates. [Tr. 43:4-11].

As set forth in Silva's letter of February 5, 2016, Respondent still insisted that the Union's initial contract proposal must be translated into English and that the Union must pay half of the cost in order for negotiations to proceed in a meaningful way. [ALJD 7:1-5; J Ex. 16]. At no time did Respondent withdraw or temper that demand.

#### **IV. ARGUMENT**

**THE ALJ ERRED BY FAILING TO FIND THAT RESPONDENT VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY INSISTING ON A PERMISSIVE SUBJECT OF BARGAINING AS A CONDITION OF CONTINUING NEGOTIATIONS FOR AN INITIAL COLLECTIVE-BARGAINING AGREEMENT AND BY FAILING TO MAKE SIGNIFICANT COUNTERPROPOSALS TO THE UNION'S BARGAINING DEMANDS THEREAFTER. (Exceptions 1 through 5).**

**A. Threshold matters such as bargaining ground rules are permissive subjects of bargaining.**

Under the Act, an employer and the chosen representative of the employees are under an obligation to bargain concerning wages, hours and other terms and conditions of employment. Bargaining subjects have traditionally been divided into two categories: mandatory and permissive. In *NLRB v. Wooster Division of Borg-Warner*, 356 U.S. 342 (1958), the Supreme Court held that wages, hours and other employee terms of employment are mandatory subjects, and the parties are under a statutory duty to bargain concerning the same. The Court specified that “[t]he duty is limited to those subjects, and within that area neither party is legally obligated to yield.” *Id.* at 349. As such, a party can bargain to impasse concerning a matter deemed to be mandatory under the Act.

However, in *Borg-Warner, supra*, the Court also held that “[a]s to other matters ... each party is free to bargain or not to bargain, and to agree or not to agree.” *Id.* Therefore, matters outside the scope of wages, hours and terms of employment are permissive, and the parties are not under an obligation to bargain concerning these specific subjects. Since the parties have no duty to bargain over permissive subjects, the Board has found it to be a violation of Section 8(a)(5) to insist on a non-mandatory subject, regardless of the parties’ good faith. *Bartlett-Collins*, 237 NLRB 770 (1978). Therefore, insisting on permissive subjects of bargaining constitutes a *per se* violation of Section 8(a)(5).

Examples of the Board's application of the principles of *Borg-Warner, supra*, to permissive subjects of bargaining include *Smurfit-Stone Container*, 357 NLRB 1732, 1733-1734 (2011) (employer's insistence that, as a condition to bargain the effects of a plant closure, the Union had to accept a midterm cancellation of the collective-bargaining agreement, violated Section 8(a)(5) of the Act); *Salvation Army of Massachusetts*, 271 NLRB 195, 198-199 (1984) (employer violated Section 8(a)(5) by conditioning further negotiations upon the union's acceptance of a contract clause recognizing the employer's ecclesiastical and religious mission, a permissive subject over which the employer could not insist to impasse).

The Board has also found violations of Section 8(a)(5) concerning matters that arise outside the scope of a written collective-bargaining agreement. Specifically, the Board has analyzed threshold and procedural matters that occur at the outset of the bargaining process. In *Bartlett-Collins, supra*, an employer insisted on the presence of a court reporter as a condition for further bargaining. The Board held that this issue did not fall within the scope of any mandatory subject of bargaining, and the presence of a court reporter during bargaining could "properly be grouped with those topics defined by the Supreme Court as 'other matters' about which the parties may lawfully bargain, if they so desire, but over which neither party is lawfully entitled to insist to impasse." 237 NLRB at 772-73.

The *Bartlett-Collins* Board was adamant that "[t]he question of whether a court reporter should be present during negotiations is a threshold matter, preliminary and subordinate to substantive negotiations such as are encompassed within the phrase 'wages, hours, and other terms and conditions of employment'." *Id.* at 773. As such, a party could not obstruct the beginning of the bargaining process by insisting on a threshold matter unrelated to conditions of employment. The Board explained this holding as part of its "statutory responsibility to foster

and encourage meaningful collective bargaining, we believe that we would be avoiding that responsibility if we were to permit a party to stifle negotiations in their inception over such a threshold issue.” *Id.*; see also

The issue of permissive “threshold matters” was further analyzed in *Timken Co.*, 301 NLRB 610, 614-615 (1991), where an employer was found to have violated the Act by conditioning bargaining sessions on the union’s acceptance of the presence of a stenographer during the meetings. The employer argued that, in the past, the union had accepted the presence of the stenographer and, thus, the matter had become mandatory in their labor relationship. Nevertheless, the *Timken* Board found that the employer’s conditioning of bargaining over a threshold matter violated Section 8(a)(5), because it stifled negotiations from the start. As such, no party can lawfully insist on a permissive subject over the other party’s objection, even if the matter had been accepted by the other party in the past. *Id.* at 614.

Finally, in *Vanguard Fire & Supply Co.*, 345 NLRB 1016, 1017-1018, 1042-1043 (2005), an employer conditioned further negotiations upon the union’s submission of an agenda of the subjects to be discussed during the meetings. The Board held the employer had no legal right to precondition bargaining meetings over this threshold matter, and hence, violated Section 8(a)(5) by insisting on a permissive subject as a condition for any bargaining taking place.

**B. Respondent’s steadfast insistence on conditioning meaningful bargaining upon the Union’s payment of the cost of translating its initial contract proposals to English is a permissive subject of bargaining in the context of this case, and violated Section 8(a)(1) and (5) of the Act.**

Even though the language in which contract proposals are made is a threshold and procedural matter, the Board has not addressed the question of whether that constitutes a permissive or mandatory subject of bargaining. In a case preceding *Bartlett-Collins*, *supra*, the Board found that an employer failed in its duty to bargain in good faith by not making itself

available to resolve the issue concerning the language in which bargaining would take place. In *Call, Burnup & Sims*, 159 NLRB 1661 (1966), a case arising in the Commonwealth of Puerto Rico, an employer insisted that, as a precondition to begin the bargaining process, the union must submit its initial contract proposal in English and that all bargaining must be conducted in English, since none of its representatives spoke or understood Spanish. The Board held that with his conduct, the employer “was not attempting in good faith to make itself available so as to meet its statutory obligation to meet at reasonable times.” *Id.* at 1678-79. Therefore, since it did not even attempt to make its representative available to resolve the language issue, the employer had refused to bargain in good faith with the Union.

The facts of *Call, Burnup & Sims, supra*, are clearly distinguishable from those in the instant case. The key difference is that in this case all negotiators are fluent in Spanish, all negotiations have been conducted in Spanish, and there is no probative evidence that Respondent has behind the scenes or future negotiators who require an English translation of the Union’s proposals, whereas in *Call, Burnup & Sims*, none of the employer’s representatives spoke or understood Spanish. Here, Respondent’s negotiators are perfectly capable of conducting negotiations in Spanish, and all negotiations have been held locally by the parties’ local representatives in Puerto Rico, where Spanish is clearly the predominant spoken and written language. There is no claim that Respondent’s negotiators lack authority to bind Respondent to an agreement.

The ALJ’s decision contradicts the principles announced by the Board in *Bartlett-Collins, supra*. The language in which the proposals are submitted by the parties is merely an issue of form, completely unrelated to the substance of subjects over which the Act requires good faith negotiations. In the circumstances of this case, the condition imposed by Respondent is akin to

preliminary and threshold matters like the presence of stenographers and court reporters at bargaining meetings, that the Board already has determined in *Bartlett-Collins, supra*, and its progeny constitute permissive subjects of bargaining. Respondent's demand is solely for its benefit, so that proposals may be reviewed by an unnamed person or persons who are not at the bargaining table and may never be at the bargaining table.

In this regard a factor to be considered as to whether an employer (or union) is bargaining in good faith is whether the employer has given its negotiators sufficient authority to engage in meaningful collective bargaining. *S-B Mfg. Co.*, 270 NLRB 485, 492 (1984). Presumably, Spanish speakers Silva and Ramón have sufficient bargaining authority to engage in meaningful negotiations. As noted above, these negotiators, Silva and Ramón, have conducted all negotiations with the Union in Spanish, and have exchanged all but one of their many written communications with the Union in Spanish (the sole exception being Respondent's ground rules proposals, including the proposal that all contract proposals be written and in English). In fact, Respondent's scant verbal "counterproposals" to the Union have been in Spanish, rather than written in English, as required by Respondent's own proposed ground rules.

Respondent has claimed to the Union that it has non-Spanish speaking "people in the U.S." (referring to the 50 states as opposed to the Commonwealth of Puerto Rico), who require an English translation of the Union's proposals and who may later become directly involved in bargaining. However, there is no probative evidence supporting these hearsay assertions. Respondent has yet to name any such "people" or to inform the Union when they "may" get involved in negotiations, or whether it is certain that they will become involved in negotiations. Even, assuming for the sake of argument that officials of Respondent or its corporate parent, United Parcel Service, Inc. intend to review the Union's proposals and/or intend to later become

directly involved in negotiations, it is clear that the demand for an English translation is solely for Respondent's convenience.

Thus, Respondent's current negotiators, Silva and Ramón, are perfectly capable of explaining the Union's proposals to such behind the scenes officials. Respondent's predicate to meaningful negotiations is, therefore, a permissive subject of bargaining, distant and unrelated to the "wages, hours and other terms of employment." In these circumstances, if Respondent wants a Spanish translation, it should not be permitted stall negotiations for months and months, as it has, by requiring the Union to pay for it. The fact that Respondent has offered to share the cost of translation does not make its insistence on this threshold conditions lawful, because the Union has repeatedly flatly rejected this demand. Similarly, in view of the Union's unvarying rejection of the demand that it pay for the translation of its initial proposal, the Union's offer to submit its subsequent proposals in English, and to have the final contract written in English, does not negate the unlawful nature of Respondent's insistence that the Union pay for translation of its initial proposals before bargaining can seriously progress.

The fact that Respondent's demand is a permissive subject of bargaining and does not encompass a term or condition of employment is further illuminated by the fact that Respondent did not request that the Union's proposals be written in English at the time it asked the Union for its contract proposals on December 19, 2014, and that it still did not ask for an English translation when the Union provided Respondent with its Spanish language proposals on February 18, 2015. Rather, Respondent waited until the first meeting, on April 9, 2015, over seven weeks after receiving the Union's proposals, and nearly four months after asking the Union for its proposals, before demanding that the Union provide the proposals in English. Thereafter, and since July 15, 2015, Respondent has further specified and repeatedly insisted that

the Union must pay for at least half of the cost of translation of its lengthy package of initial proposals from Spanish to English.

Despite the Union's steadfast rejection of Respondent's proposed ground rule 3 with respect to payment of the translation costs regarding its initial proposals, even after the bargaining meeting of July 24, 2015, and continuing until the trial in this matter, Respondent has repeated its insistence that the Union pay for that translation, including in Silva's letter to the Union dated August 7, 2015, half a year later in Silva's letter to the Union dated February 5, 2016, and as admitted in Respondent's answers to the complaints.

To distinguish *Bartlett-Collins, supra*, and its progeny from the present case, Judge Rosas gave undue weight to a footnote in *Destileria Seralles, Inc.*, 289 NLRB 51, 58 fn, 17 (1988). In that case, citing *General Electric Co.*, 173 NLRB 253, 257 (1968), the Board stated that some logistical matters are "just as much part of the process of collective bargaining as the negotiations over wages, hours, etc." 289 NLRB at 58, fn. 17. But these two cases are easily distinguishable from the situation involved in this case.

To begin with, *General Electric Co., supra*, was decided ten years before *Bartlett-Collins, supra*, and is therefore not based on the rationale used by the Board to establish the issues that constitute permissive subjects of bargaining. In addition, *Destileria Seralles, Inc., supra*, was a case involving an employer's alleged voluntary recognition of a Union because it engaged in some "preliminary steps" that were akin to bargaining. This is a completely different context than the one involved in this case, in which the Union has been certified by the Board, the parties are beginning the bargaining process, and Respondent has used a threshold matter as a shield to indefinitely put on hold the negotiations for an initial contract with the Union.

The principles of *Bartlett-Collins, supra*, hold that the parties cannot stall negotiations by insisting on such threshold or procedural matters. As the Board has explained, these issues are non-essential to the bargaining process required by the Act, and are subordinate to the true mandatory subjects of bargaining, such as wages, hours and other terms of employment. Allowing Respondent to indefinitely delay the bargaining process until the Union accedes to its demand that the Union pay for the translations of its initial contract proposal would “permit a party to stifle negotiations in their inception over such a threshold issue.” *Timken Co.*, 301 NLRB at 614.

The instant case involves a situation comparable to the one analyzed by the Board in *Vanguard Fire & Supply Co., supra*. As discussed, in that case an employer conditioned further bargaining to the Union submitting a detailed agenda of bargaining topics before the parties’ next meeting. 345 NLRB at 1017. Under the rationale used by Judge Rosas in his decision, the condition established by the Employer in *Vanguard Fire & Supply Co., supra*, would have been acceptable because these agendas were related to “wages, hours and other terms of employment,” and thus, mandatory subjects of bargaining. This would turn on its head the legal analysis announced by the Board in *Bartlett-Collins, supra*, by allowing threshold and logistical matters to be used as hurdles to freeze the bargaining process by merely connecting them to the discussion of wages and hours of employment.

The ALJ’s determination allows Respondent to hold hostage the bargaining process by insisting that the Union’s initial proposal be translated into English. The repercussions of this decision are profound, particularly in the Commonwealth of Puerto Rico in view of the fact that only about 20 percent of the population of the territory even speaks English very well, much less

reads and writes English very well. [ALJD 3:fn.5].<sup>8</sup> To permit a large multinational corporation like Respondent or a large international union to impose an English language requirement as a threshold to negotiations with an employer or union in Puerto Rico, particularly where those at the bargaining table are primarily Spanish speakers, as in the instant case, would unfairly burden a local union or employer whose bargainers do not read, write or even speak English well.

But the implications of the Judge Rosas' decision are not limited to a Spanish vs. English scenario. His rationale provides a shield to any multinational corporation or international union to fend off its respective duty to bargain under the Act. The ALJ's decision might be expanded to permit any multinational employer or international union to send to the bargaining table a representative that speaks a language that is not understood by the other party, and then insist to the point of impasse that all bargaining proposals must be translated to the foreign language. This could significantly raise the cost of bargaining, as Respondent's demand would significantly raise the cost to the Union if the Union agreed, and bar true negotiations. In *Bartlett-Collins, supra*, the Board made it clear that the Act does not allow such procedural gambits.

**C. Respondent's failure to make significant counterproposals to the Union further establishes that it violated Section 8(a)(1) and (5) of the Act.**

Although Respondent made a handful of substantive counterproposals in its meetings with the Union in July 2015, these counterproposals were largely inconsequential "housekeeping" or minor language matters, and at these meetings, and thereafter, Respondent's main focus has been its demand that the Union pay for the translation of its initial proposals, thus unlawfully stalling negotiations. Moreover, despite the handful of verbal counterproposals, mainly addressing little pieces of the Union's proposed articles, Respondent has failed to honor

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<sup>8</sup> See, United States Census Bureau, 2014 American Community Survey for Puerto Rico, available at [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_14\\_5YR\\_S0501&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_5YR_S0501&prodType=table).

the Union's request for written counterproposals and has failed to respond to the vast majority of the Union's bargaining demands.

In addition, although Respondent has made some empty offers to resume meetings, it has unlawfully failed to resume meetings, as the ALJ properly found, and its offers to meet have been coupled with its unlawful insistence on the Union's agreement to pay to translate its bargaining proposals, thus giving the Union little hope that new meetings will be any more productive than the ones that have already occurred, during which Respondent spent significant time insisting on this permissive subject of bargaining.

For all of the above, the totality of Respondent's conduct has placed an unlawful condition on bargaining and delayed bargaining, in violation of Section 8(a)(1) and (5) of the Act.

**V. CONCLUSION AND REMEDIES SOUGHT (Exception 6)**

In summary, Counsel for the General Counsel respectfully urges the Board to grant all of the exceptions to ALJ Rosas' decision, and to find that Respondent violated the Act in all respects alleged in the complaint in Case 12-CA-159257, as amended [GC Exs. 1(c) and 1(j)], in addition to violating the Act in all respect found by ALJ Rosas with respect to the complaint in Case 12-CA-168819 [GC 1(l)]. General Counsel further respectfully urges the Board to order Respondent to take the following specified actions, and provide all other relief deemed appropriate to remedy Respondent's unlawful conduct:

1. Cease and desist from engaging in the above-described unfair labor practices; and cease and desist from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Bargain in good faith with the Union, on request, for the period required by *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), as the recognized bargaining representative in the appropriate unit. In this regard, General counsel submits that Respondent has been violating Section 8(a)(5) of the Act by failing to make counterproposals to the Union's contract proposals since March 2, 2015, within the certification year.

3. Adhere to a bargaining schedule, meet and confer in good faith with the Union with respect to wages, hours and other terms and conditions of employment for a minimum of 24 hours per month and for at least six hours per bargaining session, until a complete collective-bargaining agreement or a bona fide impasse is reached, or until the Union agrees to a respite in bargaining.

4. Prepare written bargaining progress reports every month and submit them to the Regional Director.

5. Have a management official of Respondent read the Notice to Employees in English and Spanish during working time in the presence of a Board Agent at a meeting or meetings scheduled to ensure the widest possible attendance by the unit employees at Respondent's Caguas, Puerto Rico facility, or alternatively, permit a Board Agent to read the Notice to Employees in Spanish during work time in the presence of Respondent's representative at a meeting or meetings scheduled to ensure the widest possible attendance by the unit employees.

6. Post the Notice to Employees in the English and Spanish languages.

The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged. A proposed Notice to Employees is attached hereto as the Appendix.

Dated at San Juan, Puerto Rico, this 11th day of May, 2016.

**/s/Carlos J .Saavedra-Gutiérrez**

Carlos J. Saavedra-Gutiérrez  
Counsel for the General Counsel  
National Labor Relations Board  
Subregion 24  
525 F.D. Roosevelt Ave.  
Suite 1002 La Torre de Plaza  
San Juan, Puerto Rico 00918-1002  
Telephone: (787) 766-3661  
Fax: (787) 766-5478  
E-mail: carlos.saavedra-gutierrez@nlrb.gov

**CERTIFICATE OF SERVICE**

I hereby certify that on May 11, 2016, I served Counsel for the General Counsel's Brief in support of exceptions in the matter of UPS Supply Chain Solutions, Inc., Cases 12-CA-159257 and 12-CA-168819, upon the following persons, by the means set forth below:

**By Electronic Filing to:**

Hon. Gary W. Shinnors  
Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street N.W.  
Washington, DC 20570

**By Electronic Mail to:**

José A. Silva-Cofresí, Esq.  
Alicia Figueroa-Llinás, Esq.  
Fiddler, González & Rodríguez, PSC  
PO Box 363507  
San Juan, PR 00936-3507  
jsilva@fgrlaw.com  
afigueroa@fgrlaw.com

Argenis Carrillo  
Unión de Tronquistas de PR,  
Local 901, IBT  
352 Calle Del Parque  
San Juan, PR 00912-3702  
tronquistalu901@gmail.com

**/s/Carlos J. Saavedra-Gutiérrez**

Carlos J. Saavedra-Gutiérrez  
Counsel for the General Counsel  
National Labor Relations Board, Subregion 24  
525 F.D. Roosevelt Ave.  
La Torre de Plaza, Suite 1002  
San Juan, Puerto Rico 00918-1002  
Telephone: (787) 766-5347  
Fax: (787) 766-5478  
Email: carlos.saavedra-gutierrez@nlrb.gov

## 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 a representative 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** do anything to prevent you from exercising the above rights.

**WE WILL NOT** fail or refuse to meet and bargain at reasonable times and places and in good faith with UNION DE TRONQUISTAS DE PR, LOCAL 901, INTERNATIONAL BROTHERHOOD OF TEAMSTERS as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning their wages, hours of work, and other terms and conditions of employment:

All regular full-time and regular part-time warehouse employees who work at the Employer's facility in Caguas, Puerto Rico, excluding all other employees, guards, and supervisors as defined by the Act.

**WE WILL NOT** insist as a condition of bargaining with the Union for a collective-bargaining agreement that the Union pay to translate its initial Spanish language bargaining proposals to English, and **WE WILL NOT** insist on other improper bargaining conditions.

**WE WILL NOT** cancel previously agreed-upon bargaining sessions.

**WE WILL NOT** in any like or related manner interfere with your rights under Section 7 of the Act.

**WE WILL** recognize the Union as your certified exclusive representative in the unit described above for 1 year commencing on the date we begin good faith collective bargaining with the Union.

**WE WILL**, within 15 days of the Union's request, meet and bargain at reasonable times and places and in good faith with the Union as your exclusive bargaining representative with respect to wages, hours, and other terms and conditions of employment until a full agreement or a bona fide impasse is reached, and if an understanding is reached, embody the understanding in a written agreement. Upon the Union's request, such bargaining sessions shall be held for a

minimum of 24 hours per month, for at least 6 hours per bargaining session, or, in the alternative, on another schedule to which the Union agrees.

**WE WILL** submit written bargaining progress reports every 30 days to the compliance officer for Region 12, and serve copies of those reports on the Union.

**UPS SUPPLY CHAIN SOLUTIONS, INC.**

(Employer)

**Dated:** \_\_\_\_\_ **By:** \_\_\_\_\_  
(Representative) (Title)

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*The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).*

**NLRB Subregion 24**  
525 F.D. Roosevelt Avenue  
Plaza Las Americas Mall  
LaTorre de Plaza, Suite 1002  
San Juan, PR 00918-1002

**Telephone:** (787) 766-5347  
**Hours of Operation:** 8:30 a.m. to 5 p.m.

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**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.