

**Universidad Interamericana de Puerto Rico, Inc.
and Congreso de Uniones Industriales de Puerto Rico. Case 24-CA-4706**

27 February 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 30 June 1983 Administrative Law Judge Joel A. Harmatz issued the attached decision. The Respondent filed exceptions and a supporting brief, and counsel for the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.¹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Universidad Interamericana de Puerto Rico, Inc., Rio Piedras and Bayamon, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except the attached notice is substituted for that of the administrative law judge's.

¹ We agree with the judge that the Respondent violated Sec. 8(a)(3) and (1) by discharging its janitorial employees and subcontracting their work. Unlike the judge, however, we do not find that the Respondent's failure to solicit competitive bids in September 1982 constitutes evidence of an unlawful motive. We note that the Respondent had solicited competitive bids in 1981 when it first considered the possibility of subcontracting. The information obtained from those bids was still at the Respondent's disposal in September 1982, and consequently we are not of the view that the Respondent's failure to conduct the bidding a second time is indicative of an unlawful motive. We find that the other factors relied on by the judge provide ample support for the inference that the Respondent's conduct was motivated by the union activities of its employees.

We have modified the judge's notice to conform with his recommended Order.

APPENDIX A

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

268 NLRB No. 177

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT question our employees concerning their union activity.

WE WILL NOT create the impression that we are spying on union activity conducted by our employees.

WE WILL NOT threaten employees with discharge or any other reprisal because they seek to engage in activities on behalf of a union.

WE WILL NOT discourage membership in Congreso de Uniones Industriales de Puerto Rico, or any other labor organization, by discharging or otherwise discriminating against employees because they have elected to join, form, or assist a union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Tomas Diaz Cordero, Olga Rodriguez, Juan Martinez, Antonio Santiago Ramos, Luis Pinerio, Manuel Colon Vazquez, Alfonso Melendez, Emilio Colon, Julio Alicea, Diego Rivera, Carmelo Colon, Moises Oyola, Rene Oyola, Eduardo Natal, Pedro Vazquez, Angel Martinez, Rafael Torres, Victoriano Gonzalez, Jose Gotay, Angel Gonzales, Santa Perez, Salvador Acevedo, Juan de al Cruz, Escolastica Rodriguez, Efrain Ceden, Felix Pagan, Jose Flores Serrano, Jose Hernandez, Lydia Colon Canales, Candido Cosme, Jose A. Diaz, Francisco Oquendo, Aurea Rivera Vargas, Israel Rodriguez, Martin Sierra, Lina Sierra, Miguel Angel Arroyo, and Saturnino Calderon immediate and full reinstatement to their former positions, without loss of their seniority or any other rights, benefits, or privileges previously enjoyed, and WE WILL make them whole, with interest, for all loss of earnings they sustained by virtue of our discrimination against them.

**UNIVERSIDAD INTERAMERICANA DE
PUERTO RICO, INC.**

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge: This matter was heard by me in Hato Rey, Puerto Rico, on February 22 and 23 and March 7, 1983, on an original

unfair labor practice charge filed on September 21, 1982, and a complaint which issued on November 5, 1982, alleging that the Respondent independently violated Section 8(a)(1) by coercively interrogating employees, creating the impression of surveillance, and threatening employees with discharge and other unspecified reprisals because of their union activities. The complaint further alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by on September 20, 1982, subcontracting its cleaning and maintenance work and discharging its employees so engaged in reprisal for union activity. In its duly filed answer, the Respondent denies that any unfair labor practices were committed. Following close of the hearing briefs were filed on behalf of the Respondent and the General Counsel.

On the entire record in this proceeding, including my opportunity directly to observe the witnesses while testifying and their demeanor, and on consideration of the post-hearing briefs, it is hereby found as follows.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a nonprofit corporation organized under the laws of the Commonwealth of Puerto Rico engaged in the operation of a postsecondary educational institution with branches throughout Puerto Rico, including Rio Piedras and Bayamon, herein collectively called the Metropolitan Campus, the only branches involved in this proceeding. In the course of said operation, during the calendar year 1981, a period representative of its annual operations generally, the Respondent derived revenues in excess of \$1 million, exclusive of contributions, and purchased and caused to be delivered to its educational institutions goods and materials valued in excess of \$50,000, directly from points located outside the Commonwealth of Puerto Rico.

The complaint alleges, the answer admits, and I find that the Respondent is an employer engaged commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the Respondent at the hearing admitted, and it is found that Congreso de Uniones Industriales de Puerto Rico is a labor organization within the meaning of Section 2(5) of the Act.

III. THE LABOR ORGANIZATION INVOLVED

Primarily at stake in this proceeding is the question of whether or not the Respondent in subcontracting the janitorial work at its Metropolitan Campus, and thereby terminating 38 employees, was motivated by a desire to curtail union activity within its housekeeping staff. Subsidiary questions are also presented as to whether Respondent independently violated Section 8(a)(1) through coercive interrogation, creating the impression of surveillance, and threats of reprisal.

Basically, the facts show that the Respondent is a major institution of advanced learning in the Commonwealth of Puerto Rico with facilities located throughout

the Island. There is no history of collective bargaining among any employees of the University. The Metropolitan Campus consists of separate facilities located at Bayamon and Rio Piedras. The Rio Piedras site houses a newly constructed building, first opened in January 1982, at a cost of \$20 million. Some 12,600 students are enrolled at the latter, while 3,200 attend Bayamon.

Prior to the events here in issue, janitorial services at the Metropolitan Campus were performed by individuals employed directly by the Respondent. However, in June 1981, the University first considered the possibility of subcontracting those duties. As part of that process, bids were obtained from three cleaning contractors; namely, Caribe Cleaning Services, Inc., Antilles Cleaning Services, and Auburn Building Maintenance. In early December 1981, the matter came to a head, when the president of the University, Dr. Ramon A. Cruz, rejected the recommendation of Dr. Rafael Cartegena, the chancellor of the Metropolitan Campus, and decided not to contract out the janitorial work to Caribe Cleaning Services, Inc., herein called Caribe. Cruz elected instead to afford Respondent's own employees added training and the opportunity to prove themselves capable of performing at satisfactory levels. Cruz admits that the possibility of subcontracting the services in question was not again mentioned until September 17, 1982.

Throughout the spring and summer of 1982, the Respondent took steps in support of this commitment to its own work force. First, Caribe was retained as a consultant to provide assistance in connection with the purchasing of equipment and materials, and the training of the Respondent's personnel in proper and efficient cleaning procedures.¹ That contract expired on March 30, 1982.² It was not renewed. In consequence thereof, pursuant to advice received from Caribe, the Respondent, in April, invested some \$26,000 in the purchase of new cleaning equipment.³ Later, on June 30, the Respondent entered an agreement with another firm, Systems for Planning and Management, Inc., whereby the latter's president, Duhamel A. Rivera, would work onsite at the Metropolitan Campus as "Director of Buildings and Grounds" and retain responsibility for the conservation of the campus in the areas of security and housekeeping.⁴ Pursuant to this agreement, Duhamel Rivera assumed responsibility for supervision of the cleaning employees and others, and, inter alia, to "make recommendations in connection with the contracting of necessary services."

Thereafter, in late August 1982, union activity emerged. Two janitors based at Rio Piedras, Rene Oyola and David Gonzalez, on September 15 and 16, distributed and obtained signed union authorization cards. On Monday, September 20, the Union filed a representation petition with the National Labor Relations Board. That afternoon at 3 o'clock, some 38 nonsupervisory janitorial employees at the Metropolitan Campus were assembled and informed that their work would be contracted out and their employment terminated.

¹ See Jt. Exh. 8.

² Unless otherwise indicated all dates refer to 1982.

³ See Jt. Exh. 8.

⁴ See Jt. Exh. 9.

In the interim, on Thursday, September 16, the day before the decision to subcontract was made, Oyola and Gonzalez were separately interviewed by Duhamel Rivera and the Respondent's director of maintenance, Jesus Rivera. It was averred by the employees that in the course thereof the Respondent's representatives advised that they were aware of union activity, inquired as to whether it was true that Oyola and Gonzalez were soliciting union cards, and suggested that they might possibly lose privileges or even their jobs if they persisted in such conduct. At the same time, Duhamel and Jesus Rivera admitted that they met separately with Oyola and Gonzalez on that date, but denied knowledge of any organizational activity or that the latter were employee organizers. They also denied that there was any mention of the Union in these discussions.

Assuming the credibility of Gonzalez and Oyola, it is established prima facie that the discharges were effected only a few days after representatives of the Respondent learned that union organization was in progress within the janitorial department, and attempted to thwart this effort through illegal acts of intimidation. An inference of proscribed discrimination would clearly arise from the foregoing.

The effort made on behalf of the Respondent to disassociate the subcontracting decision from union activity is founded on testimony of six high-level functionaries of the University; namely: Duhamel Rivera, director of buildings and grounds; Jesus Rivera, director of maintenance; Edwin Hernandez, dean of administration; Dr. Rafael Cartegena, chancellor of the Metropolitan Campus; Felix Enrique Ocasio, vice president for administration; and Dr. Ramon Cruz, president.

All deny knowledge that the Respondent's janitorial employees had engaged in any form of union activity prior to the contracting out of their work and all afforded testimony integrated into a chain of events calculated to inspire confidence in the assertion that this was a legitimate decision founded solely on business considerations.

If one were to accept the Respondent's evidence, the event which appears to have triggered the subcontracting arrangement was a supplemental budget proposal developed by Duhamel Rivera and first bared on Tuesday, September 14, to Dean Hernandez. The proposal called for the addition of 12-1/2 janitorial positions. Parenthetically, it is noted that, previously in August, Duhamel Rivera had commenced to make recommendations to improve cleaning services at the Metropolitan Campus. On August 30, a date which coincided with the beginning of a new semester, at his behest, new work schedules were implemented for janitorial employees, which increased hours during the night shift and on Saturdays, when fewer classes were held and janitorial work could be performed with less disruption from student traffic. In any event, on Wednesday, September 15, Duhamel Rivera, having received tentative approval from Hernandez, personally submitted the budget proposal to Chancellor Cartegena.⁵ Cartegena assertedly inquired as to whether

⁵ See Jt. Exh. 12.

Rivera considered the alternative of subcontracting and whether he had made a cost comparison measuring the desirability of subcontracting against his present supplementary budget request.⁶ Cartegena also asked whether Rivera could "guarantee" that, if the supplementary budget request were approved, the cleaning services would prove satisfactory.⁷ Rivera on both counts responded in the negative. Cartegena, as the testimony goes, then instructed Rivera to meet with Dean Hernandez to prepare a comparative cost analysis based on Caribe's proposal made on October 26, 1981. Cartegena made no suggestion that Rivera or Hernandez first inquire of Caribe as to whether vitality remained in the proposal made some 11 months earlier.

Later in the day, on September 15, Duhamel Rivera met with janitorial employees, describing the supplementary budget proposal that had been submitted. Those present were informed that the success of that proposal depended on the ability of the employees to carry out their basic functions, and he urged them to make a maximum effort to show that they could clean the campus. He indicated that he told the employees that if they failed to show the administration that they could do the cleaning, not only their jobs but his own would hang "in balance."

As for the critical events of September 16, Duhamel Rivera and Jesus Rivera admitted that they initiated the separate meetings that day with David Gonzalez and Rene Oyola. However, contrary to the testimony of the employees, the former denied reference to union activity. Instead, it is claimed that these two individuals were among seven selected for interviews who were reputed to be leaders or employees of influence, and that meetings with the remaining five employees were aborted due to the supervening decision to contract out. According to Duhamel Rivera, the purpose of the meetings was limited to management's desire to foster a broader understanding of the newly implemented work schedule and to persuade influential employees to support the new arrangement.⁸

⁶ The supplemental budget proposal covered cost increments in addition to those assignable to janitorial service.

⁷ The maintenance service industry is low wage based, labor intense, and plagued with turnover. For this reason, it is doubtful that in a large scale cleaning operation a guarantee that janitorial work will be performed satisfactorily on a sustained day-to-day basis could be sincerely expressed or enforced. Cartegena's premise that an independent contractor such as Caribe would afford such a guarantee impressed as born of a desire to exaggerate by sheer argumentation the beneficial results to be achieved through subcontracting.

⁸ The fact that such interviews were limited to employee organizers is one of a number of coincidences imbedded in the Respondent's justification for the subcontracting decision. To explain away suspicion, the Respondent points to testimony that five other employees were designated for similar meetings and that it was intended that meetings be held with four on September 16 and three others on a later date. However, of the four selected, two were not available and hence the meetings of September 16 involved only Rene Oyola and Angel David Gonzalez, as they happened to be available. There were no further meetings because, on the morning of September 17, Duhamel Rivera, by happenstance, learned of the decision to contract out. No Bayamon employees were among the seven allegedly selected for interview.

Meanwhile, Dean Hernandez, on September 15, as the testimony goes, was busily engaged in preparation of the cost analysis requested by Dr. Cartegena. Both agree that the typed report was submitted to Cartegena on September 16. The document reflects a savings of \$247,826 annually through contracting out to Caribe Cleaning. As indicated, this calculation was made on the basis of a proposal made by Caribe 11 months earlier, and without inquiry as to whether it was still in effect.⁹ Armed with this, Dr. Cartegena, in the 10(j) proceeding before the United States District Court,¹⁰ explained his next step, and the basis for it, as follows:

Well, it was substantial savings. On the other hand, the Engineer Duhamel Rivera could not guarantee that we would have an acceptable level of cleaning, which I could have with the company because once a company is contracted, what you really contract out is a certain level of cleaning. And this level of cleaning costs "x" amount of money.

So, I was—I was sure that—well, we have tried and we have done everything in our hands to let our employees learn the new system. The situation did not improve. Not only that, but the person who is—as the consultant tells me, that he needs twelve and a half additional positions, and over and above that, he could not guarantee any level of cleaning.

So, really, at that time I decided that I would strongly recommend to the president that I would reiterate my original recommendation, namely, that we contracted [sic] out the services of Caribe Cleaning.

On the morning of September 17, Cartegena claims to have met with the president of the university, Dr. Ramon A. Cruz. According to Cartegena, he informed the president as follows:

I told the president that he knew the situation at the campus. As a matter of fact, he had written to me regarding that situation, that the engineer was requesting twelve and a half new positions and "x" amount of money to do the job; that the employees were reluctant and have shown difficulties in carrying out the new work schedules necessary for the cleaning. Consequently, that I would strongly recommend that we contracted [sic] out Caribe Cleaning.

Cruz and Cartegena agree that Cruz then allegedly posed the obvious question as to whether Cartegena "was sure whether Caribe Cleaning was maintaining their conditions of the proposal they had submitted back in November 1981." As indicated, Cartegena had not

⁹ See R. Exh. 5.

¹⁰ Prior to the instant hearing, a proceeding was instituted by the General Counsel in the United States District Court for the District of Puerto Rico under aegis of Sec. 10(j) of the Act. Following hearings on January 19, 20, 21, 24, and 25, the Honorable Jaime Pieras, Jr., U.S. District Court Judge, on February 17, 1983, issued an "Opinion and Order" to the effect that "This Court cannot conclude that interim injunctive relief would be just and proper in the case at bar." See R. Exh. 6.

bothered to check. Indeed, he acknowledged that he had no recent contacts with Caribe either directly or indirectly prior to September 17. According to his testimony, he called Dean Hernandez urging the latter to contact Caribe and to inquire as to whether they would stand on their 11-month old proposal. Later, according to Cartegena, Hernandez telephoned him back, reporting that Caribe would do so.¹¹

Cruz corroborated Cartegena while under examination by me as follows:

JUDGE HARMATZ: And Cartegena, he came to you kind of out of the blue, didn't he? I mean, had you—

DOCTOR CRUZ: He came to me quite concerned about the situation he had.

JUDGE HARMATZ: Right. What was it that had him aroused at that point in time? Was there anything specific that he mentioned that caused him to come to you?

DOCTOR CRUZ: Well, he simply reminded me that I had refused to accept this company contract before, but that the situation he felt was out of his control. He wanted me to reconsider the decision.

JUDGE HARMATZ: Okay. And when was the last time he had mentioned this proposal to you, this recommendation to you, prior to that?

DOCTOR CRUZ: It was back in 1981, before we had moved to the new building.

JUDGE HARMATZ: And that was the last time that he mentioned it to you? 1981, before you moved to the new building was the last time that he had mentioned this proposal?

DOCTOR CRUZ: Yes, that's correct.

JUDGE HARMATZ: So this is some nine months later, at least.

DOCTOR CRUZ: That's correct.

JUDGE HARMATZ: And he's asking you to reconsider nine months later. Now, did he tell you why he wanted you to reconsider it?

DOCTOR CRUZ: Well, he told me that in spite of the fact that we had gone through a training of employees and we had purchased new equipment the situation on the campus was no better, and that he was being asked for an additional amount of money to hire more employees and more equipment. And he felt that this was the right time to make the decision.

¹¹ Jose Fermaint, Caribe's general manager, confirmed such a conversation. While admitting that labor was the most expensive cost factor under a maintenance contract, he did not appear to clearly recall when the collective agreement covering his employees granted periodic increases during the years 1981-1982. This, despite the fact that intervening wage increases or predictable changes in wage levels during the term of any new maintenance contract would have direct bearing on the economic feasibility of resurrection in tact of an 11-month-old proposal. It is also noted that, according to Fermaint, the collective-bargaining agreement between Caribe and the "bona fide" union representing Caribe's employees was scheduled to expire in December 1982, only a few months after Caribe entered a formal contract with Respondent. That collective-bargaining agreement presumably would have been subject to renegotiation at that point.

Cruz, having decided to accept Cartegena's recommendation, next asserts that he called Felix Ocasio, the Respondent's vice president in charge of administration. Ocasio is alleged to have recommended that the decision be carried out as fast as possible for security reasons; namely to avoid vandalism, sabotage, and disruption on the part of employees who had access to sensitive areas and expensive and critical equipment.

With Ocasio's alleged advice, Cruz inquired of Cartegena as to how quickly the contract could be set in motion. Cartegena again called Hernandez, who again allegedly contacted Caribe, reporting back that they would be ready to perform on Monday, September 20.¹²

The first confrontation between representatives of the Respondent and Caribe did not take place until 4:30 p.m. on September 17. At that session,¹³ terms of a contract were discussed and an understanding was reached that Caribe would take over the janitorial services at 7 p.m. on Monday, September 20. Caribe agreed to purchase the cleaning equipment recently acquired by the Respondent and also to purchase materials held in inventory by the Respondent. Dr. Cruz did not participate in that meeting. Later, a written agreement was executed on Wednesday, September 22, 1982.¹⁴

Also on September 17, following the meeting with Fermaint, certain of Respondent's representatives met to devise the means by which its maintenance employees would be notified of their termination the following Monday.

On Monday, September 20, at approximately 4:15 in the afternoon, a meeting was conducted with the janitorial employees. They were given three documents. One notified them of their termination, a second related to an extension of benefits until December 1982, and a third consisted of an invitation by Caribe for the discharges to file job applications with that firm.¹⁵

At first blush and on a cold reading, testimony offered in support of the defense was not without appeal. Thus, it clearly is fact that the performance by the janitorial staff had been an object of criticism and a matter of continuing concern to the University's administration. Indeed, the subcontracting of that work was previously considered a year earlier. Also working in the Respondent's favor was the fact that the defense was shouldered by a bevy of distinguished witnesses. Dr. Ramon Cruz, the president of the Respondent, and the chief executive of one of the largest advanced learning centers in the Commonwealth had placed his integrity on the line. Joining him were Felix Ocasio, the University's vice president in charge of administration, as well as the chancellor of the Metropolitan Campus, Dr. Cartegena,

¹² It is noteworthy that before the decision was made, neither Cartegena nor Cruz nor any other representative of the Respondent had any direct face-to-face contact with any representative of Caribe. All actions were taken based on information relayed from Hernandez, who was in telephonic communication with Fermaint of Caribe.

¹³ According to Fermaint the University was represented by Hernandez, Felix Ocasio, and University attorneys Jean Villilla and Costa del Moral. Neither Cruz nor Cartegena attended.

¹⁴ See Jt. Exh. 12.

¹⁵ By a virtue of the agreement between Caribe and the Respondent, Caribe was obligated to provide employment to 25 of the discharged employees.

and its dean of administration, Attorney Hernandez. In contemplating the probabilities, I found it difficult to accept that academicians of such prominence would place their integrity on the line and violate the oath to veil an act of discrimination as against the lowest echelon of the University's employees. Nonetheless, as shall be seen, I am convinced that each contributed to a web of prevarication in an overall effort to wrong the discharges.¹⁶ Thus, the Respondent's witnesses testified from an argumentative and evasive stance and in a fashion not atypical of that afforded by those having something to hide. The asserted business justification was punctuated by significant omissions, shifting explanations, improbability, astonishing coincidence and, on its face, was implemented under nondeliberative conditions of the type familiar where illegal conduct is masked by pretext. But these impressions might well have been overlooked were it not for unmistakable evidence that a document, central to the defense, lacked authenticity, and had to have been concocted by certain of the Respondent's witnesses to influence in its favor the litigation before the United States District Court and the National Labor Relations Board.¹⁷

In connection with the latter, it will be recalled that Hernandez testified that on instruction from Cartegena, relayed by Duhamel Rivera, he prepared a cost analysis on September 15, which he delivered to Cartegena on September 16. Cartegena in turn testified in the 10(j) proceeding that, on September 17, he presented this "analysis" to Dr. Cruz. The document in question was offered in the proceeding before the United States District Court as Joint Exhibit L and before me as the Respondent's Exhibit 5. It showed that the University would realize savings of \$247,826 during the period 1982-1983 by contracting out. However, contrary to the Respondent's testimony, the General Counsel in his brief argues convincingly that this document could not have existed in its proffered form at any time prior to September 20. For it showed that \$22,822 would be realized from the sale of equipment and material. Yet, it is clear that there was no contact between Caribe and the Respondent until September 17. Moreover, according to Fermaint in a telephone conversation with Hernandez on the morning of September 17, the latter inquired as to whether Caribe

¹⁶ Witnesses offered by the General Counsel were not the most impressive I had ever seen. The existence of union activity was established through Jose Alberto Figueroa, a nonemployee union organizer, David Gonzalez, Rene Oyola and Diego Rivera, the latter three being janitors who were terminated on September 20. As shall be seen, Diego Rivera was not viewed as a believable witness, and I have declined to give credence to his testimony where uncorroborated. At the same time, Figueroa, Gonzalez, and Oyola labored under breakdowns in recollection as to when the campaign started and while their testimony was not entirely consistent, these deficiencies were negligible compared to the gross distortion of fact apparent in the Respondent's proof. Indeed, suspicion generated by the Respondent's own evidence with respect to highly material matters actually served to enhance the probability of the critical testimony offered by Gonzalez and Oyola concerning the meetings with the Riveras on September 16. In sum, the testimony proffered in support of the defense was so plainly lacking in truth that it actually served to reinforce the existence of an unlawful motive herein, and along with it, the believability of the testimony pointing rationally to that conclusion.

¹⁷ The document in question appears to have been relied on by Judge Pieras. See R. Exh. 6, Findings of Fact 17 and 18.

would purchase the University's equipment. Fermain't responded that he was not at that time at liberty to discuss the matter, but would have to check records and determine what position would be most advantageous for his firm. Later that afternoon, as Fermain't puts it, "I made the University an offer which they deemed proper for the purchase of said equipment." Fermain't also relates that, on the afternoon of September 17, Caribe agreed to purchase the University's cleaning supplies, but only after valuation through a physical inventory which did not take place until Monday, September 20. Quite obviously therefor, the amount paid by Caribe for the equipment and supplies remained in an unpredictable state until Fermain't's offer for the purchase of equipment on September 17 and the completion of the inventory on September 20. The sum ultimately agreed to was memorialized in the contract formally executed on September 22, as \$6,800 for the purchase of materials and \$16,022, for the purchase of equipment. Thus, the total purchase price was \$22,822, the identical figure allegedly used by Hernandez in preparing the cost analysis on September 15 and 16. See Joint Exhibit 12. This is the most astonishing in a series of remarkable coincidences underlying the defense. Quite obviously, according to the clear, undisputed testimony of Fermain't, an individual whose interest in this proceeding was allied with that of the Respondent, this figure would not have been available to Hernandez, on September 15, when he allegedly prepared the document, or on September 16, when Cartegena allegedly examined the document, or on September 17, when the "analysis" was given to Cruz, or for that matter at any time prior to the completion of the inventory and assignment of dollar value to it on Monday, September 20. From this it follows that the decision to subcontract was made on September 17 without benefit of any cost analysis showing that such a course would produce savings of \$247,826.

The fictitious nature of the Respondent's Exhibit 5 is reinforced by testimony on the part of Hernandez that the \$22,822 figure was derived from Caribe's October 26, 1981 proposal. Indeed, Hernandez went so far as to testify that it was a fair assumption that those figures would have remained the same 11 months later. Simply put, this could not have been. For, according to my examination of Caribe's earlier proposals, no specific monetary sum was mentioned, but the matter was left to future negotiation. Thus, the only relevant reference in Joint Exhibits 1 and 2 is the following stipulation:

Considering the University has already made an original investment in equipment and materials, the contractor is willing to acquire these equipments and materials at a reasonable price for both parties if the University so wishes.

In any event, it is undisputed that the University expended substantial capital in acquiring new equipment after the 1981 proposal and in April 1982. Moreover, as indicated, the value of materials was not subject to predetermination but required a physical inventory at the time of takeover. The testimony of Hernandez was plainly false and I am convinced, as the General Counsel contends,

that the Respondent's Exhibit 5, a document that lies at the cornerstone of the Respondent's economic defense, constituted a complete fabrication, manufactured out of a desire to obscure the true reason for the decision to contract out the janitorial work.

Against this background, my own misgivings concerning other aspects of the defense which seemed to lack plausibility or impressed as gravely suspect are affirmed as part and parcel of a comprehensive effort to conceal what actually transpired. These areas are outlined below:

1. Testimony offered by the Respondent indicates that the decision to contract out was hastily arrived at, without participation of Duhamel Rivera or Jesus Rivera, the individuals with day-to-day supervisory responsibility for maintenance operations. It will be recalled that knowledge and union animus had been imputed to both by witnesses for the General Counsel. In the circumstances, the exclusion of Duhamel Rivera raises some interesting questions. For as recently as June 30, the Respondent contracted for the services of Rivera's consulting firm for the purpose, inter alia, of providing supervision and enhancing performance of the Respondent's cleanup crews. The contract was to continue for a period of 1 year, expiring on June 30, 1983, with compensation afforded by the University at a rate of \$2,083.33 monthly. On August 30, a new system, devised by Duhamel Rivera, was implemented. The discharge decision was made at a time when Rivera was in the process of orienting cleaning crews to that new system only 3 weeks after commencement of a new semester. Meetings had been held, repeatedly, with different combinations of janitorial crews, and others were scheduled when Duhamel Rivera was informed in casual fashion of the discharge decision. Although Duhamel Rivera had been retained to provide counselling in the area of "the contracting out of necessary services," and while Cruz had been alerted to Rivera's request that 12-1/2 additional janitorial positions be allocated, Cruz expressed no curiosity as to the logic behind this request, nor did he inquire of Caribe as to its views on the question of whether work demands at the new facility justified an enlarged janitorial force.

2. Cruz made the decision hastily during a 30-minute period, without development of current facts in consonance with sound procurement practices. When in 1981 the Respondent considered the possibility of contracting out janitorial services at the Metropolitan Campus, deliberations took place over a period of 5 months. Three contractors submitted bids. Although Caribe had submitted its bid on October 26, 1981, and Cartegena at that time allegedly recommended acceptance of that bid,¹⁸ it was not until December 2, 1981, that Dr. Cruz rejected this recommendation and elected to afford additional training to the existing complement of janitors and to retain them. It is noted that Dean Hernandez testified

¹⁸ As an aside, I was struck by the fact that on September 17 Cartegena, though acknowledging that he was aware that employees of Caribe were represented by a labor organization, found it unnecessary, before approaching the president of the University, to obtain an update on the October 26, 1981 proposal. Instead, it is the sense of his testimony that his recommendation to Cruz was on the basis of a cost analysis which at that juncture remained purely hypothetical.

that the Caribe Cleaning proposal of October 1981 was "much more expensive" than that submitted in the fall of 1981 by Auburn, a competitor. Jose Fermaint, Caribe's general manager, acknowledged that his firm was only second or third in volume among janitorial contractors in the Puerto Rican market. He also acknowledged that the Respondent's contract was the largest held by his firm when obtained in September 1982. No explanation is offered as to why other contractors were not afforded an opportunity to compete when the Respondent finally elected to contract out its janitorial services.

The haste with which Cruz acted prevented him from touching base with either the board of directors or the executive committee, a step which, considering the bylaws of the University, raised serious question as to Cruz' credibility both as an administrator and witness. Thus article III, section 3.2, subsection C, thereof, provides as follows:

Any single contract, application, document or proposed lease of property used or to be used by the University committing for obligating to the University of the total of more than \$100,000 (one hundred thousand dollars) in aggregate salary, rental or purchase price payment shall be previously authorized by the board of trustees or by its executive committee.

Cruz excused his failure to seek such authorization by affording testimony in the instant hearing and in the 10(j) proceeding to the effect that he knew this provision to be inapplicable to the Caribe arrangement. However, his explanation as to why he was of this frame of mind on September 17 was so shifting and lacking in substance as to suggest a lack of veracity. Thus, before the District Court, Dr. Cruz testified that the above restriction did not apply to service contracts, but was limited to leases and purchases of materials, supplies, and equipment. However, no such qualification is suggested by the above provision, and its ordinary meaning suggests otherwise. On the other hand, when questioned by me as to this matter, Cruz indicated that prior authorization was unnecessary because janitorial costs had been budgeted and the relevant provision of the bylaws only applied to nonbudgeted expenditures.¹⁹ Here again, there is no such limitation expressed on the face of that provision. Furthermore, the inherent purpose of such limitations, i.e., to mitigate losses due to possible conflict of interest or kick-backs in the procurement process, would hardly be served if only nonbudgeted expenditures were covered. Furthermore, it is extremely doubtful that, as Cruz implies, the chief executive could, on his own, effect nonbudgeted purchases up to \$100,000. The testimony afforded by Cruz, in this respect, struck me as bootstrap and contrived to cover his participation in an ultra vires

¹⁹ President Cruz attempted to bridge the differences in his testimony before the district court by offering that he neglected to mention the limitation to nonbudgeted amounts, because of the rapidity with which questions were shot at him by Board counsel in that proceeding. It is apparent, however, as he later conceded, that his own counsel afforded him full opportunity to explain why he felt that art. III, sec. 3.2, subsec. C, was not applicable to Caribe's contract.

act. Regrettably, I note that my impression of the overall testimony afforded by Dr. Cruz, weighed against other disclosures herein, was that he willingly enmeshed himself in a conspiratorial disregard for truth.²⁰

Another high-ranking administrator, Felix Ocasio, was offered to allay suspicion as to the timing of Cruz' action. It is noted in this connection that this suspicion is enforced by a number of objective factors, including the fact that the decision to terminate the 38 employees was made abruptly and in the middle of a pay period. It occurred 3 weeks into a new semester, after the Respondent, without resurrecting the possibility of subcontracting, had an opportunity to evaluate the performance of the cleaning staff in the new Rio Piedras building during a full spring semester which ended in mid-May and summer sessions which ended in July.²¹ Moreover, the decision was made early in the tenure of Duhamel Rivera, occurring only 2-1/2 months after the consulting agreement was entered and in the course of his first formal attempt, invoked some 3 weeks earlier, to improve the quality of janitorial services. Indeed, while this process was in motion, Cruz, without seeking counsel of Duhamel Rivera, determined to eliminate the janitors and contract away their work, without soliciting competitive bids or approval of either the board of directors or the executive committee of the University. Despite the fact that the issue of contracting out had not been discussed by Cartegen and Cruz since December 1981, Caribe was installed with such haste that a formal written contract was not entered until 5 days later.

Ocasio did not dispel the suspicion arising from the foregoing. His explanation for Cruz' conduct was unconvincing. It is clear, from testimony of both Cruz and Ocasio, that the decision was made first, and then Ocasio's guidance was sought by telephone as to the means of implementation. Thus, as Ocasio did not participate in the decision itself, his advice was after the fact and furnished no explanation for the haste with which Cruz reached his decision and the failure of Cruz and Cartegen to take a more studied approach.

Furthermore, the testimony of Ocasio, Cruz, and Hernandez that Ocasio recommended immediate implementation for security reasons is itself suspect. The possibility of subcontracting, as well as the rumors that would naturally be generated thereby, had previously been experienced at the Metropolitan Campus, apparently without incident. For, it will be recalled that in 1981 the Respondent made a full-blown study of the possibility of contracting out the janitorial service over a 5-month span, a matter necessarily opened to the public through

²⁰ Although Cruz claims to have made the decision to subcontract, his testimony on examination by the Respondent's counsel seemed deliberately general, devoid of specifics, and seemingly sanitized. Most curious in this respect is the fact that though Cartegen testified that on September 17 he presented to Cruz R. Exh. 5, Cruz did not reveal whether or not this was so, or that he made his decision based on reference to any form of documentation whatever.

²¹ In August 1982, no classes were scheduled, and the facilities were used solely for purposes of student registration. The testimony of Cartegen to the effect that student traffic during that period was "very heavy" impressed as argumentative, unbelievable, and calculated to deceive. Ultimately, he did admit that only one-third of the classrooms were in use during that month.

the solicitation of bids. No evidence was presented as to any adverse expression from its janitorial work force during that period. The assumption that continued deliberation in 1982, rather than the hasty decision which was made, would meet with a different experience fits a pattern of shallow and seemingly contrived testimony. Considered against the total record, I did not believe Ocasio and find that he, too, was among high-level officials of the University who afforded false testimony to obscure the discrimination perpetrated in this case.

In sum, it is concluded that the claim that the Respondent elected to contract out to Caribe and terminate its employees for legitimate business reasons was a scandalous sham orchestrated within the highest administrative levels of the University. As heretofore indicated, at the cornerstone of the defense lay a document so crudely conceived as to render inescapable the conclusion that it was manufactured as an act of desperation to impede a straightforward adjudication of statutory rights. Beyond that, the incredible testimony afforded on behalf of the defense was so pervasive as to lend heightened probability to the testimony of David Gonzalez and Rene Oyola as to the events of September 16. Thus, contrary to the testimony of Jesus Rivera and Duhamel Rivera, it is inferred that on or before the meetings of that date both learned that organization activity was underway and that David Gonzalez and Rene Oyola were the vanguard.²² I find that it was more than just coincidence that they were the only employees with whom the Riveras met on September 16, and I find that the purpose thereof was to confront the employees with discovery of their involvement and to persuade them, through intimidation, to cease activity on behalf of the Union.²³ It is concluded

²² Diego Rivera, another janitor, testified that he had several encounters with supervisors, who told him that the discharges were union inspired. Thus, he related that Manuel Gonzalez, a supervisor of janitors on the nightshift, and Director of Guards Jose Aldeya, in separate conversations, either stated or implied this to him on September 20, after employees were notified of their discharge. Gonzalez denied having made any such statement. Aldeya was not available as he was incarcerated in prison at the time of hearing. I was not impressed with the demeanor of Diego Rivera, and his uncorroborated testimony did not ring true. Notwithstanding my misgivings concerning the reliability of witnesses presented by the Respondent, in this instance, I am willing to give the Respondent the benefit of the doubt. Also based on Diego Rivera's further testimony, the General Counsel attributes an admission of improper motive to Cruz, during an interview following the discharges on September 23. The General Counsel argues that Rivera's testimony in this respect indicates that Cruz implied that had he known the identity of the union leaders he would have terminated them alone, and not all of the employees. However, Rivera's testimony seemed garbled and, in the form presented, it seemed unlikely and improbable. In any event, the matter is cumulative and here again I shall give the Respondent the benefit of the doubt.

²³ Rene Oyola testified that on January 23, 1983, he by chance met Maintenance Supervisor Julio Casado at a funeral. Oyola claims that during the course of their conversation Casado stated that he knew that the janitors had been fired because they were trying to bring in a union. Casado admits to having met Oyola on the occasion in question, and to the fact that they had discussed the proceeding then pending in the United States district court. He denied making the specific statement imputed to him by Oyola as to the reason behind the discharge. Although the Respondent disputes the assertion that Casado was a supervisor within the meaning of Sec. 2(11) of the Act, and though I would reject this claim, that issue and the basic question of credibility need not be reached, because in my opinion, even if the statement were made, it was not shown to have been anything more than an expression of personal opinion by a low-level supervisor, not likely to be privy to the true rea-

sons underlying the mass discharge. Moreover, the incident is purely cumulative and unnecessary to the result reached.

that in the course thereof Duhamel Rivera created the impression that the Respondent was aware of their union activity, unlawfully questioned them concerning union activity, and that he and Jesus Rivera implied that continued organizational activity could result in loss of privileges and discharge, all in violation of Section 8(a)(1) of the Act. Moreover, such elements as timing, knowledge, union animus, and the false testimony furnished by the Respondent's witnesses all contribute to a solid inference that the Respondent terminated its employees on September 20 on the basis of the recently acquired knowledge of union activity and to thwart, at its inception, organization activity among these easily replaceable employees. Accordingly, it is concluded that the Respondent thereby violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent independently violated Section 8(a)(1) of the Act by creating the impression that union activity of employees was subject to surveillance, by coercively interrogating employees concerning union activity, and by threatening that continued union activity could lead to discharge or other reprisals.
4. The Respondent violated Section 8(a)(3) and (1) of the Act by on September 20, 1982, terminating the 38 employees listed on Appendix B attached hereto and contracting out their work in order to thwart organization activity among them.
5. The above unfair labor practices constitute unfair labor practices having an effect upon commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it shall be recommended that the Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Furthermore, on the evidence presented here, it is concluded that the Respondent reacted to a budding organization campaign swiftly and in callous disregard for the guaranteed rights of its employees. It thereby engaged in an unfair labor practice so flagrant as to inherently reflect a proclivity to violate the Act. Accordingly, a broad cease-and-desist order shall be recommended requiring the Respondent to cease and desist from "in any other manner" interfering with, coercing, or restraining employees in the exercise of their Section 7 rights. See *Hickmott Foods*, 242 NLRB 1357 (1979).

With respect to the subcontracting and discriminatory discharge of the janitorial work force, it shall be recommended that the Respondent be ordered to restore the janitorial function, and to offer immediate reinstatement

sons underlying the mass discharge. Moreover, the incident is purely cumulative and unnecessary to the result reached.

to the employees listed on Appendix "B," attached hereto, to their former positions, without prejudice to their seniority and other rights and privileges. In so recommending, I reject as lacking in merit the contention of Caribe that such relief is inappropriate in the circumstances of this case. The Board has held, even in cases where union animus is lacking, that the appropriate remedy for job displacement due to subcontracting requires a return to the status quo ante, absent evidence of undue hardship.²⁴ No such showing has been made here. The fact that restoration might require termination of Caribe's present employees on this project hardly forecloses such a remedy, for this group enjoys employment solely as the beneficiary of the Respondent's unlawful discrimination. Furthermore, these employees, and their employer, Caribe Cleaning Services, Inc., will suffer no consequences under such a remedial formula beyond that which would be sustained under cancellation of the contract on 30 days' notice, action which the Respondent was free to take for any reason. See Joint Exhibit 12, section 7. Thus, the General Counsel's claim as to the appropriateness of a conventional Board order, including reinstatement, has not been refuted by substantial evidence. Finally, it shall be recommended that the Respondent be ordered to reimburse employees listed in Appendix "B," for all loss of earnings they have incurred since September 20, 1982, and until the Respondent provides a bona fide offer of reinstatement, less net interim earnings. Said backpay shall be computed on a quarterly basis as provided in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as authorized by *Florida Steel Corp.*, 230 NLRB 651 (1977).²⁵

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER²⁶

The Respondent, Universidad Interamericana de Puerto Rico, Inc., San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating, creating the impression of surveillance, or threatening employees because they have engaged in union activity.

(b) Discouraging membership in a labor organization by discharging, or in any other manner, discriminating against employees because they elect to join, form, or assist a labor organization.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

²⁴ See, e.g., *Equitable Gas Co.*, 245 NLRB 760 (1979).

²⁵ See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

²⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act.

(a) Offer to the employees listed on attached Appendix B hereto, immediate reinstatement to their former positions, without prejudice to their seniority or other rights and privileges, and make them whole in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or appropriate to analyze the amounts due under the terms of this order.

(c) Post at its facilities located in Rio Piedras and Bayamon, Puerto Rico, bilingual copies of the attached notice marked "Appendix A."²⁷ Copies of said notice on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

²⁷ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX B

Tomas Diaz Cordero	Angel Gonzalez
Olga Rodriguez	Santa Perez
Juan Martinez	Salvador Acevedo
Juan de la Cruz	Antonio Santiago Ramos
Luis Pineiro	Escolastica Rodriguez
Efrain Cedeno	Manuel Colon Vazquez
Alfonso Melendez	Felix Pagan
Emilio Colon	Jose Flores Serrano
Julio Alicea	Jose Hernandez
Diego Rivera	Lydia Colon Canales
Carmelo Colon	Candido Cosme
Moises Oyola	Jose A. Diaz
Rene Oyola	Francisco Oquendo
Eduardo Natal	Aurea Rivera Vargas
Pedro Vazquez	Israel Rodriguez
Angel Martinez	Martin Sierra
Rafael Torres	Lina Sierra
Victoriano Gonzalez	Miguel Angel Arroyo
Jose Gotay	Saturnino Calderon