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

NOVA SOUTHEASTERN UNIVERSITY

and

LOCAL 11, SERVICE EMPLOYEES INTERNATIONAL UNION

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

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

Nova's solicitation rule is a proper and necessary directive needed to protect the integrity of Nova's campus which reasonably balances security, property, and labor rights. The standard proposed by the Charging Party is not supported by Supreme Court precedent. *See Lechmere v. NLRB*, 502 U.S. 527 (1992); *see also New York*, 313 F.3d at 590; *Pneu Elec.*, 309 F.3d at 853, rejecting *Gayfers Dept. Store*, 324 NLRB 1246 (1997). Furthermore, even using the analysis suggested by the Charging Party, Nova's rule is a valid balance between its security and property rights and the Section 7 rights of the employees of its contractors. *See Armstrong Rubber*, 119 NLRB at 383; *ITT Indus, Inc.*, 341 NLRB at 940; *CDK Contracting Co.*, 308 NLRB 1117 (1992). Therefore, the Board should reject the standard recommended by the Charging Party and rely on the standard established by *Lechmere v. NLRB*, 502 U.S. 527 (1992) in rejecting the Decision of the ALJ and dismissing this case.

## I. NOVA'S SOLICITATION RULE IS VALID

The instant case involves an attempt by an employee of a contractor to distribute literature on Nova's campus and not the Section 7 rights of Nova's employees. Steve McGonigle, former employee of UNICCO (Nova's previous contractor), testified that he was informed he could not

solicit without prior approval per Nova's uniformly-enforced solicitation policy. (See G.C. Ex. 18; Tr. 111). McGonigle did not request permission and would have been permitted to distribute literature had he made such a request. (Tr. 237). Thus, Nova's rule strikes the proper balance between the rights of the employees of its contractors and Nova's security concerns, as demonstrated by the decisions relied upon by the Charging Party discussed below.

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

The Charging Party argues that Nova is requesting the Board overrule its past decisions and hold that Nova can insulate itself from Section 7 rights by subcontracting its work.[1] (See C.P. Answering Brief, p. 5). Nova's position, however, is that non-employee contractors do not have the same Section 7 rights that Nova's employees do.[2] Furthermore, the specific record facts of this case demonstrate that Nova struck the proper balance between its legitimate security concerns and the Section 7 rights of non-employee contractors. McGonigle was not forbidden from distributing union leaflets at all times on Nova's property. (Tr. 123-24). Rather, McGonigle was required to follow the uniformly applied rule that all other non-employees must follow – i.e. he must seek permission from the administration prior to soliciting. (Tr. 237). This allows Nova to maintain the integrity of its campus with knowledge of who is on Nova's campus for security purposes, as well

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[1] The Charging Party's assertion on p. 4 of her Answering Brief that any ambiguity in the applicability of Nova's rule should be construed against Nova fails to recognize that the General Counsel has the ultimate burden of presenting evidence to support her claim. *Wright Line*, 251 NLRB 1083 (1980).

[2] The Charging Party's assertion on p. 7 of her Answering Brief that Nova does not challenge the determination that the rule is unlawful because it bars solicitation during non-work time in non-work areas, and that the Board can affirm the ALJ on this ground alone, is inaccurate. Nova is challenging the ALJ's determination that the rule is unlawful. Nova's rule does not bar solicitation during non-work time in non-work areas, but rather requires contractor employees to first get permission.

as other reasons such as compliance with commercial solicitation agreements and the prevention of litter. (Tr. 131, 135, 137, 217-20).

The Charging Party urges the Board to follow the rationale set forth in *Gayfers Dept. Store*, 324 NLRB 1246 (1997) as a simpler approach than the one used by the ALJ in the instant case. In *Gayfers*, the Board relied on *Southern Services v. NLRB*, 300 NLRB 1154 (1990) in finding that the employees of electrical contractors were not strangers or trespassers on property and applied the *Republic Aviation* standard. *See id.* at 1250-51. However, both *New York, New York, LLC vs. NLRB*, 313 F.3d 585 (D.C. Cir. 2002) and *NLRB v. Pneu Elec., Inc.*, 309 F.3d 843 (5th Cir. 2002) discredit Gayfers for not following the reasoning established by the Supreme Court in *Lechmere v. NLRB*, 502 U.S. 527 (1992), namely that Section 7 rights depend on whether or not the individual is an employee. *See New York*, 313 F.3d at 590; *Pneu Elec.*, 309 F.3d at 853.

The Charging Party goes on to argue that Nova must acquiesce to the inconvenience of submitting some of its property interests to the Section 7 rights of its subcontractor employees, comparing *CDK Contracting Co.*, 308 NLRB 1117 (1992) . This is precisely what Nova's rule does. In *CDK*, the Board found that the general contractor could not deny access to union officials who sought to communicate with employees of a subcontractor, which was represented by that union and had a visitation clause in their contract and distinguished *Lechmere*. While the Board upheld the ALJ's finding, it modified the remedy to allow the respondent to promulgate a rule (which had previously been in existence) requiring the non-employees to sign-in at the security gate, and to provide the non-employee with an escort, so long as the requirements were reasonable and non-discriminatory. *See id.* at 1118, n.1.

Similarly, Nova did not deny McGonigle access to its property or completely forbid solicitation by the employees of its contractors. Rather, Nova requires permission before

solicitation is allowed on campus, much like the remedy issued by the Board in *CDK*. Nova's policy is reasonable in that it allows Nova to identify the individual as someone who is permitted to be on campus engaging in solicitation, as was the case in *CDK* where the non-employees were required to sign-in and have an escort. *See id.* Nova is not completely prohibiting the employees of its contractors from engaging in Section 7 activities, but instead is modifying the requirements for these non-employees in order to maintain security.

The Charging Party's suggestion that Nova could employ other means of determining whether a contractor employee was engaged in appropriate behavior, i.e. uniforms or name badges, fails to adequately protect Nova's interests. Despite the Charging Party's conclusory argument without citation to the record that requiring visitors to present personal identification "would seem to be a far more effective security measure," (C.P. Answering Brief, p. 9), the testimony of individuals with actual experience maintaining the integrity and security of Nova's campus, i.e., George and Santulli, affirms the need and effectiveness of Nova's current policy. Also, the Charging Party's suggestion would put the Board in the position of making finite management decisions best left to a company. The issue is not whether Nova's Public Safety Department is aware that contractors are on campus, but rather who is on campus for what purpose. Nova has an open campus and must be alerted to strangers on campus for security, commercial, and litter purposes. Also, Nova has a legitimate concern regarding a contractor employee on campus who is not performing the services for which they are contracted to perform. Nova's solicitation policy provides the most reasonable structure through which Nova can balance its security and operational needs and the Section 7 rights of non-employees.

**B. Unique Security Interests Justify Nova's Rule.**

The Charging Party argues that the ALJ properly rejected Nova's security justification for its solicitation policy and that Nova offered no factual evidence supporting the necessity for the rule

other than the testimony of safety director and former police chief, John George. The Charging Party ignores the numerous incident reports introduced by the General Counsel (G.C. Exs. 19-24), as well as the corroborating testimony offered by Santulli (Tr. 217-20). Furthermore, the testimony of George was improperly restricted based on the objections of the Charging Party and Counsel for the General Counsel.

The Charging Party cites *St. Luke's Hospital*, 300 NLRB 836 (1990), which found that the respondent's concern for litter did not justify a policy barring solicitation and distribution of literature. The Board reasoned that the respondent failed to adduce sufficient evidence because it solely relied on the generalized testimony of its employee and did not offer adequate business records or reports demonstrating past problems. The record in the instant case, however, specifically includes incident reports of problems with litter on campus due to the distribution of literature. (See G.C. Exs. 19, 20, 23, 24).

This same reasoning applies to *The Presbyterian Med. Ctr.*, 227 NLRB 904 (1977) (involving off-duty employee access to the hospital), *Zenith Radio Corp. of Missouri*, 172 NLRB 1724 (1968) (finding that the hazard of pedestrians in the parking lot and fire hazard and debris not sufficient to support rule restricting all access), and *Armstrong Rubber and Tire Co.*, 119 NLRB 382 (1957) (finding no accident reports to support testimony of increased accidents). As noted above, Nova did in fact offer evidence of the security and litter problems caused by unchecked solicitation and distribution of literature on campus, as well as other operational needs. Additionally, Nova was hindered in the presentation of specific acts of crime by employees of contractors because the testimony of George was limited by the ALJ. Specifically, the ALJ would not permit evidence of occurrences of on-campus crimes post-dating the McGonigle incident because he found it was not

relevant. (Tr. 134).[3] However, evidence of crime committed by Nova's contractor's is directly relevant to its security needs and the need for the specific policy at issue, whether or not the incidents pre-date or post-date McGonigle's distribution of literature. Nova's policy was not crafted in response to the McGonigle incident, but instead has been in place for 20 years. (Tr. 219). The Charging Party's trial tactic of objecting at the hearing to evidence based on relevance and then arguing that Nova lacks this same evidence which had been objected to, should be rejected.

Furthermore, the *Armstrong* board specifically noted that "safety of operation is a legitimate concern of an employer, and may, under some circumstances, justify the promulgation of rules which would impinge upon the normal exercise of rights of self-organization." *See id.* at 383; *see also First Healthcare Corp.*, 336 NLRB 646, 650 (2001) ("security problems, traffic control problems, or other difficulties...might well justify an employer's restriction (or even prohibition) of such access"). The Board in *First Healthcare* used a balancing approach to address the concerns of the property owner and the Section 7 rights of offsite employees, stating "[a]ppropriate measures might also be justified, for example, to require apparent trespassers to identify themselves and thus to determine whether the person seeking access is, in fact, an offsite employee of the employer." *Id.* (finding that offsite employees, as opposed to non-employees, have a right to access, that an employer may have a heightened private property right concerns for offsite employees, but that on balance the employer was not justified in completely excluding offsite employees from access to its property).

As noted in *ITT Indus, Inc.*, 341 NLRB 937, 940 (2004):

> the test we apply here does not compromise employers' legitimate security concerns. Instead, it strikes a balance between an employer's security

[3] The Charging Party's assertion that it is not likely that criminals would use solicitation as a cover for their activities is similarly not on the record, and is incorrect. (See C.P. Answering Brief, p. 8). George was also prohibited from testifying that individuals distributing literature in parking lots "scope out" vehicles in order to steal.

> concerns and the Section 7 rights of offsite employees by recognizing that an employer may have heightened private property-right concerns when its offsite [employees] seek access to its property, and by affording an employer the right to demonstrate why its security needs warrant restrictions on the access of its offsite employees to the outside, nonworking areas of its property.

In the instant matter, the normal rights of the employees of Nova's contractors are not being impinged upon by Nova's solicitation policy. Even if the standard is modified to find that the policy does impose on contractor employees, Nova's uniformly-enforced solicitation policy as applied to the employees of its contractors is justified based on the need for security and the integrity of the campus. The reasonable restriction of requiring employees of contractors to request permission prior to soliciting on campus is supported by the analysis used in the cases cited above and the record evidence.

## II. THE BOARD SHOULD NOT ADOPT THE TEST USED IN *GAYFERS*

The Charging Party argues that the Board should adopt a simpler test than the one created by the ALJ, and instead should follow the analysis in *Gayfers*. As noted above, however, the reasoning of *Gayfers* was discredited by the D.C. and Fifth Circuits for failure to follow Supreme Court precedent. Rather, the Board should rely on the rationale used by the Supreme Court in *Lechmere v. NLRB*, 502 U.S. 527 (1992), as explained in *New York, New York, LLC vs. NLRB*, 313 F.3d 585 (D.C. Cir. 2002) and *NLRB v. Pneu Elec., Inc.*, 309 F.3d 843 (5th Cir. 2002). There is a clear distinction between non-employees and employees in that only employees have the right to distribute literature on non-working time in non-working areas on an employer's property. McGonigle was not Nova's employee and therefore did not have the right to solicit and distribute literature on Nova's property.

The Charging Party's rationale argues that one size fits all. It ignores the need to respect property rights and evaluate the reasons for having restrictions. The Charging Party's suggestion

that Nova's rule "prohibits" the employees of contractors from soliciting is false. Rather, Nova's solicitation policy merely requires the employees of contractors get permission from Nova prior to distributing literature. (G.C. Ex. 15; Tr. 55, 124, 131, 219). Furthermore, the Charging Party's standard asks the Board to get into the operational details of running a business. Instead, Nova's rule provides a much simpler alternative - an employee of a contractor can just ask for permission. The Charging Party makes no articulation that this rule is overbearing. The Charging Party also argues that the only significance of balancing a property owner's security interest is whether an alternative location for engaging in organizing activity is available, which may not always be the case. (C.P. Answering Brief, p. 10). However, the evidence on record in the instant case established that an alternative location was available. (Tr. 234-35). The Charging Party is advocating for a standard that asks the Board to ignore the U.S. Supreme Court.

Even if the Board adopts the reasoning that the employees of contractors enjoy greater rights than strangers to Nova's property, Nova has a heightened private property-right concern with respect to contractor employees as opposed to its own employees. *See Armstrong Rubber*, 119 NLRB at 383; *ITT Indus, Inc.*, 341 NLRB at 940. Nova has established that its solicitation policy strikes the proper balance between its legitimate, demonstrated security concerns and the rights of contractor employees. *See CDK*, 308 NLRB at 1118, n.1.

## IV. CONCLUSION

Nova's rule is a reasonable balance of security, property, and labor rights. It is a proper and necessary policy utilized to safeguard the integrity of Nova's campus. Contractor employees have the ability to ask for permission to solicit so that Nova is on notice of proper solicitation on campus. The standard proposed by the Charging Party should not be accepted as it ignores clear Supreme Court precedent. Rather, Nova's solicitation policy should be found to be valid as applied to

McGonigle in the instant case, and the Board should reject the arguments put forth by the Charging Party.

For the reasons stated above and in Nova's supporting Brief, 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: June 12, 2009

Respectfully submitted,

By: _____

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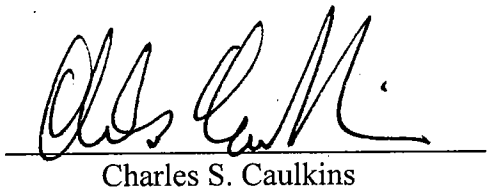
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and three copies of this RESPONDENT'S REPLY BRIEF TO THE CHARGING PARTY'S ANSWERING BRIEF TO THE 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 Electronic Mail.



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Date: June 12, 2009