

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 12**

**NOVA SOUTHEASTERN UNIVERSITY**

**and**

**Cases 12-CA-25114  
12-CA-25290  
12-CA-25298**

**SEIU LOCAL 32 BJ**

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

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DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46 of the Board’s Rules and Regulations, Counsel for the General Counsel files the following Answering Brief to Respondent’s Exceptions and Brief in Support of its Exceptions to the Decision and Order of the Administrative Law Judge.

**I. Statement of the Case**

The hearing was held before the Honorable John H. West, Administrative Law Judge (herein called the “ALJ”), on November 17 and 18, 2008. On March 16, 2009, Judge West issued his Decision and Recommended Order finding that Respondent committed unfair labor practices in violation of Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining and enforcing a rule in Respondent’s Campus Safety and Traffic Handbook stating that: “No solicitation is allowed on any NSU campus or facility without the permission of the NSU Executive Administration”; by interfering with the distribution of union literature by an employee of UNICCO to his co-workers during non-working time and in a non-working area; by telling an employee of UNICCO that he could not distribute union literature at any time on Respondent’s

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<sup>1</sup> The name of the Charging Party appears as amended pursuant to the Charging Party’s motion to change its name from Service Employees International Union, Local 11 to SEIU Local 32 BJ due to a merger that occurred in or about August 2008, between SEIU Local 11 and SEIU Local 32 BJ. The ALJ granted the motion, without objection. (ALJD 1:fn. 1).

property; by having Tony Todaro tell an employee of UNICCO that he could not engage in solicitation at any campus or facility of Respondent without the permission of Respondent; by having Tony Todaro issue a disciplinary warning to UNICCO employee Steve McGonigle for violating the unlawful no-solicitation policy of Respondent; and by, Tony Todaro, interrogating a former employee of UNICCO concerning his union activities and implicitly threatening him that employees would not be hired because of their union activity. (ALJD 44:24-49). On April 30, 2009, Respondent filed its Exceptions and supporting brief to the ALJ's Decision and Recommended Order.<sup>2</sup>

## **II. Overview of the ALJ's Decision and Recommended Order Regarding Respondent's Unlawful No-Solicitation Rule**

In this brief, Counsel for the General Counsel will establish that the ALJ's Decision and Recommended Order should be affirmed as described herein, and all of Respondent's Exceptions should be overruled.

With respect to Respondent's no-solicitation rule, the ALJ properly found, in part, that Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing an overbroad and facially invalid no-solicitation policy, applying to anyone entering Respondent's property, including its own employees, requiring permission from Respondent to engage in solicitation, citing Brunswick Corp., 282 NLRB 794, 795 (1987). (ALJD 19:38-40). Moreover, Respondent violated Section 8(a)(1) of the Act by interfering with UNICCO employee Steve McGonigle's Section 7 rights to distribute union literature during non-working time and in a non-working area, and by instructing

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<sup>2</sup> Judge West's Decision and Recommended Order will be identified by "ALJD", page, and line. Respondent's Exceptions will be identified by the number of the Exception, and Respondent's Brief in Support of its Exceptions to the Decision and Order of the Administrative Law Judge will be identified by "RB" and the page number. Transcript pages will be identified by the page, line, and name of the witness, where necessary for clarification. "GCX" refers to General Counsel's exhibits, "CPX" refers to Charging Party's exhibits, and "RX" refers to Respondent's exhibits.

UNICCO supervisors to issue a warning to McGonigle for violating the unlawful no-solicitation policy. In reaching this conclusion, the ALJ properly applied the reasoning set forth by the Board in Fabric Services, 190 NLRB 540 (1971) because McGonigle was employed at Respondent's facility on a continuous and regular basis; McGonigle distributed union leaflets only to his UNICCO co-workers during non-working time and in a non-working area while his co-workers arrived at work; Respondent had a long-term contract with UNICCO and was required under the contract to provide all the supplies to UNICCO necessary to perform its function at Respondent's facility; Respondent could have used its own employees to perform the work rather than contracted with UNICCO to perform the janitorial, maintenance and landscaping work on its campus; and Respondent should not be allowed to reap the rewards of not using its own employees, by not having to pay certain benefits and higher wages, while at the same time violating the Section 7 rights of on-site employees. Moreover, the ALJ properly distinguished cases such as Babcock & Wilcox Co., 351 U.S. 105 (1956) and Lechmere v. NLRB, 502 U.S. 527 (1992), involving strangers to the property, finding the instant case more akin to the rights granted to employees under the Supreme Court's decision in Republic Aviation Corp. v. NLRB, 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372 (1945).

**III. The ALJ's Findings of Fact Should be Affirmed, and Respondent's Exceptions 1-3 Should be Overruled**

The ALJ's findings of fact should be affirmed, and Respondent's Exceptions 1 and 3 should be overruled. The ALJ correctly applied the Board's legal standards to the evidence presented at the hearing; the ALJ's rulings with respect to the admission of

evidence at the hearing were without error; and Respondent failed to identify any facts supported by the record to refute the ALJ's findings of fact.<sup>3</sup> (Exception 1-3, RB 3).

**A. Respondent's Operations and Contract with UNICCO**

Respondent is engaged in the operation of a private not for profit university. (ALJD 2:25-26) (GCX 1(cc), 1(ee)). Respondent has several campuses in South Florida, including the main campus located in Ft. Lauderdale, Florida (herein called Respondent's facility). (ALJD 2:41-46) (Tr. 37:13-22, Santulli; GCX 1(cc); GCX 3). John Santulli, vice-president of facilities management, who is in charge of facilities management, including contract operations, for all of Respondent's facilities in Florida, testified during the hearing. (ALJD 2:42-43; 3:51-52) (Tr. 39:9-19). Santulli is also responsible for Respondent's safety and security administered by Respondent's public safety department. (Id.). Steve Bias, who did not testify at the hearing, is the executive director of protective services, and Bias is responsible for the operations of the public safety department. (ALJD 3:31-32, 41) (Tr. 53:18-22, Santulli).

Respondent had a subcontractor named UNICCO Service Company (herein called UNICCO) that provided the janitorial and landscaping services at Respondent's facility. (ALJD 3:1-2) (Tr. 40; GCX 1(ii), exhibit 1; GCX 17). Respondent and UNICCO had a contract that was effective, by its terms, from May 2001, for three consecutive years. (GCX 17, pgs. 1-2).<sup>4</sup> The UNICCO employees worked out of the physical plant. (ALJD 3:1) (Tr. 40:12-19, Santulli). During 2006 and early 2007, UNICCO's hourly employees reported to the physical plant where they punched a time clock, and UNICCO's

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<sup>3</sup> Although Respondent, in Exception 1, also argues that the ALJ restricted Respondent's direct and cross examination of certain witnesses, Respondent did not present any arguments concerning this Exception, and Exception 1 should be overruled in its entirety.

<sup>4</sup> It appears that Respondent exercised its option under the contract to renew its agreement with UNICCO, until UNICCO lost the contract in February 2007. (GCX 17, pg. 2).

employees were allowed to park their vehicles in the parking lots that surrounded the physical plant. (ALJD 3:2-5) (Tr. 40:23-25, 41:1-25, Santulli). UNICCO's employees were supervised by Jack Sado, maintenance manager, who in turn reported to Eugene Vladioiu, maintenance manager/HVAC manager, and ultimately to Tony Todaro, director of physical plant. (Tr. 59:2-25, 60-3-25, Santulli; Tr. 89:1-7, Sanchez). In or about 2006, the Union commenced an organizing campaign at Respondent's facility for UNICCO's janitorial and landscaping employees. (Tr. 183:25, 184, Todaro). Todaro testified that in connection with the Union's organizing campaign, well before August 2006, James Canavan, UNICCO's vice-president of labor relations, spoke to UNICCO's managers about the union campaign and told them that the employees were allowed to pass out flyers during non-working time. (ALJD 11:11-14; 13:14-16) (Tr. 186-187, 201:1-18).<sup>5</sup>

On or about February 17, 2007, UNICCO lost its contract with Respondent for an unspecified performance issue, and Respondent hired new contractors to perform the work. (ALJD 13:6-7; 14:10-11) (Tr. 57:11-25, Santulli) (Tr. 207, Todaro). W.H. Massey took over the general maintenance operations, and TCB took over the janitorial work. (ALJD 14:11-22) (Tr. 57:11-25, Santulli). TCB, in turn, subcontracted the landscaping services to Green Source. (ALJD 14:12-13) (Tr. 57:11-25, Santulli). At that time, UNICCO's employees were given the opportunity to apply for jobs with the new contractors, and some, but not all, of UNICCO's employees were hired by the new contractors. (ALJD 14:13-14) (Tr. 78:1-3, Bazile). Respondent also hired former

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<sup>5</sup> UNICCO was also required to post a Notice to Employees, dated July 28, 2006, pursuant to a settlement agreement regarding working hours and closely checking work orders. (ALJD 13:17-18) (RX 3).

UNICCO supervisors, including Tony Todaro as the director of physical plant,<sup>6</sup> Jack Sado as the general maintenance manager, Eugene Vladioiu as the assistant director of general maintenance, and Thai Nguyen as the athletic grounds supervisor. (ALJD 14:14-20) (Tr. 58:19:25, 59-60, Santulli; RX 2).

**B. Respondent has Maintained and Enforced an Overbroad and Invalid No-Solicitation Rule in the Campus Safety and Traffic Handbook**

As found by the ALJ, Respondent has maintained and enforced the following overly broad and invalid rule in the Campus Safety and Traffic Handbook (herein called the Handbook): “**No solicitation is allowed on any NSU campus or facility without the permission of the NSU Executive Administration**” (GCX 15, pg. 3; GCX 16, pg. 2; GCX 1(ee), Tr. 55-57, Santulli). The policy applies to anyone entering Respondent’s facility, including faculty, staff, and subcontractor’s employees. (ALJD 19:21-24; fn. 11, 13) (Tr. 49-53, Santulli). Respondent posted the 2006-2007 Handbook on Respondent’s website and currently posts the 2007-2008 Handbook on the website. (ALJD 3:34-49) (Tr. 51-52:1-7, Santulli). Public safety officers, who report to public safety coordinators, police the campus in marked vehicles to stop any conduct in violation of the Handbook. (Tr. 54-55, Santulli).

**C. Respondent, by David Neely, Interfered with the Distribution of Union Literature by UNICCO Employee Steve McGonigle**

On August 22, 2006, Respondent, by Public Safety Officer David Neely, interfered with the distribution of literature by Steve McGonigle, a UNICCO employee. Steve McGonigle was hired by UNICCO as a lead painter in or about May 2003. (ALJD 8:3-4) (Tr. 100:18-25, McGonigle). The ALJ fully credited McGonigle’s testimony.

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<sup>6</sup> Even before this time, including at the time when Respondent caused the issuance of warnings to UNICCO employee McGonigle, Todaro had been listed as director of physical plant on Respondent’s website. (ALJD 3:12:23) (GCX 8-11).

(ALJD 36:36-37). McGonigle typically arrived at Respondent's facility at approximately 7:15 a.m. every day, parked in a parking lot near the physical plant, used the restroom, and spoke to co-workers prior to his official 8:00 a.m. start time at work. (ALJD 8:4-8) (Tr. 101-103, McGonigle). On August 22, 2006, McGonigle arrived at 7:15 a.m., and distributed pink union flyers in the parking lot to co-workers as they arrived to work. (ALJD 8:12-14) (Tr. 104-107, McGonigle; GCX 28-29). Contrary to Respondent's arguments, the ALJ's finding that both McGonigle and the co-workers McGonigle distributed flyers to were on non-working time and in a non-working area is fully supported by the record. (ALJD 22:11-16; fn. 11, 13) (Tr. 104-107, McGonigle) (Exception 2). After leafleting to co-workers, McGonigle placed the flyers in his back pocket. (ALJD 8:18-19; 9:21-22) (Tr.107:23-25, McGonigle). **David Neely, public safety officer, approached McGonigle in a public safety vehicle and told McGonigle that "he needed to stop leafleting".** (ALJD 8:16-18) (Tr. 108:1-5). Although McGonigle told Neely that he was leafleting during non-working hours and questioned Neely about who gave the instruction, Neely did not respond. (ALJD 8:18-20) (Tr. 108:1-14). Public Safety Officer Neely did not testify, and Santulli admits that Neely informed McGonigle that he was prohibited from distributing or posting flyers at Respondent's facility pursuant to the no-solicitation policy in the Handbook. (ALJD 5:35-53; 6:1-20) (Tr. 63:18-25, 64:1-23, Santulli).

With respect to Respondent's argument that the ALJ failed to consider that McGonigle testified that he "may have" passed out some flyers before soliciting in the parking lot, this is irrelevant because Respondent has failed to establish that any supervisor of Respondent responsible for enforcing Respondent's no-solicitation rule saw

McGonigle engage in said conduct. (Tr. 104-107, McGonigle) (Exception 2). Similarly, the ALJ found that McGonigle passed out union buttons by the time clock after the August 2006 incident, but rejected Respondent's characterization that Respondent "allowed" McGonigle to distribute the buttons on that occasion. (ALJD 21:19-22) (Exception 2). Finally, Respondent's argument that the ALJ did not consider Santulli's testimony that he would have granted McGonigle permission to solicit had he made the request is disingenuous. (Exception 2). Rather, the ALJ noted Counsel for the General Counsel's argument that Santulli's testimony on this point establishes that he would have granted permission to McGonigle to distribute leaflets in the public swale at the entrance to the parking lot. (ALJD 21:3-6) (Tr. 234:1-25, 235:1-3, Santulli). Furthermore, given the ALJ's conclusion that Respondent's rule requiring said permission is overly broad and facially invalid, and that Respondent violated the Act by not allowing McGonigle to distribute the leaflets to his co-workers in a non-working area during non-working time, Respondent's arguments are irrelevant. Finally, as will be more fully explained below, the record clearly supports the ALJ's finding that McGonigle distributed leaflets to his co-workers while both he and his UNICCO co-workers were on non-working time and in a non-working area. (ALJD 22:11-16; fn. 11, 13) (Exception 3).

**D. Respondent, by Ian Vincent and Maria Lemme, Informed UNICCO Employee Steve McGonigle that he could not Distribute Union Literature at any time on Respondent's Property**

McGonigle also testified that after Public Safety Officer Neely told him to stop distributing leaflets, McGonigle punched the time-clock and went to the public safety building to discuss Neely's instruction to stop leafleting. (ALJD 8:22-23; 9:1) (Tr. 108:19-23). At public safety, McGonigle spoke to a public safety coordinator, a woman

whose name McGonigle does not recall, and Ian Vincent, public safety coordinator. (ALJD 9:1-3) (Tr. 110:1-17). McGonigle explained to both of them that Public Safety Officer David Neely had instructed him to stop leafleting. (ALJD 9:1-3) (Tr. 110:1-17). The unidentified female coordinator called facilities management and gave the telephone to McGonigle, who spoke to Maria Lemme, assistant director of facilities management. (ALJD 9:5-6) (Tr. 110:19-25, 111:1-10, McGonigle). After McGonigle explained the situation to Lemme, Lemme told McGonigle that she would call him back. (ALJD 9:5-6) (Tr. 110:19-25, 111:1-10, McGonigle).

**Public Safety Coordinator Vincent returned and said to McGonigle that he had spoken to Steve Bias, executive director of protective services, and that McGonigle was not allowed to pass out a leaflet on campus.** (ALJD 9:7-8) (Tr. 111:11-16). When Vincent spoke to McGonigle, Vincent had a copy of the flyer McGonigle had been distributing in his hands. (ALJD 9:8) (Tr. 111:17-25). **Assistant Director of Facilities Management Lemme called McGonigle back and told him that she had spoken to Santulli, and McGonigle was not supposed to be leafleting on campus.** (Tr. 112). McGonigle told Lemme that he was leafleting during non-working hours, and that this was a violation of his rights. (ALJD 9:9-11) (Tr. 112). **Both Vincent and Lemme told McGonigle that it did not matter because, “Nova was a private university, and you’re not allowed to leaflet.”** (ALJD 9:14-15) (Tr. 113:3-9). McGonigle said that he felt this was a violation of his rights, and that he was going to file a complaint with the National Labor Relations Board. (ALJD 9:15-17) (Tr. 113:3-9). The unidentified female coordinator wrote down McGonigle’s statement. (ALJD 9:17)

(Tr. 113). After leaving the public safety building, McGonigle returned to work. (ALJD 9:18) (Tr. 113:16-17).

**E. Respondent, by Tony Todaro, Informed UNICCO Employee Steve McGonigle that he could not Engage in Solicitation at any Campus or Facility of Respondent without Permission and Instructed UNICCO Supervisors to Issue a Warning to McGonigle Pursuant to the No-Solicitation Rule**

Respondent's incident report confirms that both Todaro and Sado were informed of Public Safety Officer Neely's instructions to McGonigle to stop leafleting. (ALJD 6:23-52) (GCX 18, Tr. 197, Todaro). Subsequently, on August 24, 2006, Todaro gave McGonigle two progressive disciplinary notices (herein called warnings) because he distributed union flyers to co-workers on August 22, 2006. (ALJD 9:43) (GCX 30-31). **One of the warnings states that on August 22, 2006, "Mr. Steve [Steve McGonigle] was handing out (solicitation and distribution) of unauthorized materials at the job location. (without permission from Nova University and UNICCO Co.)."** (ALJD 9:29-34) (GCX 30). **The warning further states that "this practice must stop immediately." (Id.). The other warning states that on August 22, 2006, "Mr. Steve [Steve McGonigle] left his assigned work area to another area without permission from his supervisor...must not leave assigned areas for other than work related issues without permission from supervisors."**<sup>7</sup> (ALJD 9:34-41) (GCX 31). Supervisor Jack Sado signed the warnings as the issuer, and Supervisor Eugene Vladoiu, signed the warnings as a witness. (Id.). The warnings are consistent with UNICCO's contract with

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<sup>7</sup> The ALJ did not find a violation with respect to this latter warning.

Respondent which required UNICCO to enforce Respondent's safety policies.<sup>8</sup> (ALJD 4:25-32).

On August 24, 2006, Supervisor Sado summoned McGonigle to his office and said that Director of Physical Plant Todaro wanted to see him because he was being written up. (ALJD 9:44-48) (Tr. 116:5-19). Sado took McGonigle to Todaro's office, and they both sat down with Todaro. Supervisor Vladoiu was also present. (ALJD 9:48-50). Todaro told McGonigle that he was written up and read the two warnings to McGonigle. (ALJD 9:50-52) (Tr. 117-118; GCX 32-33). Todaro also read Respondent's no-solicitation policy stating that, "**No Solicitation is allowed on any NSU campus or facility without the permission of the NSU Administration**" and UNICCO's no-solicitation policy stating that, "Solicitation and Distribution of unauthorized materials at the job location" was prohibited. (ALJD 9:50-51) (*Id.*). Todaro gave McGonigle copies of the warnings, Respondent's no-solicitation policy, and UNICCO's no-solicitation policy. (*Id.*).

Based on the foregoing, all of the ALJ's findings of fact, as supported by the record, should be affirmed, and Respondent's Exceptions 1-3 should be overruled.

**IV. The ALJ Correctly Concluded that Respondent Violated Section 8(a)(1) of the Act as alleged in Paragraph 6 of the Consolidated Complaint by Maintaining and Enforcing a Facially Invalid and Overbroad No-Solicitation Rule in the Campus Safety and Traffic Handbook, and Respondent's Exceptions 4 through 11 Should be Overruled**

As properly found by the ALJ, Respondent violated Section 8(a)(1) of the Act as alleged in Paragraph 6 of the Consolidated Complaint by maintaining and enforcing the

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<sup>8</sup> There are two provisions in UNICCO's contract with Respondent that required UNICCO to enforce Respondent's no-solicitation policy. (GCX 17). The safety provision states that, "Contractor shall abide by all OSHA and NSU Safety regulations..." (GCX 17, pg. 10), and the Compliance with Applicable Laws and Regulations provision states that, "...[c]ontractor agrees that it, its agents and employees will abide by all rules, regulations, and policies of NSU during the term of this Contract..." (GCX 17, pg. 6).

following facially invalid and overbroad no-solicitation rule in its Campus and Safety Traffic Handbook: “No solicitation is allowed on any NSU campus or facility without the permission of the NSU Executive Administration.” Respondent’s Exceptions 4-11 should be overruled. (ALJD 19:38-40; 20:23-26) (GCX 15, pg. 3; GCX 16, pg. 2; GCX 1(ee); Tr. 55-57, Santulli). The ALJ’s conclusions that the rule is overly broad and discriminatory on its face (ALJD 19:38-40); that Respondent applied the rule to anyone entering Respondent’s property (ALJD 19:22-24, fn. 11, 13); that Respondent failed to communicate to employees that the rule did not apply to employees during non-working times and in non-working areas (ALJD 19:36-39); and that Respondent has failed to show any special circumstances justifying its facially invalid and overbroad rule (ALJD 19:34-36), should be affirmed.

As found by the Supreme Court in Republic Aviation v. NLRB, 324 U.S. 793, 803, n.10 (1945), it is unlawful for an employer to prohibit employees from engaging in union solicitation on their employer’s property on non-working time and distribution on non-working time in non-working areas, in the absence of special circumstances making the rule necessary in order to maintain production or discipline. As the ALJ found, Santulli testified that the policies in the Handbook must be followed by any individual entering Nova property, including Nova faculty and staff; and Respondent failed to prove that the policy “is not generally applied to management of Nova employees.” (ALJD 19:21-24; fn. 11, 13) (Tr. 49-53, Santulli) (Exception 6, RB 8-9).<sup>9</sup>

The ALJ, using the proper legal standards, found that Respondent’s no-solicitation rule is overly broad and discriminatory on its face, citing Brunswick Corp.,

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<sup>9</sup> As such, Respondent’s argument that the rule is not in its employee manual is irrelevant because the policy must be followed by all faculty and staff, and the ALJ specifically rejected this argument. (ALJD 21:12-13, fn. 11, 13) (RB 8).

282 NLRB 794, 795 (1987), because any rule requiring employees to ask permission from their employer prior to engaging in protected concerted activity during non-working time and in non-working areas is unlawful. See also TeleTech Holdings, Inc., 333 NLRB 402, 403 (2001) (ALJD 19:39-45, 20:1-8) (Exception 10, RB 9). Once a rule like the one at issue is found presumptively unlawful, a respondent bears the burden of showing that it communicated or applied the rule in a way that conveyed a clear intent to permit distribution of literature in non-working areas during non-working time, citing Ichikoh Mfg., 312 NLRB 1022 (1993), *enfd.* 41 F. 3d 1507 (6<sup>th</sup> Cir. 1994). (ALJD 20:13-21). “Any remaining ambiguities concerning the rule will be resolved against the employer, the promulgator of the rule,” citing Norris/O’ Bannon, 307 NLRB 1236, 1245 (1992). (ALJD 20:19-22). As found by the ALJ, “[t]he rule at issue is unlawful on its face...[and] Respondent did not show that it communicated effectively to employees to eliminate the impact of this facially invalid rule.” (ALJD 20:24-27) (Exceptions 9 and 11, RB 8). Thus, the issue of how the rule is applied to subcontractor’s employees is irrelevant to the ALJ’s finding concerning the facial invalidity of the rule, and Respondent’s arguments to the contrary should be rejected. (RB 9).

As noted by the ALJ, Respondent’s security issues are not unique so as to warrant its overly broad and invalid rule, and the ALJ properly rejected Respondent’s arguments to the contrary. (ALJD 19:24-36) (Exceptions 5, 7, 8 and 10; RB 9). The ALJ sharply noted that similar security issues have occurred at businesses, post offices, hospitals, shopping malls, and courthouses. (ALJD 24-28) (Exceptions 5 and 7, RB 9). More importantly, the ALJ found that none of the instances cited by Respondent, namely, shootings at Virginia Tech, the University of Texas at Austin, and Columbine High

School, involved employees of subcontractors working at those schools. (ALJD 19:31:34).<sup>10</sup> Contrary to Respondent's argument, as found by the ALJ, John Jorge, Respondent's current director in the public safety department, did not have any personal knowledge of the incidents involved in the case. (ALJD 18:36-42) (Tr. 135-139, Jorge) (Exception 4, RB 9).

Accordingly, the ALJ's finding that Respondent violated Section 8(a)(1) of the Act as alleged in Paragraph 6 of the Consolidated Complaint by maintaining and enforcing a facially invalid and overbroad no-solicitation rule should be affirmed, and Respondent's Exceptions 4-11 should be overruled.

**V. The ALJ Correctly Concluded that Respondent Violated Section 8(a)(1) of the Act as alleged in Paragraph 7 of the Consolidated Complaint by on or about August 22, 2006, by David Neely, outside the Maintenance Shop on its Ft. Lauderdale Campus, Interfering with the Distribution of Union Literature by Employees of UNICCO to their Co-workers During Non-working time and in a Non-working area, and Respondent's Exceptions 12-52 Should be Overruled**

The ALJ properly found that Respondent violated Section 8(a)(1) of the Act as alleged in Paragraph 7 of the Complaint by on or about August 22, 2006, by David Neely, outside the maintenance shop on its Ft. Lauderdale campus, interfering with the distribution of union literature by employees of UNICCO to their co-workers during non-working time and in a non-working area, and Respondent's Exceptions 12-52 should be overruled. (ALJD 36:18-21) (Exception 12, RB 9-13). The ALJ provided detailed reasoning for his reliance on the Board's decision in Fabric Services, 190 NLRB 540

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<sup>10</sup> Although Respondent makes an unsupported reference to the effect that they understand that it is necessary to seek permission from the U.S. Marshall Service for contractor employees of anyone else to solicit inside the federal building where the hearing in this case was held, this is not part of the record. (RB 7). Moreover, the hearing in the instant case was held in a federal building, where the circumstances are distinguishable from those at Respondent's facility. In this regard, the National Labor Relations Act does not apply to federal employees, like those who work in the federal building. Accordingly, Respondent's argument should be rejected.

(1971) for his conclusion that Respondent violated Section 8(a)(1) of the Act (Exception 40), and the ALJ's critical findings of fact for reaching this conclusion should be upheld. (ALJD 31:51-52) (Exception 40). Namely, that Respondent prohibited McGonigle from distributing flyers to his co-workers while both "he and they had not yet clocked in." (ALJD 22:11-16) (Exception 13, 38; RB 13)<sup>11</sup>; that Respondent's no-solicitation rule was unlawful; that McGonigle distributed leaflets only to his UNICCO co-workers rather than Respondent's employees; that McGonigle worked on a continuous, exclusive, and long-term basis on Respondent's campus; that the work performed by UNICCO's employees could be done by Respondent's employees (Exception 39); that, pursuant to the contract between UNICCO and Respondent, Respondent was required to provide all of the supplies necessary for UNICCO to perform its work; and that Respondent should not be allowed to reap the rewards of not using its own employees, while at the same time denying on-site employees, such as McGonigle, Section 7 rights. (ALJD 31:35-53; 36:5-21).

More specifically, the ALJ used the proper legal standards, principally relying on Fabric Services, 190 NLRB 540 (1971), for his conclusion that Respondent violated Section 8(a)(1) of the Act by enforcing the rule against McGonigle. (ALJD 22-23). Fabric Services involved an installer repairman employed by Southern Bell who was dispatched to Fabric Services's plant. The repairman wore a pen pocket protector reflecting his union support. Fabric Services's personnel manager told the repairman that

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<sup>11</sup> In this regard, McGonigle testified that the employees had to punch the time clock at 8:00 a.m., but he arrived at about 7:15 a.m. (ALJD 8:3-8) (Tr. 102); that he leafleted prior to the 8:00 a.m. start time; that he handed out flyers to co-workers in the parking lot as they were coming to work (ALJD 8:13-15, 22:15-16) (Tr. 104-105); and that his co-workers were on their way to punch the time clock to go to work when he handed out the flyers (ALJD 8:13-15, 22:15-16) (Tr. 107). Thus, Respondent did not present any evidence to contradict McGonigle's credited testimony that he leafleted during his own, as well as his co-workers, non-working time and in non-working areas, as found by the ALJ. (Exception 13; RB 13).

he had to remove the pocket protector to work at the plant. Southern Bell's supervisor told the repairman to remove the pocket protector and return to his assignment. The Board upheld the trial examiner's findings, that both employers violated Section 8(a)(1) of the Act. The trial examiner found that Section 8(a)(1) did not protect employees from the exercise of Section 7 rights solely from their own employer. Moreover, the ALJ stated that "to exonerate Fabric Services from statutory responsibility in these circumstances because...[the Southern Bell repairman] was not its employee, would, I believe, subvert the clear policy and intent of the Act. Having 'knowingly participate[d] in the effectuation of an unfair labor practice, [Fabric Services] place[d] itself within the orbit of the Board's corrective jurisdiction.' NLRB v. Gluck Brewing Co., 144 F.2d 847, 855 (C.A. 8)." 47 NLRB 1079 (1943). (ALJD 23:19-24).<sup>12</sup> Moreover, the trial examiner in Fabric Services, found that "by virtue of its ownership of the property and its power to evict [the installer] from its premises," Fabric Services was in a position of sufficient control to either order the repairman to remove his union pocket protector or remove him from the property. Fabric Services, at 542. The trial examiner, as upheld by the Board, determined that this was sufficient to find a violation of the Act. Id. Similarly, contrary to Respondent's argument, Respondent had sufficient control over UNICCO's employees by virtue of its ownership and control of its campus, and the ability to stop UNICCO employees from violating its no-solicitation policy. (RB 6). Finally, Respondent failed

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<sup>12</sup> As noted by the ALJ, in a dictum footnote, the trial examiner in Fabric Services stated that the case had been different if solicitation was involved. However, the ALJ properly distinguished the instant case in that McGonigle was not soliciting Nova's employees; UNICCO employees were not outsiders on Nova's property on a short-term basis; the contract between UNICCO and Nova was entered into May 2001; and UNICCO employees, including McGonigle, worked at Nova continuously, exclusively and regularly for years. (ALJD 23:fn. 16).

in showing any special circumstances warranting any employee, including UNICCO's employees, to seek permission prior to soliciting on campus. (RB 7).

Moreover, the ALJ properly found that the principles set forth by the Board in Southern Services, Inc. v. NLRB, 300 NLRB 1154 (1990), *enfd.* 954 F.2d 700, 704 (11<sup>th</sup> Cir. 1992), are clearly applicable to the instant case. (ALJD 24). In so doing, the ALJ noted the reasoning enunciated in Southern Services that the practice of subcontracting does not "automatically curtail Section 7 rights". (ALJD 23:31-33). Accordingly, in Southern Services, the Board held that "when the relationship situates the subcontract employee's workplace continuously and exclusively upon the contracting employer's premises, the contracting employer's rules purporting to restrict that subcontract employee's right to distribute union literature among other employees of the subcontractor must satisfy the test of Republic Aviation Corp. v. NLRB, 325 U.S. 79, 65 S.Ct. 982, 89 L.Ed. 1372 (1945)."

In the instant case, as found by the ALJ, McGonigle had worked at Respondent's campus "on a continuous, regular, and exclusive basis for years" (ALJD 22:11-12); McGonigle was not soliciting Respondent's employees (ALJD 23:45-46; 46, *fn.*16); UNICCO employees were not outsiders to Nova's property (ALJD: 23:45-46, *fn.* 16) (Exception 14); Respondent entered into a long-term contract with UNICCO in May 2001 and UNICCO continued to provide these contractual services to Respondent through the dates involved herein (ALJD 24:*fn.* 17) (GCX 17); under the terms of UNICCO and Respondent's contract, Respondent furnished "all supplies necessary to complete and effectively perform all work defined in this Contract" (ALJD 23:34-37; 24:*fn.*17) (GCX 17); UNICCO's employees replaced or did the work that could have

been done by Respondent's employees (ALJD 23:34-37; 24:fn.17) (GCX 17) (Exception 15); Respondent undoubtedly considered that it did not have to pay for full benefits when using a contractor (Exception 16); and that from the flyer distributed by McGonigle on August 22, 2006, it appears that UNICCO's janitors did not have health insurance. (ALJD 8:fn.5; 24:1-8) (GCX 29) (Exception 17). Accordingly, Respondent's arguments that the ALJ's findings set forth above are based on assumptions rather than evidence should be summarily rejected. (RB 12, fn. 4).

The ALJ also correctly distinguished the facts of New York New York Hotel and Casino, 313 F.3d 585, 587-590 (D.C. Cir. 2002) (referred to as NYNY by the ALJ). (ALJD 26:20-22) (Exception 18). In so doing, the ALJ found that in contrast to the facts of NYNY: 1) UNICCO worked out of Respondent's property as if Respondent had used its own employees, and was not leasing any property (ALJD 26:23-25) (GCX 17) (Exception 19); 2) Respondent supplied everything UNICCO needed to perform the work (ALJD 26:26-30) (GCX 17) (Exception 20, RB 12); UNICCO performed work that would normally be done by Respondent for the "smooth operation of the function of the property owner" rather than complementary as was the casino operation in NYNY (ALJD 26:29-30, 27:1-4) (Exceptions 20, 21 and 22); 4) Respondent's no-solicitation policy is unlawful (ALJD 27:5-6) (Exception 23); 5) McGonigle only leafleted co-workers coming to work and did not try to involve non-UNICCO employees in an attempt to convince Respondent's president that UNICCO's janitors should have living wages and health care (ALJD 27:10-15) (Exception 24); and 6) Respondent never told McGonigle that he was trespassing even though Respondent did "trespass" other individuals who had handbilled on campus. (ALJD 26:21-30; 27:1-50) (Exception 25). On this last point, the ALJ

properly found that, “If the theoretical trespass approach is even a valid approach in the circumstances of this case, Nova waived its theoretical opportunity to treat McGonigle as a trespasser. In actuality Nova never intended to treat McGonigle as a trespasser.<sup>13</sup> McGonigle was not an outsider seeking access to Nova’s property. McGonigle was not an invitee doing short-time work as was the Southern Bell repairman in Fabric Services. With respect to access, McGonigle was treated as an employee of Nova would be.” (ALJD 27:36:43) (Exceptions 26-31). Thus, the policy and intent of the Act would be subverted by exonerating Respondent because McGonigle was not its employee, and Respondent placed itself within the orbit of the Board’s corrective jurisdiction by knowingly participating in the effectuation of an unfair labor practice. (ALJD 28:12-16) (Exception 32).

Moreover, the ALJ properly distinguished the facts in NLRB v. Pneu-Electric, Inc. (Pneu), 309 F.3d 843 (5<sup>th</sup> Cir. 2002)<sup>14</sup>, as involving workers performing electrical work, who were licensed and specially trained employees (Exception 33); a short-term contract rather than a long-term contract<sup>15</sup>; solicitation in a work area and during working time versus McGonigle who was distributing leaflets during non-working time and in a non-working area while both McGonigle and his co-workers were off the clock (Exception 36); the employees in question were asked to leave the job site and told they were fired; and the case involved both 8(a)(1) and (3). (ALJD 29:23-44) (RB 13). Moreover, the ALJ rightfully noted the balance to be struck when “on-site employees are

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<sup>13</sup> Respondent has not provided any basis for its argument that McGonigle was treated as any “invitee” on the property would be or that McGonigle was not treated as a trespasser because he had already stopped soliciting. In this regard, Counsel for the General Counsel established that, in sharp contrast to Respondent’s approach to McGonigle, Respondent treated other handbillers on campus as trespassers. (See GCX 18-24) (RB 9-10, 13).

<sup>14</sup> 332 NLRB 616 (2000), enforcement granted in part, order vacated in part 309 F. 3d 843 (5<sup>th</sup> Cir. 2002).

<sup>15</sup> Contrary to Respondent’s Exception 35, the record supports the ALJ’s finding that UNICCO’s contract was terminated because of performance issues. (Tr. 207, Todaro) (ALJD 29:34-35).

rightfully on the property” involves management rather than property interests, citing Hudgens v. NLRB, 424 U.S. 507, 521-22, n. 10 (1976). (ALJD 31:1-33) (Exception 37).

As found by the ALJ, even looking beyond Fabric Services, this case should be decided under the analysis set forth in Republic Aviation Corp. (ALJD 32:1-2) (Exception 52). Moreover, the ALJ noted that the facts in the instant case are even more compelling for finding a violation than the facts in Southern Services, in that Southern Services did not involve an unlawful no-solicitation policy and the property in that case was not open to the public as is Respondent’s property. (ALJD 32:1-17) (Exception 41-43). Moreover, contrary to Respondent’s arguments, the ALJ properly reasoned that the Supreme Court’s decision in Lechmere v. NLRB, 502 U.S. 527 (1992) does not change the Board’s and Eleventh Circuit decision in Southern Services. Lechmere involved non-employee organizers who were strangers to the property. (ALJD 32:19-34) (RB 7-8). Accordingly, even assuming arguendo that McGonigle had an alternative means for distributing leaflets to his co-workers, this is irrelevant because McGonigle, who was not a stranger to the property, had a right to distribute union leaflets in the parking lot in a non-working area and during non-working time.

In sum, the ALJ, relying on Fabric Services, properly found that Respondent violated Section 8(a)(1) of the Act because McGonigle was rightfully on Respondent’s property reporting to work (Exception 44); Respondent did not treat McGonigle as a trespasser and waived the theoretical right to treat him as a trespasser by not treating him as an outsider (Exceptions 45-46); Respondent did not attempt to show that its management interests were prejudiced in any way (Exception 46); Respondent did not show that its unlawful rule was necessary to maintain production or discipline;

Respondent's campus was open to the public (Exception 47); Respondent did not establish that its property rights were affected in any meaningful way by McGonigle's leafleting only co-workers, during non-working time and in a non-working area while he was rightfully on the property (Exception 47); Respondent should not be allowed to continue denying Section 7 rights, as it has done for years, to individuals that it substitutes for Nova employees and who are performing work Respondent's employees could be doing (Exception 48); Respondent's no-solicitation rule was found unlawful by the ALJ (Exception 49); and Respondent should not be allowed to reap the benefit of denying Section 7 rights to leaflet co-workers on non-working time and in non-working areas when it decides to use subcontracted employees instead of its own, whether or not Respondent does so to avoid hiring and paying certain benefits to employees. (Exceptions 50-51) (ALJD 35:21-41, 36:1-21).

Accordingly, the ALJ's finding that Respondent violated Section 8(a)(1) of the Act as alleged in Paragraph 7 of the Consolidated Complaint should be affirmed, and Respondent's Exceptions 12-52 should be overruled in their entirety.

**VI. The ALJ Correctly Concluded that Respondent Violated Section 8(a)(1) of the Act as Alleged in Paragraph 8 of the Consolidated Complaint, by on or about August 22, 2006, by Ian Vincent and Maria Lemme, at the Public Safety Building at its Ft. Lauderdale Campus, Telling Employees of UNICCO that they could not Distribute Union Literature at any time on Respondent's Property, and Respondent's Exceptions 53-56 Should be Overruled**

The ALJ also correctly found that Respondent violated the Act as alleged in Paragraph 8 of the Consolidated Complaint by on or about August 22, 2006, by Ian Vincent and Maria Lemme, at the public safety building in its Ft. Lauderdale campus, telling employees of UNICCO that they could not distribute union literature at any time

on Respondent's property, and Respondent's Exceptions 53 through 56 should be overruled. (ALJD 36:23-38, 37:1-14).

The ALJ credited McGonigle's testimony that on August 22, 2006, Acting Director of Facilities Management Lemme told McGonigle that "she had spoken to Mr. John Santulli<sup>16</sup> and that I was not supposed to be leafleting on campus" (ALJD 37:1-2) (Tr. 112); that Public Safety Coordinator Ian Vincent told McGonigle that he had spoken with Steve Bias and that McGonigle was not allowed to pass out a leaflet on campus; and that Lemme and Vincent told McGonigle that it did not matter that he was doing it on his own time because Nova was a private university and he was not allowed to leaflet. (ALJD 37:1-8). The ALJ found that McGonigle impressed him as being a credible witness, and Respondent failed to present Bias, Vincent or Lemme to testify. (ALJD 36:36-37, 37:2-3) (Exception 53). Relying on his prior finding that Respondent, through Public Safety Officer Neely violated the Act by precluding McGonigle from exercising his Section 7 right to distribute leaflets to his co-workers, the ALJ properly concluded that Respondent's supervisors further violated the Act by affirming Respondent's position. (ALJD 37:8-12) (Exceptions 54-56).

Accordingly, the ALJ's finding that Respondent violated Section 8(a)(1) of the Act as alleged in Paragraph 8 of the Consolidated Complaint should be affirmed, and Respondent's Exceptions 53-56 should be overruled.

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<sup>16</sup> As pointed out by the ALJ, Santulli did not deny that he told Lemme that McGonigle could not leaflet on campus. (ALJD 36:37-38, 37:1-2).

**VII. The ALJ Correctly Concluded that Respondent Violated Section 8(a)(1) of the Act as alleged in Paragraphs 9 and 10 of the Consolidated Complaint by on or about August 24, 2006, by Tony Todaro, at the Physical Plant at its Ft. Lauderdale Campus, Telling Employees of UNICCO that they could not Engage in Solicitation at any Campus or Facility of Respondent without the Permission of Respondent, and Todaro Caused UNICCO to Issue a Disciplinary Warning to UNICCO Employee Steve McGonigle Pursuant to its No-Solicitation Policy, and Respondent's Exceptions 57-65 Should be Overruled**

The ALJ correctly concluded that Respondent violated Section 8(a)(1) of the Act, as alleged in Paragraphs 9 and 10 of the Consolidated Complaint, by on or about August 24, 2006, by Tony Todaro, at the physical plant at its Ft. Lauderdale campus, telling employees of UNICCO that they could not engage in solicitation at any campus or facility of Respondent without the permission of Respondent, and instructing UNICCO to issue a disciplinary warning to UNICCO employee Steve McGonigle pursuant to Respondent's no-solicitation policy, and Respondent's Exceptions 57-65 should be overruled (ALJD 40:32-25). Respondent's arguments that it did not have sufficient knowledge to properly defend the allegations is a red herring, as found by the ALJ. (RB 18-20). Moreover, although Respondent attempts to create an issue by suggesting that the ALJ did not find that Todaro was an agent of Respondent and by the ALJ's discussion concerning who issued the warning, these are disingenuous arguments that are not relevant to the fundamental issues in this case and should be rejected. (RB 18-20).

Ultimately, regardless of the precise words used by the ALJ, he properly found the Todaro lied under oath; that Respondent was behind Todaro's decision to give the warning to McGonigle; and that the warning was issued pursuant to Respondent's unlawful no-solicitation policy. In this regard, the ALJ, citing Fabric Services, Inc., 190 NLRB 540 (1971), found that although McGonigle was not Respondent's employee,

Respondent knowingly participated in the effectuation of an unfair labor practice. (ALJD 39:32-40) (RB 18). See also NLRB v. Gluek Brewing Co., 47 NLRB 1079 (1943), affirmed as modified 144 F.2d 847 (C.A. 8 1944). Moreover, by ordering McGonigle to stop leafleting on its premises and participating in the issuance of the discipline to McGonigle, Respondent also exercised the requisite “control” over UNICCO’s employees to find a violation. Thus, St. Francis Hospital, 263 NLRB 834, 849-850 (1982), enfd. 729 F.2d 844 (D.C. 1984), is inapposite in that the Board found the employer in that case had not exercised any control whatsoever in the unfair labor practices (no violation of the Act by employer who acted only as labor advisor to hospital) (RB 18).

Moreover, the record clearly supports that Todaro was acting as Respondent’s agent when he informed McGonigle of Respondent’s no-solicitation rule and gave McGonigle the warning. In this regard, Todaro’s position and duties reflect that he was Respondent’s conduit for disseminating information to UNICCO’s employees, and McGonigle reasonably (and accurately) believed that Todaro was acting on behalf of Respondent.

The Board applies common law agency principles to determine whether an employee is an agent of an employer and whether his or her conduct is attributable to the employer. If the employee acted with apparent authority of the employer with respect to the alleged unlawful conduct, the employer is responsible for the conduct. “Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question.” D&F Industries, Inc., 339 NLRB 618, 619 (2003),

quoting Cooper Industries, 328 NLRB 145 (1999); See also Pan-Oston Co., 336 NLRB 305, 306 (2001). The Board considers whether, under all of the circumstances, the employee would reasonably believe that the alleged agent “was reflecting company policy and speaking and acting for management.” (Id.). The position and duties of the employee alleged to be an agent are relevant to a determination of agency status. Pan Osten, at 306; Jules v. Lane, 262 NLRB 118, 119 (1982). Accordingly, an employee’s action may be attributed to the employer if the employee is “held out as a conduit for transmitting information [from the employer] to the other employees.” D&F, at 619; Cooper Industries, supra, at 145; Debber Electric, 313 NLRB 1094, 1095 (1994). The Board also considers whether the alleged agent’s statements or conduct are consistent with those of the employer. D&F Industries, 339 NLRB at 619; Hausner Hard-Chrome of KY, 326 NLRB 426, 428 (1998).

In the instant case, Todaro’s duties and responsibilities demonstrate that he spoke for and acted for Respondent when he gave McGonigle the warning for violating Respondent’s unlawful no-solicitation rule. Since 2006 and continuing to date, Todaro has been held out as Respondent’s agent in Respondent’s facilities management directory on the website showing him as part of Respondent’s staff,<sup>17</sup> has maintained a NOVA e-mail address, and has used Respondent’s “E-Mat” computer system for work orders. (GCX 8-10, 27; Tr. 251-266, Todaro). While employed by UNICCO, Todaro reported to Arlene Morris who was Respondent’s executive director of facilities management, and Morris reported to Santulli. (Tr. 60, Santulli). Todaro, Morris and Santulli were all depicted on Respondent’s facilities management administrative personnel chart when

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<sup>17</sup> Although Santulli testified that Todaro was listed on Respondent’s website prior to 2007 only for the public to have contact information, it is notable that he was the only UNICCO employee on that webpage, and he was not identified as a UNICCO employee on the website directory. (RB 17).

Todaro was employed by UNICCO. (Tr. 47-48, Santulli; GCX 11). Todaro was Respondent's contact person if issues arose under Respondent's contract with UNICCO, and Respondent would authorize Todaro's recommendations.<sup>18</sup> (Tr. 62:18-21, 238, Santulli).

Todaro held meetings with his employees to inform them that UNICCO was losing its contract with Respondent and that they could apply for jobs with the new contractors. (Tr. 95:18-25, 96, Sanchez). Once hired by Respondent as director of physical plant, Todaro maintained the same job description, phone number, office and e-mail address that Todaro had during his employment by UNICCO. (Tr. 61:1-25, 67:15-25, Santulli; GCX 25-26). Todaro continued to report to Respondent's executive director of facilities management. (Tr. 60, Santulli). See AM Property Holding Corp., 350 NLRB 998, n.21 (2007) ("night supervisor" who was publicly characterized as the property owner's supervisor, who maintained same duties while changing several times from subcontractor to respondent's payroll, who informed employees of the termination of existing cleaning contract and provided job applications to employees for new contractor was an agent of employer when making coercive statements to employees).

Todaro's agency status is further demonstrated by McGonigle's credible testimony that UNICCO Supervisor Sado told him that Todaro wanted to see him to write him up and that Todaro read from Respondent's no-solicitation policy when he gave McGonigle the warnings. Moreover, Respondent errs by suggesting that Counsel for the General Counsel's witnesses were required to testify about their subjective belief that Todaro was authorized to speak for Respondent. (RB 17). Rather, Counsel for the

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<sup>18</sup> Todaro testified that he had to obtain authorization from Santulli to create Steve McGonigle's painter position. (Tr. 204).

General Counsel established that when Todaro gave McGonigle the discipline and read from Respondent's unlawful no-solicitation policy, McGonigle, like any other UNICCO employee, would have reasonably believed under those circumstances that Todaro was speaking for Respondent. (RB 18). Accordingly, under all of these circumstances, Director of Physical Plant Todaro was Respondent's agent.<sup>19</sup>

In addition, as found by the ALJ, Respondent had sufficient knowledge of the warning issued to McGonigle in order to prepare its defense, and its arguments to the contrary are a "red herring". (ALJD 38:21-26) (Exceptions 57-58, RB 20). The ALJ correctly noted that the August 28, 2008 Consolidated Complaint alleged, in part, that: on a date in or about August 2006, a more precise date being unknown to the undersigned, Respondent, by Tony Todaro, instructed UNICCO to issue two disciplinary warnings to UNICCO employee Steve McGonigle pursuant to its no-solicitation policy." (ALJD 38:25-32) (GCX 1(cc)). As noted by the ALJ, Counsel for the General Counsel's October 21, 2008 Opposition to Respondent's Motion for More Definite Statement of the Consolidated Complaint and Memorandum of Law in Support Thereof, further stated that "based on the information available to the General Counsel, it appears that Todaro gave the instructions to issue the warnings to UNICCO supervisors Jack Sado and Gene Vlado[i]u." (GCX 1(gg) (ALJD 38:35-46). All of Respondent's pre-hearing motions regarding this issue were denied. (GCX 1(cc), 1(ff)-1(ll). Respondent also had another opportunity to hear Counsel for the General's Counsel's entire Case-in-Chief on the first day of the hearing, but Respondent failed to present Sado or Vladoiu, its own supervisors, on the second day of the hearing. *Id.* Moreover, contrary to Respondent's argument,

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<sup>19</sup> It is noted, also, that in its answer in Case 12-CA-25114 dated January 26, 2007, Respondent admitted Todaro's agency status. (GCX 1(v)).

Counsel for the General Counsel was not required to give Respondent copies of the warnings prior to the hearing. (RB 20).

Accordingly, the ALJ's conclusions that Todaro lied under oath about the disciplines (Exception 59); that a reasonable person would not have forgotten about the disciplines during the time period prior to the hearing (Exception 60); that UNICCO's Vice President of Labor Relations told Todaro and Vladoiu that the discipline was unlawful as far as UNICCO was concerned (Exception 61); that Todaro was doing the bidding of Respondent with respect to the discipline (Exception 62); that Todaro falsely claimed he did not remember talking to McGonigle about the disciplines (Exception 63); that the tactical approach for Todaro to plead ignorance was not orchestrated by Todaro alone (Exception 64); that Respondent's false claim that it did not know about the role of Sado and Vladoiu in the discipline is a smoke screen (Exception 65); that exonerating Respondent because McGonigle was not its employee would subvert the clear policy and intent of the Act, and that Respondent placed itself within the orbit of the Board's corrective jurisdiction by knowingly participating in the effectuation of an unfair labor practice (Exception 66); that Respondent, by its Supervisors Neely and Lemme, violated the Act by telling McGonigle that he could not handbill his co-workers during non-working time and in non-working areas (Exception 67); that Respondent's own incident report dated August 22, 2006, indicates that Todaro and Sado were notified by other agents of Respondent of the incident (Exception 68); that Todaro gave McGonigle the discipline and that Todaro had Sado and Valdo sign the discipline and sit in on the meeting (Exception 69); that the citation of UNICCO's no-solicitation rule in the discipline is false and misleading because UNICCO had instructed its managers that

employees could leaflet during their lunch and break times (Exceptions 70 and 71); that UNICCO mentioned its own no-solicitation rule in the discipline, so it would not be obvious that McGonigle was disciplined just for violation of Respondent's unlawful no-solicitation rule (Exception 72); and that Respondent went beyond its contract with UNICCO in that McGonigle was disciplined after Respondent notified Todaro and Sado of its unlawful no-solicitation rule and of McGonigle's conduct (Exception 73), should be upheld.

The ALJ's Recommended Order requires Respondent, in part, "Within 14 days from the date of the Board's Order, remove from its files, and ask UNICCO to remove from its files, any reference to the unlawful discipline of Steve McGonigle for violating Nova Southeaster[n] University unlawful solicitation rule, and within 3 days thereafter notify the employee in writing that this has been done and that the discipline will not be used against him in any way." (ALJD 46;1-5). Contrary to Respondent's argument that it cannot comply with this Recommended Order, Respondent can be required to remove any reference in its own files to the warning and ask UNICCO to remove the warning.

Moreover, the warning was given to McGonigle as a result of Respondent's unlawful conduct in maintaining and enforcing an unlawful no-solicitation rule, and the cases cited by Respondent to support its contention that the warning is de minimus did not involve an unlawful rule. Dieckbrader Express, 168 NLRB 867 (1967) (no violation because alleged interrogation involved a supervisor questioning a lead man, conversation was casual, unaccompanied by other 8(a)(1) threats); American Federation of Musicians Local 76, 202 NLRB 620, 621 (1973) (no violation found, in part, because the employer had substantially remedied the conduct at issue).

Accordingly, the ALJ's findings that Respondent violated Section 8(a)(1) of the Act as alleged in Paragraphs 9 and 10 of the Consolidated Complaint, respectively, by on or about August 24, 2006, by Tony Todaro, at the Physical Plant at its Ft. Lauderdale campus, telling employees of UNICCO that they could not engage in solicitation at any campus or facility of Respondent without the permission of Respondent, and by Todaro, instructing UNICCO to issue a disciplinary warning to UNICCO employee Steve McGonigle pursuant to its no-solicitation policy should be affirmed, and Respondent's Exceptions 57-65 should be overruled.

**VIII. The ALJ Correctly Concluded that Respondent Violated Section 8(a)(1) of the Act as alleged in Paragraph 11 of the Consolidated Complaint, by Tony Todaro, on or about February 19, 2007, by Interrogating Employees Concerning their Union Activities and Implicitly Threatening that Employees would not be Hired because of their Union Activities, and Respondent's Exceptions 75-86 Should be Overruled**

The ALJ correctly found that Respondent violated Section 8(a)(1) of the Act as alleged in Paragraph 11 of the Consolidated Complaint by on or about February 19, 2007, through Tony Todaro, interrogating employees concerning their union activities and implicitly threatening that employees would not be hired because of their union activities, and Respondent's Exceptions 75-86 should be overruled. (ALJD 42:40-41). The ALJ properly found that the incident occurred in February 2007, after Todaro had been hired by Respondent, and that Respondent's arguments to the contrary are disingenuous (ALJD 41:32-51; 42:1-6) (Exceptions 75-76); that Jose Sanchez' testimony should be credited in its entirety (ALJD 42:9-12); that Tony Todaro was not credible when he testified that he did not recall the conversation (ALJD 18:25-29; 42:9-12) (Exception 77); and that Todaro's conduct was inherently coercive in violation of Section 8(a)(1) of the Act because Todaro's questioning was intertwined with an implicit threat

that Sanchez would not be hired because of his union activities. (ALJD 42:37-38) (Exceptions 84-85).

Jose Sanchez, who impressed the ALJ as a credible witness, is a former UNICCO maintenance employee who worked at Respondent's facility. (ALJD 16:49-50;42:9-12) (Tr. 87:1-25). Sanchez' immediate supervisor was Supervisor Jack Sado, who in turn reported to Supervisor Eugene Vladoiu, and ultimately to Director of Physical Plant Todaro. (ALJD 16:50-51) (Tr. 89:1-7). When UNICCO lost the contract with Respondent, Sanchez submitted an application for work with Massey Construction, the new maintenance contractor at Respondent's facility, to Supervisor Eugene Vladoiu, but Sanchez was not hired. (ALJD 16:51-52; 17:1-4) (Tr. 88:7-25, 89:1-9).

The ALJ properly found that the incident in question took place in or about February 2007, after Sanchez was laid off and after Todaro was hired by Respondent.<sup>20</sup> (ALJD 17:4-5; 41:31-41;42:1-6) (Exception 75, RB 21-22). As found by the ALJ, Sanchez credibly testified that he spoke to Todaro as Todaro was leaving a coffee shop near Respondent's facility. (ALJD 17:4-8) (Tr. 89:10-25, 90:1-2). **Sanchez asked Todaro, "If he was going to have a job and what was going on?" (ALJD 17:9-12; 18:1-4) (Tr. 90:1-7). Todaro responded, "No, not at this moment." (ALJD 17:10-12). Todaro then asked Sanchez if he was for the Union, and Sanchez said yes. (ALJD 17:13-35). As found by the ALJ, Todaro sarcastically asked Sanchez, "Why he did not go on the line and "[t]hey [the union] might pay you with your friend**

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<sup>20</sup> The ALJ rejected Respondent's argument that Counsel for the General Counsel did not prove that Todaro was already hired by Respondent when the incident took place, and noted that Respondent was disingenuous in making this argument. (RB 21, Exception 76). In this regard, the ALJ noted that Sanchez was not sure about the exact date of his layoff but was given an application to apply for employment with Massey about two weeks before his layoff (ALJD 41:31-52, 42:1-6); that Sanchez unequivocally testified that he knew Todaro was already hired by Respondent when the incident occurred (ALJD 41:34-36) (Exception 75); and that Respondent's attorney understood that Sanchez was laid off in February 2007 (ALJD 42:5-6).

**Steve[McGonigle].” (ALJD 17:36-37) (Exception 78).** Sanchez said he didn’t think he would get paid for it and that he needed to work. Todaro told Sanchez to call him in about three months because he would have a better idea as to what was happening. (Id.) (Tr. 90:22-25).

As the ALJ found, Todaro was not sincere when he spoke to Sanchez. (ALJD 42:28-29) (Exception 80). Rather, “while Sanchez was looking for employment, Todaro linked his knowledge of Sanchez’ union activity with the possibility of Sanchez being hired to work on Nova’s campus. Todaro’s questioning of Sanchez ostensibly to confirm what Todaro undoubtedly already knew was coercive in that Todaro was, in effect, telling Sanchez you made your bed now go sleep in it; you supported the union now go and see if the union will pay you to go on the line.” (ALJD 42:29-34) (Exceptions 81-82). Moreover, the ALJ noted that Todaro’s comment “call me back in three months” really meant that he would not be hired any time soon in light of his union activities. (ALJD 42:35-36) (Exception 83, RB 22). Todaro told Sanchez to call him in three months, but Todaro did not really intend to try to get work for Sanchez nor did he tell Sanchez to deal with Massey himself. (ALJD 42:21-29) (Exception 79). Thus, the ALJ properly found that “this amounted to an implicit threat that employees would not be hired because of their union activities. (ALJD 42:36-37) (Exception 84).

The Board holds that an interrogation is unlawful if, under the totality of the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Mathews Readymix, Inc., 324 NLRB 1005, 1007 (1997), *enfd.*, in part, 165 F. 3d 74 (D.C. Cir. 1999); Emery Worldwide, 309 NLRB 185, 186 (1992). The Board considers whether the interrogated employee was an open or

active union supporter, whether proper assurances were given concerning the questioning, the background and timing of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. Stoody Co., 320 NLRB 18, 18-19 (1995); Rossmore House, 269 NLRB 1176, 1177-1178 (1984), enfd 760 F.2d 1006 (9<sup>th</sup> Cir. 1985). Interrogation by a high-level supervisor is one factor supporting a conclusion that the questioning was coercive. Wiers International Trucks, Inc., 353 NLRB No. 48, slip op., at 22 (2008); Stoody Co., at 18-19. In addition, an employer violates that Act by threatening not to hire employees because of their union and/or protected concerted activities. Bay Harbour Electric, Inc., 348 NLRB 963, 985 (2006); US Plastics Corp., 213 NLRB 323 (1974).

As found by the ALJ, the Board has consistently held that “[q]uestions involving an individual’s union support in the context of that individual seeking employment are inherently coercive and therefore interfere with Section 7 rights.” (ALJD 42:37-41) (Exceptions 85-86). See Mathews Readymix, Inc., 324 NLRB 1005, 1007 (1997) enfd., in part 165 F.3d 74 (D.C. Cir. 1999). The principles set forth by the Board in Mathews Readymix are applicable even if the case did not involve an open union supporter. (RB 23-24). As noted by the judge in Mathews Readymix, the employer violated the Act because regardless of respondent’s motivation, the applicants could reasonably believe that the respondent would prefer to hire employees who would not be sympathetic to the union. Mathews Readymix, Inc., at 1015. In Camvac Int’l Inc., 288 NLRB 816, 820 (1988), a case cited by Respondent in its brief, the Board noted that the respondent violated the Act when a high-level supervisor, who could affect the employee’s job, interrogated an open union supporter. Thus, the Board has found that employers, such

as Respondent, violate the Act when they interrogate employees in the context of other unlawful threats. See Diamond Electric Manufacturing Corporation, 346 NLRB 857, 891 (2006) (employer violated the Act by interrogating open union supporter at the same time employer threatened employee with plant closure). (RB 23-24). Therefore, the ALJ properly rejected Respondent's argument in its post-hearing brief that Todaro's conduct was "innocuous and did not rise to the level of coercion."<sup>21</sup> (ALJD: 41:12-16) (RB 22).

Accordingly, the ALJ's finding that Respondent, by Tony Todaro, violated Section 8(a)(1) of the Act as alleged in Paragraph 11 of the Consolidated Complaint by interrogating employees concerning their union activities and implicitly threatening that employees would not be hired because of their union activities should be affirmed, and Respondent's Exceptions 75-86 should be overruled.

**IX. The ALJ Correctly Concluded with respect to Paragraph 12 of the Consolidated Complaint alleging that on or about February 19, 2007, at the Ft. Lauderdale campus, Respondent, by Thai Nguyen, Threatened that Employees would not be Hired because of their Union Activities, that Lester Bazile's Testimony was Credible, and Respondent's Exceptions 87-88 Should be Overruled**

With respect to Paragraph 12 of the Consolidated Complaint alleging that on or about February 19, 2007, at the Ft. Lauderdale campus, Respondent, by Thai Nguyen, threatened that employees would not be hired because of their union activities, the ALJ properly credited Lester Bazile's testimony. Thus, Respondent's Exceptions 87-88 should be overruled. Nevertheless, the ALJ did not find that Respondent, by Thai Nguyen violated Section 8(a)(1) of the Act. Respondent has not set forth any evidence to support its argument that the ALJ erred in finding that Nguyen's testimony is

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<sup>21</sup> Respondent's reliance on Dieckbrader Express, 168 NLRB 867, 869 (1967) is misplaced in that the employee in question was a leadman, rather than a rank and file employee, and the supervisor's questioning of the leadman was not intertwined with any threats related to union activity. (RB 23).

contradictory; that the conversation occurred after Nguyen was hired by Respondent and the employees were hired by Green Source; and that Nguyen would not be telling the employees he was recommending them to Green Source because they were already hired at the time. (ALJD 43:39-46) (Exception 87). Moreover, contrary to Respondent's contention, the ALJ properly credited Bazile's testimony, and discredited Nguyen's testimony. (ALJD 44:2-3) (Exception 88).

Leszier Bazile, a former UNICCO landscaping employee, testified under subpoena issued by Counsel for the General Counsel. (ALJD 15:14-15) (Tr. 76:13-23, 77:14-20). Bazile is from Haiti and his native language is Creole, but he does speak English. (ALJD 15:fn. 10) (Tr. 76:1-12, Bazile). When Bazile was employed by UNICCO, his immediate supervisor was UNICCO's Athletic Grounds Supervisor Thai Nguyen, and on or about February 18, 2007, Respondent hired Thai Nguyen for the same position. (ALJD 15:17-18) (Tr. 77:7-8, Bazile; Tr. 177, Nguyen; RX 2). Nguyen testified that he has the same job duties working for Respondent as he did when he worked for UNICCO, taking care of the ball fields at Respondent's facility. (ALJD 16:14-16) (Tr. 173:14-25, Nguyen). When Green Source took over the landscaping services, UNICCO employees Dennis McGriff, Jacque Jean Louise, Jean Fabre and Leszier Bazile were all hired by Green Source. (ALJD 16:41:42) (Tr. 180, Nguyen).

Bazile testified that not all of the former UNICCO landscaping employees were hired by Green Source. (Tr. 78:1-3). Bazile, who was hired by Green Source on February 18, 2007, credibly testified that on February 19, 2007, he saw new employees working at Respondent's facility. (ALJD 15:19-20; 15:21-22) (Tr. 77:19-20; Tr. 78:1-9, Bazile; Tr. 181:1-18, Nguyen). Bazile testified that on that same date, he was at the

Eddie Griffin cafeteria at Respondent's facility with Jacque Jean Louise, Jean Fabre and Dennis McGriff, when they asked Nguyen about the new employees. (ALJD15:23-25) (Tr. 78:10-25; Tr. 79:1-10). Although Bazile testified using a Creole interpreter through most of his testimony, Bazile was able to testify in English concerning the conversation with Nguyen. (Tr. 75:6-13, Tr. 79:11-20). **Thus, on direct examination, Bazile testified that he asked Nguyen, "Why didn't you call the old employees to come to work and then you hired the new employees?" Bazile testified that Nguyen responded that, "No because they make part of the Union. That's why they didn't call them."** (ALJD 15:29-49; 15:1) (Tr. 79: 15-17, 19-20). The ALJ did not question Bazile's credibility based upon the fact that Bazile misspoke about which employee asked Nguyen the question. (ALJD 16:3-12) (Tr. 81, 85).

Accordingly, the ALJ's finding crediting Bazile and discrediting Nguyen should be affirmed, and Respondent's Exceptions 87-88 should be overruled.

**X. The ALJ's Conclusions of Law and the ALJ's Decision and Recommended Order Should be Affirmed Except to the Extent Noted in General Counsel's Cross-Exceptions, and Respondent's Exceptions 1-99 Should be Overruled**

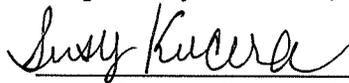
Based on the foregoing, the ALJ's Conclusions of Law and the ALJ's decision and Recommended Order should be affirmed, except to the extent noted in General Counsel's cross-exceptions, and Respondent's Exceptions 1-99 should be overruled. As found by the ALJ, Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act as follows: a) maintaining and enforcing the following rule in the Nova Southeastern University Campus Safety and Traffic Handbook: "No solicitation is allowed on any NSU campus or facility without the permission of the NSU Executive Administration" (ALJD 44:24:31) (Exception 89); b) interfering with the distribution of

union literature by an employee of UNICCO during non-working time and in a non-working area (ALJD 44:32-33) (Exception 90); c) telling an employee of UNICCO that he could not distribute union literature at any time on Respondent's property (ALJD 44:35-36) (Exception 91); d) having Tony Todaro tell an employee of UNICCO that he could not engage in solicitation at any campus or facility of Nova Southeastern University without the permission of Nova Southeastern University (ALJD 44:39-41) (Exception 92); e) having Tony Todaro issue a disciplinary warning to UNICCO employee Steve McGonigle for violating the unlawful no-solicitation policy of Nova Southeastern University (ALJD 44:43-44) (Exception 93); and f) through Tony Todaro, interrogating a former employee of UNICCO concerning his union activities and implicitly threatening him that employees would not be hired because of their union activity. (ALJD 44:46-48) (Exception 94).

Accordingly, the ALJ's Conclusions of Law and Decision and Recommended Order should be affirmed in its entirety, except to the extent noted in General Counsel's cross-exceptions, and Respondent's Exceptions 1-99 should be overruled.<sup>22</sup>

Dated at Miami, Florida, this 28<sup>th</sup> day of May, 2009.

Respectfully submitted,



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<sup>22</sup> The General Counsel's cross-exceptions are being filed simultaneously with this answering brief.

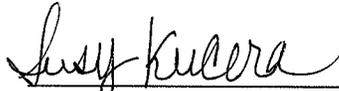
**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the attached General Counsel's Answering Brief to Respondent's Exceptions and Brief in Support of its Exceptions to the Decision and Order of the Administrative Law Judge is being electronically filed with the National Labor Relations Board at [www.nlr.gov](http://www.nlr.gov), and duly served electronically upon the following named individuals on the 28<sup>th</sup> day of May 2009:

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