System One Corp. *and* Emmanuel Sarmiento. Case12–CA–16870

December 19, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On April 26, 1996, Administrative Law Judge Albert A. Metz issued the attached decision. The General Counsel and the Respondent filed exceptions, supporting briefs, and answering briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

1. The Respondent has excepted to the judge's findings and conclusion that it is subject to the jurisdiction of the National Labor Relations Act (NLRA). The Respondent asserts instead that it is subject to the jurisdiction of the Railway Labor Act (RLA), because (a) the services provided by the Respondent are those traditionally performed by employees of air carriers and (b) at all material times the Respondent was directly owned by an air common carrier (Continental Airlines, Inc.).

The Board finds it unnecessary in this case to follow its general practice of referring cases to the National Mediation Board (NMB) for an initial ruling when a party raises a claim of arguable RLA jurisdiction.[4] Under the two-part test developed by the NMB for resolution of such issues, the NMB first determines whether the nature of the work performed is that traditionally performed by employees of air or rail carriers. Second, the NMB determines whether a common carrier or carriers exercise direct or indirect ownership or control of the employer. Both parts of the test must be satisfied for the NMB to assert jurisdiction.[5] In agreeing with the judge that the Respondent is not subject to the jurisdiction of the RLA, we adopt and rely on the judge's finding that the evidence does not show that the services provided by the Respondent are those traditionally performed by employees of air carriers.[6] When it is clear, as it is here, that an employer is not subject to the RLA, there is no need to refer the case to the NMB.[7]

2. We agree with the judge that the General Counsel has not established that the Respondent failed to give Charging Party Sarmiento a higher wage increase because of his protected concerted and union activity. We find that the General Counsel established a prima facie showing in support of this allegation. We agree with the judge, however, that the Respondent has established through the credited testimony of Supervisor Tina Clark (which is corroborated by the uncontroverted testimony of Supervisor Paul Stein and Director of Customer Relations Kay Urban) that Sarmiento's statements about unions did not play any role in the amount of his wage increase and that the Respondent would not have given Sarmiento a higher wage increase even in the absence of his protected activity.[8]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, System One Corp., Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating and threatening employees because they discuss union activities.

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

[1] The Respondent contends that the judge erred in refusing to draw an adverse inference against the General Counsel based on the latter's failure to call two employees to testify in corroboration of Sarmiento's uncontroverted testimony that he discussed unionization with them. We affirm the judge's ruling. There is an insufficient basis in the record for reasonably assuming that either employee would be favorably disposed to the General Counsel's or Sarmiento's position. See *Queen of the Valley Hospital*, 316 NLRB 721 fn. 1 (1995)

[2] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and we find no basis for reversing the findings.

[3] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[4] See *United Parcel Service*, 318 NLRB 778 (1995), enfd. 92 F.3d 1221 (D.C. Cir. 1996).

[5] Id. at 779–780 fn. 7.

[6] We do not, however, rely on the judge's finding that the services provided by the Respondent are similar to those over which the Board has asserted jurisdiction. This is not a factor in the NMB's two-part jurisdictional test. Nor do we rely on *Trans World Airlines*, 211 NLRB 733 (1974), because the instant case does not involve employees employed directly by an air carrier.

[7] See *Federal Express Corp.*, 317 NLRB 1155 fn. 5 (1995).

For the reasons set forth in his dissenting opinion in *Federal Express Corp.*, supra, Chairman Gould would eliminate the Board's general practice of referring cases involving RLA jurisdictional claims to the NMB for an initial ruling. In any event, however, on the facts of this case, he finds that there is ample basis for the Board's assertion of jurisdiction. Accordingly, he concurs in not referring this case to the NMB and in asserting jurisdiction over the Respondent.

[8] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

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

(a) Within 14 days after service by the Region, post at its Miami, Florida facility copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 20, 1995.

(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 has taken to comply.

[9] 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."

APPENDIX

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

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

WE WILL NOT interrogate or threaten our employees because they discuss union activities.

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

SYSTEM ONE CORP.

Hector Nava, Esq. and *Jennifer Burgess-Solomon, Esq.*, for the General Counsel.

Kenneth A. Knox, Esq., of Ft. Lauderdale, Florida, and *Phillip Nicholas, Esq.*, of Miami, Florida, for the Respondent.

Emmanuel Sarmiento, of Miami, Florida, for the Charging Party.

DECISION

INTRODUCTION

STATEMENT OF THE CASE

ALBERT A. METZ, Administrative Law Judge. This case was heard at Miami, Florida, on February 5–7, 1996.[1] The dispute centers on whether System One Corp. (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act) in actions it took against employee Emmanuel Sarmiento.

I. JURISDICTION

A. *Background of Respondent's Operations*

The Respondent denies that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent asserts that it is an entity subject to the jurisdiction of the Railway Labor Act because of its connection to airlines. The parties agreed to the following detailed stipulation concerning the Respondent's business operations:

At all material times, Respondent has been an information management service company engaged in developing and selling travel management software products and in maintaining a sophisticated computer reservation systems. Respondent creates and provides computerized travel-related information services, information management services, development and value added marketing, and other travel related information and data to travel agencies, cruise lines, rental car agencies, corporations, and travel suppliers worldwide. It provides software products, as well as integrates databases to customers, to obtain complete destination information. Additionally, it provides travel information over the Internet.

At all material times, Respondent has provided, sold, and maintained an automated computer database with software package, automated accounting systems, and computer support services to general travel related service groups, including travel agencies, rental car agencies, cruise lines, etc., which such employers use to reserve airline flights, tours, cruises, hotels, rental cars, etc.

Respondent does not, in and of itself, provide reservation services to any airlines. Some of Respondent's customers and clients include Carnival Cruise Lines, Royal Caribbean Tours, Sterling Cruises, Kloster Cruise Travel, Royal Caribbean Tours, Capitol Tours, Inc., Hertz Rental Car Agency, Avis Rental Car Agency, Metro Travel, 25 Travel, Inc., America Travel, Inc., Iraza Travel and Tours, and Transmarine, Inc.

Respondent provides automation to travel agencies. It began performing this service as a department of Eastern Airlines, a carrier covered by the Railway Labor Act. Respondent was, at all times material, a wholly owned subsidi-

[1] All subsequent dates refer to 1994 unless otherwise indicated.

ary of Continental Airlines Holding, Inc., which is also in the airline passenger business. At all times material, employees of the Respondent received unlimited flights on Continental Airlines and were able to get flight privileges on other airlines. This is a benefit customarily provided to employees of air carriers. In addition, at all times material, the Respondent's day-to-day operations were directed by its president, who reported directly to the president of Continental Airline Holdings, Inc. Respondent posts at its worksite the National Mediation Board Form 5 and 6, which advises employees of their rights under the Railway Labor Act.

Until April 27, 1995, Respondent was wholly owned by Continental Airlines, Inc. On April 27, 1995, Continental Airlines, Inc. sold Respondent to Amadeus Global Travel Distribution, S.A., and Respondent is now known as System One Information Management LLC, doing business as System One Company. At the present time, Amadeus, EDS (Electronic Data Systems Corp.), and Continental Airlines, Inc. each own one-third interest in Respondent.

Respondent continues to provide the same type of services and computer software information, which are provided before the above-mentioned transaction took place in April 1995, including information management, marketing, distribution, and customer support services to travel agencies and other customers around the globe. More than 700 airlines, 29,000 hotel properties, 41 car companies, and other travel providers contracting with Respondent will be available over a single-computer network to 9000 travel agencies in the U.S. and 33,000 travel agencies worldwide. Among these U.S. travel agencies are ones which serve corporate travel accounts of AT&T, Exxon, Proctor and Gamble, Ernst and Young, etc.

Amadeus is owned by Air France, Iberia Airlines, and Lufthansa German Airlines. EDS is not owned by an airline.

The Respondent's answer admits that it is a Delaware corporation with an office located in Miami, Florida. It concedes that it is engaged in furnishing and servicing automated accounting system software packages to all travel related service groups, including travel agencies, rental car agencies, and cruise lines. At the material times, Respondent's gross revenues annually exceeded $500,000 and its direct inflow and outflow of services exceeded $50,000. The services provided by Respondent include amounts in excess of $50,000 to Carnival Cruise Lines which Respondent admits is directly engaged in interstate commerce.

Respondent's director of customer relations, Kay Urban, testified that the Respondent was an information management service. The business provides data specifically tied to certain suppliers. This data includes information about Amtrack, car rental services, and hotels. The Respondent's customers then use the data to make their needed bookings regarding these services. The Respondent collects fees for providing the hardware application and its network to its customers.

B. *Analysis of Jurisdictional Question*

The Respondent argues that the case should be dismissed because it performs services which have traditionally been performed in the airline industry. In the alternative, Respondent urges that the matter should be referred to the National Mediation Board for determination. The General Counsel disputes the Respondent's work is traditionally performed by airlines. It argues the Board has jurisdiction because Respondent is a computer service similar to other employers over whom the Board has claimed jurisdiction.

The National Mediation Board asserts jurisdiction when: (1) The employer is a common carrier engaged in interstate or foreign commerce, or (2) The employer is directly or indirectly owned or controlled by or under common control of a rail or air common carrier and the services provided are those traditionally performed in the rail or air industry.

The parties agree that the Respondent is not itself a common carrier but that it was owned at the relevant times by an air common carrier, Continental Airlines. The record does support the conclusion that the computer services provided by Respondent are similar to those over which the Board has asserted jurisdiction. E.g., *EDP Medical Computer Systems*, 284 NLRB 1232, 1237 (1987). The Respondent's data processing services are provided to a wide range of customers including hotels, car rental companies, travel agencies, and cruise lines. Based on the record as a whole, the evidence does not show that these comprehensive computer services are functions that airlines commonly perform.

The Board has recognized that there must be a direct connection to workers and the transportation function contemplated by the Railway Labor Act. In *Trans World Airlines*, 211 NLRB 733, 733 (1974), the Board stated:

> Where a group of employees are involved in work which would normally be covered by the National Labor Relations Act, the mere fact that the employer is one within the definitional sweep of the Railway Labor Act will not serve to bar the Board's jurisdiction. There must be a more direct connection between the employees and the transportation function so as to warrant the special considerations for which Congress enacted the Railway Labor Act.

The Respondent argues that the Board is required to first submit the jurisdictional issue to the National Mediation Board. That is a discretionary decision for the Board to make. *United Parcel Service*, 318 NLRB 778 (1995). I find that the Respondent does meet the jurisdictional requirements established by the Board as to employers engaged in business in interstate commerce. The Respondent is found to be an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. SARMIENTO'S WORK HISTORY

Charging Party Sarmiento worked for the Respondent as a customer service escalation specialist. During his employment he had some disciplinary problems.

A. *Sexual Harassment*

In August 1992 Respondent received a complaint from a female employee that Sarmiento was sexually harassing her. Sarmiento had been having an affair with the woman and she had sought to end the relationship. She complained that he had ignored her rejection and put a key to a hotel room on her desk. Additionally, he reportedly made an uninvited late night visit to her home. Sarmiento received a reprimand for this behavior and was referred to the Respondent's employee assistance program for counseling.

B. *Philippines Airline*

In March 1993 Philippines Airlines complained of the treatment they had received from Sarmiento during a call he made to resolve a customer's problem. Considering the severity of the situation he was placed in the second step of the Respondent's performance review system. Although the Respondent does not consider this program a form of probation, it does have the effect of gauging an employee's efforts to improve work related shortcomings. The program consists of three steps—an oral discussion, a written reminder, and a "decision making leave" phase. In the latter phase, the employee is suspended with pay and prepares a written action plan describing how he intends to improve.

C. *Baseball Game*

In March 1994 Sarmiento requested a day off work. This request was denied because his services were needed. On the designated day he called in sick. Another employee was substituted for him at overtime pay.

The Respondent soon discovered that Sarmiento was not sick but had attended a professional baseball game. He was again placed in the management performance program. This time at the third stage where he was suspended with pay and required to write a self-improvement plan.

III. SARMIENTO'S EEO COMPLAINT

In the early summer of 1994 Sarmiento was dissatisfied by the treatment he was receiving from his immediate supervisor, Tina Clark. He felt she was responsible for his lack of promotion and pay increases. As a result Sarmiento filed a complaint against Clark with the Respondent. He alleged his perceived ill treatment was based on her discrimination against him because he was a male.

An investigation was conducted by Supervisor Paul Stein. He concluded there was a personality problem between Sarmiento and Clark, but no discrimination against Sarmiento. Sarmiento apparently accepted this conclusion. When Stein offered to see about a lateral transfer for Sarmiento to remove him from Clark's supervision, Sarmiento declined the offer. Sarmiento did independently seek other work in the Company but remained under Clark's supervision until his termination.

IV. THE "SHOUTING UNION" INCIDENT

Sarmiento continued to be dissatisfied with the Respondent's compensation program. In late October 1994 Sarmiento was at his work station discussing wages with two fellow employees. They were in is a large room consisting of many work stations. These stations are staffed by employees who are speaking on telephone headsets to Respondent's customers. Approximately 20 employees were in the area on this occasion. At one point in the discussion Sarmiento stated that it might be a good idea for the employees to consider becoming represented by a union.

A supervisor, Jim Perry, was nearby and overheard Sarmiento talking loudly. He recalled hearing him, apparently in a fit of exuberance, speak in a loud voice that could be heard in a wide area the words, "Union, union, union." He later mentioned what he had heard to his boss, Paul Stein, when they were carpooling.

Sarmiento denied shouting out words about unions. None of the employees in the area at the time were called by any party to testify to what they heard. As the employees were presumably available to either party to call as witnesses, I draw no adverse inferences from their failure to testify. *Queen of the Valley Hospital*, 316 NLRB 721 fn. 1 (1995). I conclude from the record as a whole that Sarmiento was at least speaking loudly when he uttered remarks about unions.

V. SARMIENTO'S MEETING WITH SUPERVISOR URBAN

The General Counsel alleges that the Respondent violated the Act when Supervisor Kay Urban interrogated and threatened Sarmiento about discussing unions. The Respondent argues that Sarmiento was counseled by Urban, not for union talk, but boisterous conduct.

A. *The Witnesses' Recollections*

Supervisor Kay Urban received word of Sarmiento's alleged loud remarks about unions shortly after the incident. She called him into her office to discuss the matter. Urban and Sarmiento enjoyed a friendly working relationship. She had served as his unofficial mentor, encouraging his work and ambitions with Respondent. Urban was three supervisory levels over the work that Sarmiento performed and did not have direct contact with him in his employment.

According to Sarmiento, Urban asked if he was talking about forming a union. He acknowledged he had spoken on that subject. Urban stated it was not a very intelligent thing to do because Supervisor Perry was going to be the one hiring employees for some new positions. Urban said what he had done could be detrimental to getting a promotion. Urban suggested that Sarmiento might want to apologize to Supervisors Perry and Stein. Sarmiento minimized his discussion of unions and agreed it would be prudent to apologize.

Urban testified that she called Sarmiento to her office to advise him that by shouting in the workplace he was once again showing poor judgment. She admitted asking him if he stood up and shouted about unions. Urban denied that Sarmiento's talking about unions had anything to do with her counseling him. She stated her concern was for his loud behavior. She testified that Sarmiento admitted he had yelled out as she had been informed. Sarmiento did not receive any discipline because of the incident.

Acting on Urban's advice Sarmiento went to Perry and personally apologized for the occurrence. He also later sent an E-mail apology to Stein. In both apologies he downplayed unions and his interest in them.

B. *Analysis of the 8(a)(1) Allegation*

I find Sarmiento's more detailed recitation of his meeting with Urban to be the most accurate portrayal of what was said.[2] I note also that the context of the conversation is put in perspective by Sarmiento's subsequent apologies which centered upon talking about unions—not about speaking too loudly in the workplace.

[2] While Sarmiento's testimony is credited concerning this conversation, it should be noted that other aspects of his testimony discussed below are found not credible. *Edwards Transportation Co.*, 187 NLRB 3, 3–4 (1970).

Urban impressed me as being sincerely interested in Sarmiento's professional development. However, her motivation in making the remarks is not dispositive. Under all the circumstances, Urban's statements about Sarmiento's discussing unions with fellow employees were coercive and threatening. I find that the Respondent violated Section 8(a)(1) of the Act by Urban's interrogating Sarmiento and making the threat to his promotion potential.

VI. SARMIENTO'S MERIT PAY RAISE AND DISCHARGE

The General Counsel alleges that Sarmiento was given a discriminatorily substandard wage increase and discharged because of his protected act of discussing unions. The Respondent counters that Sarmiento received an average pay raise and he was discharged for misconduct.

A. *Events Surrounding the Pay Raise*

On December 20 Supervisor Clark called Sarmiento into her office to announce he had been awarded a merit pay raise. She told him he would be receiving a 4-percent wage increase. Sarmiento could see a list of other employees' raises on Clark's desk and he mistakenly believed they ranged from 4 to 7 percent. Sarmiento was upset by his analysis of the raises because he continued to feel that he deserved more money. He also resented his lack of progress in receiving a grade raise.

Sarmiento left Clark's office and returned briefly to his work station. However, he was becoming increasingly anguished to the point of almost being in tears. Sarmiento decided to leave work. He gathered his carry-on bag, a thermos of coffee, a bag of pretzels, and left his station.

According to Sarmiento, as he was hurriedly leaving through a hallway his thermos bottle slipped from his hand as he carried it by his side. The thermos fell against the wall and broke the glass inner liner. Coffee was spilled on the wall and floor. He did not stop to retrieve the thermos. Sarmiento explains the matter as an accident.

Other employees testified to hearing a loud noise and investigating the cause. One employee saw Sarmiento exiting the hallway. The employees discovered that there was a mark on the wall apparently made when the thermos bottle had been thrown against the wall. Coffee was spilled down the wall. Broken glass was on the floor. The estimates of where the mark and coffee were left on the wall varied, but indicate the indentation was approximately 4–4–1/2 feet up on the wall. There was also a broken bag of pretzels scattered on the floor about 5 feet away from the damaged thermos bottle. The floor in the hallway is carpeted.

Sarmiento was found in the Respondent's parking lot by a fellow employee who calmed him down. After about 20 minutes Sarmiento regained control of his emotions. He then returned to his work area. In the meantime, Supervisor Clark had been advised of the incident and investigated the mess in the hallway. Clark concluded that Sarmiento had thrown the thermos against the wall. She decided he should be terminated and telephoned her decision to Stein who concurred. After Sarmiento returned to his work station Clark called him into her office and discharged him.

Sarmiento telephoned his mentor, Urban, at her home where she was on vacation and reported his discharge. She questioned him as to what had happened. Urban testified they talked a couple of times about the incident and she got conflicting stories. One time Sarmiento told her he had broken the thermos when he swung around and it hit the wall. The next time he told her it broke when he dropped it on the floor. Urban promised Sarmiento she would check into the matter, which she promptly did. She concluded the discharge was justified and told Sarmiento she was going to support that decision of her subordinate.

Sarmiento appealed his termination through an internal company grievance process. He was permitted to pick panel members, call witnesses, and present his defense to the firing. Sarmiento did not raise his union activities as part of his defense. Sarmiento's discharge was sustained in the appeal process.

B. *Analysis of the Raise Issue*

The General Counsel contends the 4-percent raise received by Sarmiento was discriminatory limited because of his union activities. The Respondent denies that allegation and argues that Sarmiento was not treated disparately.

Sarmiento was mistaken when he thought that 4 percent was the lowest percentage of raise given in his department. The merit increases actually ranged from 3 to 7 percent. Each supervisor was given a pool of money for distribution to their subordinates and the discretion to determine the allotment. The following is a breakdown of the increases in Clark's department:

AMOUNT	NO. EMPLOYEES RECEIVING
3%	3
4%	4
5%	7
6%	3
7%	5

Clark credibly testified as to the standard criteria she used in determining employees' raises. She was also believable when she denied that Sarmiento's union statement played any role in the amount of raise he received. The evidence does not support the conclusion that Clark limited Sarmiento to a merit raise of 4 percent because of his protected activities. I find that the General Counsel has not proven by a preponderance of the evidence that the merit wage increase awarded Sarmiento was a violation of Section 8(a)(1) and (3) of the Act.

C. *Analysis of Sarmiento's Discharge*

The General Counsel contends that Sarmiento's discharge was the result of his protected concerted activities. The General Counsel has the initial burden of establishing a prima facie case. This must be sufficient to support an inference that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support a prima facie showing of discriminatory motivation under Section 8(a)(3) are union activity, employer knowledge, timing, and employer animus. Once such prima facie unlawful motivation is shown, the burden shifts to Respondent to demonstrate that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd.

662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984).

Sarmiento was not credible when he testified, and demonstrated at the hearing, how the thermos allegedly slipped from his hand as he carried it by his side. Considering his demeanor, and the evidence as a whole, I conclude that Sarmiento did throw the bottle at the wall in a fit of anger.

The Respondent's witnesses were convincingly credible that Sarmiento's isolated mention of unions, 2 months before the thermos incident, was not the cause for his discharge. Certainly Urban's warning to Sarmiento about talking of unions shows some antiunion animus existed at Respondent's office. However, I do not find that this played a part in the discharge. Sarmiento admittedly had a mixed record of some good work blemished by demonstrations of bad judgment. His violent reaction to the pay raise was, not surprisingly, viewed very seriously by the Respondent. The evidence of Sarmiento's conduct on December 20, along with his history of poor judgment, is sufficient to overcome the General Counsel's prima facie case. Sarmiento's singular act of talking about a union has not been proven by a preponderance of the evidence to be the motivation for his termination. I find that the Respondent did not violate Section 8(a)(1) and (3) of the Act by discharging Emmanuel Sarmiento.

CONCLUSIONS OF LAW

1. System One Corp. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent violated Section 8(a)(1) of the Act by interrogating and threatening an employee for discussing union activity.
3. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
4. Respondent has not violated the Act except as specified.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1) of the Act, I recommend that it be required to cease and desist therefrom and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed under Section 7 of the Act.

[Recommended Order omitted from publication.]