

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

NOVA SOUTHEASTERN UNIVERSITY

and

LOCAL 11, SERVICE EMPLOYEES
INTERNATIONAL UNION

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

**RESPONDENT'S REPLY BRIEF TO GENERAL COUNSEL'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 ALJ's Decision, as well as the Counsel for the General Counsel's Answering Brief, speculates on a number of factual issues not established at the hearing. The ALJ applied an improper legal standard for contractors to the instant facts. As opposed to the standard relied on in *Fabric Services*, 190 NLRB 540 (1971), Nova does not have a duty to allow employees of its contractors the ability to exercise Section 7 rights in the same manner that employees enjoy. See *New York, New York, LLC vs. NLRB*, 313 F.3d 585 (D.C. Cir. 2002).

I. NECESSITY OF NOVA'S SOLICITATION RULE

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

In her Answering Brief, the Counsel for the General Counsel restates the ALJ's discussion that Nova's solicitation policy as applied to McGonigle violated the Act and that Nova's security issues were not unique. The Counsel for the General Counsel argues that Nova's Director of Public Safety, John George, did not have personal knowledge of the incidents involved in the case. (See

G.C. Answering Brief, p. 14). However, George testified that his current position with Nova involves enforcement of its solicitation policy. Furthermore, at the time of the incident with McGonigle, George was the Police Chief for the Town of Davie, which included jurisdiction over Nova. (Tr. 131, 137). Therefore, George had first hand knowledge of Nova's solicitation policy, the need for this specific policy, and how it has been applied.

Also, the Counsel for the General Counsel argues that contrary to Nova's argument, the record clearly states that McGonigle was in a non-working area when leafleting. Despite the argument of the Counsel for the General Counsel and the finding of the ALJ, McGonigle himself testified that after arriving and using the restroom inside the building, he "had some fliers that [he] was intending on passing out. He may have passed a few out on the way out of the building..." (Tr. 104). Therefore, it is not clear that McGonigle was not in a non-working area when he began handing out fliers, or that the co-workers already inside the building had not yet clocked in.

The Counsel for the General Counsel impermissibly attempts to shift the burden of proving her case to Nova. *Cf. Wright Line*, 251 NLRB 1083 (1980). For example, the Counsel for the General Counsel claims that "Respondent failed to prove that" its policy did not generally apply to Nova employees. (See G.C. Answering Brief, p. 12). However, the Counsel for the General Counsel has the burden of establishing who the policy applied to and how it was enforced. Furthermore, she argues that Nova's rule is overly broad because any rule requiring employees to ask for permission is unlawful. *Cf. Brunswick Corp.*, 282 NLRB 794 (1987). Yet, the instant case involves employees of contractors who must get permission prior to soliciting. Accordingly, the Counsel for the General Counsel did not meet her burden for proving the effects of the solicitation policy on Nova's employees.

The Counsel for the General Counsel noted that Nova’s reference that solicitation inside the federal building in Miami requires permission was not part of the record. (GC Answering Brief, p. 14).¹ Yet, the ALJ’s decision discusses numerous alleged examples of how Nova’s security situation is not unique, none of which were presented factually on the record – i.e. security threats to “businesses, post offices, on hospital property, in law offices, in a Texas cafeteria, in shopping malls, and at least one stock brokerage that I am aware of...” (See Decision, p. 19). Unlike the basis for the ALJ’s attempt at demonstrating similar security issues, Nova actually offered record evidence of its security threats in the form of incident reports and the testimony of its Director of Public Safety and the former Police Chief. (Tr. 131, 135, 137-38; GC Exs. 18-24). Accordingly, Nova relied on record evidence to support its argument that its solicitation policy was crafted to balance the unique security needs of its educational campus with the rights of the employees of its contractors.

B. The Legal Standard Advanced by the ALJ and the Counsel for the General Counsel is not Applicable to the Instant Facts.

The Counsel for the General Counsel argues that the ALJ properly relied on *Fabric Services*, 190 NLRB 540 (1971) in finding that Nova’s solicitation rule was improper, and that Nova should not be permitted to reap the benefits of hiring a contractor and not having to pay benefits and higher wages. At no point during the hearing did the Counsel for the General Counsel present evidence regarding Nova’s motivation for using a contractor or what wages were paid, nor could she considering the scope of the Amended Complaint. The main rule at issue in *Fabric Services* does not apply to the instant facts, but rather the rule noted at footnote 11 in that decision is applicable. The Counsel for the General Counsel further argues that the ALJ properly distinguished

¹ While the Counsel for the General Counsel points out that the NLRA does not apply to federal employees, Nova’s discussion of needing permission to solicit inside the federal building referenced employees of private contractors.

the footnote in *Fabric Services* differentiating the individual's right to wear union insignia at issue in the case from a property owner's right had the invitee been soliciting employees. However, as set forth in Nova's supporting Brief, the *Fabric Services* footnote did not limit this distinction to short-term relationships.

Furthermore, *Southern Services v. NLRB*, 300 NLRB 1154 (1990), *enfd.*, 954 F.2d 700 (11th Cir. 1992) (holding that subcontractor employees have the right to distribute literature where the workplace is exclusively on contracting employer's premises) is not otherwise controlling. The Counsel for the General Counsel's discussion that the ALJ properly used *Southern Services* and did not rely on assumptions contains no argument that the ALJ's findings were not assumptions. Rather, the very language cited by the Counsel for the General Counsel makes the ALJ's failure to rely on record evidence clear – i.e. “Respondent **undoubtedly** considered that it did not have pay for full benefits when using a contractor...and...it **appears** that UNICCO's janitors did not have health insurance.” (G.C. Answering Brief, p. 18) (emphasis added). Under *Wright Line*, the Counsel for the General Counsel has the burden to prove her case with evidence, not the ALJ's opinion of the appearance of Nova's relationship with its contractors.

Contrary to the Counsel for the General Counsel's assertion, the record does not support the supposition that Nova's contract with UNICCO was terminated because of performance issues. Rather, the record contains no evidence of why the contract ended. Counsel for the General Counsel relied on the testimony of Todaro, who had no involvement with the canceling of UNICCO's contract by Nova. Further, Todaro stated that he thought it may have been a performance issue – “I said I *think* it was a performance issue...I don't know exactly for sure.” (Tr. 207) (emphasis added). It is worth noting that on the one hand the Counsel for the General Counsel

is calling Todaro a liar, and on the other hand citing his testimony regarding the reason behind the canceling of the contract.

Also, as argued in Nova's supporting Brief, the Counsel for the General Counsel ignored and fails to address that *Southern Services* did not take *Lechmere* into consideration and has been discredited by the D.C. Circuit Court in *New York, New York, LLC vs. NLRB*, 313 F.3d 585 (D.C. Cir. 2002); *see also NLRB v. Pneu Elec., Inc.*, 309 F.3d 843, 853-55 (5th Cir. 2002); *ITT Indus. Inc. v. NLRB*, 251 F.3d 995 (D.C. Cir. 2001). While Counsel for the General Counsel argues that *Lechmere* involved strangers and that Nova waived its right to treat McGonigle as a trespasser, *Lechmere* makes clear that a company cannot be compelled to allow the distribution of literature by non-employee union organizers. *See Lechmere v. NLRB*, 502 U.S. 527, 533 (1992).

The Counsel for the General Counsel also ignores the actual terms of Nova's solicitation policy. The policy does not completely bar the employees of its contractors from soliciting or distributing literature. Rather, the policy states that permission is required prior to such solicitation. (G.C. Ex. 15; Tr. 55, 124, 131, 219). Furthermore, Santulli testified that McGonigle would have been permitted to solicit had he sought prior permission. (Tr. 237).

Nova's current solicitation policy, as enforced in the instant case, is necessary to protect the security and integrity of its campus. The policy provides the proper balance for the exercise of Section 7 rights by non-employees. Accordingly, the decision of the ALJ and the arguments repeated by the Counsel for the General Counsel regarding Nova's solicitation policy as applied in the instant action should be rejected.

II. TODARO NOT FOUND TO BE AN AGENT OF NOVA

In her brief, the Counsel for the General Counsel argues that Nova's arguments regarding the agency of Todaro are disingenuous and irrelevant. (See G.C. Answering Brief, p. 23).² Yet, both Nova and Counsel for the General Counsel dedicated three pages each in their post-hearing briefs to the topic of the agency of Todaro.³ Whether Todaro was an agent of Nova prior to February 2007 was a crucial issue with regard to any liability Nova may have for Todaro's alleged actions during that time period. Despite the importance of the issue and the extensive briefing by the parties, the ALJ did not find that Todaro was an agent of Nova prior to February 2007.

The Counsel for the General Counsel's argues that "regardless of the precise words used by the ALJ, he properly found" that Nova was responsible for a violation of the Act. (See G.C. Answering Brief, p. 23). However, agency is more than a precise word, it is a legal concept that could create liability for Nova if it is established. The ALJ did not find that Todaro was an agent of Nova prior to February 2007 because that facts presented at the hearing did not support such a conclusion.

No testimony was presented by McGonigle or any other UNICCO employee that they believed Todaro was acting on behalf of Nova when he was employed by UNICCO. The Counsel for the General Counsel's supposition that "McGonigle reasonably (and accurately)

² The Counsel for the General Counsel's agreement with the ALJ that Nova made a tactical approach to have Todaro plead ignorance of the discipline to McGonigle should also be rejected. Nova was never made aware of the discipline or given a copy of the warnings, despite numerous motions and attempts to clarify the allegations. Furthermore, the Counsel for the General Counsel's urging that Nova be required to "ask" UNICCO to remove McGonigle's discipline should be rejected as Nova's request to UNICCO would have no legally binding effect.

³ The Counsel for the General Counsel's footnote 19 claiming that Nova admitted Todaro's agency is misleading considering Nova's Amended Answer specifically denied Todaro's agency.

believed that Todaro was acting on behalf of Respondent” exists no where on record, nor does she attempt to cite any portion of the record supporting this claim. (See G.C. Answering Brief, p. 24, 27). Ultimately, the burden of proof rested on the party asserting agency, and the Counsel for the General Counsel failed to meet this burden. *See Pan-Oston Co.*, 336 NLRB 305 (2001); *Wright Line*, *supra*. At best, the Counsel for the General Counsel has circumstantial evidence regarding Todaro’s duties and responsibilities, rather than actual evidence that Todaro spoke for and acted for Nova.⁴ Despite the arguments by the Counsel for the General Counsel to the contrary, Todaro was not an agent of Nova prior to February 2007 and Nova therefore as a matter of law is not responsible for any alleged actions taken by him during this time period, as fully briefed in Nova’s supporting Brief.

III. NO ALLEGED THREATS MADE TO EMPLOYEES

As stated in Nova’s supporting Brief, Todaro was well aware of Sanchez’s union affiliation, and thus was not interrogating him in the conversation at issue. Todaro was not attempting to learn Sanchez’s union sentiments and his comments could not have interfered with Sanchez’s rights. The ALJ’s finding that Todaro “sarcastically” asked Sanchez if he was in a union was entirely speculation. Again, the Counsel for the General Counsel failed to meet her burden under *Wright Line* by not presenting actual evidence that Todaro interrogated Sanchez. Accordingly, the Counsel for the General Counsel’s recitation of the ALJ’s decision should be rejected.

⁴ The Counsel for the General Counsel mischaracterizes Santulli’s testimony by claiming that Todaro reported to Arlene Morris when he was employed by UNICCO. (See G.C. Answering Brief, p. 25). Rather, Santulli testified that Todaro currently reports to the Executive Director of Facilities Management (now that he is employed by Nova), and that in 2006 (when Todaro was employed by UNICCO), Nova’s Executive Director was Arlene Morris. Santulli did not testify that Todaro reported to Morris in 2006. (Tr. 60).

Furthermore, the Counsel for the General Counsel's characterization of Nguyen's testimony is inaccurate. The ALJ's assertion that Nguyen's testimony "appears to be contradictory" mischaracterizes the testimony by conflating Nguyen's recounting of his conversation with Bazile with his earlier recommendation to Green Source that his men be hired (Tr. 178-79). Also, the Counsel for the General Counsel's assertion that Bazile's testimony should not be discredited because he "misspoke" creates a double standard for the similar recollection of the conversation by Nguyen and Bazile once again. Regardless, the ALJ found that even if Nguyen's testimony is discredited, no violation of the act occurred. (See Decision, p. 44). The Counsel for the General Counsel is not excepting to this finding, but rather only arguing that Bazile's testimony should be credited and Nguyen's discredited, which does not affect the outcome of the decision.

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 so Nova is alerted to the presence of contractors engaging in activity other than what they are contracted to do in areas other than appropriate work areas. The arguments advanced by the Counsel for General Counsel must fail because they are based on an improper legal standard as well as speculation which is not supported by record evidence. Furthermore, Nova's agents did not interrogate or otherwise violate the rights of Sanchez or Bazile.

It is hypocritical for the General Counsel and the ALJ to deny a private entity like Nova the ability to restrict the solicitation of its contractors while the federal government building provide the same protection that Nova currently has in place. Much like the ALJ, the Counsel for the General Counsel relies on speculation and personal attacks, *e.g.*, repeatedly suggesting Nova is

disingenuous. (See G.C. Answering Brief, pp. 8, 23, 30, 31). The Counsel for the General Counsel's reliance on her own speculation as opposed to actual record evidence (e.g., "McGonigle, like any other UNICCO employee, would have reasonably believed under those circumstances that Todaro was speaking for Respondent." G.C. Answering Brief, p. 27), demonstrates the weakness of her case. Simply put, Counsel for the General Counsel failed to meet her required evidentiary burdens.

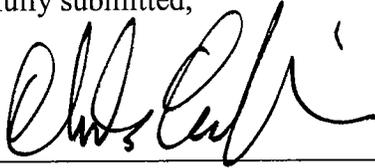
For the reasons stated above and in Nova's supporting Brief, Respondent respectfully requests that the Board refuse to adopt the ALJ's recommended findings of fact and conclusions of law, and that Board set aside the ALJ's Supplemental Decision and Order. Respondent further respectfully requests that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

Date: June 11, 2009

FISHER & PHILLIPS LLP
450 East Las Olas Boulevard
Suite 800
Fort Lauderdale, Florida 33301
Telephone: (954) 525-4800
Facsimile: (954) 525-8739

Respectfully submitted,

By: _____



Charles S. Caulkins, Esquire
(Fla. Bar No. 0461946)
David M. Gobeo, Esquire
(Fla. Bar No. 0016565)

*Attorneys For Nova Southeastern
University*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and three copies of this RESPONDENT'S REPLY BRIEF TO GENERAL COUNSEL'S ANSWERING BRIEF TO 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.



Charles S. Caulkins

Date: June 11, 2009