

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DHL EXPRESS

Cases 4-CA-35417
4-CA-35622
4-CA-35629
4-CA-35630
4-CA-35696
4-CA-35697
4-RC-21327

and

AMERICAN POSTAL WORKERS
UNION, AFL-CIO

THE CROSSROADS GROUP LABOR
RELATIONS CONSULTANTS

and

Case 4-CA-35685

AMERICAN POSTAL WORKERS
UNION, AFL-CIO

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General Counsel.

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DECISION

Statement of the Case

ROBERT A. GIANNASI, Administrative Law Judge. This consolidated representation and unfair labor case was tried in Philadelphia, Pennsylvania for 6 days from March 11 through March 19, 2008. The case involves an organizing effort by the Charging Party Union (hereafter, the Union) at Respondent DHL's Breinigsville, Pennsylvania facility, beginning in April 2007 and culminating in a Board conducted election in September 2007. The consolidated unfair labor practice complaint alleges that Respondent DHL violated Section 8(a)(1) of the Act by various acts and statements of coercion and interference through its admitted supervisors and agents, including security guards employed by Risk Protective Services, with which it had contracted to provide security services at the Breinigsville facility, and Michael Penn, a labor consultant employed by Respondent Crossroads, with which it had contracted to help in its campaign to

defeat the Union. The complaint also alleges that Respondent Crossroads was itself liable for the violations committed by Penn. In addition, the complaint alleges that Respondent DHL violated Section 8(a)(3) and (1) of the Act by committing various acts of discrimination against employee Elias Sleiman and by discriminatorily discharging employee Emilia Rios because of their union activities. Some of the Section 8(a)(1) allegations were also advanced by the Union as objections to the September 2007 Board conducted election, which was part of the representation case. The Union asks that the election, which it lost by a vote of 217 to 135, be overturned and that the Board order a new election. The Respondent filed an answer in the unfair labor practice case, denying the essential allegations in the complaint. It also urges that the Union's objections to the election in the representation case be overruled and that the Board certify the election results.¹

After the trial, the General Counsel and the Respondent filed briefs, which I have read and considered.² Based on the entire record in this case, including the testimony of the witnesses, and my observation of their demeanor, I make the following:

Findings of Fact

Jurisdiction

Respondent DHL is a corporation engaged in global package delivery services for commercial customers, with a facility located in Breinigsville, Pennsylvania, where the events herein occurred. During a representative one-year period, Respondent DHL, in conducting its business operations, performed services valued in excess of \$50,000 outside the Commonwealth of Pennsylvania. Accordingly, I find, as Respondent DHL admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. Respondent Crossroads, an admitted agent of Respondent DHL, is a general partnership with an office and place of business in San Clemente, California. It performs labor consulting work representing management in labor and employment matters. During a representative one-year period, Respondent Crossroads performed services valued in excess of \$50,000 outside the State of California. Accordingly, I find, as Respondent Crossroads admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.³

The Union is a labor organization within the meaning of Section 2(5) of the Act.

The Alleged Unfair Labor Practices

Background and Overview

Respondent's facility in Breinigsville, Pennsylvania, near Allentown, occupies some 500,000 square feet of space. Packages are unloaded from incoming trucks, sorted and processed, and then reloaded onto trucks for final delivery. Some 450 employees, mostly identified as package handlers, work at the facility. Respondent employs both full time and part

¹ After the trial closed, the General Counsel submitted a substitute for GCX 1(v), which purported to be the Union's objections to the election, but apparently is not. The substitute, identified as GCX 1(v-2), is admitted, without objection.

² Respondent filed a "brief" of 141 pages, a copious corruption of the word. The General Counsel submitted one half as long. The Charging Party mercifully abstained from adding to the paper chase by not filing a brief.

³ Hereafter, when the singular Respondent is used, it will refer to Respondent DHL.

time package handlers on two basic shifts, the twilight shift that begins at about 7:30 p.m. and the midnight shift that begins at about 11:30 p.m. The Breinigsville facility opened in stages in January and February of 2007, with many of the employees transferring from a similar nearby facility operated by ABX, which was taken over by Respondent. The management and supervisory structure is headed by Plant or Hub Manager Shawn Swallow. Under him are an Operations Manager and Sort Managers, as well as various supervisors and lead persons. The lead persons are not supervisors and were eligible to vote in the Board election.

Almost from the opening of the new facility, nonemployee union organizers started handbilling outside the large parking lot of the facility. Not only officials from the Union, but also officials from the Teamsters union undertook these efforts. Beginning in late April, however, employees themselves started handbilling—for the Union—on the sidewalk leading from the parking lot to the plant entrance. The sidewalk runs about 400 feet from the parking lot to the plant entrance, going straight for a distance and then cutting at a right angle to the entrance. The handbilling by employees continued on consecutive Mondays through at least July 2007. Several of the complaint allegations involve incidents of alleged interference with those handbilling efforts, some of them implicating the use of security guards at Respondent's facility. Those incidents are discussed in more detail later in this decision.

Uniformed security guards, employed by Risk Protective Services, provide security services at the facility. Those guards are admitted agents of the Respondent. There are three security guard stations outside the facility. One of the posts covers the parking lot and the sidewalk to the entrance of the plant. That means that security guards have responsibility for this area, although they often simply observed the area from a parked car in the parking lot and did not regularly patrol the sidewalk area on foot. Security guards are also stationed inside the entrance to the facility, where they screen employees and visitors.

After the Union secured sufficient support from employees, on July 30, 2007, it filed a petition for a Board election in a unit of Respondent's packaging employees. Pursuant to a stipulated election agreement approved on August 15, 2007, a Board conducted election was scheduled for September 12 and 13, 2007. Prior to the election, both the Union and the Respondent distributed handbills and other material to the employees urging them to vote either for or against union representation. The Union also periodically distributed its newsletter, which included articles authored by particular employees, including the alleged discriminatees, Elias Sleiman and Emilia Rios. Respondent countered with handbills of its own. The Respondent also had a labor consultant, Mark Penn, an admitted agent of Respondent, speak to groups of employees on several occasions in late August to urge them to vote against the Union. The employees were required to attend the meetings, which were on held on work time, and they were paid for the time they spent at the meetings. Many of the Respondent's employees speak Spanish. Penn, who is fluent in Spanish, spoke separately to the Spanish speaking employees and the English speaking employees, making basically the same points in each language. The General Counsel alleges that, in two of the speeches, Penn made statements that were violative of the Act. Those allegations will be considered in more detail later in this decision.

Two of the leading union activists were Elias Sleiman and Emilia Rios, part time employees at the facility. Both were known by Respondent's management and supervisors to be union activists. Sleiman particularly was an outspoken union advocate, who regularly handbilled on the sidewalk outside the entrance to the facility. On several of those occasions, he had confrontations with security guards and managers. He was also active in asking questions and making comments during Penn's meetings with assembled employees. Rios also engaged in handbilling and was the leading Spanish-speaking employee distributor and gatherer of union authorization cards. The General Counsel alleges that, at various times from

5 May through July of 2007, Respondent discriminated against Sleiman by reassigning him to more onerous duties, restricting his movements, reducing his work hours, and issuing him a written warning and a negative evaluation. The General Counsel also alleges that Respondent discriminatorily discharged Rios on June 27, 2007. The complaint also contains other
 5 allegations of Section 8(a)(1) conduct during the period leading up to the election. All of these allegations will be discussed in more detail later in this decision.

10 The election was held as scheduled on September 12 and 13, 2007. The employees rejected the Union by a vote of 217 to 135, with 3 challenged ballots that were not outcome determinative. The Union filed objections to the election. It withdrew some of them during the first day of the hearing, which left only objections that were coextensive with some of the complaint allegations in the unfair labor practice case. The Regional Director also ordered that, in determining the validity of the election, I consider conduct set forth in paragraphs 10, 11(b) and 13 in the consolidated complaint because evidence on those matters was uncovered in the
 15 course of the Regional Director's investigation of the Union's objections.

The Allegations of Interference with Employee Handbilling

20 The complaint alleges that, on three different occasions, on April 30, May 14, and July 30, 2007, the Respondent unlawfully interfered with employee handbilling on the sidewalk outside the entrance of its facility. Since the employees were distributing pro-union handbills before the beginning of the evening shift on non-work time and in non-work areas, the handbilling was protected union activity. In paragraphs 6(a) and (b), the complaint alleges that, on April 30, Respondent, through its security guards, who were admitted agents of the
 25 Respondent, and other management officials, directed employees to leave the premises from which they were distributing handbills; told them if they did not, the police would be called; and also engaged in surveillance of employees while they were handbilling. In paragraphs 7(a), (b) and (c), the complaint alleges that Respondent, through agents Gloria Szymborski and Human Resources Manager Dennis Arends, engaged in unlawful surveillance and interference on May
 30 14, by mingling and interfering with employees while they were engaged in protected handbilling activity; and by Arends' taunting of an employee handbiller on that occasion. In paragraph 9, the complaint alleges that, on July 30, Respondent, again through its admitted agents, security guards attached to the facility, engaged in surveillance of employees who were distributing pro-union handbills.

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The Facts

40 April 30, 2007 was the first time employees distributed pro-union handbills on the sidewalk separating the employee parking lot and the entrance to the facility. The sidewalk runs about 400 feet from a Y-shape at the end of the parking lot, past a right-angle turn, and directly to the main entrance to the facility. The handbillers were stationed on this occasion, and on all other occasions, about midway between the parking lot and the right-angle turn to the entrance. They were thus at least 100 feet away from both the entrance and the parking lot. The handbilling began at about 6:30 p.m., one hour before the evening shift started. Employees
 45 Elias Sleiman and Emilia Rios, together with two other employees, William Molina and Eugene Esterly, did the handbilling on this occasion. Sleiman was the most active of the handbillers and he clearly was their leader. Shortly after they began handbilling, the employees were approached by Respondent's security guards and told to leave immediately. They were told that they could not handbill where they were stationed, and that, if they did not leave, the police
 50 would be called. Sleiman questioned the propriety of that order and the employees continued handbilling, while the security guards remained among them. As a result, the Respondent called the police, and, about 10 minutes later, the police arrived on the scene. Human

Resources Manager Dennis Arends admitted that he was the person who directed the security guards to order the handbillers to leave and to call the police. The security guards remained with the handbillers until the police arrived. In addition, at one point, Sort Manager Mark Levey approached the handbillers and told them that they were not permitted to handbill in that area. After a while, the police talked with some non-employee Union officials, who were outside the premises, off a public road adjoining the facility, where they offered advice and encouragement to the handbillers. As a result of these conversations and conversations with Respondent's officials, the police left. Respondent concedes that the employees were entitled to handbill during the times and at the location at which the handbilling took place.

During the time the police were present, and even after the police left, several of Respondent's managers and supervisors appeared outside the entrance to observe what was happening. Arends, for example, remained at the entrance of the facility watching the proceedings. The security guards also assembled there for about 10 minutes after they left the area where the handbilling took place.⁴

Employees continued handbilling every Monday throughout the next few months. Sleiman and Rios were among the handbillers. On May 14, while employees were handbilling before the beginning of the shift, Human Resources Manager Arends directed one of his assistants, Gloria Szymborski, to go outside and distribute water bottles to the incoming employees. Apparently, the Respondent had some water bottles left over after a reception that day inaugurating the opening of the facility. Szymborski went outside and stood among, and very near, the employees distributing handbills. She distributed some water bottles, but she also stood among the handbillers for a period of time without distributing water bottles. Photographs were taken of her among the handbillers, one of her carrying a box of water bottles and one of her without a box. Those photographs are exhibits in this case. She remained among the handbillers for about 15 or 20 minutes, according to the uncontradicted testimony of several witnesses, including two of the handbillers, Sleiman and Esterly, as well as Union Representative Mark Dimondstein, who observed what was happening from his vantage point on the road alongside the facility. Szymborski, who did not testify in this proceeding, engaged in conversations with the handbillers, including asking how many employees were handbilling. In response to questions from the handbillers as to why she was there, she answered that her boss, Arends, had sent her outside and that she was told to remain with the handbillers. After she left and went back inside, Arends came outside with some water bottles. He passed by the handbillers and engaged them in some small talk. He then went to the far end of the sidewalk near the beginning of the parking lot and distributed water bottles to employees as they were reporting for work. There is no reason given on this record why Arends and Szymborski did not distribute their water bottles near the entrance to the facility. Indeed, according to Arends, there were some bottles of water left over the next day, Tuesday, May 15. On that occasion, Arends and another assistant of his distributed those bottles to employees inside the entrance to the facility.

⁴ The above is based primarily on the credible testimony of employees Sleiman and Esterly, which was in substantial accord on material matters, augmented in part by the testimony of Union Representative Mark Dimondstein, who viewed the scene from his vantage point off the facility some 40 or 50 feet away from the action. I found particularly credible the testimony of Esterly that Area Manager Mark Levey told the employees that they could not handbill on the sidewalk. Sleiman and Dimondstein corroborated Esterly in this respect, even though Dimondstein could not identify Levey by name. I reject Levey's testimony that he did not make such a comment since I found his testimony in this respect unworthy of belief.

I find that Arends crafted his testimony to give the impression that his presence among the handbillers on this occasion was unrelated to their handbilling and was motivated by a desire to simply meet and greet employees and give out water bottles. I reject that testimony. I find that Arends's testimony in this respect demonstrated a lack of candor that adversely infected the reliability of his testimony on this and other issues about which he testified. I find instead that Arends and Szymborski deliberately injected themselves in and around the handbillers to interfere with the handbillers and to intercept employees before they approached the handbillers. Sleiman told Arends that his presence around the handbillers was causing the employees to avoid accepting the handbills, and I find, in accordance with Sleiman's testimony, that some employees did in fact avoid accepting handbills because of Arends's presence.

Sleiman and Arends also exchanged words, away from the other handbillers, at one point during the evening of May 14. Sleiman testified that Arends followed him as he tried to move away from Arends, and, when Sleiman questioned his presence there, Arends replied that he could remain where he was and taunted him by stating, "Come on. Bring it on." Arends denied he made such a remark, and testified that Sleiman left the area where he was handbilling and approached Arends where he was distributing water bottles and engaged him in conversation. There is no doubt that the two men had a confrontation, but no other employees overheard what was said. I believe that Arends did make the statement attributed to him by Sleiman. Sleiman's testimony on the point was firm and withstood vigorous cross-examination. I found Arends to be a less reliable witness, having exaggerated his reason for injecting himself in the midst of the handbillers, as indicated above. He also demonstrated an interest in defending his turf. He made it clear, both to Sleiman at the time and on the witness stand, that he had a right to be where he was on this occasion. In all the circumstances, I believe it is perfectly plausible, and more likely than not, that he made the remark attributed to him by Sleiman.

The employees continued to handbill every Monday at the same time and location. On July 30, 2007, Operations Manager Pasquale Scaramuzzini noticed that non-employee Union officials had parked their car off a public road along the outside of Respondent's property. These officials had stationed themselves in this area on prior occasions so that they could oversee the handbilling and call out instructions and otherwise communicate with the employees handbilling on the sidewalk of the Respondent's facility. Respondent had never before objected to their presence, although there is apparently some dispute as to whether they were on Respondent's property or on public property. On this occasion, Scaramuzzini directed the security guards to call the police and confront the non-employee Union officials. The police arrived and spoke to the Union officials. There is no allegation that Respondent did anything wrong in calling the police or having them confront the Union officials off the public road adjoining the facility.

The General Counsel does, however, allege a violation with respect to actions taken against the employee handbillers on July 30. There was no police effort directed to the handbilling employees, but several security guards approached the handbillers, according to Sleiman, who again was handbilling on the sidewalk with several other pro-union employees. Sleiman told them to leave, but one security guard was stationed among the handbillers for about twenty minutes to half an hour—and very close to the handbillers—while the police were dealing with the Union officials. The guard did not leave until the police left, even though Union Representative Dimondstein, from his vantage point about 40 or 50 feet away, called over to Sleiman to tell the guard to leave. Sleiman spoke to the guard who nevertheless remained among the handbillers. The testimony of Sleiman and Dimondstein about the security guard remaining among the handbillers on this occasion was uncontradicted and I credit it.

Analysis

I find that Respondent unlawfully interfered with protected concerted activity when, on April 30, its agents told handbillers that they could not handbill on the sidewalk leading to the plant entrance, threatened to call, and actually called, the police. Sort Manager Levey and the security guards transmitted these messages to the handbillers, and, of course, Arends was responsible for setting these events in motion. Such conduct amounted to surveillance and more. Respondent's conduct was coercive and unlawfully interfered with protected union activity. See *Sprain Brook Manor Nursing Home*, 351 NLRB No. 75 (2007) (slip op. at 2-3); and *North American Pipe Corp.*, 347 NLRB No. 78 (2006) (slip. op. at 12).

Although the General Counsel also separately alleges that Respondent engaged in surveillance on this occasion because several of Respondent's supervisors and managers watched the goings on while the security guards and the police intervened, I find that such passive conduct did not amount to a separate violation of the Act. I believe the management officials watching the action on this occasion were simply acting as curious onlookers. The General Counsel also alleges that the security guards remained in the area among the handbillers and that this too constituted surveillance. For the same reason I gave above with respect to the presence of the management officials, I believe that the conduct of the security guards in remaining on the scene after their initial interference with the handbilling was simply a continuation of the earlier unfair labor practice and adds nothing new in terms of unlawful conduct. Once the police left, the employees were permitted to handbill without interference, notwithstanding that management officials and security guards remained on the scene observing what was taking place. I do not believe that there was anything separately coercive in such conduct in either case. Nor would a separate finding of surveillance significantly add to the remedy in this case, particularly since I have found a violation with respect to other aspects of Respondent's conduct on April 30 and I am finding a surveillance violation on other allegations in the complaint. I therefore find the violation alleged in paragraph 6(a) of the complaint and dismiss the allegation in paragraph 6(b) of the complaint.⁵

I also find that Respondent interfered with and surveilled protected activity when, on May 14, Szymborski and Arends injected themselves into the handbillers' midst while they were handbilling employees. Szymborski, who was sent outside by Arends, was an agent of the Respondent on that occasion, specifically authorized by Arends to go outside and distribute water bottles to employees while the handbilling was in progress. While there, she remained near and around the handbillers for an extended period of time, thereby interfering with their handbilling efforts. In all the circumstances, the employees, particularly those doing the handbilling, reasonably believed that Szymborski was speaking and acting for Respondent's management while she stationed herself among them. See *Albertson's Inc.*, 344 NLRB 1172 (2005); and *Wal-Mart Stores, Inc.*, 350 NLRB No. 71 (2007), slip op. at 6 and cases there cited.

⁵ I reject Respondent's contention (Br. 12) that its violation was "de minimis" or somehow "cured." A large group of employees was privy to Respondent's conduct, which had a reasonable tendency to interfere with Section 7 rights. It would be natural for employees to resist taking any of the handbills for fear of becoming embroiled in police and security guard activity sanctioned by Respondent's management. Nor did Respondent repudiate its unlawful conduct, undertake broad and adequate publication of such repudiation, or formally notify employees that it would not interfere with employee rights in the future. Indeed, it engaged in other unfair labor practices. Thus, the requirements of *Passavent Memorial Area Hospital*, 237 NLRB 138 (1978) that might, in some circumstances, permit an employer to avoid liability for violations were not met in this case.

When Szymborski left and went back inside the facility, Arends replaced her, and he too stationed himself in such a way as to interfere with the handbillers's efforts. Although Respondent tried to present their actions as an innocent effort to meet and greet employees and offer them water, I have rejected Arends' testimony to this effect. I find instead that the reason he advanced was a pretext. It is clear that Arends deliberately injected himself and his assistant into the handbilling activity in order to interfere with that activity. They could have distributed their water to employees immediately outside or even inside the entrance to the facility, as Arends and another assistant did the very next day. But they chose to go outside, well away from the entrance and right where the handbilling was taking place, in a childish effort to interfere with the handbilling. This was clearly the type of unusual and out of the ordinary activity that permits a finding of unlawful surveillance, even though management officials are observing protected activity on the employer's property. See *Sprain Brook Manor, supra*, slip op. at 2, and cases there cited. I therefore find that the General Counsel has proved the violations alleged in paragraph 7(a) and (b) of the complaint.

I do not believe, however, that Arends' remark to Sleiman on this occasion—"Come on. Bring it on"—amounted to a separate violation of the Act. At most, the remark, which no one else overheard, was an invitation to fight, not a threat that Arends would do anything, certainly nothing of a physical nature. More likely, it was an angry response to Sleiman's questioning of Arends's perceived right to be where he was. To the extent that the remark can be related to Sleiman's union activity—his handbilling—it was a part of Arends's overall interference with the handbilling activity on May 14. I have found such interference amounted to unlawful surveillance. Arends's remark to Sleiman added nothing of significance to the surveillance finding, except perhaps that it demonstrated the interference with the handbilling was intentional and deliberate. It also demonstrated Respondent's antipathy and animus towards Sleiman for his union activities, but it was not itself a separate unlawful threat. In these circumstances, I find that the General Counsel has not proved the separate violation alleged in paragraph 7(c) of the complaint. Accordingly, that allegation will be dismissed.

I further find that the Respondent engaged in unlawful surveillance when, on July 30, it stationed its security guards next to the employee handbillers while the police were investigating the propriety of non-employee Union officials being on the roadway adjacent to the facility. It is uncontested that the employee handbillers were properly engaging in protected union activity on the sidewalk leading to the facility so there was no legitimate reason for the presence of the security guards in the midst of the handbilling. The testimony concerning the presence of the guards on this occasion was uncontradicted and credible. In particular, the presence of one guard among the employee handbillers for such an extended period, and so near them, was unusual and out of the ordinary. It was also completely unconnected to whatever concerns the Respondent had about the presence of the Union officials on the roadway adjacent to the facility. Accordingly, I find that the General Counsel has proved the surveillance allegation in paragraph 9 of the complaint. See *Villa Maria Nursing Center*, 335 NLRB 1345, 1353 (2001).⁶

⁶ Respondent put on evidence to the effect that its security guards are normally "posted" in the parking lot and the sidewalk area leading to the entrance to the facility, thus suggesting that the presence of the security guards in the midst of the handbillers was normal, perhaps an effort to check the IDs of the handbillers to make sure they were employees. I reject any such contention. First of all, the security guard posting is not equivalent to a security guard being stationed on the post. Security guards were simply responsible for any suspicious activity on the sidewalk; they were not normally positioned in that area. Nor did they simply check IDs when they positioned themselves among the handbillers on July 30. Indeed, there is absolutely

Continued

Various Section 8(a)(1) Violations

5 The General Counsel alleges that several supervisors committed violations when they interacted with employees at the facility from about mid-April through early September 2007. The relevant allegations are set forth in paragraphs 5, 8, 10, 11(b), and 13 of the complaint. The evidence relating to those allegations basically involves the testimony of one employee (or, in one case, two employees) and the supervisor.

10 In paragraph 5 of the complaint, the General Counsel alleges that, in about mid-April 2007, Supervisor Jeff Ng unlawfully interrogated an employee concerning her union sympathies. The evidence in support of this allegation comes from the testimony of employee Niselle Rodriquez. She testified that, sometime in April 2007, her supervisor, Ng, presented her with her evaluation. Thereafter, at his computer desk, he engaged her in small talk, including asking
15 her what she thought about the Union. Rodriquez, who had not indicated her position on the Union prior to this point, answered that she had heard things about the Union, but did not know much about it. Ng then said, "It's your choice, don't let nobody tell you what to do." Tr. 556. Ng denied having a one-on-one conversation with Rodriquez about the Union, although he testified that he had general conversations about unions in so-called pre-sort meetings with the
20 employees he supervised. I have no reason to discredit Rodriquez, who impressed me as an honest witness. I therefore accept her testimony as an accurate account of what happened between her and Ng.

25 Interrogations are not per se unlawful. The test for whether an interrogation is unlawful is "whether under all the circumstances the interrogation reasonably tends to restrain, coerce or interfere with rights guaranteed by the Act." *Bloomfield Health Care Center*, 352 NLRB No. 39 (2008), quoting from *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enf. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In the circumstances of this case, I do not find that the interrogation of Rodriquez by Ng was unlawful. Although Rodriquez's union sympathies were unknown, the questioning was by a low-level supervisor and did not take place
30 in a formal setting. The question itself was innocuous and Rodriquez's response was unremarkable. Significantly, Ng ended the conversation by stating that whether to support a union or not was Rodriquez's choice, thus signifying that he did not mean to coerce or even influence her in that choice. The questioning was not undertaken in the context of threats or
35 other coercive conduct. And it appears to have been an isolated incident, certainly not repeated by Ng. Thus, I do not believe the questioning reasonably tended to restrain, coerce or interfere with employee rights. Accordingly, I shall dismiss the allegation of unlawful interrogation in paragraph 5 of the complaint.

40 In paragraph 8 of the complaint, the General Counsel alleges that Supervisor Tom Garritano threatened employees with stricter work rules leading to discipline and discharge if they selected the Union to represent them. In support of this allegation, the General Counsel offered only the testimony of employee Greg Eshbach, who testified that he found himself

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no evidence that they checked IDs on this or any other occasion when they confronted the handbillers. By July 30, both the security guards and Respondent's management officials knew that the handbillers were bona fide off-duty employees legitimately engaging in protected union activity on the sidewalk leading to the entrance to the facility. More importantly, the conduct of the security guards remaining among the handbillers and monitoring their activities for an
50 extended period of time on July 30 was certainly out of the ordinary and unusual. That was sufficient to support a finding of unlawful surveillance.

overhearing Garritano speaking to the employees he supervised in a pre-shift meeting in the spring of 2007. Eshbach did not work in that part of the facility, but was in the area picking up a key for the forklift he was operating. Eshbach testified that Garritano was addressing about 15 employees, none of whom Eshbach knew. According to Eshbach, in the course of his remarks, Garritano said that, if the Union was voted in, he could not work with it and he would have to enforce the rules—"you'd go to the shop steward and you would just have to either get disciplined or fired." Tr. 450. Eshbach also said that Garritano related his remarks to his personal experiences in the Army. Garritano credibly testified that he spoke to his employees on occasion about his personal experience as a Defense Department employee, in which he described the situation where wage rate employees worked side by side with general schedule employees. He told his employees that the wage rate employees, who were represented by unions, had much stricter rules. He also told employees that he could not predict how a union would function if it secured representation rights at Respondent's facility.

I cannot accept Eshbach's testimony as an accurate portrayal of what Garritano said at any particular meeting. His account is so truncated and difficult to understand that I cannot make a sensible finding of fact based on his testimony. Nor was his testimony supported or corroborated by any one else, even though several employees supposedly heard the same remarks that he did. Garritano understandably could not even identify Eshbach as being present in any of his preshift meetings because Eshbach did not belong there and merely overheard what was being said. Nevertheless, Garritano's candid testimony about what he said generally at preshift meetings makes sense and holds together as a coherent story. It also fills in the blanks in Eshbach's rather disjointed account. I am convinced that Eshbach garbled what he actually heard and that Garritano's testimony reflects more completely what he said at all of his meetings, including the one Eshbach was testifying about. Garritano impressed me as a completely honest and reliable witness, whose testimony was much more detailed and comprehensible than Eshbach's. In these circumstances, I cannot credit Eshbach's testimony about what Garritano said. I credit instead Garritano's testimony as to what he likely said in the meeting that Eshbach overheard. Accordingly, I shall dismiss the allegation that Garritano violated the Act as set forth in paragraph 8 of the complaint.

In paragraph 10 of the complaint, the General Counsel alleges that, in late August 2007, Operations Manager Pasquale Scaramuzzini solicited grievances from employees and promised unspecified benefits if they rejected the Union. The evidence in support of the allegation comes from the testimony of employees Delvin Pena and Juan Ramon Mora Gomez. Pena testified that, at some point shortly before the election, he and Gomez were waiting for an elevator at the facility when they were approached by Scaramuzzini, who had just come on the job as the Operations Manager. Scaramuzzini in fact started his employment on July 16, 2007. According to Pena, Scaramuzzini made a comment about Pena's ID lanyard, which had the Union's name on it. Scaramuzzini asked whether Pena and Gomez knew anything about the Union. After they replied that they did, Scaramuzzini said that he did not know what was going on before he arrived at the facility, but, now that he was here, there was no need for a union. He continued, "I am here, and if you have a problem you address me and I promise you that this problem will be solved." Tr. 561-562. Gomez testified that Scaramuzzini also addressed him on this occasion, "trying to seduce us . . . to be in the opposite side of the Union." Tr. 582. Scaramuzzini derided the benefits that the Union could obtain for the employees and Gomez asked what the Respondent could do for them. According to Gomez, Scaramuzzini said he could "do anything for me" if "we dropped . . . the Union." Tr. 583. Gomez did not corroborate Pena's testimony about Scaramuzzini's remarks concerning addressing him about problems, and Pena did not corroborate Gomez's testimony about Scaramuzzini's remarks concerning benefits.

5 Scaramuzzini denied ever promising any employees that he would fix their problems because that would have been contrary to instructions he had been given by his superiors on how to approach the employees with respect to the union campaign. He said that he did tell employees that he was available to answer their questions in accordance with Respondent's so-called "open door" policy. He specifically denied telling Pena or Gomez that he would take care of their problems if they voted against the Union. He also denied telling Gomez, he would give Gomez anything he wanted if he would reject the Union. He did testify that he did have a conversation with both employees near the elevator on the second floor, but that the conversation was about their training for new positions. In the course of that conversation, he said if they had any questions they should come to see him.

10 I do not believe that the General Counsel has proved the violations alleged in paragraph 10 of the complaint. I do not credit Pena's testimony that Scaramuzzini said that there was no need for a union and tied that remark to the notion that grievances could be brought to him without the need for a union. Pena's testimony in this respect was not corroborated by Gomez, who was also present on this occasion. Nor did I find Pena an impressive witness. I find much more plausible the testimony of Scaramuzzini that he never made such a statement and that any conversation with the two employees had to do with their training. Scaramuzzini impressed me as a reliable witness and I have no reason to doubt his testimony. Gomez's testimony about the alleged promise of benefits is hard to comprehend. But it likewise was not corroborated by Pena, who was present and would have overheard Scaramuzzini's alleged remarks. I cannot credit Gomez's testimony in this respect. Not only was Scaramuzzini a more reliable witness than Gomez, but Gomez's testimony that Scaramuzzini promised him "anything" if he would reject the Union does not ring true. In these circumstances, I find that Scaramuzzini did not make the remarks attributed to him by Pena and Gomez. Accordingly, I shall dismiss the allegations set forth in paragraph 10 of the complaint.

30 Paragraph 11(b) of the complaint alleges that, in late August or early September, Human Resources Manager Arends threatened to discharge an employee for writing a union newsletter article critical of Respondent and favorable to the Union. The evidence in support of this allegation comes from the testimony of employee Nereida Oquendo. She testified that, a couple of days before the election, Arends was distributing coupons for the Allentown Fair to employees near the entrance to the facility. According to Oquendo, when she approached Arends to get her coupon, he mentioned an article she had written in a recent union newsletter supportive of the Union. The article stated that the employees should be willing to pay union dues. Arends commented that Oquendo had been absent in the past and the Respondent had not fired her. She responded that she had indeed been absent, but had an excuse. On cross-examination, Oquendo reinforced and confirmed her testimony on direct when she was asked about her pre-trial affidavit, which, in substance, supported her testimony. According to Oquendo, Arends said, "Oh, you are the one who wrote the article in the newsletter" and she answered that she had. And then he asked why she had written it, but before she could answer, Arends said that she had "missed three weeks sick and the company did not even fire me." Tr. 534. Oquendo responded to Arends by stating that she had called her supervisor about her absences.

45 Arends denied he had ever talked to Oquendo about her newsletter article. He also denied threatening her because she had written a newsletter article. He did, however, recall having a conversation with her, in which he reminded her, as he did with other employees, that "DHL had looked out for their interests in the past." Tr. 1106. He also confirmed that he and his assistant, Geoffrey McVey, handed out tickets to employees for the Allentown Fair. On cross-examination, Arends elaborated on how Respondent had helped Oquendo. He stated that she had been a no-call no-show for "a number of days in a row." He also stated that, at this time,

Oquendo had called him to say that she wanted to “keep her job.” Tr. 1130. And he told her that she was welcome to return. Arends nevertheless denied that he reminded Oquendo of this when he gave her tickets for the Allentown Fair.

5 I credit Oquendo’s testimony. She impressed me as an honest witness, who withstood
vigorous cross-examination and reinforced her testimony by reference to her pre-trial affidavit.
Arends, on the other hand, did not impress me as a reliable witness, particularly when he was
testifying about his involvement in the handbilling activities of employees on May 14. He had a
10 distinct tendency to testify in conformity with Respondent’s litigation theories rather than to
candidly and truthfully testify about what happened. Moreover, his testimony on cross-
examination concerning the Oquendo incident tends to confirm that of Oquendo. It certainly
confirms the context of her testimony. Arends did indeed do her a favor in the past. He
basically excused what would have amounted to a dischargeable offense. It would have been
15 plausible for him to remind her of it, as she testified, when Arends spoke to her about her
newsletter article in the course of giving out tickets to the Allentown Fair. Nor do I credit
Arends’s testimony that he never mentioned the adverse newsletter article. That too would
have been plausible, particularly in view of the intensity of the union campaign and the notoriety
of newsletter articles generally during the union campaign. My assessment of the situation, as
20 well as my observation of Arends’ demeanor, also convinces me that Arends viewed Oquendo’s
newsletter article in favor of the Union as a personal betrayal, especially because he had done
her a favor in the past. In view of my credibility determination, I find that Arends did indeed
mention the newsletter article to Oquendo and made a reference to not having fired her in the
past. The clear implication of his statement was that the Respondent had the authority to retain
or discharge employees and would exercise this authority based on whether an employee
25 supported the Union or not. This amounts to a threat to retaliate against employees because of
their union activities. Accordingly, I find that Respondent has violated the Act, in accordance
with the allegation in paragraph 11(b) of the complaint.

In paragraph 13 of the complaint, the General Counsel alleges that Supervisor Sam
30 Manzano threatened an employee with more onerous working conditions if employees voted for
the Union. The evidence in support of that contention was based on testimony from employee
Elisa Alonzo, who speaks Spanish, not English. She testified that, a few days before the
election in early September, in one of the break areas, Supervisor Manzano, who was not her
supervisor, but who also spoke Spanish, had a conversation with her in Spanish. Her own
35 supervisor, who did not testify, was also present, but he spoke only English. According to
Alonzo, Manzano told her that she should not vote for the Union because it was “no good.” He
related that he had family members, who had worked in a unionized operation, and the
experience was not a good one. Manzano also said that if a union came in, “the supervisors
could not help the workers, they could only watch.” Tr. 442. Alonzo explained that Manzano
40 said the supervisors could not help with “pulling the sled or the pallets,” something she
described as “heavy work.” Tr. 442. Manzano testified generally that he often told employees
about the bad experiences his family members had had working in union environments, but
insisted that he also told employees that he could not speak for what would happen at
Respondent’s facility if the Union won the election. Manzano’s testimony about the
45 conversation with Alonzo was sketchy. In response to a question by Respondent’s attorney as
to whether he recalled having a conversation with Alonzo, Manzano stated, “I don’t specifically
recall speaking to her, but I have no reason to say I didn’t, either.” Tr. 865. He then responded
to another general question about his family member’s experience in a unionized plant by
repeating that he made sure the employees understood that what happened there did not
50 necessarily mean that that would happen at Respondent’s facility. In view of Manzano’s lack of
specific recollection concerning their conversation, and Alonzo’s more reliable and detailed
recollection of that conversation, I credit Alonzo’s account.

Manzano's statement that, if a union were voted in at Respondent's facility, the supervisors would not help the employees with their work amounted to a threat that the employees would suffer an adverse change in their working conditions if the Union came in.

5 The context of the statement carries the clear implication that, at present, the supervisors do help employees with their work, especially the heavy work of pulling sleds or pallets. Otherwise, there would be no need to phrase the statement the way it was phrased. Neither in Manzano's testimony nor elsewhere in the record is there any support for the notion that supervisors did not help employees with their work, prior to Manzano's statement. Manzano's statement to Alonzo was also separate from and completely unrelated to Manzano's other statements about the adverse effects of a union on his family members. Thus, his testimony that, as a general matter, he would caution employees that he did not know whether the effects of a union on Respondent's operations would be the same does not operate to exonerate him from the effects of his specific statement to Alonzo about not helping employees. Nor was there any evidence that Manzano's statement to Alonzo referred to possible union rules governing work in the operations of unionized employers. Manzano gave no such explanation in his testimony. In these circumstances, I view Manzano's statement to Alonzo as an unlawful threat that, if the Union were voted in, employees would be subjected to stricter and more onerous working conditions. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act, as set forth in paragraph 13 of the complaint.

The Allegations Involving Labor Consultant Mark Penn

As indicated above, Mark Penn, a labor consultant utilized by Respondent and an admitted agent of Respondent, as well as Respondent Crossroads, is accused of committing two unfair labor practices in speeches he gave to employees. Paragraph 11(a) alleges that, on August 21, 2007, in remarks addressed to assembled employees, Penn threatened to sue an employee for writing a newsletter critical of Respondent and supportive of the Union. Paragraph 12 alleges that, in another speech to employees in late August 2007, Penn threatened employees with the "loss of their regularly scheduled annual wage increases if they selected the Union as their collective bargaining representative."

The Alleged Threat To Sue

35 The Facts

Penn gave at least three different sets of speeches to groups of employees, all of which were given separately in Spanish and in English. The first speech, delivered on the week of August 14 and 15, was generally about the Act, the Board and the Board's election process. At that meeting, Penn spoke a bit about his own background, which included stints as a union organizer and as a labor consultant for management. He testified he made presentations similar to the ones he made for Respondent some 250 times over the course of his career as a labor consultant. He does not utilize a written script for his presentations. In his first speech, he also mentioned that, in his work as a union organizer, he felt he had helped employees in only three out of ten campaigns. Penn testified that he told employees, "That's three out of every ten times I could honestly say the employees at this company are better off with the union than they were before the union came in. But seven out of ten times, I personally felt that we left the employees in either the same situation or worse, and I say worse only because we didn't solve their problems yet they were now paying union dues." Tr. 692. According to Elias Sleiman, who attended this meeting, Penn advised employees that, when he worked as a union organizer, "they did not help the people as much as the union organizers tell us. . . . They only help three out of each ten people that pay dues into the union." Tr. 230. At that point, an employee

named Millie called Penn a liar and a thief. She called out, "You're a thief, you stole my money." Tr. 230-231. Sleiman also testified that Penn said he was hired by Respondent to advise it on labor law "because the labor law is so complicated and any word up or down would make it legal or illegal." Tr. 230. Sleiman's testimony about Millie's remarks and Penn's reference to labor law being complicated in this meeting was uncontradicted.

Shortly after Penn's first set of speeches, an article appeared in the Union's August 20, 2007 newsletter, written by Sleiman, in which he criticized Penn. Sleiman's article referred to Penn as a "union buster," and discussed Penn's initial speech to employees. The article includes the following:

This union buster started lying in the first five minutes of the meeting. He said he is just a labor consultant and is here to advise the company about labor laws so they stop breaking those laws. If that's true, why isn't he upstairs educating managers and supervisors instead of conducting anti-union meetings with the workers?

This union buster also admitted a personal role of misrepresenting union members and lying to them about "stealing" their money. I don't know about the laws in Massachusetts but in Pennsylvania you go to jail for that.

Now DHL brings in this union buster to tell us the "truth" and the "facts." Isn't that ironic!

The fact is, that for over 100 years the answer to workers mistreatment, disrespect, favoritism, harassment, disregard and abuse is a union. It's time tested and proven over and over again and hiring a liar to tell us otherwise is not going to change the facts.

Penn's second set of meetings took place on August 21 and 22. At one of those meetings, which was in English and which Sleiman attended, Penn referred to Sleiman's article. He read the initial two paragraphs cited above and denied the substance of the accusations. According to Penn, he told employees he never said, as the article mentioned, that he was hired "to advise the company about labor laws so they stop breaking those laws. So I corrected the record. I said I never said that in the first meeting. What I said . . . was . . . yes, I am here to communicate the company's position and make sure it's done in a lawful manner, but never implied or inferred that the company had been breaking the law." Tr. 696. He also said that, contrary to the implication in the article, he did meet with managers and supervisors of the Respondent. Tr. 696. Penn also testified as follows concerning what he said about the second paragraph he read to employees:

I told employees that I believed that this statement crossed the line. . . . I strongly believe this is defamatory. And I told them that, first of all, I never, never said that, okay, never mind admitting to saying that, I never said that, never did it. Mr. Sleiman, I believe he stood up and he said, well, yes, you did say that. And although I don't remember exactly what he said, he said, you know you said that you only helped three out of ten employees, he said, not companies, that you only helped three out of ten employees and that means that you stole money from the rest of them, something to that effect. . . . And then I reminded the entire group, I said if you remember, what I said was, and then I repeated what my testimony was about the first meeting, exactly that I felt, you know, I could only hold my head high three out of ten times. Tr. 697

Sleiman testified that, during his exchange with Penn at this meeting, he said that he wrote only "what I understood from [Penn's] last meeting and nothing else and that's the truth and I would not apologize for me telling the truth." Tr. 235. According to Sleiman, Penn then said that he

was not “talking about three out of every ten employees, it was three out of every ten companies,” which Sleiman thought “means the same thing.” Tr. 235.

5 Penn also told the employees that if Sleiman did not retract the statements made in the article, he would consult his attorney to see if he could sue Sleiman for defamation. According to Penn, he said, “I want a written retraction or else I will consult with my attorneys to explore all legal option[s] that are available to me including a possible lawsuit.” Tr. 697-698. Sleiman and a group of employee witnesses who supported his testimony confirmed that Penn explicitly threatened to sue Sleiman for defamation. A group of Respondent’s witnesses testified, 10 contrary to Penn, that he simply threatened to consult his attorney.⁷ Nevertheless, it is clear from Penn’s own testimony that he mentioned at least the possibility of a lawsuit. He said, in substance, that he intended to sue if there was no retraction, and any reasonable person would understand him to mean exactly that. Moreover, Penn was clearly angered by what he viewed as an attack on his integrity and it would have been natural for him to react by explicitly 15 threatening to sue, in accordance with the testimony of Sleiman and other employee witnesses who supported his testimony. In these circumstances, and in view of the clear implication of even Penn’s account of what he said, I find that Penn did indeed explicitly threaten to sue Sleiman for his article, unless he retracted his statements.

20 Significantly, although he never actually initiated a law suit, Penn testified that he did indeed consult a lawyer—in fact, more than one, although none was an expert in the law of libel. According to Penn, he dropped any notion of a lawsuit because he viewed a subsequent newsletter article by Sleiman as an effective retraction. In that article, in the August 27 25 newsletter, Sleiman wrote as follows:

25 I would like to take this opportunity to thank all of my co-workers for their support in response to the latest intimidation ploy by DHL when their \$475/hour “hired gun” Mike Penn publicly threatened to sue me for my last article. He said in his first anti-union meeting that as part of the leadership of a Teamsters local they took dues money 30 from every ten people and they only helped three people. To take money and not fairly represent everybody in my opinion is “stealing.” I was not the only one who heard him say what I remember his saying. When other workers told him he should be ashamed of himself for what he said he did, he never “corrected” them in that meeting. Like I told all of you before, after other labor law violations that DHL committed against me, I will 35 not be silenced and I will stand by you and fight until we win. RX 20

40 Despite testifying that he viewed the above as a retraction, Penn never mentioned to employees in subsequent meetings with them, or in any other manner that he viewed the Sleiman article as a retraction. Nor did he ever mention to employees—or to Sleiman, for that matter—that he had decided not to sue Sleiman for defamation.

45 ⁷ I reject that testimony in view of Penn’s admission he threatened a possible lawsuit if Sleiman did not retract his statements. Penn did not withdraw that admission when he later denied Sleiman’s testimony that Penn threatened a lawsuit that would cost Sleiman “big” (Tr. 716). Although I doubt if Penn explicitly threatened his lawsuit would cost Sleiman “big,” 50 Sleiman and his fellow workers could well have inferred the possibility of a large liability from such a lawsuit. For purposes of this case it is irrelevant whether that possibility was made explicit.

Analysis

5 It has long been accepted Board law that threats to sue for engaging in protected
 concerted activity, as opposed to the actual filing of lawsuits for engaging in such activity, are
 violations of the Act. *S.E. Nichols Marcy Corp.*, 229 NLRB 75 (1977). Such threats reasonably
 tend to interfere with, restrain or coerce employees in the exercise of their rights under the Act.
 See *United States Postal Service*, 350 NLRB No. 12 (2007), enf'd. 184 LRRM 2075 (11th Cir.
 10 May 2, 2008), citing authorities; and *Network Dynamics Cabling, Inc.*, 351 NLRB No. 98 (2007),
 slip op. at 5. Nothing in *BE & K Construction Co.*, 351 NLRB No. 29 (2007), which held that
 retaliatory but reasonably based lawsuits do not constitute unfair labor practices, alters this
 approach. See discussion in *United States Postal Service*, supra, 350 NLRB No. 12, including
 at n. 1. Indeed, at the time of the *Nichols* case, all lawsuits by employers, whether or not
 15 retaliatory or reasonably based, were immune from an unfair labor practice finding. See
 discussion at n. 2 of the *Nichols* case, supra.⁸

A threat to sue an employee for writing a pro-union article in a newsletter distributed to
 employees during a union campaign obviously tends to interfere with or coerce employees in
 the exercise of their protected rights. Employees are permitted to advance their views on
 20 unions, even in boisterous language, so long as their views are not maliciously false, that is,
 made with knowledge of their falsity or with reckless disregard for their truth or falsity. See
Valley Hospital Medical Center, 351 NLRB No. 88 (2007), slip op. at 3-4, and cases there cited.
 "Where an employee relays in good faith what he or she has been told by another employee,
 reasonably believing the report to have been true, the fact that the report may have been
 25 inaccurate does not remove the relayed remark from the protection of the Act. . . . In addition, in
 the context of an identified, emotional labor dispute, the fact that an employee's statements are
 hyperbolic or reflect bias does not render such statements unprotected." *Ibid*, citing numerous
 case authorities.

30 Indeed, those same principles are reflected in cases dealing with state court defamation
 actions against unions or their agents for statements made in the context of a labor dispute.
 Courts have recognized that statements in hotly contested labor campaigns are often
 statements of opinion or figurative expression, incapable of being proved true or false in any
 objective sense. See *Steam Press Holdings v. Hawaii Teamsters Local 996*, 302 F.3d 998,
 35 1005-1009 (9th Cir. 2002), cert. denied, 537 U.S. 1232 (2003). See also *Jolliff v. NLRB*, 513
 F.3d 600, 609-617 (6th Cir. 2008). As the Sixth Circuit stated in *Jolliff*, citing numerous
 authorities, debate in labor disputes may well include "vehement, caustic, and sometimes
 unpleasantly sharp attacks." *Id.* at 609. Again citing authorities, the Court also emphasized that
 40 "rhetorical hyperbole, a vigorous epithet" and "loose, figurative, or hyperbolic language" merit
 protection. *Id.* at 610. Such language is not even viewed as a factual misstatement. *Id.* at 610-
 611 and cases there cited. Manifestly, such statements are not viewed as "maliciously untrue"
 or made "with knowledge of their falsity or with reckless disregard for their truth or falsity."
Valley Hospital Medical Center, supra, 351 NLRB No. 88, slip op. at 3. "Before the test of
 reckless or knowing falsity can be met, there must be a false statement of fact." *Steam Press*
 45 *Holdings v. Hawaii Teamsters*, supra, 302 F. 3d at 1009, n. 6, quoting *Old Dominion Branch No.*

⁸ Nor can it be argued that a threat to file a lawsuit is "incidental" to the filing of a lawsuit,
 thus implicating the constitutional underpinnings of *BE & K*. As the Board stated in *United*
 50 *States Postal Service*, supra, 350 NLRB No. 12, slip op. at 1-2, that notion was specifically
 rejected by the District of Columbia Circuit in *Venetian Casino Resort, L.L.C. v. NLRB*, 484 F.3d
 601 (D.C. Cir. 2007).

496, *Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974). Respondent bears the burden of proving both false statements of fact and malice. See *Diamond Walnut Growers*, 316 NLRB 36, 47 (1995).

5 Applying the above principles, I find that Sleiman's newsletter article remained a protected activity, notwithstanding his harsh attack on Penn. Respondent has not satisfied its burden of proving that the article contained false statements of fact or that such false statements of fact were made with malice. Sleiman's article was mostly hyperbole and devoid of direct statements of fact that could even be challenged as false. Of the two paragraphs Penn found offensive, the first one simply calls him a "union buster" who assertedly was trying to keep Respondent from "breaking the law." This is mild stuff in the tough banter of a typical union campaign. The second paragraph is rather cryptic without context, but apparently refers to Penn's statement, in his first meeting with employees, that, as a union organizer, he was only able to help employees in three out of ten campaigns. Sleiman described Penn's role in that respect as misrepresenting members, lying to them and stealing their dues money. In a sense, Sleiman was simply describing another employee's emotional reaction to Penn's remarks in that first meeting. It was she who called him a "thief" and a "liar." As Sleiman made clear in a subsequent article, the use of those words in his article was a rather colorful and hyperbolic reference to Penn's failure, as an organizer paid from the dues of union members, to adequately represent their interests. This was not meant as a statement of fact, but rather as a rhetorical comment. Finally, Sleiman's opinion—and that is what it was—that Penn's lying to union members and stealing their dues was actionable under the laws of Pennsylvania was exaggerated campaign rhetoric, not a misrepresentation of fact. None of those statements were demonstrably misrepresentations of clear fact. Nor do I believe they were viewed as such by any of the employees—or, indeed, any reasonable person reading those statements. This is particularly so because, in the same meeting in which he threatened to sue Sleiman, Penn carefully and explicitly corrected what he considered objectionable in Sleiman's article.

30 In any event, even assuming some factual misrepresentations, nothing in the two paragraphs deemed objectionable by Penn were indicative of malice, which requires a showing that the statements were made with knowledge that the statements were false or with reckless disregard of whether they were or not. The harshest statements, accusing Penn of lying and stealing when he was a union organizer, simply parroted the accusations of another employee at Penn's first meeting. Indeed, Sleiman's subsequent article makes it clear that his original statements were not made with malice. See *Joliff v. NLRB*, supra, 513 F.3d at 614-617.⁹

40 I find therefore that Sleiman's statements remained protected concerted activity and that Penn's threat to sue for such protected statements was coercive and violative of the Act. Penn's threat to sue was especially chilling because, as he testified, he had carefully rebutted Sleiman's article in the same meeting. Thus, the allegedly offensive statements were corrected. But the threat to sue never was retracted and stood as a reminder to employees not to cross Penn or the Respondent with strong pro-union statements. Sleiman himself testified that he lessened his previous outspoken opinions on union issues after Penn's threat because he starting thinking about "what I should [or] should not say." Tr. 340. Penn's failure to notify the employees, to whom he had announced his intention to sue Sleiman, that he had, after reading Sleiman's second article on the matter, decided not to initiate a lawsuit, exacerbated the

50 ⁹ As the General Counsel points out (Br. at 31), employee statements accusing an employer of being a "crook," "liar," or "thief" in the course of engaging in protected activity have not been found sufficient to render such activity unprotected. See *General Chemical Corp.*, 290 NLRB 76, 82-83 (1988) and other cases cited in the General Counsel's brief.

coercive effect of his threat. He thus let linger in the minds of employees the notion that boisterous language by employees in support of the Union would be met with the possibility of a lawsuit. That message certainly has the reasonable tendency to chill and interfere with union activities. I accordingly find that Penn, on behalf of Respondent DHL and on behalf of his
 5 employer, Respondent Crossroads, violated the Act as alleged in paragraph 11(a).

The Alleged Threat That Regular Wage Increases Would Be Lost

In Penn's third set of meetings, which took place on August 28 or 29, he discussed the
 10 collective bargaining process as a general matter, once a union was selected by employees. He referred to a chart on a white board, on which he had written out, both in English and in Spanish, some of the steps in the process and some of the terminology related to the process. Prominently displayed on the white board was the term "status quo." The white board chart was prepared by Penn before his meetings and the board was moved to the different locations of the
 15 meetings. Both sides presented employee witnesses, some Spanish speaking and some English speaking, who heard the speeches and gave dueling accounts of what Penn said at this set of meetings. Unfortunately, their accounts of what was said were very selective and incomplete. The General Counsel's witnesses testified that Penn described how long the negotiating process could last and he also said that, during that period, wages would be
 20 "frozen." Respondent's witnesses denied that the word "frozen" was mentioned in connection with wages or benefits during the negotiating process and emphasized instead that the word "status quo" was mentioned in connection with the statement that wages and benefits would remain the same during bargaining. It would be very difficult for a trier of fact to determine what was said just from the testimony of employees. Obviously, the employees testified about what
 25 they remembered most about Penn's remarks concerning collective bargaining. They did not intentionally lie, but they definitely shaded their testimony. Thus, I cannot base my findings solely on such testimony.

Instead, I rely chiefly on Penn's testimony about what he said in this third set of
 30 meetings. He had given similar speeches both in Spanish and in English for many years. His account of his remarks at this set of meetings was the most comprehensive of the accounts given by the witnesses in this case. His testimony was detailed and it placed his remarks in appropriate context. For example, a Union newsletter, distributed sometime before the August 27 or 28 speeches, had accused him of having violated the Act in an earlier speech to
 35 employees of another employer, several years before. On that occasion, the Board found that Penn threatened employees by stating that their wages would be frozen during negotiations. Penn was candid in explaining this prior brush with the law, and, when it was brought up by an employee in one of his meetings, he admitted his error. He also explained that it was inappropriate to say that wages would be frozen during negotiations and he was not making that
 40 claim to Respondent's employees. Indeed, I believe he avoided the word precisely because he had been burned before when he used it. I believe, instead, that he concentrated on the word "status quo" and explained that all existing wage programs and benefits would remain as they were and would stay the same throughout negotiations, as he emphasized in his testimony. That his testimony in this respect was supported by some employee witnesses, as well as by
 45 Plant Manager Swallow, who introduced Penn and remained at the meetings to hear his remarks, simply enhances Penn's testimony. I also find significant that Penn specifically wrote the word "status quo" on his white board presentation before making his remarks.

To the extent that some of the General Counsel's witnesses may have suggested that
 50 Penn specifically threatened that Respondent's existing pay for performance and periodic wage increase program would be halted during negotiations, I reject that testimony. I am convinced that Penn made no such reference to Respondent's particular wage increase program. His

remarks were addressed generally to what an employer could or could not do with respect to existing wage and benefit programs, during negotiations. Significantly, Swallow told employees, at this and other meetings, that any specific questions about Respondent's own policies and benefits should be addressed to two corporate human resources experts, who were in attendance at the meetings. This tends to confirm that Penn did not address the specific wage and benefit policies of the Respondent in his remarks.

In short, in accordance with Penn's testimony, I do not believe that Penn suggested that Respondent would not continue existing wage and benefit programs if the employees selected a union to represent them. What he did say was that such programs would "stay the same" or remain "status quo" during negotiations. That, of course, was an accurate statement of existing law. Indeed, in some circumstances, even a reference to wages typically remaining frozen during negotiations is perfectly lawful. See *Flexible Industries, Inc.*, 311 NLRB 257 (1993) and *Mantrose-Haeuser Co.*, 306 NLRB 377 (1992). Accordingly, I will dismiss the allegations in paragraph 12 of the complaint.

The Sleiman Discrimination Allegations

It is settled law that, in order to establish a finding of discrimination, the General Counsel must make an initial showing that a substantial or motivating factor in the employer's adverse action against an employee was the employee's union or other protected concerted activity. As part of that initial showing, the General Counsel may show that the employer's reasons for its action were false or pretextual. Also indicative of an initial showing of discrimination is the timing of the action at or near the time of the employee's union activity. Once the General Counsel has made such an initial showing, the burden of persuasion shifts to the employer to show that it would have made the same decision, even absent the union or protected activity. See *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003); and *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984).

In paragraphs 14(a), (b), (c), (d) and (e), the General Counsel alleges that Respondent discriminated against employee Elias Sleiman by reassigning him to a more onerous job, restricting his movements, reducing his hours, issuing him a written warning and issuing him a negative evaluation. It is uncontested that Sleiman was a known union activist. He was heavily involved in handbilling employees every Monday before the beginning of the twilight shift from late April through late July 2007. He was considered the leading employee spokesman during the handbilling, often telling Respondent's officials and agents to stop interfering with the handbilling activity, which Respondent unlawfully interfered with and surveilled. At one point, during his handbilling, he was confronted by Human Resources Manager Arends and told to "bring it on." He also wrote widely distributed newsletter articles promoting the Union's position and criticizing the Respondent's position in the union campaign. He was also outspoken in employee meetings in which the Respondent sought to convince employees to reject the Union. It is in this context that I view the above complaint allegations involving Sleiman and apply the above principles dealing with union-based discrimination.

The Alleged Reassignment to More Onerous Work

In support of this allegation, the General Counsel relies primarily on Sleiman's testimony. He testified that, in April and May, 2007, he operated a "tugger," an electric-powered cart that pulls a small trailer. According to Sleiman, on May 2, 2007, Sort Manager Levey asked him to work on the other side of the building. When he got there, another supervisor, Trevor Steigerwalt, asked him to park his tugger and work in the unload area, unloading trucks. Steigerwalt told him that he would be doing this work for a "couple of weeks." Tr. 171-173.

Actually, Sleiman was switched with Lenny Bryant, who formerly did the unload job. The unloading work involves picking up boxes inside a truck and putting them on a conveyor belt that runs from the inside of the truck and into the facility. Sleiman had occasionally unloaded trucks before, but he views that as harder work than lifting boxes on to and off of the tugger.

5 There are, however, harder jobs at the facility, according to other witnesses, including Plant Manager Swallow, whom I found particularly reliable on this point.

According to Sleiman, after two weeks, he went to Levey and asked when he was going back to his old job. Levey told him, basically, "if Trevor put you there then you stay there." Tr. 10
10 174. Sleiman also complained to Steigerwalt, who said the present situation was working well. About a week later, according to Sleiman, he prepared a letter to Plant Manager Swallow, complaining about the assignment. Although the letter (GCX 13) is dated May 7, 2007, it was not delivered to Swallow until late May. Sleiman also testified that "[t]he union helped" him write the letter (Tr. 322). As a result, Sleiman met with Swallow and another manager, after which
15 Swallow offered Sleiman a choice of three other jobs, including one in the quality control department that he accepted.

Respondent's evidence on the transfer or reassignment is decidedly to the contrary. According to Respondent's witnesses, the transfer took place in mid or late March, well before
20 Sleiman began his open union activities. Sort Manager Mark Levey, who essentially made the decision to reassign Sleiman, testified that, at the beginning of 2007, Sleiman ran a tugger transporting misrouted packages to the correct reloading areas for outbound connections. Sleiman was one of several employees who did this work; the tugger operators were not part of the quality control department. According to Levey, Sleiman was moved off the tugger in mid-
25 March of 2007, at a time when he did not know Sleiman was a union supporter. Levey moved Sleiman off the tugger in order to cross-train other employees on the tugger and because Sleiman had some performance issues while he was on the tugger. Levey noticed a lot of "missorts that were left in the west end of the building he was responsible for. He was talked to numerous times to make sure that those packages get services between Reloads 1, 2, 3, and 4. He was leaving those reloads to go deliver freight throughout the building." Tr. 1000.
30 Steigerwalt corroborated much of Levey's testimony about the tugger position. Steigerwalt had been given the authority over some tuggers, including Sleiman, in early March of 2007. Steigerwalt perceived a problem with the overall performance of the tuggers under his authority. He asked that he be given Lenny Bryant as a tugger operator because he had previously
35 worked with Bryant and was favorably impressed by him. Both Steigerwalt and Levey confirmed that Levey agreed and that Sleiman and Bryant essentially switched jobs. Steigerwalt and Levey also each established that the date of the reassignment was in mid-March because they recalled a specific incident that took place at the facility in late March, after the Sleiman reassignment. Swallow also testified about the meeting he had with Sleiman, in
40 which Sleiman was taken off the unloading assignment and brought into quality control. Swallow denied the charge in Sleiman's letter to the effect that he was removed from the tugger and assigned to unload trucks because of his union activities. Swallow also said that he had no problem with taking Sleiman off the unloading job, but he did not want to put him back on the tugger because of Sleiman's problems when he ran the tugger.

45 As to the crucial issue of the date of Sleiman's reassignment, I credit the testimony of Levey and Steigerwalt, which was clear, coherent and mutually corroborative. Sleiman's testimony that the reassignment was made on May 2 does not withstand analysis. The letter he sent to Swallow complaining about the assignment was dated May 7. It was purportedly written
50 after he learned that the two-week or temporary assignment was going to be more permanent and after he consulted some union officials who helped him write the letter. Sleiman's time line is thus broader than the 5 days that elapsed from when he says the reassignment was made

and the date of the letter. I found that Sleiman's grasp of dates was generally faulty. For example, he insisted that Penn's threat to sue him came in the same meeting in which Penn discussed wages and benefits during bargaining. That turned out to be wrong. I find it much more likely that the reassignment was made in mid-March, as Levey and Steigerwalt testified.

5 To the extent that Steigerwalt had anything to do with the decision, in terms of recommending it, I find that he credibly testified that his reasons for reassigning Sleiman were business-related. Indeed, his assessment of the tugger problem also caused him to make another reassignment at about the same time; he took another employee, Carl Yates, off his tugger position. Moreover, I credit Levey's testimony that he spoke with Sleiman on several occasions about
10 Sleiman wandering off with the tugger into areas where he was not supposed to be. On cross-examination, Sleiman reluctantly admitted that Levey had had at least one such conversation with him about two months before a confrontation between the two of them in June 2007. On balance, I found Levey's testimony more reliable than Sleiman's on whether Sleiman wandered
15 inappropriately about the facility in the tugger. I also credit both Levey and Steigerwalt that the tugger position was and is different from a position in the quality control department. Their testimony is also supported by that of Swallow. Sleiman's testimony on this point was quite ambiguous and tended to suggest that he was both a tugger and an employee assigned to the quality control department. That point is not supported by the evidence.

20 In view of my credibility determinations set forth above, I find that Sleiman's reassignment from the tugger position to the unload position took place in mid-March 2007, well before his union activities were generally known. I also find that the assignment was made for justifiable business reasons, as set forth by Levey and Steigerwalt. Indeed, at about the same time, another employee, Carl Yates, was removed from his tugger position. Moreover, I find
25 that Swallow's resolution of Sleiman's complaint about the assignment was incompatible with what might be expected of a decision originally based on anti-union considerations. Once the matter was brought to Swallow's attention, he quickly offered Sleiman relief from what Sleiman viewed as an onerous assignment, so long as Sleiman was not put back on the tugger. Nor did Sleiman insist on being put back on the tugger. In these circumstances, I find that the General
30 Counsel has not proved that the reassignment of Sleiman from the tugger to the unload position was based on his union activities. But even if the General Counsel had met his initial *Wright Line* burden on this point, I find that Respondent would have made the reassignment even in the absence of Sleiman's union activities. Accordingly, I will dismiss the allegation in paragraph 14(a) of the complaint.

35

The Alleged Restriction of Movement

As to the allegation about restriction of movement, the General Counsel again offers the testimony of Sleiman. On June 14, according to Sleiman, Levey and his immediate supervisor,
40 William Wilkinson, approached him, at which time Levey complained that Sleiman had taken eight minutes for a smoke break. Levey also told Sleiman that, the day before, he had seen Sleiman out of the quality control area. Levey told Sleiman that he was not to take unauthorized breaks and that he would have to remain in the quality control area, unless he had permission from a supervisor. According to Sleiman, those restrictions still apply, and only to him. He also
45 testified that, before the restriction, he spent about 95% of his time outside the quality control area.

By the time of the Levey-Sleiman conversation, Sleiman had been taken off the unload position, at his request, and placed in the quality control department. Levey credibly testified
50 about the job duties of that position. According to Levey, quality control employees are not to leave the quality control area and look for damaged freight. Ordinarily, other employees bring damaged packages to the quality control area, where the quality control people repair or rewrap

the packages and put a new airbill on them. Plant Manager Swallow confirmed that only rarely would quality control employees leave their area to pick up or repair damaged packages. Levey testified that he spoke to Sleiman about taking a long smoke break without the prior permission of a supervisor and also about wandering away from the quality control area. Levey placed the conversation on June 13 rather than June 14. According to Levey, Sleiman was not actually
 5 doing any work when he noticed Sleiman out of his work area; Sleiman was reading a magazine. The latter complaint is similar to others Levey made about Sleiman's wandering off when he was on the tugger. Nevertheless, Levey denied telling Sleiman that he was restricted to the quality control area while he was on the clock.

10 I do not accept Sleiman's testimony insofar as it purports to support the allegation in paragraph 14(b) of the complaint. I believe, in accordance with Levey's testimony, that Levey did not restrict Sleiman to the quality control area, although he may have told Sleiman not to wander around the facility, as he had done on many prior occasions when he was a tugger.
 15 That was consistent with the normal job duties of a quality control employee, who generally works in a dedicated area. I also believe Levey's testimony that, on this occasion, Sleiman was observed out of his work area without having a work-related reason for being out of the area. I believe Sleiman exaggerated or misunderstood the conversation he had with Levey about his smoke break and being outside his work area. That conversation, which is fulcrum of this
 20 allegation of the complaint, is also discussed below in connection with Sleiman's June 27 written warning.

25 Sleiman's testimony about the alleged restriction is questionable. I doubt very much Sleiman's testimony that, before the alleged restriction, he spent 95% of his time outside the quality control area. Indeed, another witness for the General Counsel, Nereida Oquento, a full-time quality control employee, who sometimes worked on the second floor, where Sleiman did not, estimated that she only worked outside the quality control area half of her time. She also testified that there is an area set aside for quality control with tables on which the employees repair damaged packages. In fact, as of June 13 or 14, Sleiman had been in the quality control
 30 department for only about two weeks, having been permitted to work there by Swallow at the end of May or at the beginning of June. Sleiman's view that he was always a quality control person, except for the time he spent in the unload position, is somewhat strained. I found his testimony about his job responsibilities before June of 2007 to be quite confusing. I am convinced that he was a tugger operator until his reassignment to the unload position. Although
 35 he may have done some work on damaged packages, he was not assigned to the quality control department until after his meeting with Swallow. In all the circumstances, I believe that Sleiman confused the wide arc of his job as a tugger before he was reassigned to do unloading work with his job in quality control after Swallow put him there. I believe that this confusion caused him to exaggerate or misunderstand Levey's conversation with him on June 13 or 14.¹⁰

40 _____
 45 ¹⁰ I am also aware of the documentary evidence showing the rosters of Respondent's employees, which consistently lists Sleiman in the quality control department from early 2007. GCX 36. I am not sure how that evidence impacts this allegation, or, indeed, this case, but I am convinced, from the testimony of Swallow and other management witnesses, particularly
 50 Steigerwalt, that those rosters were not entirely accurate. Steigerwalt specifically and credibly testified that the rosters were not relied upon on a daily basis by supervisors. In the first few months of Respondent's operations at its new facility there was a lot of confusion, certainly about job titles and job duties. This is also shown by Sleiman's testimony, which confusingly placed himself both as a quality control person and employee who also ran the tugger. In any event, I put no great weight on the validity of the rosters insofar as making significant findings in this case.

Accordingly, I find that the General Counsel has failed to show that Respondent restricted Sleiman's movements because of his union activities. Even if that finding were supportable as an initial matter, I find that Respondent has shown that quality control people normally work mostly in the quality control area. Levey's admonition that Sleiman stay in the quality control area was thus not an unlawful restriction, but rather a reminder that he was not to wander away from the area where he was to perform his major job responsibilities. As such it was based on a legitimate business-related assessment of the situation. In these circumstances, I find that Respondent has shown that it would have treated Sleiman just as it did, advising him not to wander outside the quality control area when he had no work-related reason to leave the area, even in the absence of Sleiman's union activities. Consequently, I will dismiss the allegation in paragraph 14(b) of the complaint.

The June 27 Written Warning

On Monday, June 25, 2007, Sleiman again distributed union material to employees outside the facility at the beginning of the twilight shift. On that occasion, he distributed a copy of the Union's June 25 newsletter. On the front page of the newsletter was a signed article by Sleiman, accompanied by his photograph, entitled, "Welcome to Our Family." As a rhetorical device, he began the article by urging the DHL managers and supervisors not to read the rest of the article because "you aren't going to like it." He went on to urge employees to join and support the Union to better their working conditions, and to criticize the Respondent for giving employees a "fake" welcome and then chasing them out "as soon as the last box is off the slide." He ended the article by tweaking the managers, stating, "I warned you not to read it!!!" GCX 15.

Sort Manager Mark Levey had received a copy of the newsletter article, and Levey approached Sleiman twice, during his shift the next day, on June 26. On both occasions, Levey referred to Sleiman's article and stated that he could not avoid reading the whole article. Sleiman's testimony in this respect was uncontradicted because, although Levey testified extensively during this trial, he did not testify about the newsletter article or any conversations with Sleiman about the article. Nor do I have any reason to question the veracity of Sleiman's testimony about Levey's comments on the newsletter article. I therefore credit Sleiman in this respect.

Also, on June 26, at about 11:15 p.m., Sleiman was approached by his supervisor, William Wilkinson. Wilkinson told Sleiman to punch out immediately because his hours were being cut. After he had punched out, Wilkinson asked Sleiman if he had taken his break and Sleiman replied that he had. Wilkinson then said that Sleiman had not worked for four hours—the point after which employees may take a paid break, under Respondent's policy. Sleiman responded that he was scheduled or intended to work 7 hours that night before Wilkinson asked him to punch out, which would have put him in compliance with Respondent's policy. Sleiman's testimony in this respect, which I credit, is uncontradicted because Wilkinson did not testify in this trial.¹¹

Sleiman was subsequently issued a written warning for admittedly taking his break before working a full 4-hour shift, in violation of Respondent's policy. The written warning—a

¹¹ Sleiman also testified that he was told by his previous supervisor, Trevor Steigerwalt, that he could take his paid break between 10:30 and 11:00 and this is what he had done. Sleiman's testimony in this respect was not contradicted by Steigerwalt.

corrective action—carried a date of June 27, 2007 and was issued by Supervisor Wilkinson. Sort Manager Mark Levey signed off on the warning as manager. Sleiman refused to sign the warning, with a notation dated June 28. However, the written warning also contained a reference to an incident that took place two weeks before, on June 13 or 14. As mentioned
 5 above, on that occasion, Sort Manager Mark Levey had spoken to Sleiman twice, first about failing to ask his supervisor’s permission before taking a break, and secondly about being out of his area. Levey did not issue a written corrective action memorializing this discussion at the time, even though the record shows that corrective actions are regularly issued for verbal warnings. Indeed, the corrective action form has a specific box for “verbal warning.”¹²

10 I find that the General Counsel has shown that the June 27 warning was issued because of Sleiman’s union activities, particularly his critical newsletter article that was distributed two days before. Levey, who was instrumental in issuing the warning, had commented about the article. The incident that supposedly provoked the warning was Sleiman’s apparent failure to
 15 take his break after working four hours. But the uncontradicted testimony shows that Sleiman was slated to work more than four hours, as he had consistently done in the past, according to Respondent’s own records. Thus, his break would have been permissible had he not been told to clock out early on the evening of June 27. The reason he was told to clock out was that his hours were being reduced, a change that, as I find below, was discriminatory. Moreover, the
 20 June 27 warning added an incident to the warning that had nothing to do with what happened on that night to precipitate the warning. Respondent added something that happened two weeks before, when Levey told Sleiman not to take a long smoking break and not to wander around the facility. Levey had not issued a warning at the time of the earlier incident, obviously because he did not think that his conversation with Sleiman required a warning. Indeed,
 25 Levey’s testimony denying that he restricted Sleiman’s movements on that occasion makes it clear that he did not consider the matter one that justified disciplinary action. Levey had had numerous conversations with Sleiman about wandering around the facility while he was on the tigger; and he did not believe that any of those conversations justified any sort of discipline, according to his own testimony. It was partly based on that testimony of Levey’s that I
 30 dismissed the allegation that Levey had unlawfully restricted Sleiman to the quality control department. It was only after Sleiman’s newsletter article apparently rankled Levey, and only after Sleiman’s hours were discriminatorily reduced, that Levey injected the earlier incident into the June 27 warning. In these circumstances, I find that the warning was issued for discriminatory reasons. In addition, the Respondent has failed to show that it would have
 35 issued the warning in the absence of Sleiman’s union activities. Viewing what precipitated the warning, it is clear that Sleiman’s break would have been proper had he not had his hours reduced for discriminatory reasons; and it is also clear that, absent Sleiman’s union activities, Respondent would not have added the two-week old incident as an item on the June 27 warning. Accordingly, I find that the General Counsel has proved the allegation in paragraph
 40 14(d) of the complaint.

The Reduction in Hours

45 As indicated above, Sleiman’s uncontradicted testimony shows that Supervisor Wilkinson notified Sleiman at about 11:15 p.m., the night of June 26, that his hours were being cut and that he had to punch out immediately. He had only worked roughly 4 hours of an anticipated 7-hour stint that night. Again, according to Sleiman’s uncontradicted testimony, he was the only quality control employee sent home early that night. The others continued to work.

50 ¹² Sleiman complained to Plant Manager Swallow about the June 27 warning, but Swallow declined to alter it.

Wilkinson also told Sleiman that, from then on, he was only permitted to work until 10:30 p.m. And, in fact, that prohibition was implemented and applied until the date of the trial. Documentary evidence confirms that Sleiman's hours were cut dramatically from June 26, 2007, through the rest of the year. Before the end of June, he regularly worked between 5 to as many
 5 as 8 hours per shift. After that point, except on a few days in which he worked 4 hours, he never worked more than 3 or 3 ½ hours. See GCX 14. The period covered by the documentary evidence includes peak season, which begins in August or September and runs through
 10 December, a time when all employees are encouraged to put in more hours. According to Plant Manager Swallow, during peak season, "the heaviest time of the year," Respondent asks "the part-time employees to work longer hours;" indeed, they are asked to "actually double shift." Tr. 771. See also RX 12 and Tr. 779. But Sleiman was never asked to work more hours during
 15 peak season. Nor, at any time, was he ever told that he could work more hours or that Wilkinson's instructions were rescinded. In contrast to Sleiman, two other part-time quality control employees, Julio Romero and Dave Hunsberger, consistently worked 7 or 8 hours, sometimes more, during the same July through December 2007 period, according to additional documentary evidence. GCX 22 and 23.

In view of the timing of the initial reduction in Sleiman's hours, one day after his
 20 newsletter article critical of Respondent, and the same day he was discriminatorily issued a written warning, I also find that Respondent's reduction of Sleiman's hours was discriminatory. Sleiman was treated differently from his part-time colleagues in the quality control department since he was the only one whose hours were cut. Moreover, Wilkinson's precipitous action in
 25 telling Sleiman to punch out in the middle of the shift was extraordinary and unexplained. It is highly unlikely that, if the reduction were based on legitimate business reasons, it would have been announced so suddenly and dramatically. Thus, the General Counsel has clearly met his initial burden of proving discrimination under *Wright-Line*.

Nor has Respondent rebutted the clear inference of discrimination. It is true that
 30 Respondent ordered a general cut in hours in June, but Plant Manager Swallow left the specifics of the cut to his subordinates.¹³ Sort Manager Levey testified that he ordered the cuts in the areas under his supervision, but his testimony was woefully inadequate to explain why he made the cuts in the quality control department. He testified that he had to cut hours in the
 35 departments under his authority because of "[p]roduction standards we had to meet." Tr. 1013. He also testified, almost theoretically, in response to a leading question, that the quality control area "would be one of" the areas in which it would be easier to cut hours without affecting
 40 service. This testimony is hardly a coherent explanation. It does not justify or even establish a cut in hours for the quality control department. Nor does his testimony offer anything to explain why Sleiman's hours were cut and the hours of other quality control people—particularly, the other part-time quality control people—were not.¹⁴ Nor does it make sense for Respondent to
 cut the hours of an employee, who, as I note below in the next section of this decision, was found in his last evaluation to have been a "good hard worker."

¹³ Swallow testified theoretically that quality control would be one of the areas in which it
 45 would be easier to cut hours, but it is clear that he knew nothing about the specific reduction in hours in any one department or area. He did not focus on the quality control department when he ordered a general reduction in hours. And he knew nothing about why Sleiman's hours were cut.

¹⁴ Contrary to the suggestion in Respondent's brief (Br. 116), there is no evidence that
 50 Respondent spared Hunsberger and Romero from a cut in hours because they had special or unique job requirements. Levey, for example, made no such representation in his testimony.

To the extent that Levey's testimony can be viewed as justifying the reduction in Sleiman's hours as non-discriminatory, I reject it as not worthy of belief. Although I credited his testimony in part in other sections of this decision, I found him particularly unreliable when, as here, his testimony seemed to mask anti-union sentiments. For example, I discredited his testimony that, on April 30, he did not make statements to the handbillers to the effect that they could not handbill on the sidewalk near the entrance to the facility. Wilkinson, of course, did not testify. It was he who would have known the real reason why Sleiman's hours were cut; and it was he who would have known more about the reduction of hours in the quality control department. Nor did any other witness on Respondent's behalf reliably explain why Sleiman's hours were cut. Significantly, even during peak period, when Respondent encouraged employees to work more hours, no one in management thought to increase Sleiman's hours or even talk to him about increasing his hours. In these circumstances, I find that Respondent not only failed to rebut the General Counsel's strong initial showing of discrimination, but that Respondent's evidence—or, more precisely, the lack of it—confirms and strengthens the finding of discrimination. Accordingly, I sustain the allegation in paragraph 14(c) of the complaint.¹⁵

Sleiman's Negative Evaluation

On July 9, 2007, Sleiman received his 6-month evaluation, which is used to compute pay raises under the Respondent's pay for performance program. That evaluation, which was prepared by Supervisor Wilkinson, rated Sleiman as having partially met expectations, which translated into a pay raise of 35 cents per hour. In eight of nine categories, he was rated as having partially met expectations; in the other, adaptability, he was rated as having fully met expectations. GCX 5. According to Sleiman's uncontradicted testimony, when Wilkinson gave him the evaluation, Sleiman complained about it, whereupon Wilkinson told Sleiman, "I hate to do this . . . There's too much politics going on in here, just sign this and let me go." Tr. 222. Sleiman's earlier evaluation, prepared in January of 2007 by Supervisor Sam Manzano, rated him as fully meeting expectations in 5 categories and as exceeding expectations in 4 categories. In that evaluation, Manzano called him a "good hard worker." GCX 20. In his January 2008 evaluation by Supervisor Jeff Magan, Sleiman was rated as having fully met expectations in 7 of 9 categories. GCX 21.

A day or two after receiving his July 2007 evaluation, Sleiman complained about it to Human Resources Manager Arends, who agreed to look into the matter. Arends eventually spoke to Wilkinson and the evaluation was changed. The change was reflected in a revised evaluation issued on September 18, 2007, about a week after the Board election, which the Union lost. The revised evaluation was more favorable and found that basically Sleiman met expectations. Six of 9 categories were changed from partially meets expectations to fully meets expectations. For example, in both the productivity and quality of work categories, the original remarks were changed, and, as a result, Sleiman was raised from partially meets to fully meets

¹⁵ Contrary to Respondent's contention (Br. 120), Sleiman did not have an obligation to volunteer for more hours during peak season, either to establish discrimination or diminish back pay. First of all, the discrimination here was established even before the peak season call for volunteers. Moreover, the Respondent's lack of action in the face of its need for increased hours manifestly demonstrates that the discrimination continued. It was, in any event, reasonable for Sleiman to assume that, in the face of the discrimination against him, any request, on his part, for more hours would have been futile.

expectations. As a further result, he received an additional raise of 35 cents per hour, paid retroactively to the date of the July evaluation. GCX 6.¹⁶

5 I find that the General Counsel has shown that Sleiman's July 2007 evaluation was negative because of his union activities. Respondent had discriminated against him twice the month before, once by issuing him a written warning and once by reducing his hours. The latter discrimination was a continuing violation. The evaluation was admittedly wrong. Indeed, Respondent issued a revised evaluation after the election. Both the prior and the subsequent
10 evaluations were much better than the one issued in July. The July evaluation was so out of character that it cannot be explained by anything other than continued discrimination against Sleiman. Thus, I find that the negative evaluation was a part of Respondent's pattern of discrimination against Sleiman in June and July of 2007. Moreover, Wilkinson's remark to Sleiman at the time the negative evaluation was issued—that there were "politics" involved in the issuance of the negative evaluation—implicates anti-union motivation because the union
15 campaign and Sleiman's leadership effort in it were the most likely explanations for the use of the word, "politics." That evidence simply reinforces the inference that the negative evaluation was issued for discriminatory reasons.

20 Respondent's apparent defense on this aspect of the case is that a mistake was made: The July 2007 evaluation was simply wrong and it was eventually corrected. In support of its defense, the Respondent submits documentary evidence showing that several other evaluations during this time period were also revised upwards. It is not surprising that, in a unit of about 450 employees, some evaluations are corrected or revised. But the fact that other evaluations were revised, as was Sleiman's, does not really answer or rebut the General Counsel's initial showing that the issuance of Sleiman's original evaluation was discriminatorily motivated. The fact that it
25 was revised simply shows that it was more negative than it should have been. Thus, it supports a crucial aspect of the General Counsel's case. That other evaluations were also revised upward does not at all shed light on the reason for Sleiman's original evaluation, much less show that Sleiman's original evaluation was wrong for reasons other than discrimination. And since Wilkinson, who knew best why the original evaluation was prepared as it was, did not testify, the record stands silent on the point. Indeed, Wilkinson's remark to Sleiman at the time he gave Sleiman the evaluation suggests that he was somehow ordered to issue the negative evaluation because of "politics," a euphemism, in this case, for union activities. Respondent has given no benign answer to that remark. In all the circumstances, the Respondent has failed to
30 rebut the strong evidence of discrimination in the issuance of the negative July 2007 evaluation to Sleiman. Accordingly, I find that the General Counsel has proved the allegation in paragraph 14(e) of the complaint.

40 _____
¹⁶ I reject Arends' testimony that Sleiman did not come to him to complain about the evaluation until some time in late August and that the changes were mere technical changes. I found his testimony in this respect as unreliable as it was in the other instances in which I rejected his testimony. For example, I found his testimony particularly strained when he emphasized that Sleiman came to him not simply in late August, but in "late, late August." Tr. 1109. In addition, Sleiman was clearly not a person who would wait before complaining about adverse employment actions, as this record shows. My assessment of this aspect of Sleiman's character lends credence to his testimony that he complained shortly after he received the evaluation. Moreover, Arends's testimony about the technical changes in the two evaluations is
45 refuted by reference to the substantive changes that are apparent on the revised evaluation itself.
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The Discharge of Employee Emilia Rios

5 In paragraph 15 of the complaint, the General Counsel alleges that Respondent discharged Emilia Rios because of her union activities. It is admitted that Rios was a known union activist. She had distributed union literature outside the entrance to the facility and had been one of the handbillers who was subjected to unlawful surveillance and interference from the Respondent. She was the leader among Spanish-speaking employees in distributing authorization cards to and gathering signed cards from other employees. She also gave an example of one occasion when she was prevented from distributing union literature in the cafeteria by Human Resources Manager Arends. Rios had a break in employment from the beginning of April to sometime in May 2007, apparently for medical reasons. When she returned, she resumed her union activity. On June 18, she wrote an article for the Union's newsletter critical of the Respondent and favorable to the Union. The article complained about the Respondent's reduction of hours for part time employees like Rios; the article also complained about the constant changes in the hours. See RX 8.

20 On June 25, Supervisor Brian Buck met with Rios and several other part-time employees at the beginning of their shift on Reload 2. Sam Manzano was the Service Supervisor for Reload 2. Apparently, he was in overall charge of these employees. But he was absent on the night of June 25. At the June 25 meeting, Buck announced a change in the reporting time for Rios and the others from 7:30 p.m. to 7:45 p.m. The change was to begin the next day, June 26. Although the change in starting time applied to all the employees, Rios maintained that she alone ended her work day at 10:30 p.m., so the change meant a reduction in her time, and consequently in her pay, of some 15 minutes. Later that evening, Rios complained to Buck about the reduction in her hours. According to Rios, Buck replied that her hours were reduced because "you don't wear the appropriate clothing, you don't use metal shoes as you're supposed to and because you complain a lot." Tr. 608. Since Buck did not testify, Rios's testimony on this point is uncontradicted.

30 At any rate, the next day, June 26, Rios punched in at 7:27 p.m., contrary to the instructions of her supervisor the night before. According to Rios, she realized that she had punched in too early, and attempted to rectify the situation by going to Supervisor Sam Manzano and telling him about it. According to Rios, at about 7:35 p.m., Manzano told her that "it would be fine, he'd take care of it." Tr. 610. Manzano's testimony is quite to the contrary on this point. Manzano was notified early on the evening of June 26 about the change in starting times announced the night before. After he came out of a meeting with full-time employees at about 7:30 p.m., he noticed Rios sitting in the break area. That would have been well before her new starting time. After another meeting with part-time employees at 7:45 p.m., which included Rios, he consulted the time-keeping system and confirmed that Rios had punched in at 7:27. Since that was some 18 minutes before her scheduled start time, he approached Rios and brought this to her attention. Only at that point, according to Manzano, did Rios say that she had made a mistake in punching in early. In assessing the credibility of both witnesses, I credit Manzano on this part of the case. His testimony was clear, detailed and coherent. Rios, on the other hand, seemed to be trying to shape her testimony to her own ends. For example, she testified that Manzano did not adequately translate for her or explain to her why she was being discharged, but, in her pre-trial affidavit, she clearly set forth the reasons she was given for her discharge. She was also less than candid in acknowledging her prior disciplinary record. Nor was I impressed by her demeanor on the witness stand. She seemed somewhat argumentative and unable or unwilling to answer questions directly. In these circumstances, I have no doubt that Manzano's account of what happened on June 26 was more accurate than Rios's account.

After he spoke to Rios, Manzano confirmed with Buck that Rios had complained to Buck about the new start time. He also observed that other part-time employees working with Rios had punched in appropriately. Manzano believed that Rios's conduct amounted to a theft of time and brought it to the attention of his superior, Sort Manager Doug Albert. Rios had had two other disciplinary actions in her personnel file, both issued by Manzano. Both indicated that they were final warnings, which meant that if she committed the same offense again, she was subject to discharge. The warnings, which were labeled corrective actions, are written in English, but, at the time they were issued, Manzano, who is bilingual, translated and explained the substance of the warnings to Rios, who understands some English, but primarily speaks Spanish. The first warning, dated February 6, 2007, dealt with an incident that took place on February 2. It chastised her for taking unauthorized breaks. The second warning, dated March 8, 2007, dealt with an accumulation of incidents that amounted to failures to punch out appropriately, which resulted in a consequent theft of time. The March 8 warning states that Rios "has engaged in a pattern of untimely punch outs that extend a half an hour beyond her shifts scheduled ending time. Beginning 2/26/07, supervisors clearly informed employees of the requirement to punch out at the twilight shift's scheduled end time, 10:30. Emilia has continuously punched out at (11) eleven o'clock between 2/26/07 and 3/6/07, despite the fact that no work is available past 10:30." RX 20(b).¹⁷ The General Counsel does not allege that these prior warnings, which were issued before the union activity began in earnest, were unlawful.

As a result of the June 26 incident, and after taking into consideration Rios's earlier warnings, Respondent decided to discharge her. This was accomplished on June 27, shortly after Rios reported for work. Manzano accompanied Rios to Sort Supervisor Albert's office, where she was informed that she was discharged. Manzano translated what was said into Spanish so that Rios could understand what was being done and why it was done.

The General Counsel has met his initial burden to show that Respondent's discharge of Rios was motivated by her union activities. She was a known union leader, who had been involved in extensive open union activity. She had, for example, been among the handbillers who were interfered with by Respondent. Moreover, the timing of her discharge came a little over a week after the publication of an article by her in the Union's newsletter critical of Respondent's policy on the reduction of and changes in hours for part-time employees, the very policy Rios criticized on June 25, the day before her discharge. According to Rios's uncontradicted testimony, Supervisor Buck expressed his concern that she "complain[ed] a lot," an implicit reference to her newsletter article. Moreover, Respondent had, at about the same time, engaged in discriminatory retaliation against Elias Sleiman, a fellow union supporter and handbiller. In these circumstances, particularly the timing of the discharge after the critical newsletter article, I find that the General Counsel has met his initial *Wright-Line* burden of showing that the discharge was due to Rios's union activities.

¹⁷ The transcript mistakenly refers to two Respondent's Exhibits 20, both of which were introduced and received into evidence. The first, which shall remain labeled as Respondent's Exhibit 20, is Sleiman's August 27, 2007 newsletter article, entitled, "I will not be silenced." Penn referred to that article in his testimony. The second Respondent's Exhibit 20, which was Rios's second warning or corrective action, dated March 8, 2007, was not originally provided to me in the list of exhibits. It was later provided to the reporting service and subsequently to me. To avoid confusion, this exhibit, Rios's second corrective action, will be relabeled Respondent's Exhibit 20(b). There was discussion of this exhibit, along with Respondent's Exhibit 19, Rios's first corrective action, in Manzano's testimony.

I also find, however, that the Respondent has rebutted the General Counsel's case by showing that it would have discharged Rios even if she had not engaged in union activity. The credited testimony shows that Rios deliberately punched in early on the evening of June 26. Contrary to her testimony, she did not approach Supervisor Manzano to tell him she mistakenly punched in early. Manzano actually approached her and confronted her with the fact that she had punched in early. As a result, she would have been paid for time she did not work, thus stealing time from her employer. Unfortunately for Rios, this was not the first time she had been cautioned against stealing time. She had been issued warnings three or four months before, for misusing her break time and for failing to punch out appropriately.¹⁸ Each of those warnings was labeled a final warning. Her early punch-in on June 26 was a continuation of the "pattern" of time punching violations set forth in her March 7 warning. Notwithstanding her complaint about the Respondent's reduction of her hours and those of other part time employees, the General Counsel did not allege that Respondent was deliberately cutting her hours or was doing so for discriminatory reasons. In any event, Rios was not free unilaterally to defy Respondent's order to change her starting time. All of the other employees working in her area complied with the new starting time. It is clear that Respondent viewed seriously stealing time by punching in early, punching out late or misusing paid break periods. There is thus no basis in this record for finding that firing Rios for this offense was out of character or amounted to a pretext. In view of Rios's prior record and her defiance on June 26 of a lawful order changing her starting time, Respondent has shown that it would have discharged Rios, even in the absence of her union activities. Accordingly, I shall dismiss the allegations in paragraph 15 of the complaint.¹⁹

The Objections to the Election

I have found that Respondent engaged in unlawful surveillance of employee handbilling activity on July 30, 2007. This incident, which took place within the critical pre-election period, was a continuation of previous unlawful interference with legitimate handbilling activity. The

¹⁸ Because Rios was off work for an extended period between her final warnings and June 26, the final warnings were actually more recent in terms of her total work time.

¹⁹ The General Counsel submitted documentary evidence (GCX 26-31) with respect to the disciplinary records of five employees who allegedly committed the same type of offenses as Rios, but were not discharged for those offenses. Although all but one of those employees were eventually discharged for different reasons, all had been warned about inappropriately punching in or out and thus stealing time. I do not agree with the General Counsel that the documentary evidence shows that Respondent treated those five employees more leniently than Rios and that such lenient treatment demonstrates that Rios was discharged for pretextual reasons to mask a discriminatory motive. Employees Vega, Drisker, Ocasio and Sanchez were each issued a single written warning essentially for stealing time offenses. But so was Rios, prior to the incident that prompted her discharge. Johnetta McNeill received two verbal warnings for stealing time in September of 2007 and a final written warning for another offense of that type on December 26, 2007. She was fired a month later for insubordination. Although McNeill was initially given two verbal warnings, she was given a final warning, just like Rios, for stealing time. Rios did it again and she was fired. McNeill was thus not treated substantially differently than Rios. Nor is there any evidence as to whether she was a union supporter or not. I cannot conclude simply from the documentary evidence about McNeill that Rios was treated in a disparate manner or that such treatment was caused by Rios's union activities. In any event, the overall documentary record for these five employees shows that the Respondent viewed seriously the notion of stealing time. Thus, far from establishing a discriminatory motive or a pretext for the discharge of Rios, I believe, on balance, the evidence supports the Respondent's position rather than that of the General Counsel.

July 30 violation came to the attention of most of the employees, who were entering the facility at the time the unlawful surveillance occurred. Other violations occurred during the critical pre-election period, which broadly affected large groups, if not all, of the employees who voted in the election. Thus, the Respondent also violated the Act by virtue of Penn's unlawful threat, in an August 2007 meeting of employees, to sue a leading union activist for engaging in protected concerted activity. Widely disseminated newsletters were implicated in this matter, both before and after the threat. The Respondent also engaged in discrimination against Union activist Elias Sleiman. That discrimination included a reduction in his hours, which began prior to the filing of the election petition, but continued throughout the pre-election period. Indeed, it continued until the date of the trial in this case. In view of Sleiman's position as an outspoken union leader—he was, of course, the object of the unlawful threat to sue—Respondent's treatment of him undoubtedly came to the attention of large numbers of employees. In addition, the Respondent threatened retaliation against an employee for writing a pro-union newsletter article and threatened an employee with more onerous working conditions if she supported the Union. While the latter two violations, which both took place shortly before the election, were probably not as widely known, they follow a pattern of unlawful activity that undoubtedly became part of the lore of the workplace. A significant number of employees were affected by the violations. Considered in toto, the violations I have found had a reasonable tendency to interfere with the holding of a free and fair election on September 12 and 13, 2007. In these circumstances, I find that the election results must be set aside and new election must be held that properly reflects the will of the employees free from unfair labor practices or other objectionable conduct.

Conclusions of Law

1. By directing employees to leave the premises where they were properly engaged in protected handbilling activity, threatening to call the police if they did not leave and by actually calling the police, and by engaging in surveillance of the protected union activity of employees, Respondent has violated Section 8(a)(1) of the Act.

2. By threatening employees with reprisals, including more onerous working conditions and discharge, for engaging in union activities, Respondent has violated Section 8(a)(1) of the Act.

3. By threatening to sue employees for engaging in protected union activity, Respondent DHL and Respondent Crossroads have violated Section 8(a)(1) of the Act.

4. By reducing the work hours of, and issuing warnings and negative performance evaluations to, employees for engaging in union activities, Respondent has violated Section 8(a)(3) and (1) of the Act.

5. The above violations are unfair labor practices within the meaning of the Act.

6. Respondent DHL and Respondent Crossroads have not otherwise violated the Act.

7. By engaging in some of the unfair labor practices set forth above—those occurring after the petition was filed in this case, the Respondent has interfered with the holding of a free and fair election on September 12 and 13, 2007. That election is set aside and the Regional Director must hold a new election.

Remedy

5 Having found that Respondent DHL and Respondent Crossroads have engaged in certain unfair labor practices, I will order them to cease and desist from engaging in those unfair labor practices in the future and to take certain affirmative action designed to effectuate the policies of the Act.

10 Respondent DHL, having unlawfully discriminated against employee Elias Sleiman, must offer him reinstatement of the hours he previously worked prior to his unlawful reduction of hours and must make him whole for any loss of earnings and other benefits because of such reduction in hours. Backpay, together with interest, shall be computed in accordance with applicable Board law. Respondent DHL must also expunge the unlawful warning and the unlawful negative evaluation issued to Sleiman and promise not to use such unlawful documents against him in future disciplinary actions. Respondent DHL will also be ordered to
15 post an appropriate notice to employees.

20 Because Respondent Crossroads has no employees who are affected by its unfair labor practice and because it is in the business of providing labor relations advice to clients, a notice posting by Respondent Crossroads would be useless. However, the clients of Respondent Crossroads do have employees and they should know that Respondent Crossroads has violated the Act, as found in this decision. Accordingly, I am ordering that Respondent Crossroads mail an appropriate notice, at its expense, to all of its clients as of the date that this order becomes a final order of the Board.

25 On these findings of fact and conclusions of law, and on the entire record herein, I issue the following recommended²⁰

ORDER

30 The Respondent DHL, its officers, agents, successors and assigns, shall

1. Cease and desist from

35 (a) Directing employees to stop engaging in protected union activity, threatening to call or calling the police to stop such protected activity, or surveilling or otherwise interfering with such protected union activity.

40 (b) Threatening reprisals, including instituting more onerous working conditions and discharging or otherwise disciplining employees because they engage in protected union activity.

(c) Threatening to sue employees for engaging in protected union activity.

45 (d) Discriminating against employees by reducing their hours, issuing them warnings or negative evaluations or in any other way because they engage in protected union activity.

50 ²⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order herein shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.

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

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

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(a) Within 14 days of this Order, remove the discriminatory warning issued to employee Elias Sleiman, as well as the discriminatory negative evaluation issued to Sleiman in July 2007 from his employment file, and, within 3 days thereafter, notify him in writing that this has been done and that neither of these will be used against him in any way.

10

(b) Immediately reinstate the hours previously worked by Elias Sleiman before the unlawful reduction of his hours beginning on June 26, 2007 and make him whole for any loss of pay and benefits due to the discriminatory reduction of his hours, together with any interest, as computed under applicable Board law.

15

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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(d) Within 14 days after service by the Region, post at its office and place of business in Breinigsville, Pennsylvania, copies of the attached notice marked "Appendix A."²¹ Copies of the notice on forms provided by the Regional Director for Region 4, after being signed by Respondent DHL's authorized representative, shall be posted by Respondent DHL 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 DHL 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, Respondent DHL has gone out of business or closed the facility involved herein, Respondent DHL shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since May 29, 2007.

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(e) 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 Respondent DHL has taken to comply.

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The Respondent Crossroads, its officers, agents, successors and assigns, shall

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1. Cease and desist from

(a) Threatening to sue employees for engaging in protected union activity.

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(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

²¹ 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."

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

5 (a) Copies of the attached notice marked "Appendix B,"²² on forms provided by the Regional Director for Region 4, after being signed by an authorized representative of Respondent Crossroads, shall be mailed, at its expense, to all of its clients as of the date this order becomes final.

10 (b) 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 Respondent Crossroads has taken to comply.

IT IS ALSO ORDERED that Case 4-RC-21327 be severed and remanded to the Regional Director to schedule a new election when she thinks it appropriate to do so.

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

Dated, Washington, D.C., June 5, 2008.

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Robert A. Giannasi
Administrative Law Judge

²² See fn. 21 above for language change if the order is enforced by a court of appeals.

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 Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT direct employees to stop engaging in protected union activity, threatening to call or calling the police to stop such protected activity, or surveilling or otherwise interfering with such protected union activity.

WE WILL NOT threaten reprisals, including instituting more onerous working conditions and discharging or otherwise disciplining employees because they engage in protected union activity.

WE WILL NOT threaten to sue employees for engaging in protected union activity.

WE WILL NOT discriminate against employees by reducing their hours, issuing them warnings or negative evaluations or in any other way because they engage in protected union activity.

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

DHL EXPRESS

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

615 Chestnut Street, One Independence Mall, 7th Floor

Philadelphia, Pennsylvania 19106-4404

Hours: 8:30 a.m. to 5 p.m.

215-597-7601.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 215-597-7643.

APPENDIX B

NOTICE

Provided 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 Federal labor law and has ordered us to publish and obey this Notice.

FEDERAL LAW GIVES EMPLOYEES THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with them on their behalf
Act together with other employees for their benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT threaten to sue employees for engaging in protected union activity.

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

THE CROSSROADS GROUP LABOR
RELATIONS CONSULTANTS

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

615 Chestnut Street, One Independence Mall, 7th Floor
Philadelphia, Pennsylvania 19106-4404
Hours: 8:30 a.m. to 5 p.m.
215-597-7601.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S

COMPLIANCE OFFICER, 215-597-7643.