

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

NOVA SOUTHEASTERN UNIVERSITY

and

LOCAL 11, SERVICE EMPLOYEES
INTERNATIONAL UNION

CASES: 12-CA-25114
12-CA-25290
12-CA-25298

**RESPONDENT'S BRIEF IN SUPPORT
OF ITS EXCEPTIONS TO THE
DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE**

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TABLE OF CONTENTS

I. STATEMENT OF THE CASE 1

II. ARGUMENT 3

**A. NOVA’S UNIFORMLY-ENFORCED SOLICITATION POLICY AS APPLIED TO CONTRACTORS IS LAWFUL AND
NECESSARY TO MAINTAIN THE SECURITY OF ITS CAMPUS..... 3**

B. NOVA DID NOT THREATEN OR INTIMIDATE WORKERS 13

 1. *Todaro Was Not a Nova Employee in August 2006* 14

 2. *Todaro Did Not Act as Nova’s Agent in August 2006* 15

 3. *Alleged Actions Not Sufficient To Rise to Level of Violation* 18

C. TODARO DID NOT INTERROGATE SANCHEZ. 21

III. CONCLUSION 24

TABLE OF AUTHORITY

CASES

<i>American Federation of Musicians Local 76</i> , 202 NLRB 620, 621 (1973)	21
<i>Camvac Int'l Inc.</i> , 288 NLRB 816 (1988)	23
<i>D&F Indus., Inc.</i> , 339 NLRB 618 (2003)	18
<i>D.G. Real Estate Inc.</i> , 312 NLRB 999 (1993)	14
<i>Dieckbrader Express</i> , 168 NLRB 867 (1967)	21
<i>Fabric Services, Inc.</i> , 190 NLRB 540 (1971)	5
<i>Hudgens v. NLRB</i> , 424 U.S. 507 (1976)	11
<i>ITT Indus. Inc. v. NLRB</i> , 251 F.3d 995 (D.C. Cir. 2001)	11
<i>Lafayette Park Hotel</i> , 326 NLRB 824 (1998)	8
<i>Lechmere v. NLRB</i> , 502 U.S. 527 (1992)	7
<i>Malbaff Landscape Construction Co.</i> , 172 NLRB 128 (1968)	6
<i>Manimark Corp.</i> , 301 NLRB 599 (1991)	22
<i>Mathews Readymix, Inc.</i> 324 NLRB 1005 (1997)	23
<i>New York, New York, LLC vs. NLRB</i> , 313 F.3d 585 (D.C. Cir. 2002)	11
<i>NLRB v. Babcock & Wilcox, Co.</i> , 351 U.S. 105 (1956)	7
<i>NLRB v. Gluek Brewing Co.</i> , 147 F.2d 847 (8th Cir. 1944)	18
<i>NLRB v. Pneu Elec., Inc.</i> , 309 F.3d 843 (5th Cir. 2002)	11
<i>Ready Mix</i> , 337 NLRB 1189 (2002)	16
<i>Rossmore House Hotel</i> , 269 NLRB 1176 (1984)	22
<i>Southern Services v. NLRB</i> , 300 NLRB 1154 (1990)	11
<i>St. Francis Hospital</i> , 263 NLRB 834 (1982)	18
<i>Sylvania Electric Products, Co.</i> , 174 NLRB 1067 (1969)	6
<i>Tarheel Coals, Inc.</i> , 253 NLRB 563 (1980)	14
<i>The A.S. Bell Publishing Co.</i> , 270 NLRB 1200	16
<i>Westward Ho Hotel</i> , 251 NLRB 1199 (1980)	16
<i>Zimmerman Plumbing Co.</i> , 325 NLRB 106 (1997)	16

REGULATIONS

NLRB Rules and Regulations, § 102.46	1
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Respondent, Nova Southeastern University (“Nova”), by and through undersigned counsel, pursuant to Section 102.46 of the National Labor Relations Board Rules and Regulations and Statements of Procedure (“NLRB Rules and Regulations”), submits this Brief in Support of its Exceptions to the Supplemental Decision and Order (“Decision”)¹ issued by Administrative Law Judge (“ALJ”) John H. West on March 16, 2009.

I. STATEMENT OF THE CASE

A hearing in connection with cases 12-CA-25114, 12-CA-25290, 12-CA-25298 was held from November 17 and 18, 2008 in Miami, Florida. The consolidated complaint alleged:

a. that Nova interfered with the distribution of union literature by UNICCO employee Steve McGonigle on August 22, 2006, in a non-working area on non-working time, based on its policy of no solicitation without permission;

b. that Nova, through Anthony Todaro, instructed UNICCO to issue McGonigle discipline pursuant to its solicitation policy in August 2006;

c. that in February 2007, Nova, through Todaro, interrogated and implicitly threatened that employees would not be hired because of union activities; and

d. that in February 2007, Nova Athletic Grounds Supervisor Thai Nguyen threatened that employees would not be hired because of their union activities.

At the hearing, Nova presented evidence that its solicitation policy is lawful and was lawfully applied to McGonigle; that Todaro was employed by UNICCO, and not Nova, prior to February 18, 2007; that Nova did not instruct any UNICCO employee to issue discipline to McGonigle; and that no employees were threatened that they would not be hired because of union activities.

¹ JD(ATL)-05-09, Ft. Lauderdale, FL.

In his Decision, the ALJ found that Nova's solicitation policy is unlawful; that Nova violated McGonigle's Section 7 rights when it prohibited him from distributing fliers without permission; that Nova violated McGonigle's rights for the discipline issued to him by UNICCO for violating Nova's unlawful policy; and that Nova, through Todaro, interrogated and implicitly threatened Jose Sanchez regarding his union involvement. The ALJ also found that the discipline issued to McGonigle by UNICCO regarding leaving his work area while on the clock was not a violation of McGonigle's rights, and that Nova, through Nguyen, did not threaten that employees would not be hired because of their union activity.

Nova is an educational facility which includes pre-kindergarten through secondary schools, as well as a 26,000-student university. Its primary campus of 300 acres is located in Davie, Florida. Nova engages a number of contractors to perform services on its campuses. Nova used UNICCO Service Company ("UNICCO") to perform janitorial and maintenance services prior to February 2007. At that time, Nova replaced UNICCO with a number of other contractors and hired certain UNICCO employees directly, including Anthony Todaro as its Director of Physical Plant and Thai Nguyen as its Athletic Grounds Supervisor. (Tr. 57-60, 131, 217-19, 224-25).²

Steve McGonigle worked for Nova's contractor UNICCO as a painter. McGonigle was involved in unionizing efforts on the main Nova campus and he has been on the direct payroll of the SEIU. (Tr. 102, 121-22). On August 22, 2006, McGonigle arrived for work at the Central Services Building and began passing out Union fliers inside the building. McGonigle then proceeded out of the building to the parking lot where he passed out additional fliers to co-workers. (Tr. 104-5).

At 7:26 a.m., Nova's Public Safety received a report of a person handing out leaflets on

² Nova will use "Tr. (page number)" to refer to the transcript of the November 17-18, 2008 hearing, "G.C. Ex. (number)" to refer to the exhibits introduced by Counsel for the General Counsel, and "R. Ex. (number)" to refer to the exhibits introduced by Nova.

campus. Public Safety Officer David Neely responded to the report and found McGonigle in the parking lot of the Central Services Building with pink flyers in his back pocket. Neely did not know what was on the flyers, but told McGonigle that non-employees could not pass out flyers on Nova's property. McGonigle said he would comply, but would file a complaint. (G.C. Ex. 18).

McGonigle testified that he clocked in at 8:00 a.m. and while on work time went to the Security Operations Center to complain. (Tr. 108). He also testified that he spoke with Ian Vincent, who had a copy of McGonigle's Union leaflet and told him that he could not leaflet on campus. (Tr. 111). McGonigle was given a copy of Nova's solicitation policy and told to follow it. (G.C. Ex. 18). This policy states: "No solicitation is allowed on any NSU campus or facility without the permission of the NSU Executive Administration." (G.C. Ex. 15). This policy is published in the Campus Safety and Traffic Handbook. It is not part of the Human Resources or Employee Handbook Policies. (Tr. 214-15).

II. ARGUMENT

Upon review of the evidence and hearing testimony, it is obvious that the ALJ's determinations in this case are seriously flawed. In particular, the ALJ misapplied the legal standard to the evidence presented at the hearing with respect to a property owner's right to restrict solicitation by employees of contractors. The ALJ further misconceived the standard for assigning liability to a party other than the employer, as well as improper interrogation by an employer. In short, the combination of misconceptions of the law and the numerous errors committed by the ALJ invalidate his findings that Nova violated the Act.

A. Nova's Uniformly-Enforced Solicitation Policy as Applied to Contractors Is Lawful and Necessary to Maintain the Security of its Campus.

The testimony at the hearing demonstrated that Nova's solicitation policy prohibits solicitation on campus without the permission of the administration. (Tr. 55, 124, 131, 219). This

policy has been in effect for 20 years and serves many purposes for the University, the most important being the safety of its students and staff. (Tr. 131, 219-20). Nova has a duty to protect the people on its educational campus – people who include high school, middle school, and university students, elementary children and children with special needs, as well as students who live on campus. (Tr. 131, 217-18). Nova requires its contractors to verify the background of all prospective employees. (Tr. 198). In addition to safety, Nova has exclusive vendor agreements making a policy of only allowing solicitation with permission necessary. (Tr. 135, 220). Furthermore, Nova’s contractors generally have a limited role while on campus, which is to perform their jobs in only the areas necessary to complete the work and it is important for Nova to know where these contractors are. (Tr. 137). Entry to Nova’s 300 acre campus is not secured and the need for a uniform rule is crucial for public safety officers to ensure the maximum amount of campus security. (Tr. 135, 138, 216, 220).

Nova’s solicitation rule does not prevent employees of contractors from engaging in solicitation activities, however. The rule provides the proper balance between Nova’s security needs and property rights, and contractor employees’ Section 7 rights. Contractor employees who wish to engage in solicitation can get the permission of the administration, which serves the dual purpose of allowing those permitted to be on campus to engage in lawful activities while still allowing the school to monitor the safety of its campus. (Tr. 231-32, 234, 237). McGonigle did not seek permission prior to handing out the Union literature on August 22, 2006. (Tr. 231). McGonigle was treated the same as any other solicitor who did not first get permission. (R. Exs. 6, 7, 8). Importantly, Nova’s Vice President of Facilities Management John Santulli testified that if McGonigle had sought permission and would not agree to a request to distribute literature in another location, Santulli would have permitted the distribution of McGonigle’s literature in the parking lot

area. (Tr. 237).

As a fundamental grounds for appeal, Nova excepts to the ALJ's application of the legal standard for solicitation by non-employees. The ALJ incorrectly relies on *Fabric Services* as the lynchpin of his argument that Nova's solicitation rule is unlawful. In *Fabric Services, Inc.*, 190 NLRB 540 (1971), the Board adopted the findings and conclusions of the administrative law judge that a Southern Bell repairman was permitted to wear union insignia while performing work for Fabric Services. However, the instant case is distinguishable from *Fabric Services* in a number of significant ways.

In *Fabric Services*, Southern Bell sent a repairman to Fabric Services to work on the telephone system. *See id.* at 541. The repairman had a pocket protector that stated: "CWS, IT DOESN'T COST – IT PAYS, JOIN CWA-AFL-CIO." *Id.* The repairman was told by Fabric Services that he could not wear the insignia, and he returned to Southern Bell's work center. A Southern Bell supervisor told him to remove the insignia and return to Fabric Services, and the repairman complied. *See id.* Fabric Services argued that it should not be held liable for violating Section 8(a)(1) solely because it was not the repairman's employer. *See id.*

The Board in *Fabric Services* rejected the respondent's defense and held that the Act extended protection beyond the immediate employer-employee relationship, and that the respondent directly interfered with the repairman's protected right to wear a union insignia at work. *See id.* at 541-42. The Board reasoned that the burden is on the respondent to establish the special circumstances justifying a prohibition on the wearing of union insignia. The Board also reasoned that the word "join" did not convert the insignia to the kind of solicitation that is otherwise proper to restrict. *See id.* at 541. Ultimately, Fabric Services was in a position of sufficient control to enforce its direction that the repairman remove his union insignia. *See id.* at

542.

The Board rejected the reasoning in the decisions cited by *Malbaff Landscape Construction Co.*, 172 NLRB 128 (1968), which found that where two employers have a contractual relationship, but Employer B has no control over the employees of Employer A, Employer B cannot be found liable for 8(a)(3) violations, or the derivative 8(a)(1) allegations, against Employer A's employees. *See Fabric Services* at 542. Importantly, in the instant case, Nova did not have substantial control over the employees of UNICCO, and the ALJ did not find otherwise.

Moreover, in *Fabric Services*, the ALJ recognized a clear distinction between an individual's right to wear union insignia and a property owner's right to control solicitation. *See id.* at 543, n.11 ("My view of this case would have been different had it involved prohibition against employee solicitation or other organizational activity, instead of a prohibition against the wearing of union insignia."). *Fabric Services* did not need to demonstrate special circumstances to insist that the repairman was an invitee on the property for a limited purpose, and that he must refrain from attempts to organize. *See id.* (citing *Sylvania Electric Products, Co.*, 174 NLRB 1067 (1969)). Despite ALJ West's assertions to the contrary at footnote 16 of his Decision, the *Fabric Services* footnote did not limit this distinction to short-term relationships.

Accordingly, Nova was not required to establish special circumstances in order to insist that non-employee McGonigle confine himself to the purpose of the contractor's services on its campus. *See Fabric Services*, at 543, n.11. Nova was clearly permitted to restrict McGonigle's ability to solicit on campus. Furthermore, Nova's rule did not completely prohibit McGonigle from solicitation, but rather required him to get permission - the same permission that is required of any non-employee solicitor on campus. (G.C. Ex. 18; Tr. 55, 124, 131, 219, 237; R. Exs. 6, 7, 8).

Assuming *arguendo* that Nova was required to establish the special circumstances for requiring non-employees to get permission prior to soliciting, Nova introduced the unrebutted testimony of Vice President of Facilities Management John Santulli and former Davie Police Chief John George establishing the unique difficulties of controlling an educational campus. (Tr. 131, 216-20). Although the ALJ's personal opinion that other facilities are equally subject to violence and theft, no such evidence was introduced at the hearing. Interestingly, while the ALJ asserts that the same dangers exist for judges (Decision, p. 19), counsel understands that permission from the U.S. Marshall Service is necessary in order for contractor employees of anyone else to solicit inside the federal building where the instant hearing was held in Miami.

An employee's right to solicit for a union is protected under the Act. Section 7 of the Act states "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations." 29 U.S.C. Section 157. Further, Section 8(a)(1) provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed" by Section 7. 29 U.S.C. Section 158(a)(1). However, these same rights do not extend to non-employees.

It is well settled that a property owner/employer has substantial rights to limit activities by outsiders on its private property. *NLRB v. Babcock & Wilcox, Co.*, 351 U.S. 105 (1956); *Lechmere v. NLRB*, 502 U.S. 527 (1992). In *Babcock*, the Court held that "an employer may validly post his property against non-employee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. In these circumstances the employer may not be compelled to allow

distribution.” *Babcock*, 351 U.S. at 111.³

This test was reaffirmed in *Lechmere*, where the Court emphasized a “critical distinction” between employees and non-employees: the organizing activities of employees are guaranteed by Section 7, while Section 7 applies only derivatively to non-employees. The *Lechmere* court said that where there were *any* alternative means of communication with employees, regardless of how effective those means might be, a non-employee union organizer is not entitled to access private property for organization or other recognition purposes. *Lechmere*, 502 U.S. at 539-40. The burden imposed on the union to show that there is no alternative to entry on the respondent’s property is a heavy burden. *See id.* at 535.

As we have explained, the exception to *Babcock*’s rule is a narrow one. It does not apply wherever nontrespassory access to employees may be cumbersome or less-than-ideally effective, but only where ‘the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them.’

Id. at 539 (citation omitted). As a rule, a company cannot be compelled to allow the distribution of literature by non-employee union organizers. *See id.* at 533

The instant issue is whether the application of a security rule prohibiting solicitation without permission to non-employee contractors in an educational campus environment is valid. While maintenance of a rule that reasonably tends to chill Section 7 rights even absent evidence of enforcement violated Section 8(a)(1), *Lafayette Park Hotel*, 159 LRRM 1243, 326 NLRB 824, 825 (1998), Nova’s rule is not contained in its employee manual and contains no reference to employees. (G.C. Ex. 15). The policy is in fact a part of a safety program that has been in place for over two decades that applies to all visitors on campus, and is not a part of Nova’s employee

³ In *Babcock*, the union admitted other means were available to contact the employees, but argued that the workplace was preferable. *See Lechmere*, 502 U.S. at 532 (citation omitted).

handbook. (Tr. 214-15) (“Q. Does Nova have any written rules and guidelines for employees that are not in this? A. Yes...[t]hose type of policies and procedures [rules for employees] are not in these documents [the Campus Safety and Traffic Handbook].”).

Clear public record and common knowledge demonstrate that educational campuses experience a unique threat of violence, as demonstrated by the shootings at Virginia Tech, the University of Texas at Austin, and Columbine High School. As stated above, Nova is an open campus which includes pre-kindergarten and special needs children, as well as on-campus living facilities for students. This is an entirely different factual scenario from the office settings described by the ALJ. Those offices are typically in buildings with security protocols or different security issues from an educational facility.

Former Davie Police Chief John George testified to the unique vulnerabilities of Nova’s campus. (Tr. 131). In addition to the possibility of violence turning into homicide against students or faculty, the issues of rape, robbery, and crimes committed within student housing are uniquely present on Nova’s campus. Nova’s policy is consistently enforced against all solicitors with the main goal of maintaining campus security, as well other goals including the prevention of litter. However, Nova balanced the rights of solicitors by permitting solicitation when it is aware ahead of time of said solicitation.

The ALJ misconceived the legal standard applicable to Nova’s clear solicitation policy as applied to contractors. Given the broad authority of a property owner to restrict outsiders, it is clear that Nova is permitted to prohibit the distribution or posting of literature by McGonigle on its property. As the hearing testimony demonstrated, Nova does not treat non-employees not affiliated with a union any differently with regards to distribution of literature. McGonigle was an “invitee” to be on Nova’s property solely and exclusively to perform his duties as a UNICCO employee. If

McGonigle exceeds the scope of this invitation for any reason (such as posting of literature on University property, distributing literature for commercial, political, or organizational purposes) he becomes a trespasser. As such, Nova had a right to request McGonigle cease distributing literature in the parking lot area. McGonigle was not “trespassed” because he had already stopped soliciting. (Tr. 107-08).

Here, McGonigle had many alternative means for soliciting his co-workers without distributing the pink flyers on campus without permission. For example, he could have provided other UNICCO workers with the flyers at the UNICCO time clock locations on Nova’s property (the Central Services Building and the Administrative Services Building) as he had on other occasions without discipline. (Tr. 123-24). He could also effectively communicate with the UNICCO workers on public property located at the entrances to the University’s campus that are used by UNICCO workers. (Tr. 216-17). The general media is also available. Ultimately, he could have simply asked for permission and it would have been granted. Upon questioning by Judge West, Santulli responded:

THE WITNESS: I would say let's stand by for a minute and let me verify the federal law since I'm not an expert. And if it's confirmed that you have that right, then again, I would still probably designate the location in the parking lot to say why don't you do it here so that Public Safety knows that it's authorized.

(Tr. 237). Based on the context of the facts in the instant case, Santulli’s response provides the proper balance for a property owner with respect to Section 7 rights. Nova’s rule allows Public Safety to respond without hesitation to potentially improper solicitors on campus. The more exceptions to a rule that requires notifying Public Safety of solicitation ahead of time, the more likely a criminal incident will occur on campus.

In addition, McGonigle’s discipline had no negative affect on him – he received one verbal

warning about his distribution of literature (G.C. Ex. 30). Additionally, after this verbal warning, McGonigle distributed union paraphernalia. (Tr. 124). Balancing all circumstances surrounding Nova's solicitation policy as applied to contractors, the security rule is lawful.

The Supreme Court has noted the distinction between employees and non-employees based on a management interest as opposed to a property interest. *Hudgens v. NLRB*, 91 LRRM 2489, 424 U.S. 507, 521-22, n.10 (1976). The clear, uncontroverted testimony presented at the hearing demonstrated Nova's continued property interest in monitoring the activities of contractors on its campus. (Tr. 131, 135, 217-20). Further, Nova has legitimate business and security reasons for being aware of contractor activities on campus. (Tr. 131, 135, 137, 217-20).

Southern Services v. NLRB, 300 NLRB 1154 (1990), *enfd.*, 954 F.2d 700 (11th Cir. 1992) (holding that subcontractor employees have the right to distribute literature where the workplace is exclusively on contracting employer's premises) is not otherwise controlling. *Southern Services* dealt with a Coca Cola facility, and not an educational campus. *See Southern Services*, 300 NLRB at 1154. Accordingly, the facts of *Southern Services* do not provide a proper comparator. Furthermore, this case did not take *Lechmere* into consideration and has been discredited by the D.C. Circuit Court in *New York, New York, LLC vs. NLRB*, 313 F.3d 585 (D.C. Cir. 2002); *see also NLRB v. Pneu Elec., Inc.*, 309 F.3d 843, 853-55 (5th Cir. 2002); *ITT Indus. Inc. v. NLRB*, 251 F.3d 995 (D.C. Cir. 2001).

The *New York* case is similar in some respects to the instant case in that the employees were food services contractors at a hotel, and the contractor employees performed services exclusively within the hotel. The contractor employees were prevented from distributing union literature pursuant to a uniformly enforced policy. The Board found an 8(a)(1) violation, but the court remanded the case to the Board where a decision is currently pending basing its holding on the rules

established by *Babcock* and *Lechmere*. See *New York*, 313 F.3d at 590-91.

While noting that the Supreme Court has never addressed the issue of whether a contractor working on property under another employer's control, the *New York* court specifically discredited *Southern*. The *New York* court reasoned that the *Southern* case was contrary to the opinion of the Supreme Court's holding in *Lechmere*. See *New York*, 313 F.3d at 589. The court noted that the Restatement states "a 'conditional or restricted consent to enter land creates a privilege to do so only in so far as the condition or restriction is complied with.'" *Id.* While *Southern* could not identify why the subcontractor's employees would be trespassers while soliciting but employees would not be, the point of *Lechmere* is that the Section 7 rights of employees entitles them to engage in organizing on its employer's premises – "nonemployees do not have comparable rights." *Id.*

The ALJ's attempt in this matter to distinguish *New York* is erroneous, and should be overruled. The ALJ's assertion that UNICCO used a Nova building as would a Nova employee had no basis in the record. (See Decision, p. 26). The ALJ's other distinctions, such as UNICCO employees not providing complementary services to Nova, that Nova supplied everything needed by UNICCO to perform its services, and that McGonigle was handing fliers to UNICCO employees who were off-duty were similarly not established in the record. (See Decision, P. 26).⁴ While

⁴ The ALJ made a significant number of assumptions which were not based on evidence presented at the hearing, including: p. 24 - that UNICCO employees replace or do the work which could be done by employees of Nova, that one of the considerations of Nova using contractors is that it does not have the expense of full benefits for those employees, that it appeared that UNICCO janitors did not have health insurance; p. 26 - that UNICCO employees worked out of a building like Nova employees would if it used its own employees, that Nova supplied UNICCO with everything it needed to work or that the work performed by UNICCO was not complementary to the function of Nova; p. 27 - that the work performed by UNICCO employees on Nova's property was work that normally would be performed by the employees of the property owner, that Nova treated McGonigle as it would one of its own employees, that Nova never intended to treat McGonigle as a trespasser; p. 36 - that Nova takes the approach it does to avoid having to pay certain benefits such as health care and living wages.

McGonigle did testify that he was off-duty while soliciting, he also testified that he began handing out fliers to his co-workers inside the building, and did not comment on whether they were off-duty or not. (Tr. 104). Additionally, Nova did not give McGonigle a “trespass notice” because he stopped soliciting. In fact, his own testimony was that he had already stopped handing out fliers by the time Public Safety arrived. (Tr. 107-08). The ALJ cites no legal support for his assertion that Nova “waived” its ability to treat McGonigle as an invitee and trespass him if he continued to violate Nova’s policy.

Furthermore, the ALJ’s attempt to distinguish *Pneu* is also erroneous. His assertion that the case was distinguishable because the *Pneu* contractor did not performed services “one would expect that your average worker in a plastic plant would be able to do” is unreasonable. (See Decision, p. 29). The main purpose of Nova is to provide education, and one would not expect to find a professor painting a building on campus. Also, Nova’s contract with UNICCO was for three years, and therefore not a “long-term” contract to have continued *ad infinitum*. As stated above, McGonigle was not forced to leave the premises because he stopped soliciting, unlike the employees in *Pneu* who refused the property owner’s instructions.

Accordingly, McGonigle is not afforded the same rights as Nova employees with respect to union solicitation on campus. Nova is an educational institution whose unique circumstances require a strict solicitation policy to protect its distinctive security needs. Therefore, Nova’s uniformly enforced policy is lawful as to contractors.

B. Nova Did Not Threaten or Intimidate Workers .

Assuming *arguendo* that the ALJ was correct in finding that protections under the Act can extend beyond the direct employment relationship, no showing of the requisite control was established at the hearing that would impute liability to Nova. Nova is not liable for the actions of

Todaro because he was not a supervisor employed by Nova prior to February 18, 2007. Furthermore, Todaro did not act as Nova's agent nor did he have apparent authority. No Nova employee instructed Todaro to give McGonigle discipline. Further, even if agency is assigned to Todaro, his actions did not violate the Act.

1. Todaro Was Not a Nova Employee in August 2006

There are two fundamental reasons Nova is not liable for the actions of Todaro prior to February 18, 2007. First, Todaro was not employed by Nova during that time. Second, the ALJ did not find that Todaro was an agent of Nova. Nova's contractors supervised their own employees. (Tr. 214). Generally, an independent contractor will not subject an employer to liability for unauthorized acts. *See Tarheel Coals, Inc.*, 106 LRRM 1042, 253 NLRB 563, 566 (1980). Section 2(3) of the Act states that "The term "employee" shall include any employee...but shall not include...any individual having the status of an independent contractor."

UNICCO was an independent contractor hired by Nova to perform certain services and Todaro was an employee of UNICCO. It is unrefuted that Nova did not directly control the employees of its contractors. (Tr. 174, 183, 214). Rather, UNICCO assumed the risk involved in contracting the work and controlled its employees in the performance of the contracted assignment. Any role Todaro had in coordinating the efforts of UNICCO did not give him authority to act on behalf of Nova. *See D.G. Real Estate Inc.*, 144 LRRM 1195, 1196, 312 NLRB 999 (1993).

The ALJ's holding that Nova violated the Act because of the discipline issued to McGonigle by UNICCO for the solicitation incident was erroneous. (See Decision, p. 40). Although the ALJ correctly found that Nova did not violate the Act based on the discipline to McGonigle for leaving his work area without permission, the same reasoning should apply to the solicitation discipline. The matter was between UNICCO and McGonigle. (See Decision, p. 40 "This issue was between

McGonigle and UNICCO.”) Applying different standards to the discipline is inconsistent. If UNICCO violated the Act through its actions, then the Board should pursue UNICCO.

As an analogy, Nova has a rule against unauthorized vehicles parking in faculty spots. While Nova may issue a ticket to a violator, it may also make a contractor aware of a violation of the rule by the contractor’s employee. That contractor then has the discretion whether to issue discipline for the violation of Nova’s rule. Similarly, Nova notified UNICCO of McGonigle’s violation of the policy, but no evidence was presented at the hearing that Nova instructed or even suggested that UNICCO discipline McGonigle. Accordingly, Nova cannot be liable for the actions of the supervisors of its independent contractor, UNICCO.

The ALJ’s repeated citation (Decision, pp. 23, 28) to *Fabric Services* that exonerating Nova would subvert the clear policy and intent of the Act is the type of public policy argument that makes clear Counsel for the General Counsel did not establish an actual violation by Nova. Even if the alleged discipline by UNICCO violated McGonigle’s rights under the Act, Nova was not responsible for any such transgression.

2. Todaro Did Not Act as Nova’s Agent in August 2006

Although the ALJ believed that the discipline to McGonigle was solely based on Nova’s policy, and not UNICCO’s, the ALJ did not hold that Todaro acted as Nova’s agent prior to February 18, 2007. The Board applies common-law agency principles, including the traditional right-to-control test. *See Tarheel Coals, 253 NLRB at 566*. “Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.” Restatement (Third) of Agency, §1.01. The essential element of any agency claim is the right to control the actions of the alleged agent. The

Board reviews all of the circumstances, but the most important element is the extent of actual supervision of the alleged employee over the means and manner of performance. *See Tarheel Coals*, 253 NLRB at 566; *The A.S. Bell Publishing Co.*, 116 LRRM 1284, 270 NLRB 1200, 1202.

“The burden of proving any type of agency relationship is on the party asserting the relationship.” *D.G. Real Estate Inc.*, 144 LRRM at 1196. An individual who was not the agent of the employer cannot create liability for the employer for an unfair labor practice. *See Westward Ho Hotel*, 105 LRRM 1461, 251 NLRB 1199 (1980). An employer’s effort to monitor, evaluate, and improve the result of a contractor’s performance does not mean the employer has control over the manner and means of performance. *See Ready Mix*, 170 LRRM 1401, 337 NLRB 1189 (2002). In *Ready Mix*, the Board held that an employee who relayed and helped implement customer instructions at a job site did not have apparent authority. The Board noted that there was no evidence that his conduct was “perceived by employees to be a managerial or supervisory function.” *Id.* at 1189. Even though the employee himself had made “various claims to employees that he had authority to direct work and to coordinate job tasks,” there was no evidence that the employer “either conferred this authority on [the employee] or cloaked him with apparent authority to act as its agent.” *Id.*

In essence, the standard for establishing agency for purposes of Section 2(13) of the Act is whether the individual had been placed in such a position by management that employees could reasonably believe that the individual spoke for management. In determining whether statements made to employees are attributable to the employer under an agency theory, the Board looks to whether under all of the circumstances employees would *reasonably believe* that the alleged agent was reflecting company policy and speaking and acting for management. *Zimmerman Plumbing Co.*, 159 LRRM 1023, 325 NLRB 106 (1997). Furthermore, to demonstrate apparent authority, the

General Counsel needed to show ““a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question.”” *D.G. Real Estate Inc.*, 144 LRRM at 1196.

Todaro did not act as an agent for Nova prior to February 19, 2007. It is unrefuted that Nova did not direct the employees of its contractors. Rather, UNICCO employees performed their duties pursuant to the contract UNICCO had with Nova, and UNICCO received work orders from Nova through an electronic system called “E-Maint.” (Tr. 157-58, 174, 183, 224). Todaro testified to how his current position is different from his position with UNICCO, including the ability to approve requisitions and the supervision of contractors as opposed to supervising his own employees. (Tr. 193, 252, 262). Santulli also testified that he never told UNICCO employees that Todaro acted on Nova’s behalf. (Tr. 225). Both Todaro and Nguyen testified that discipline for UNICCO employees was handled through UNICCO’s Human Resources department and policies. (Tr. 156, 174). Also, Todaro testified that he was instructed on how to deal with unionizing by UNICCO’s Vice President of Labor Relations Jim Canavan. (Tr. 187).

Todaro was not guaranteed a position with Nova when the contract with UNICCO expired, and he needed to apply and interview for a position like all other employees. (Tr. 191). Also, Todaro does not discipline the employees of Nova’s current contractors, such as Green Source. (Tr. 194). Further, Santulli testified that the purpose of listing Todaro on Nova’s website prior to 2007 was for the public to have contact information for the Director of the Physical Plant, not to list Nova employees or list everyone who spoke for Nova. (Tr. 45, 226).

Importantly, the ALJ did not find that Todaro was an agent of Nova. The facts clearly established that Nova simply notified UNICCO of the solicitation incident. No one, including McGonigle, testified that they believed Todaro was authorized to speak for Nova. While Counsel

for the General Counsel had the opportunity to have any of the three former UNICCO employees testify to their reasonable belief that Todaro was authorized to speak for Nova, she did not do so. In fact, Santulli testified that he did not authorize Todaro to speak for Nova. (Tr. 225). Therefore, it would have been clear error to hold otherwise.

Furthermore, McGonigle claimed that he discussed *UNICCO's* solicitation policy with Todaro following the August 22 incident, meaning McGonigle understood Todaro spoke on behalf of UNICCO. (Tr. 118). Determining whether a contractor is an agent is not the same as determining whether an employee acted as an agent in making statements to other employees. *Compare D&F Indus., Inc.*, 174 LRRM 1254, 339 NLRB 618, 619 (2003).

The ALJ engages in no legal discussion of the basis for finding Nova liable for the pre-February 2007 actions of Todaro other than *Fabric Services*, citing *NLRB v. Gluek Brewing Co.*, 147 F.2d 847 (8th Cir. 1944). However, the court in *Gluek* stated that liability only extended where a party knowingly participates in the effectuation of an unfair practice by another. *See id.* at 855. The ALJ did not find that Nova participated in the discipline of McGonigle, or even requested the discipline of McGonigle. Furthermore, the Board has explicitly found that where an employer maintains the ultimate authority over its employees, and where the party did not instruct the employer to violate the Act, no liability can extend to that party. *See St. Francis Hospital*, 263 NLRB 834, 849-50 (1982), *enfd St. Francis Hospital v. NLRB*, 729 F.2d 844 (D. D.C. 1984); *see also Valley Hospital*, 222 NLRB 623, 625 (1976) (distinguishing cases extending liability to non-employers based on direct interference). Therefore, Nova is not liable for any alleged actions taken by Todaro prior to him being hired by Nova on February 18, 2007.

3. Alleged Actions Not Sufficient To Rise to Level of Violation

As an initial matter, the Consolidated Complaint only alleged that Todaro “instructed”

UNICCO to issue discipline to McGonigle; it does not allege Todaro to have issued the discipline. Counsel for the General Counsel did not move to conform the pleadings to any of the allegations of Todaro's actions made at the hearing. Rather, her Motion to Conform was limited to typographical errors. (Tr. 269). Counsel for the General Counsel never established that Todaro instructed anyone to give McGonigle discipline, despite having the opportunity to do so on the record. The discipline clearly indicates that McGonigle's UNICCO Supervisor Jack Sado and Manager Gene Vladiou issued the discipline, and does not contain Todaro's name. (G.C. 30). Further, McGonigle did not testify that he heard or was otherwise made aware that Todaro was the one who was issuing him the warnings. Therefore, the ALJ erred in considering this matter. The finding that Todaro issued discipline himself should be overruled.

With respect to the assertion that the issuance of the warning (as contrasted with the allegation that Todaro instructed two UNICCO supervisors to issue discipline) was a violation of the Act, Nova did not fully have the opportunity to refute this claim. Nova filed both a Motion for More Definite Statement and a Motion for Summary Judgment, but was never provided with a response as to whether McGonigle was in fact given discipline. Nova was not aware of the discipline issued to McGonigle by UNICCO prior to the hearing, despite its attempts to get Counsel for the General Counsel to clarify the allegations. Nova was handicapped in its defense of this claim. Had Nova been given knowledge of the verbal warning, it would have been able to clarify the circumstances on the record by having a UNICCO employee testify to it.

The ALJ's decision suggests, by discrediting Todaro and other supposition, that Nova actually knew the alleged facts surrounding the discipline. The ALJ speculates as to why Nova did not call Sado or Vladiou. However, Counsel for the General Counsel pled that Todaro "instructed UNICCO to issue two disciplinary warning to UNICCO employee Steve McGonigle pursuant to its

no-solicitation policy.” (See Consolidated Complaint, Paragraph 10). Furthermore, in her opposition to Nova’s motion for more definite statement, Counsel for the General Counsel offered that based on information currently available to her that “it appears that the instructions were given to UNICCO supervisors Jack Sado and Gene Vladou [sic].” (See Counsel for the General Counsel’s Opposition to Respondent’s Motion for More Definite Statement of the Consolidated Complaint, p. 3). Nova had no reason to call Sado or Vladiou because there was no allegation that they were agents of Nova. Nova only had to defend against the claim that Todaro was an agent and that no one from Nova instructed these individuals to give the discipline. Todaro and Santulli were the only witnesses Nova could rely on for this issue. Counsel for the General Counsel never alleged that Todaro himself gave the discipline. The ALJ is relying on speculation to concoct disingenuousness on the part of Nova.

In reality, Counsel for the General Counsel bears the responsibility for failing to inform Nova of its full allegations. The ALJ creates a piecemeal explanation relying on circular reasoning in order to defend Counsel for the General Counsel’s unfair prosecution of this part of her case. Counsel for Nova requested the information regarding the discipline in an email and filed a motion for more definite statement prior to the hearing. Counsel for the General Counsel was in possession of UNICCOs disciplinary forms that were issued to McGonigle. Nova was never provided with the forms or the fact that written evidence existed. It is unclear why Counsel for the General Counsel did not allege or clarify the argument that would ultimately be advanced at the hearing. At best, the allegations regarding the discipline against McGonigle were not properly pled.

Even if the verbal warning issued to McGonigle for solicitation was properly considered and was improper, it was not sufficient enough to rise to the level of a violation of the Act by Nova. As an initial matter, UNICCO is no longer a contractor for Nova, and Nova cannot comply with the

ALJ's Order because it does not have the authority to remove any warnings from McGonigle's UNICCO file. McGonigle is not employed on Nova's campus. Because McGonigle had the ability at any time subsequent to August 2006 to have requested permission from Nova to distribute literature, but chose not to do so, (Tr. 231), the discipline should be viewed as *de minimis* and should not require any corrective action. *See Dieckbrader Express*, 168 NLRB 867 (1967) (holding that if any 8(a)(1) violation occurred, it was of a minimal nature); *American Federation of Musicians Local 76*, 82 LRRM 1591, 202 NLRB 620, 621 (1973). Therefore, the ALJ's finding that the discipline issued by UNICCO was a violation on Nova's part was clear error, and Nova should not be required to take any corrective action.

C. Todaro Did Not Interrogate Sanchez.

Similarly, after being hired by Nova, Todaro did not implicitly threaten or intimidate Jose Sanchez. As an initial matter, the ALJ's speculation that counsel for Nova knew the date of Sanchez's termination or the date of his alleged conversation with Todaro is inaccurate. Nova is not in possession of Sanchez's termination records from its contractor, nor is it independently aware of Sanchez's termination date. Sanchez initially testified that he was laid off in January, and the conversation with Todaro happened within days of that event. This testimony was during direct examination by Counsel for the General Counsel:

Q. Do you recall when your last day of work for UNICCO was?

A. I think January 17th, two years ago.

Q. Are you sure it was in January?

A. I don't remember exactly, but something around there.

(Tr. 88). However, counsel for Nova was certain of the date Todaro was hired, which was February 18, 2007. Counsel's question to Sanchez regarding his application to a contractor, and

reference to February, did not establish the date Sanchez was terminated or the date of the alleged conversation.

Moreover, Todaro was not involved in the hiring decisions of Nova's new contractors, and instead encouraged Sanchez to apply for a job with Nova's contractors. Employers that seek to force employees to disclose their union sentiments without communicating a valid purpose and giving an assurance against reprisal are typically found in violation of the Act. *Manimark Corp.*, 137 LRRM 1287, 301 NLRB 599 (1991) (asking employee how she would vote on the day of the election). Employer questioning that tends to make employees act as informers regarding the union activities of their fellow employees is likewise unlawful. *Hanover Concrete Co.*, 241 NLRB 936 (1979). Nonetheless, where the inquiry is "innocuous" or part of a normal response to a conversation initiated by an employee, it does not rise to the level of coercion. As the Board stated in *Rossmore House Hotel*, 116 LRRM 1025, 269 NLRB 1176, 1178, fn. 20 (1984), "To hold that any instance of casual questioning concerning union sympathies violates the Act ignores the realities of the workplace."

Sanchez's recollection of the conversation that occurred off-campus was not indicative of an interrogation by Todaro.

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

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

(Tr. 90).

Consequently, what the Act proscribes is only those instances of true "interrogation," which

tend to interfere with the employees' right to organize. *Rossmore*, 269 NLRB at 1178, fn. 20; *Dieckbrader Express*, 168 NLRB at 869 (not every interrogation of employees concerning union views violates 8(a)(1); the test "is 'whether under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of their rights'"). In this particular case, Todaro's question to Sanchez was not illegal. Sanchez's support for the Union was clear. Prior to the conversation at the coffee shop, Sanchez testified that he was walking on a union picket line on University Drive the day after his employment on campus ended when Todaro waived him over to the coffee shop for a conversation. Sanchez also testified that he previously went on strike and he had been seen picketing in favor of the Union in front of Nova with a broom in his hand. (Tr. 89-92, 97-8).

The alleged conversation between Sanchez and Todaro should be viewed in this context. Therefore, Todaro's question would not have been posed for the purpose of ascertaining Sanchez's union sentiments. *See Dieckbrader*, 168 NLRB at 869. *Compare, Camvac Int'l Inc.*, 130 LRRM 1447, 288 NLRB 816, 820 (1988) (repeated and specific nature of questioning concerning extent of employee's union activity and absence of any lawful purpose gave rise to finding of violation). Todaro was simply suggesting how Sanchez could make money while he was looking for work. As such, it cannot rise to the level of an actionable interrogation. Sanchez's testimony indicated no fear of reprisal for answering "yes" to Todaro's question regarding his union involvement. Todaro's limited and casual remarks could not reasonably be construed as tending to restrain or interfere with the exercise of Sanchez's rights. Todaro's comments were too isolated and inconsequential. *See Dieckbrader Express*, 168 NLRB at 869.

Mathews Readymix, Inc. 324 NLRB 1005 (1997), relied on by the ALJ is distinguishable. In that decision, the employer had required applicants to indicate on a personnel form whether

they belonged to a union, which union they belonged to, and the union's address. *See id.* at 1005. The employer was unaware of the applicants' union status when propounding these forms. *See id.* at 1007. The Board found that the questions were unlawful interrogation. The Board reasoned that questions involving union sympathies in the context of a job interview are inherently coercive. *See id.*

In the instant case, however, Todaro was not interviewing Sanchez and had no decision-making or suggestive authority in the hiring process being conducted by Nova's contractors. Rather, Todaro was having a conversation with an individual that he already knew to be involved with the union, which was not unlawful interrogation of Sanchez. Therefore, the ALJ's finding that Nova interfered with Section 7 rights by the interrogation of Sanchez by Todaro was error, and should be overruled.

III. CONCLUSION

Nova's solicitation rule is a proper and necessary directive needed to protect the integrity of Nova's campus. Applying the reasoning of the ALJ, an employee of a contractor could stand next to student housing and solicit without permission with no reasonable limitations. However, a line must be drawn to protect the unique vulnerabilities of an educational campus catering to individuals ranging from university students to pre-kindergarten children. Nova's rule is a reasonable balance of security, property, and labor rights. Contractor employees have the ability to ask for permission so Nova is alerted to the presence of contractors engaging in activity other than what they are contracted to do in areas other than appropriate work areas. Nova's executive even testified that had McGonigle sought permission to solicit, it would have been granted.

The ALJ's Decision speculates on a number of factual issues not established at the hearing, including the reasons for and permanency of Nova's use of contractors, that McGonigle was treated

as an employee of Nova, and that Nova never intended to treat McGonigle as a trespasser. Without the ALJ's speculation, his argument for applying *Fabric Services* in the manner applied fails. The load-bearing beam of the ALJ's Decision that McGonigle was just like a Nova employee is an invalid premise. Its removal from the tenuous line of reasoning collapses the entire argument.

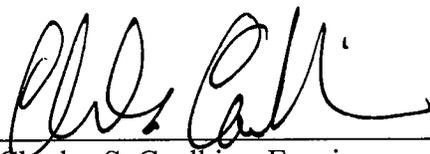
For the reasons stated above, Respondent respectfully requests that the Board refuse to adopt the ALJ's recommended findings of fact and conclusions of law, and that Board set aside the ALJ's Supplemental Decision and Order. Respondent further respectfully requests that the above-referenced matter be dismissed in its entirety.

Date: April 30, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and three copies of this RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE has been electronically filed with the Board, and copies served on Suzy Kucera, National Labor Relations Board, Federal Building, 51 SW 1st Avenue, Room 1320, Miami, Florida, 33130-1608, and Katchen Locke, Esquire, Associate General Counsel, SEIU International, 101 Avenue of the Americas, 19th Floor, Office of the General Counsel, New York, New York 10013 by United States Mail, First Class, postage prepaid.



Charles S. Caulkins

Date: April 30, 2009