

United Parcel Service and David Dunning. Cases 7–CA–33137, 7–CA–33981(2), 7–CA–34605, and 7–CA–34903

November 7, 1997

ORDER REMANDING

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On July 8, 1997, Administrative Law Judge Judith Ann Dowd issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to remand this proceeding to the judge for further credibility determinations and, if appropriate, new Conclusions of Law and recommendations.¹

The judge found that the Respondent violated Section 8(a)(4) and (1) by discharging David Dunning because he filed an unfair labor practice with the Board. She rejected the Respondent's contention that it discharged Dunning because he continued to sexually harass Erin Kelley, an employee of the Respondent, after his suspension for sexually harassing Kelley. In so doing, the judge concluded, "There is no record evidence to support the allegation that Dunning 'continued to sexually harass Kelley,' that he violated the Respondent's confidentiality mandate, that he acted in retaliation for [Kelley presumably] filing a sexual harassment complaint, or that he engaged in conduct which had the effect of creating a hostile work environment" (sec. II,C,2) (brackets in original).

In the Respondent's exceptions to the judge's finding of a violation of Section 8(a)(4) and (1), it challenges the judge's finding that there is no record evidence that Dunning engaged in any misconduct toward Kelley in the period between his suspension and discharge. The Respondent points to testimony of the Respondent's manager, William Soumis, that at a December 28, 1992 meeting where he, Manager Jennifer Shroeger, and Dunning were present, Dunning told them "it was his responsibility as a union steward to expose Erin for what she really was; that he was interviewing people; and that he was going to prove to us that she was not the sweet angel, or a comment to that effect, that we thought she was; that, in fact, he could prove that she was a homosexual." (Tr. 337:22–328:2.)²

Our review of the record shows that the Respondent accurately recounted Soumis' testimony. Our review of

¹In light of our determination to remand this proceeding, we defer ruling on the remaining issues presented in the exceptions and brief which do not require remand.

²"Tr." refers to the page and line of the transcript of the hearing that was held before the judge in this proceeding.

the record also shows, however, that Dunning's testimony about what he said at the December 28 meeting conflicts with Soumis' testimony. In answer to the question whether he discussed his rights as a union steward with Managers Soumis and Shroeger at the December 28 meeting, Dunning stated: "I'm sure I did. I'm sure I told them that I had a right to talk to other members about the reasons that I was suspended. If I needed to investigate my suspension, I, as a steward, am allowed to investigate." (Tr. 114:17–21.) In answer to the question if he had been discussing his suspension with other employees, Dunning testified, "If employees ask me why I was suspended, I would tell them why I was suspended. . . . I told them I was suspended for my union activities and for sexual harassment." (Tr. 113:14–18.) In contrast to Soumis' testimony, Dunning's testimony made no reference to an attempt to expose Kelley's alleged homosexuality.

There is, therefore, conflicting testimony about Dunning's conduct in the period between his suspension and discharge which was not addressed by the judge. Contrary to our dissenting colleague, we are unable to find that the judge implicitly credited Dunning and discredited Soumis by asserting in her statement of the facts of the December 28 meeting that, "Dunning said that he had a right to investigate his own suspension and talk to other employees about it." (Sec. II,C.) While the judge referred to the content of Dunning's testimony in her statement of facts, she made no reference anywhere in her decision to the content of Soumis' testimony about the December 28 meeting. Further, in making her legal conclusions, she stated that there is "no record evidence" that Dunning engaged in any conduct concerning Kelley after his suspension. It thus appears that the judge overlooked Soumis' testimony rather than implicitly discrediting it.³ In these circumstances, we find it necessary to remand this proceeding to the judge for an explicit credibility determination concerning the above-described testimony of Dunning and Soumis and for an analysis under *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), of the Dunning discharge in light of that determination.

ORDER

It is ordered that this proceeding is remanded to Chief Administrative Law Judge Robert A. Giannasi for appropriate action.

CHAIRMAN GOULD, dissenting in part.

Contrary to my colleagues, I find it unnecessary to remand the issue of whether the Respondent violated

³Our dissenting colleague assumes that the judge used the phrase "no record evidence" to mean "no credible evidence." We are unwilling to make the same assumption.

Section 8(a)(4) and (1) by discharging David Dunning because he filed an unfair labor practice with the Board. The majority agrees with the Respondent that there is conflicting testimony about Dunning's conduct in the period between his suspension and discharge which was not addressed by the administrative law judge and requires an explicit credibility determination. I disagree. In setting forth the facts of the December 28 meeting, the judge stated, "Dunning said that he had a right to investigate his own suspension and to talk to other employees about it." (Sec. II,C.) The judge implicitly credited Dunning and discredited the testimony of Soumis relied on by the Respondent. Thus, when the judge stated, there was "no record evidence" (sec. II,C) regarding the accusations made against Dunning, she clearly was referring to the fact that there was no credible evidence on this matter.¹ Accordingly, I dissent from the remand on this issue and would adopt the judge's finding that the Respondent unlawfully discharged Dunning because he filed unfair labor practices with the Board.

¹The majority states that they are "unwilling" to make this assumption. Obviously, the majority opinion rests on its own assumption. Regrettably, that assumption will consume unnecessary time and expense to the parties and taxpayers in yet another administrative proceeding.

Richard F. Czubaj, Esq., for the General Counsel.

Carey A. De Witt, Esq. (Butzel Long), of Detroit, Michigan, for the Respondent.

Barbara Harvey, Esq., of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JUDITH ANN DOWD, Administrative Law Judge. This case was heard in Detroit, Michigan, on September 18 and 23, 1996. Charges were filed by David Dunning (the Charging Party) in this proceeding on April 9 and December 3, 1992, and on May 24 and August 19, 1993. On May 16, 1994, the Acting Regional Director for Region 7 of the National Labor Relations Board (the Board) issued an order setting aside settlement agreement and reinstating complaint, order consolidating cases, second amended consolidated complaint and notice of hearing (complaint). The complaint alleges that United Parcel Service (the Respondent or UPS) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by enforcing its written no-distribution rule in a nonwork area, by disparately enforcing its rule against David Dunning (the Charging Party or Dunning) through oral warnings on February 14 and March 12, 1992, and a written warning on March 23, 1992, and by, on or about July 7, 1993, selectively and discriminatorily removing literature from a union bulletin board. The complaint also alleges that the Respondent violated Section 8(a)(3) and (1) and Section 8(a)(4) and (1) of the Act by disciplining and discharging Dunning because he engaged in union activities and/or filed charges and gave testimony under the Act. On June 10, 1994, the Re-

spondent filed an answer to second amended consolidated complaint and special and/or affirmative defense (answer) denying the commission of any unfair labor practices, challenging the Board's jurisdiction and raising certain affirmative defenses.

At the hearing, all parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

United Parcel Service is a corporation which maintains facilities throughout the United States, where it is engaged in the interstate and intrastate transportation of goods for delivery. Respondent maintains a distribution facility in Saginaw, Michigan. During each of the calendar years 1991, 1992, and 1993, Respondent, in conducting its business operations, had gross revenue in excess of \$500,000 and derived gross revenue in excess of \$50,000 from the transportation of freight between and among the various States of the United States. The complaint alleges, the answer admits, and I find that the Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.¹

The complaint alleges, the answer admits, and I find that at all material times Teamsters Local Union No. 486 (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Distribution in the Check-in Areas*

1. Factual background

In 1991–1993 Respondent maintained three check-in areas for package drivers at its Saginaw Center, variously known as Auburn, Swan Creek, and East Bay. Drivers arrive for work as early as 7:30 a.m. Some drivers use the locker room to change into their uniforms. Other drivers go directly to a check-in area, where they are free to talk, read newspapers and magazines, or stand around until their assigned starting time. The prestart period is the only time during the day that drivers assemble together off the clock. During this prestart period, from about 7:30 to 8:30 a.m., drivers pass around such items as entry blanks for a fishing tournament, information about a hunting contest, flyers announcing a golf outing, and sports magazines.² The drivers' contractual starting time

¹Although the Respondent admitted the above-stated facts in its answer, it also raised lack of jurisdiction as a defense, claiming that Respondent is a Railway Labor Act employer and, as such, is not subject to the jurisdiction of the Board. The Respondent's jurisdictional contention is without merit. See *United Parcel Service v. NLRB*, 92 F.3d 1221 (D.C. Cir. 1996), affg. the Board's decision in *United Parcel Service*, 318 NLRB 778 (1995).

²I credit the testimony of the General Counsel's witnesses that such distributions regularly occurred in the check-in areas. Respondent's witnesses, all of whom were supervisors, admitted that drivers regularly read newspapers and magazines in the check-in areas but

is 8:30 a.m. At that time the drivers assemble outside of the check-in area for a morning meeting and then proceed to their trucks to begin deliveries. Package drivers return to Respondent's facility anytime between 4:20 p.m. to after 8 p.m.

The Respondent maintains a written no-solicitation rule which provides, in pertinent part, as follows:

1. No employee shall solicit or promote support for any cause or organization during his or her working time or during the working time of the employee or employees at whom such activity is directed.

2. No employee shall distribute or circulate any written or printed material in work areas at any time, or during his or her working time or during the working time of the employee or employees at whom such activity is directed.

David Dunning is a delivery driver who has been employed by the Respondent for over 22 years. Since about 1980, Dunning has also been a steward for the Union. In February 1992, Dunning distributed copies of a newspaper called the Convoy Dispatch, a publication of the Teamsters for a Democratic Union (TDU) in the locker room and check-in areas of the Saginaw Center. On or about February 14, 1992, Manager Brian Konesko stopped Dunning from distributing copies of the Convoy Dispatch to drivers in the East Bay check-in area sometime prior to the drivers' start time. Konesko told Dunning that he would check with higher management to determine whether it was permissible to distribute in the check-in areas, but he never gave Dunning any further response. In mid-March 1992, Supervisor Pat Ryan asked Dunning for a copy of the Convoy Dispatch, as the latter was distributing the newspaper in a check-in area, prior to the drivers' start time. Konesko, who observed the exchange, told Dunning to report to his office. In his office, Konesko instructed Dunning that he could not distribute in the check-in areas. On March 20, 1992, Dunning was told to report to the office of one of Respondent's managers, Bill Soumis, who handed Dunning a warning letter citing his "failure to follow management instructions" and warning him that any further disregard of management instructions would result in more severe disciplinary action.

2. Respondent's enforcement of its no-distribution rule in the check-in areas

"The threshold question, in any case which concerns an employer's restraint of employee efforts to distribute literature on the employer's premises, is whether the distribution is pertinent to a matter encompassed by Section 7 of the Act." *Transcon Lines*, 235 NLRB 1163, 1165 (1978). Accord: *McDonnell Douglas Corp.*, 210 NLRB 280 (1974). If the literature is protected, "the Board applies a general rule that any restriction on employee . . . distribution during non-

they denied observing the drivers pass around any newspapers, magazines, or other materials. I find the evidence showing that distribution occurred to be more persuasive than the evidence to the contrary. It is difficult to imagine that drivers assembled off the clock for the only time during their day would not take advantage of the situation to promote sports tournaments and similar activities among their fellow drivers or, at the very least, to pass around to each other newspapers and magazines they admittedly read in the check-in areas, while they were waiting for the morning meeting to begin.

working time in nonworking areas, is presumptively violative of the Act. This presumption may, however, be overcome if the employer introduces evidence establishing its special needs regarding the maintenance of production or discipline in its facility, which would then justify an exception to the rule." *Times Publishing Co.*, 240 NLRB 1158, 1159 (1979).

In this case, there is no question that the Convoy Dispatch newspaper is entitled to the protection of Section 7 of the Act. The newspaper is distributed by a dissident group within the Teamsters Union. It primarily contains articles about current workplace issues and commentary about the Teamsters' efforts to represent employees with respect to those issues. In its brief, the Respondent does not contest the protected status of the Convoy Dispatch, and I find that the newspaper is entitled to the protection of Section 7 of the Act.

The Respondent contends that it can lawfully ban distribution of union-related literature in the check-in areas because they are work areas. In support of this contention the Respondent cites evidence showing that training, check-in, and other types of work are performed in the check-in areas by supervisors and certain classifications of employees, before and after the drivers assemble there during the prestart period. However, the evidence shows that during the prestart period itself—from about 7:30 to 8:30 a.m.—the package drivers are not on the clock and they do not perform work. On the contrary, the drivers openly read, lounge, engage in social conversation, and generally use the check-in areas as assembly and waiting rooms. It may be, as the Respondent's witnesses contend, that a supervisor will occasionally give some instructions or supplies to a driver during the prestart period. The evidence shows that such instances are the exception and not the rule and it is clear that employees cannot be required to perform work functions prior to their contractual start time. I, therefore, find that the check-in areas are used as nonwork or, at most, mixed use areas between 7:30 a.m. and the drivers' start time of 8:30 a.m., and that drivers are in a nonwork status during that period. I further find that the Respondent violated Section 8(a)(1) of the Act by enforcing its no-distribution rule in the check-in areas during the prestart period. See *Transcon Lines*, 235 NLRB 1163, 1165 (1978), *affd.* in pertinent part *NLRB v. Transcon Lines*, 599 F.2d 719 (5th Cir. 1979); and *Oak Apparel*, 218 NLRB 701 (1975).

3. The enforcement of the distribution ban against Dunning

The next issue is whether the Respondent discriminatorily enforced its no-solicitation, no-distribution rule against David Dunning, when it disciplined him for distributing the Convoy Dispatch in the check-in areas during the prestart period. The credited evidence shows that drivers routinely distributed such materials as fishing contest forms, football pool material, and information about golf tournaments in the check-in areas during the prestart period. There is no evidence showing that Respondent's no-distribution rule was enforced against these drivers. However, Dunning was given two oral warnings and a written warning for distributing the Convoy Dispatch under the same conditions under which the other material was distributed.

The evidence concerning whether or not management was aware of the distributions of magazines, contest forms, and other such materials is less clear. Nevertheless, it is undis-

puted that supervisors routinely mingled with the drivers in the check-in areas during the prestart period. Since the credited evidence shows that distributions of magazines and other materials was done openly and routinely, I infer that supervisors were aware of these distributions and took no action to stop them.³ I, therefore, find that the Respondent violated Section 8(a)(1) of the Act by discriminatorily enforcing its no-solicitation, no-distribution rule against David Dunning for distributing a protected publication.⁴

4. Distribution near the part-time employee break area

In July 1993, at the conclusion of a labor-management meeting, Dunning was approached by two employees, who inquired about the status of the ongoing contract negotiations. Dunning asked the employees whether they were on a break and they stated that they were. Dunning and the two employees then proceeded toward an unenclosed area containing refreshment vending machines, tables, and chairs. Somewhere between this break area and the place where the timeclock for part-time employees is located, Dunning handed the employees a copy of a Contract Update from the Union.⁵ Manager William Soumis, who was on the stairs coming down from the meeting, observed Dunning hand the document to the employees. Soumis confronted Dunning and told him that he could not distribute in the area where he was standing because it was a work area.

The evidence is in dispute as to exactly where the distribution occurred. Dunning testified that he and the employees were within the parameters of the unenclosed break area. Respondent's witnesses testified that Dunning was closer to the employee timeclock, which was stipulated by the parties to be located in a work area. Aside from the hair splitting over whether the distribution occurred closer to the break area or to the timeclock, the other circumstantial evidence is clear. Dunning and the other employees were on nonworking time and there were no employees in the area who actually were performing work at the time of the distribution. There is also no evidence showing that the distribution resulted in any passageway being blocked or in any disruption of production or

³Even crediting the testimony of Respondent's supervisors that they dispose of any magazines and newspapers left in the check-in area at the end of the day, this evidence is, at best, ambiguous. The discarded publications could as easily be disposed of to avoid unsightly clutter as to enforce a no-distribution rule. There is no evidence showing that the Respondent posted any warning notices, gave verbal warnings, or otherwise informed employees that the newspapers and magazines were being discarded pursuant to the no-distribution rule.

⁴Respondent also contends that the General Counsel failed to show that magazines and other reading material were distributed in 1992, the year that Dunning was disciplined for his distribution activity, because the only publications offered into evidence were dated 1996. The documents that were received in evidence were offered and accepted as examples of the kinds of materials that are routinely passed around in the check-in areas. If such publications were distributed in the check-in areas in 1996, I have no reason to doubt the credible testimony of the witnesses for the General Counsel to the effect that similar materials were distributed in the check-in areas in 1992.

⁵Contract Update was a publication issued by the Union to keep members informed about the progress of the then-current negotiation over a new collective-bargaining agreement between the Union and the Respondent.

discipline. Under these circumstances, the issue of whether Dunning was standing a few feet within or outside of an imaginary line delineating the perimeter of the break area seems to be elevating form over substance. I find that Dunning distributed union literature in, or near, a nonwork area. The Respondent's interference with the distribution therefore violated Section 8(a)(1) of the Act.

B. *The Removal of a Union Posting from the Union Bulletin Board*

On or about July 7, 1993, Dunning posted a copy of the Union's Contract Update publication on the bulletin board set aside for union postings. Manager Terry Dubay read the posting and concluded that the material was demeaning to the Respondent. After consulting with other management officials over the phone, which included reading part of the posting, Dubay removed the Contract Update from the union bulletin board.

The Board has stated as follows (*Container Corp. of America*, 244 NLRB 318 fn. 2 1979):

[W]hen an employer permits, by formal rule or otherwise, employees and a union to post personal and official notices on its bulletin boards, the employees' and the union's right to use the bulletin boards receives the protection of the Act to the extent that the employer may not remove notices which the employer finds distasteful.

In certain cases the Board has found that "special circumstances" exist where the interests of the employees in communicating a union's message are outweighed by an employer's legitimate interest in maintaining discipline, safety, or efficient production in the workplace. *Midstate Telephone Corp.*, 262 NLRB 191, 192 (1982). The employer must establish by objective evidence that its prohibition was necessary to maintain decorum and discipline among its employees. *Id.* The Board has found that employee speech retains the protection of the Act unless the remarks are egregious. *Timpte, Inc.*, 233 NLRB 1218, 1224 (1977). As noted in *Container Corp. of America*, 244 NLRB 318, 321 (1979), quoting from *NLRB v. Cement Transport, Inc.*, 490 F.2d 1024, 1029 (6th Cir. 1974):

In the context of a struggle to organize a union, "the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth," so long as the allegedly offensive actions are directly related to activities protected by the Act and are not so egregious as to be considered indefensible.

Certain facts surrounding the bulletin board incident are undisputed. All parties agree that Dunning posted a copy of the Union's Contract Update on the union bulletin board and that the posting was removed by Manager Terry Dubay. The evidence is disputed as to exactly which copy of the Contract Update was removed and why. The General Counsel contends that the leaflet that was removed was an issue of the Contract Update dated June 25, 1993, a copy of which he offered in evidence (G.C. Exh. 16). The Respondent contends that the original leaflet that Dubay removed from the bulletin board could not be located but that its personnel office retained a photocopy of the original in its files, which

it offered into evidence as R. Exh. 15. RX-15 consists of a photocopy of the Contract Update dated July 2, 1993, with a handwritten note copied on its face. Respondent's manager, Daniel Parks, identified the note as his writing. The note reads "this was the posting taken down in Saginaw. Postings by the union are confined to official business of the union and on the unions [sic] official letterhead. The union is not allowed to post information demeaning to the Co."

The Respondent contends that it removed the Contract Update because it was not printed on official union letterhead, which is a contractual requirement for all postings on the union bulletin board, and because the content of the Contract Update was demeaning to UPS. The General Counsel essentially contends that it was the content of the posting that led to its removal and that the Union's logo was sufficient to identify it as an official publication.

I find it unnecessary to resolve the dispute over which copy of the Contract Update was actually removed from the union bulletin board. With respect to content, both copies of the Contract Update, G.C. Exh. 16 and R. Exh. 15, contain rather harsh criticisms of the Respondent and allege that UPS has been guilty of serious safety violations. However, neither copy of the publication contains material that is so egregious as to lose the protection of the Act.

With respect the official union letterhead requirement G.C. Exh. 16 apparently fulfills the contractual requirement, but Respondent's Exhibit 15 contains only a small Teamsters logo at the top. However, even assuming that RX-15 is a copy of the actual document that was posted and removed, I find, in agreement with the General Counsel, that it was not the absence of official union letterhead that caused the Respondent's supervisors to remove the Contract Update. The Respondent's own witness, Terry Dubay, testified that he read the Contract Update posting and found the content to be anticompany and that he took down the document for that reason and called Manager Bill Soumis about it. Dubay remembers reading excerpts of the publication to Soumis over the phone, but he could not recall any discussion with Soumis about the lack of official union letterhead. Indeed, Dubay candidly admitted that he was unsure whether he even knew about the union letterhead requirement at that time. Soumis testified that after finishing his conversation with Dubay, and without ever seeing the posting, he called Daniel Parks, the Respondent's labor manager, and the two discussed the absence of official union letterhead on the posting. Record evidence shows that after talking to Parks, Soumis called Dubay and instructed him not to return the Contract Update to the union bulletin board, but to send it to Parks. Subsequently, Parks received Respondent's Exhibit 15 and sometime thereafter added the undated, handwritten note quoted above.

In light of Dubay's credible testimony that he was unaware of the contractual union letterhead requirement, that he was solely concerned about what he perceived to be the anticompany content of the posting, and that he only remembered discussing the content of the posting with Soumis, I decline to credit Soumis' testimony that he discussed the lack of union letterhead during his phone call to Parks. Obviously, Soumis would not know about the absence of official union letterhead if Dubay did not tell him about it, since Dubay was the only management official who actually saw the posting at the time it was removed. I find from the credi-

ble evidence that the Contract Update was removed because its content was distasteful to management and that the lack of official union letterhead was an ex post facto justification added sometime after the posting was removed. In any event, the evidence shows that the Respondent does not uniformly enforce the union letterhead requirement. Thus, the General Counsel introduced a photograph of the union bulletin board taken around the time of the hearing. The photograph shows that the bulletin board had several postings on it that contained no union indicia whatsoever. I, therefore, find that the Respondent violated Section 8(a)(1) of the Act by removing a protected publication from the union bulletin board because it was critical of UPS.⁶

C. The Alleged Discriminatory Discipline and Discharge

Some years prior to 1992, before Erin Kelley was promoted to a supervisory position, Dunning and Kelley had some casual, social contact with each other at a bar frequented by Respondent's employees, near the Saginaw facility. Kelley may have confided to Dunning at that time that she was gay. In any event, Dunning formed a belief that Kelley was homosexual. In 1992, Kelley was a supervisor in charge of a department which included some employees represented by the Union. Dunning, as union steward, had regular business dealings with her about these employees. Sometime in June 1992, Dunning encountered Kelley in the hallway of the Respondent's facility. Dunning asked Kelley, "How is your love life?" Dunning also asked Kelley if she was still seeing a particular woman. Kelley replied that she had not seen her for some time. Dunning then said that if Kelley was out meeting women and she met any heterosexual women, to send them to him.

In early July 1992, Dunning went to Kelley's office to discuss a complaint from employees in her department about the posting of start times on the bulletin board. When Dunning came into the office Kelley was talking to another driver. Dunning said, "Let me at her she screwed up one too many times." Kelley asked what she had done. Dunning replied it was not that bad and that he wanted to talk about manning requirements. Dunning then told Kelley that start times should be posted on Thursday rather than Friday. Kelley asked if that was all, and Dunning responded "That's it. It was painless, wasn't it?" As Dunning was leaving the office he asked Kelley if she was mad about something.

On July 8, Kelley went to upper management and filed a written account of the above incidents. Shortly thereafter, Dunning was called into the office of Division Manager Jennifer Shroeger. Present in her office was Manager Bill

⁶The Respondent contends in its brief that proposed Exh. 16 should have been admitted into evidence. R. Exh. 16 is a series of photocopied grievance decisions on the subject of postings on union bulletin boards. Neither the facts underlying the decisions nor the text of the contract provision they purport to interpret is set out in full in the exhibit. The exhibit was apparently offered to show the basis on which Respondent decided to remove the Contract Update at issue here, from the union bulletin board. However, Respondent's witness, Daniel Parks, from whose files this evidence came, could not testify with any certainty which parts of the exhibit, if any, he may have reviewed at the time relevant to the decision to remove the Contract Update. I, therefore, excluded this evidence as irrelevant.

Soumis and a union steward. Shroeger asked Dunning what he had done to make Erin Kelley so upset. Dunning related the incident in Kelley's office and said, "My job as a union steward is to try to take care of problems. If I become too aggressive and a supervisor is intimidated, that is tough shit." Management officials raised the issue of Dunning's remarks to Kelley in the hallway and asked him questions about that incident. Dunning essentially admitted the hallway incident.

By letter dated July 17, Shroeger notified Dunning that he was suspended for 2 days. The letter detailed the reasons for the suspension as follows:

1. Your personal and sexual harassment of a full time management employee in the Saginaw building.
2. Your insubordinate behavior toward the same management employee.
3. Your actions as a (union steward) which have exceeded your responsibilities as a steward.

The last line of the letter consisted of a warning that "the next step in progressive discipline is more severe—up to and including discharge."

On December 28, Dunning met with Managers Soumis and Shroeger about an unrelated employee grievance. During the course of the meeting, Shroeger said that she had heard Dunning had been talking about his suspension in the locker room and that the matter was confidential. Dunning said that he had a right to investigate his own suspension and to talk to other employees about it.

On January 6, 1993, Dunning was called into a meeting with Soumis, Shroeger, and a union steward. Management informed Dunning that he was being discharged. Dunning responded that his discharge was in retaliation for the NLRB charges he had filed in early December concerning his suspension. Shroeger told him that he had no right to go to the Board, that this was a matter of Federal law and not labor law. Dunning was given a discharge letter which states, in pertinent part, as follows:

The reason for your termination is in accordance with Article 17 . . . other offenses of extreme seriousness . . . of the Central Conference of Teamsters Supplemental Agreement. Specifically,

1. Continuance of sexual harassment.
2. Failure to follow management instructions.
3. Retaliation for filing a sexual harassment complaint.
4. Creating a hostile work environment.

Dunning filed grievances concerning both his suspension and his discharge. The 2-day suspension was upheld and the discharge was reduced to a suspension and final warning. Subsequently, Dunning was reinstated and given partial backpay.

Section 8(a)(3) of the Act makes it an unfair labor practice "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). Under Section 8(a)(4) of the Act it is unlawful to "discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [the] Act." 29 U.S.C. § 158(a)(4). The central focus in any case of alleged discrimination is what the employer's actual mo-

tive was for taking the adverse employment action. Under the Board's decision in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), the General Counsel has the burden of showing that protected conduct was a motivating factor in the employer's employment action. In order to meet this burden the General Counsel must prove that the employee engaged in union activities, that the employer had knowledge of these activities, and that the employer undertook an adverse employment action against the employee because of union animus. As the Board had recently explained, the General Counsel's burden is one of persuasion and not merely production. *Manno Electric*, 321 NLRB 278, 280 *fn.* 12 (1996). If the General Counsel's case is established, the burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action if the employee had not engaged in protected activity. *Office of Workers' Compensation Programs v. Greenwich Collieries*, 114 S.Ct. 2551, 2558 (1994).

The General Counsel established a *prima facie* case of discrimination by showing the Respondent had knowledge of, and animus toward, Dunning's union activities. Dunning was well known to the Respondent as a union steward who was aggressive in performing his duties. Union animus can be inferred from the Respondent's violations of Section 8(a)(1) of the Act with respect to Dunning's distribution and other union informational activities. Accordingly, the burden shifts to the employer to show that he would have taken the same action if the employee had not engaged in protected activity.

1. Dunning's 2-day suspension

Dunning was suspended for two incidents involving Erin Kelley.⁷ With respect to the incident in Kelley's office, Dunning was engaged in the protected activity of discussing an employee complaint with a department supervisor. While Dunning's statements to Kelley in the course of this meeting appear to be unnecessarily aggressive, they are not so egregious that they lose the protection of the Act. In the hallway incident, however, Dunning was not performing any union duties and his remarks to Kelley were gratuitous and highly offensive. Dunning was being brazenly insubordinate in asking Kelley, a supervisor, about "her love life" and, in particular, about a certain woman friend of hers. Dunning approached Kelley in the hallway of the Saginaw facility where anyone could have walked by and overheard the conversation. Indeed, Dunning's remarks contain the suggestion that he had no cumpunctions about talking openly about what he

⁷I decline to credit Dunning's testimony that the Respondent's supervisor, Kathy Porter, told him that he was being suspended solely because of the incident in Kelley's office. Kelley's written complaint about Dunning's conduct gave equal weight to both incidents. Moreover, the Respondent's letter notifying Dunning of his suspension specifically states as one of the reasons "your personal and sexual harassment of a full time management employee." The Respondent has used the term "sexual harassment" very loosely in dealing with Dunning's conduct toward Kelley and the issue of whether Dunning's conduct actually constitutes sexual harassment under Title VII, or Respondent's own written policies, is not before me. Nevertheless, the stated ground for the suspension of "sexual harassment" logically relates more to the hallway incident, where Dunning made specific sexual remarks, than to the incident in Kelley's office, which was devoid of overt sexual comments.

believed to be Kelley's sexual preference. I find that the Respondent would have disciplined Dunning for the hallway incident alone, regardless of his union activities. I, therefore, find that the Respondent's suspension of Dunning did not violate Section 8(a)(3) and (1) of the Act.⁸

2. Dunning's discharge

In early December, Dunning filed charges with the Board alleging that his suspension violated Section 8(a)(3) of the Act. At a meeting with management representatives on December 28, Dunning was accused of failing to keep the facts of his suspension confidential and he insisted that he had a right to investigate the matter. When Dunning was informed of his discharge by Manager Jennifer Shroeger, she stated in so many words that Dunning had no right to file a charge with the Board.⁹ As far as the record evidence shows, Dunning neither said nor did anything further to Erin Kelley that would be grounds for discipline, between the time of his suspension and the time of his discharge. All that occurred was that Dunning filed unfair labor practice charges with the Board. Furthermore, the stated reasons for Dunning's discharge do not withstand scrutiny. There is no record evidence to support the allegation that Dunning "continued to sexually harass Kelley," that he violated the Respondent's confidentiality mandate, that he acted in retaliation for [Kelley presumably] filing a sexual harassment complaint, or that he engaged in conduct which had the effect of creating a hostile work environment. The only remaining reason for the discharge is retaliation for Dunning having filed an unfair labor practice charge with the Board concerning his suspension. I, therefore, find that the Respondent violated Section 8(a)(4) and (1) of the Act by discharging Dunning because he filed an unfair labor practice charge with the Board.¹⁰

⁸I decline the General Counsel's request that I draw an adverse inference from the Respondent's failure to call Kelley at the hearing. Kelley was no longer employed by the Respondent at the time of the hearing and she even may have been in an adversarial relationship to the Respondent over her allegations of sexual harassment in the workplace. In any event, the facts concerning the unprotected conduct underlying Dunning's suspension—his remarks to Kelley in the hallway—are essentially undisputed.

⁹The Respondent does not acknowledge that Shroeger made such a statement, but it failed to call her as a witness, despite the fact that she made the decision to discharge Dunning. Respondent acknowledged that Shroeger was still employed by UPS, but it offered no explanation for its failure to call her. Under these circumstances, I draw the inference that had Shroeger been called, she would have testified adversely to the Respondent. *International Automated Machine*, 285 NLRB 1122, 1123 (1987); *Greg Construction Co.*, 277 NLRB 1411, 1419 (1985); *Pur O Sil, Inc.*, 211 NLRB 333, 337 (1974).

¹⁰The Respondent contends in its brief that R. Exhs. 10, 12, 13, and 14 properly should have been admitted into evidence. R. Exhs. 10, 12, 13, and 14 are all memos written by Shroeger documenting interviews she had with Kelley or Dunning about Kelley's original complaints of misconduct against Dunning and his subsequent activities. R. Exhs. 10 and 12 were assertedly offered by counsel for the Respondent in order to show the basis for the Respondent's suspension decision. Since I have found that Dunning's suspension did not violate the Act, the exclusion of this evidence did not prejudice the Respondent. R. Exh. 13 consists of Shroeger's notes about a meeting with Dunning which was also attended by Soumis. Soumis testified fully as to his recollection of the events of the meeting and Shroeger's notes are merely cumulative. R. Exh. 14 purports to doc-

CONCLUSIONS OF LAW

1. The Respondent, United Parcel Service, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by enforcing its written no-distribution rule in nonwork or mixed use areas at a time when employees were in a nonwork status, by disparately enforcing its rule against David Dunning through oral warnings of February 14 and March 12, 1992, and a written warning on March 23, 1992, and by, on or about July 7, 1993, selectively and discriminatorily removing literature from a union bulletin board.

3. The Respondent violated Section 8(a)(4) and (1) of the Act by discharging David Dunning because he filed unfair labor practice charges with the Board.¹¹

4. The Respondent has not otherwise violated the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that the Respondent be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discharged employee David Dunning because he filed unfair labor practice charges with the Board, shall make him whole for any loss of wages and other benefits, computed on a quarterly basis from the day of discharge to the date that he was reinstated, less any net interim earnings as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

ORDER

The Respondent, United Parcel Service, Saginaw, Michigan, its officers agents, successors, and assigns, shall

1. Cease and desist from

(a) Enforcing its no-distribution rule in the check-in area prior to the starting time of the package drivers.

ument an interview with Kelly initiated by Shroeger as a followup to Kelley's original complaint. Respondent was unable to lay a proper foundation for admission of this evidence under the business records exception to the hearsay rule. Furthermore, Shroeger was not a disinterested recordkeeper but the supervisor who made the decision to discharge Dunning. I, therefore, consider this evidence to be of questionable reliability. In sum, I decline to reconsider my decision to exclude R. Exhs. 10, 12, 13, and 14.

¹¹The complaint alleges that Dunning's discharge also violated Sec. 8(a)(3) of the Act, but the General Counsel made no argument in support of this contention either at the hearing or in his brief. As found above, Dunning's discharge violated Sec. 8(a)(4) of the Act and the remedy is the same for an 8(a)(3) violation. I, therefore, make no ruling with respect to the allegation that Dunning's discharge also violated Sec. 8(a)(3) of the Act.

¹²If 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.

(b) Disparately enforcing its no-distribution rule against employees with respect to their distribution of protected publications.

(c) Discriminatorily removing union postings from bulletin boards where union or nonwork-related postings are permitted.

(d) Discharging or otherwise disciplining employees because they filed charges with the Board.

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

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

(a) Make whole David Dunning for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(b) Preserve and, within 14 day of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facility in Saginaw, Michigan, copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous placed including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 9, 1992.

¹³ If this Order is enforced by a judgment of a 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."

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

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.

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 discharge or otherwise discipline employees for filing charges with the National Labor Relations Board.

WE WILL NOT enforce our no-distribution rules in the check-in area prior to the starting time of the package drivers.

WE WILL NOT discriminatorily enforce our no-distribution rule against employees who are distributing union or other protected publications.

WE WILL NOT discriminatorily remove union literature or otherwise disparately enforce our bulletin board policy.

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

WE WILL make whole David Dunning for any loss of earnings and other benefits resulting from his discharge, plus interest.

UNITED PARCEL SERVICE