Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Canada Council of Teamsters,

complainant,

and

FedEx Ground Package System, Ltd.,

respondent.

Board File: 27851-C

FedEx Ground Package System, Ltd.,

complainant,

and

Canada Council of Teamsters,

respondent.

Board File: 27995-C

Reshma Mahabir,

complainant,

and

Keshav Chumber,

respondent.

Board File: 28123-C

Canada

Canada Council of Teamsters,

complainant,

and

Keshav Chumber,

respondent.

Board File: 28124-C

Reshma Mahabir,

complainant,

and

FedEx Ground Package System, Ltd.,

respondent.

Board File: 28209-C

Canada Council of Teamsters,

complainant,

and

FedEx Ground Package System, Ltd.,

and

Keshav Chumber,

respondents.

Board File: 28225-C

Deneise Brooks,

complainant,

and

FedEx Ground Package System, Ltd.,

respondent.

Board File: 28249-C

Neutral Citation: 2011 CIRB 614
November 22, 2011

A panel of the Canada Industrial Relations Board (the Board) composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. David Olsen and Norman Rivard, Members, considered the above-noted complaints. Hearings were held in Toronto on September 14 to 17 and November 16 to 18, 2010, and March 29 to April 1 and April 12, 2011.

Appearances

Mr. Stéphane Lacoste, for the Canada Council of Teamsters;

Mr. J. Timothy Lawson, for FedEx Ground Package System, Ltd.

I–Nature of the Complaints

[1] This decision relates to a series of seven unfair labour practice complaints arising out of the national organizing drive at the Federal Express group of companies, including FedEx Ground Package System, Ltd. (FXG or the employer) by the Canada Council of Teamsters (CCT or the union). With the consent of the parties, the complaints were consolidated for the purposes of hearing and determination.

[2] The union's organizing campaign was launched in September 2009. These complaints relate to one location of FXG, namely 6600 Goreway Drive in Mississauga, Ontario. The complaints concern two groups of employees working at that location (administrative associates and package handlers), and relate to events occurring at various times between October 2009 and June 2010. At the time of the hearing of these complaints, the organizing drive was still continuing.

A–Board File No. 27851-C

[3] On December 3, 2009, the union filed an unfair labour practice complaint against the employer pursuant to section 94 of the *Canada Labour Code (Part I Industrial Relations)* (the *Code*). The union alleged that letters the employer sent to employees and contractors on October 6, 2009 and October 20, 2009, interfered in the affairs of the union. The union asserts that these documents constitute intimidation or attempted intimidation of employees who had joined the union and/or who were the subject of the union's organizing drive, in contravention of subsections 94(1)(a) and 94(3)(a) of the *Code*.

[4] The union also alleged that in November 2009, a manager told an employee that, if the union was certified, FXG would "shut down the facility."

[5] The union's complaint also alleged that, on November 23, 2009, a group of management representatives "invaded" the company hub located at 6600 Goreway Drive, Mississauga, Ontario, and held a captive audience meeting of all available FXG employees. It alleged that, at the meeting, the employer informed the employees that the company had a policy prohibiting union solicitation on company premises at any time because it constituted harassment, and that any such solicitation would be subject to investigation and that appropriate measures would be taken.

[6] The union alleged that, when asked by Ms. Reshma Mahabir (RM), one of the employees who had joined the union and was actively engaged in recruiting her colleagues, whether the company would close the hub if the union came in, the managers refused to answer the question. The union further alleged that a manager told the employees in attendance at the meeting that they could ask

the union to return their membership cards, and provided the address of a website where there was information on that subject. The manager allegedly also invited any employees who had concerns to see the managers for more information.

[7] The union alleged that employer representatives held a similar meeting on November 24, 2009 with employees who were not present at the November 23, 2009 meeting and that, following these meetings, some employees communicated with the union to ask that their membership cards be returned to them.

[8] The union further alleged that the company's solicitation and distribution policy was amended on November 23, 2009, in response to the union's organizing campaign.

[9] On December 18, 2009, the union amended the unfair labour practice complaint that it had filed with the Board on December 3, 2009, to add allegations that, on or about December 14, 2009, the company had hired seven new clerical employees without business reasons, for the purpose of artificially enlarging the bargaining unit in order to make it more difficult for the union to recruit a majority of employees and to intimidate the existing employees; and that on December 8, 2009, two clerical employees obtained permission from the employer to conduct anti-Teamsters solicitation during their work time. The union alleged that these employees stood outside, on company property, holding a sign asking employees to reject the union and asked employees whether they supported or opposed the CCT.

[10] The union alleged that these incidents constituted clear and repeated violations of the *Code* that affected the CCT recruitment campaign, had a ripple effect throughout all of the employer's operations in Canada and a chilling effect on the recruitment campaign in Mississauga. It claimed that, had it not been for these violations, the union would have recruited a majority of those employees and filed a successful application for certification. The union also asked that, as remedy for these unfair labour practices, the Board order automatic certification of the union pursuant to section 99.1 of the *Code*.

[11] On February 25, 2010, the union again amended its unfair labour practice complaint to add further allegations related to the activities of two administrative associates who did not support the union, and added one of those administrative associates, Mr. Keshav Chumber (KC), as a personal defendant in Board file no. 27851-C. The union alleged that the two administrative associates were acting on behalf of the employer when they asked other employees if they had signed a union membership card or not. It also alleged that, with the employer's support and encouragement, KC had distributed a letter, prepared and copied using company resources, that contained lies and defamed and libeled the union.

B–Board File No. 27995-C

[12] On March 5, 2010, the employer filed an unfair labour practice complaint pursuant to section 97(1) of the *Code* alleging a violation of section 96 of the *Code* by the union.

[13] The employer alleged that, on February 15, 2010, the union issued a press release claiming that the union "now represents FedEx's administrative workers in Mississauga, Ontario." The employer alleged that the press release stated that "the filing of the application for certification with the Board on February 12, 2010 is merely a 'formal document that confirms that a union represents a group of workers'." The employer alleged that the union falsely implied that a majority of administrative workers supported the union, while it appeared from the application for certification that the union had applied to the Board with less than majority support.

[14] The employer further alleged that the union had denigrated it as an employer and implied that the employer's lawful participation in the Board processes was an affront to workers rights. It alleged that the purpose and effect of the press release was "to lead administrative and other employees at the Toronto Facility, and other locations, to believe that they [would] be left behind to fall victim to an 'anti-union' employer if they [did] not sign union cards."

[15] The employer alleged that the press release constituted an attempt to intimidate and coerce and/or compel employees to become union members contrary to section 96 of the *Code*. It further alleged that the union's conduct, including its complaint against KC, was designed to silence him

and any other employee who dared to express a view that did not support the union's campaign, and that this constitutes a violation of section 96 of the *Code*.

C–Board File Nos. 28123-C and 28124-C

[16] On May 5, 2010, the union filed an unfair labour practice complaint pursuant to section 94 of the *Code* on behalf of RM and an unfair labour practice complaint pursuant to section 94 of the *Code* on its own behalf (Board file nos. 28123-C and 28124-C). Both complaints were based on the same facts.

[17] In her complaint, RM alleges that she continues to be the subject of reprisals, harassment, discrimination and unfair treatment by her employer. In particular, she alleges that, in late January 2010, she was physically assaulted by KC, who was known to be opposed to the unionization campaign. She was pregnant at the time. She alleges that KC is guilty of violating section 94(3) of the *Code* and that he was acting on behalf of the employer.

[18] RM states that on February 18, 2010, she reported the incident to management and that, as of the date of her complaint, no investigation had been undertaken. She alleges that KC had not been disciplined in any way, but instead had been promoted. She further alleges that management had investigated complaints from other employees in a timely manner, while neglecting to investigate her complaint.

[19] RM further alleges that on March 5, 2010, an incident took place with a co-worker, Ms. Shelsea Beaulieu (SB), that led RM to file a complaint with management. She stated that, as of the date of the complaint to the Board, her complaint to management regarding the incident with SB had not been investigated properly and that on April 9, 2010, she was issued a disciplinary measure.

D–Board File No. 28209-C

[20] On June 16, 2010, RM filed another unfair labour practice complaint pursuant to sections 94(3)(a) and 94(3)(c) of the *Code*, in which she alleges that, on Thursday, June 3, 2010, a second incident occurred between herself and KC, in which KC allegedly physically assaulted her when he grabbed a paper towel, narrowly missing the top of her head as he pulled the towel down from a ledge located directly above the area where she was preparing her lunch.

[21] RM alleged that when the hub manager, Jim McWilliams (JM) asked to speak with her in his office concerning the incident, she requested a witness of her choice. JM refused her request, at which point she indicated that she would not go into his office to discuss the incident since she was not allowed a neutral witness. As a result, RM was suspended from work for a period of time.

[22] RM further alleged that KC subsequently went around the office during work hours collecting signatures on a petition directed against her, and that this conduct has continued even though she asked JM to put an end to it. RM asserts that all of these discriminatory actions and the suspension are in reprisal for her union activities.

E–Board File Nos. 28225-C and 28249-C

[23] On June 23, 2010, the union filed an unfair labour practice complaint pursuant to section 94(3)(a) and (c) of the *Code* on behalf of Ms. Deneise Brooks (DB) and an unfair labour practice complaint pursuant to section 94(1)(a) of the *Code* on its own behalf, arising from the same facts.

[24] DB alleged that she has been treated in a discriminatory manner by the employer and subjected to reprisals and an unjustified disciplinary measure because of her union activities. In particular, DB alleged that, on or about May 13, 2010, she was issued a verbal disciplinary measure concerning an incident with KC related to racial profiling.

II–The Board's Approach

[25] For ease of reference, this record of decision will review the evidence, make findings of fact, analyze and render a decision with respect to each of the complaints in the chronological order in which they were filed with the Board. In these complaints, many of the facts are in dispute. As well, the inferences that should be drawn from the facts as a whole are contested.

[26] At issue is the reliability of the testimony given by the various witnesses. In making reliability assessments, the statement of Mr. Justice O'Halloran in *Rex* v. *Pressley*, [1948] B.C.J.No. 63 (Q.L) at paragraph 12 is helpful :

> 12. ...The judge is not given a divine insight into the hearts and minds of the witnesses appearing before him. Justice does not descend automatically upon the best actor in the witness box. The most satisfactory judicial test of truth lies in its harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case.

[27] The union complaints were filed pursuant to sections 94(1) and 94(3) of the *Code*. The employer complaint was filed pursuant to section 96 of the *Code*. Ordinarily, the burden of proof rests on the party that alleges a failure by the other party to comply with the provisions of the *Code*. However, section 98(4) of the *Code* contains a reverse onus provision for certain unfair labour practice complaints:

> 98. (4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party.

[28] A respondent's burden of proof under section 98(4) of the *Code* was summarized in *Denis Rousseau,* 2007 CIRB 393:

> [97] Under section 98(4) of the *Code*, the burden is on the employer to refute, on a balance of probabilities, the allegations giving rise to the complaint, namely that it was aware of the complainant's union activities and that those activities were a factor in its decision to terminate his employment.

[29] The Board recognizes that there will seldom be direct evidence of anti-union animus. Rather, the Board must decide, based on the overall context, whether anti-union animus played even a small part in an employer's actions.

III–Background

[30] FedEX Ground Package System Inc. is a corporation incorporated under the laws of Delaware, USA and is engaged as a ground carrier in the small package delivery business throughout North America. FXG is a wholly owned subsidiary of FedEx Ground Package System Inc., with headquarters located in Mississauga, Ontario.

[31] FXG operates facilities throughout Canada and provides package delivery systems through a network of independent contractors. One of FXG's facilities, the Toronto hub, is located at 6600 Goreway Drive in Mississauga, Ontario.

[32] The union is a council of trade unions within the meaning of section 32 of the *Code*.

[33] In September 2009, the union launched a national organizing drive targeted at employees of FXG and other parts of the FedEx group in Canada. The union launched its campaign with press releases as well as the establishment of English and French websites. It utilized social networks such as Facebook and Twitter, as well as YouTube, to communicate its messages. The union visited the employer's facilities and circulated leaflets.

[34] In early October 2009, RM, an administrative associate and an employee of FXG for four years, took it upon herself to organize the administrative associates at FXG at 6600 Goreway Drive in Mississauga, Ontario. She called the union, met with its representatives and, together with a number of her employee peers, formed an organizing committee.

[35] On February 16, 2010, the union applied to the Board for certification of a bargaining unit of FXG administrative employees working at 6600 Goreway Drive.

[36] On March 17, 2010, the Teamsters requested leave of the Board to withdraw their initial certification application and concurrently filed a second, identical certification application containing additional membership evidence.

[37] On June 7, 2010, the Board denied the union leave to withdraw its initial certification application and subsequently dismissed that application on the grounds that the membership support submitted was insufficient to entitle the union to a vote under section 29(2) of the *Code*.

IV–Board File No. 27851-C

A–Allegation that letters issued by the employer interfered with the union's organizing efforts in violation of the *Code*

[38] On October 6, 2009, JM and Diana Case (DC), a senior manager at the FXG facility, signed a letter that was distributed to FXG employees and contractors. The letter read in part:

> The Teamsters Union is trying to organize FedEx Ground workers, and Toronto is among their targets. In our opinion, we do not need a trade union. Through team work and open communication, we have created a positive and flexible environment, ... We all should be proud of what we have created together!
>
> Clearly the economic slowdown has affected our business. But stop and reflect on our Company and its commitment to us. There have been no layoffs at FXG Canada, and merit increases still were given to FedEx Ground employees in Canada during FY09 and FY10. When you compare our Company to unionized companies like GM, Chrysler or Ford, you can see how well we have done in these difficult economic times.
>
> Someone may ask you to sign a Teamsters membership card, if they have [not] done so already. It is your choice whether you sign it or not. However, please remember that signing a card is a vote for the union! Deciding whether to sign a union membership card is a decision that should not be taken lightly. You should think of it as a decision with long-term implications.
>
> Before you make a decision, you should ask yourself whether the union can possibly deliver on the long list of promises it is making. The Teamsters can make many promises but cannot guarantee anything. It is difficult to hold a trade union accountable for the promises it makes. In the end, it is up to you to assess whether FedEx Ground would agree to the Teamsters' demands in collective bargaining.
>
> Also, in attempting to get you to sign a membership card, the Teamsters may use peer pressure or tell you that they have a lot of support when that may not be the case. We urge you not to be misled if the Teamsters use those tactics. ... Nobody has to put up with intimidation in the workplace. If you feel uncomfortable due to pressure about union representation, please contact a manager immediately.

[39] The employer's District Human Resources Manager, Mr. Luis Raposo (LR), testified that, at this point, some three weeks into the campaign, there had been seven visits by the union to the Toronto facility. The union's material contained promises of job security and asserted that employees needed to join the union. Employees were asking what the employer's position was. The October 6, 2009 letter was provided to employees and contractors at the Toronto facility only. The employer did not hold any meetings with employees in conjunction with the distribution of the letter.

[40] RM testified that she saw this letter posted on the wall in the kitchen facilities in the workplace. She stated that her reaction to the letter was that she started jumping up and down, because the union was at her front door and she was eager to join the union.

[41] Mr. Duane Clarke (DC2), an administrative associate and an FXG employee since November 1999, was handed the document at the security desk when he walked into the facility. In his view, it was just the employer stating its side of the story, that the employer did not want a union and thought it had a great relationship with its employees. DC2 later became an inside organizer for the union.

[42] Mr. Jitendra Ahluwalia (JA), an administrative associate, testified that the letter did not have any influence on his decision with respect to the union, nor did it offend him.

[43] On October 20, 2009, FXG's Vice-President and General Manager, Bob Wilson (BW), Managing Director, Mike Hover (MH) and Managing Director, Rod Harris (RH) sent a letter on behalf of the employer to all Canadian employees and contractors. The letter read in part:

> Several weeks ago, the Teamsters launched an aggressive campaign to try to unionize FedEx Ground Canada. ...
>
> A number of you have encouraged FedEx Ground to be more active in responding to the Teamsters and some of the controversial written materials distributed by that Union. Very simply, Canadian law places significant restrictions on what we can say during an organizing campaign. We respect the law and will continue to follow it.
>
> FedEx Ground prefers to deal directly with employees and contractors, rather than involve the Teamsters in our business. We believe that the direct relationships and open communication we have with contractors and employees creates a unique and positive working environment. The decision of whether or not to join a union is yours to make and it is an important one. It should not be made lightly without considering the

> long-term implications, nor should it be made based on misinformation from the Teamsters. You should consider that the Teamsters depend on revenue from union dues to survive. A union often will resort to salesmanship tactics to get you to sign a membership card and get your union dues. If you sign a card, it represents a vote for the union, because under Canadian law, the union can become the representative of all employees without a vote if it collects cards 50 percent plus one of the employees.
>
> Here are some examples of union salesmanship:
>
> The Teamsters union has claimed it can negotiate higher wages and better benefits for you. What the Teamsters failed to tell you is that it cannot force the company to agree to its demands. ... While you could end up with more, you could also end up with same or less - there are no automatic increases simply because a union comes in.
>
> Teamsters organizers have appeared at some of our facilities with signs that state, "Dignity" and "Respect." We believe these signs reveal just how out of touch the Teamsters are with our culture. FedEx Ground works very hard to create a positive work environment in which everyone is treated with dignity and respect, and in which everyone has a fair chance to succeed. ...
>
> We want you to make an informed decision. Before you decide whether or not to sign a union card, please consider the Teamsters' track record very carefully, and consider whether this union actually can deliver on its promise to you. Ask about the mandatory dues, fines and assessments you could face if you join. And ask the Teamsters organizers what they legally can guarantee you. Do your homework because it's your decision and your future.
>
> ... If you have any questions about what you have heard or read so far in this campaign, you have the right to ask your manager and get the facts.

[44] LR testified that this letter was distributed to all Canadian employees and contractors. By that time, there had been multiple visits by the union to multiple FXG locations across the country. The union had engaged in picketing outside the employer's properties and denigrated the employer's brand and the way in which it treated its employees. Employees were asking questions of their managers and the employer wished to demonstrate that it did respect its employees. No meetings were called to explain the October 20 letter to employees.

[45] RM testified that when she read the October 20 letter, she just shrugged her shoulders. In her view, the letter was an indication on paper that the employer did not want employees to join the union.

[46] DC2 stated that the October 20 letter was handed to him as he walked in to start his shift. He stated that he understood that it was the same stuff as the October 6 letter, and felt the same way about this letter as the previous letter, the employer was just expressing its views.

[47] Ms. Cheryl Harold (CH), a pick-up and delivery administrator and an employee since 2001, testified that she read both of the letters and did not feel pressured or intimidated not to sign a union card. She stated that the letters explained, from the employer's perspective, what was going on.

[48] JA testified that the October 20 letter did not offend him and did not influence his decision with respect to the union.

[49] The issue for the Board is whether the employer's October 6 and October 20, 2009 letters to the FXG employees and contractors constitute an impermissible interference with the union, contrary to section 94(1) of the *Code*.

1–Position of the Union

[50] The union argues that the contents of the letters contravene section 94(1) of the *Code,* which prohibits an employer from interfering with the formation of a trade union.

[51] It refers the Board to its decision in *TQS Inc.*, 2008 CIRB 434 where the Board, in the context of an application for an interim order, commented on section 94(1) of the *Code* as follows:

> [31] Section 94(1) of the *Code* prohibits an employer from interfering in the representation of employees by a union. This section protects the fundamental right of association set out in section 8 of the *Code* and confirms the union's role in representing employees in the bargaining unit. In *Aéroports de Montréal* (1995), 97 di 116 (CLRB no. 1115), the Canada Labour Relations Board (CLRB) stated specifically that this provision "prohibits an employer from interfering in any way with or undermining the union's exclusive right to bargain" (page 123).

[52] In *Canada Post Corporation* (1985), 63 di 136 (CLRB no. 544), the Board indicated that the protection afforded by section 94(1)(a) of the *Code* takes a number of forms. In that decision, the CLRB wrote as follows on this issue:

> … This protection in fact mirrors the many constantly changing forms that the right to join a union may take, this right constituting... one of the 'basic freedoms.'[Section 94(1)(*a*)] prohibits both deliberate and unintentional violation of this right. The protection it affords is aimed at both actions that seek to undermine the status of the bargaining agent and those that merely have this effect. It also extends to those

> actions that compromise the integrity of the bargaining unit which the union represents. Finally, this protection continues to apply both in the absence and in the presence of a collective agreement. This explains what we referred to earlier as the 'omnibus' nature of the protection of [section 94(1)(*a*)]. ...
>
> (page 160)

[53] In particular, the union points to the statements in the October 6, 2009 letter that raise the shadow of economic difficulty. It argues that this comment is not innocent and was intended to frighten the employees. Because the employees are worried about losing their jobs, this reference undermines the union's organizing efforts.

[54] The union also points to the reference in the letters stating that, if employees feel uncomfortable due to pressure about union representation, to contact a manager. This, the union argues, constitutes direct interference in the affairs of the union.

[55] With respect to the October 20, 2009 letter, the union argues that the employer was clearly not happy about the results of its first letter and, unlike the first letter, where there may have been one or two employees asking questions about the employer's response to the union's organizing campaign, there was no evidence that this second letter was in response to employee questions.

[56] The union argues that the reference to the union depending on revenue from union dues is meant to undermine the union's reputation.

[57] The union also argues that the references in the second letter as to whether the union can guarantee and deliver on its promises, and the reference to dues, fines and assessments, has crossed the line of permissible conduct and submits the employer has illegally descended onto the battleground.

2–Position of the Employer

[58] FXG argues that, in the context of the extensive communications campaign by the union, the site visits and the union material that contained promises of job security, together with the assertion

that employees needed to join the union to obtain protection from the employer, the employer's reference to the economic slowdown and the fact that there have been no layoffs, is not a threat but simply a statement of fact about how well the company has done.

[59] The employer argues that stating an opinion that it does not need a trade union, is well within the bounds of section 94(2)(c) of the *Code*. It argues that it was appropriate for the employer to inform the employees that it is their choice whether to join the union and that signing a card is a vote for the union, as many employees do not know their options and rights.

[60] The employer submits that the statement in the letter indicating that, if employees feel pressured to sign a card, they could contact a manager is not a threat or undue influence, but merely a fact that the employer has an open door policy to deal with employee concerns in accordance with its anti-harassment policy.

[61] FXG argues that none of the witnesses, including those called by the union, felt intimidated or unduly influenced by the letters.

[62] The employer pointed out that the *Code* was amended in 1999 to permit the employer to express a personal point of view, so long as it is done without intimidation, threats, promises or undue influence. The employer argues that section 94(2)(c) of the *Code* is consistent with a number of provincial labour statutes, and refers the Board to a number of decisions that illustrate the scope of permissible employer free speech under similar or identical provisions.

[63] FXG directed the Board's attention to a decision of the Ontario Labour Relations Board (OLRB), *Greb Industries Limited*, [1979] OLRB Rep. February 89. In that case, the employer distributed letters to all employees in the proposed bargaining unit prior to a representation vote . The Teamsters alleged that this constituted a violation of the Ontario *Labour Relations Act*, *1995*, S.O. 1995, c.1, Sched. A (the *OLRA*) and, as a consequence, the representation vote did not reveal the true wishes of the employees. The union argued that it was not appropriate for the employer to make comments regarding the union's internal operations. The employer's remarks about job

security were viewed as carrying an implication that, if the union was certified, employees' job security may be seriously affected because the employer would not be as competitive in the marketplace. The union characterized this as a subtle threat and as constituting undue influence.

[64] The OLRB, in reaching its decision, reasoned in part as follows:

> 11... While an employer's claim to state its case to its employees is qualified by the limitations imposed in section 56, an employer is entitled to express its views and is not confined to mere platitudes. ...
>
> 14... The party which seeks to set aside a representation vote is required to establish that the impugned conduct has deprived the employees of the ability to freely express their true wishes. ...
>
> 16... In our view, the respondent is inviting its employees to seek veracity. What objection can there be to ascertaining the truth? ...
>
> 17... It is our opinion that an employee of average intelligence and fortitude would appreciate by analogy to the political process and by his own experience in life that not all promises and expectations are fulfilled. The statements about the respondent's ability to remain competitive and the matter of job security merely express a concern and do not, in our view, constitute coercion, intimidation, threats, promises or undue influence. ...
>
> (*Greb Industries Limited, supra*)

[65] The OLRB concluded that the views expressed by the employer in its letters to the employees were within the middle ground between mere platitudes and interference and influence.

[66] The employer referred the Board to another OLRB decision, *Toronto General Hospital*, [1983] OLRB Rep April 607. In that case, the Ontario Public Service Employees Union (OPSEU) applied for certification in respect of the hospital's paramedical staff. OPSEU filed an unfair labour practice complaint alleging that the employer had forwarded letters to individual members of the bargaining unit at their homes, which had unduly interfered with employees' ability to vote freely in a representation vote. Another letter was sent to the employees by a rival union.

[67] One of the employer's letters advised employees of the importance of voting, and that the majority decision of those voting would determine the outcome for all staff affected. The letter also advised employees that their salaries and benefits were competitive with wages paid to unionized paramedical employees. The second letter included a formula for the calculation of union dues. The

letter from the rival union advised that paramedical employees made up only a small portion of the total membership of the applicant union, and that there were no provisions to ensure minority disciplines would be given the same attention as issues affecting larger groups.

[68] The OLRB dismissed the application on the basis that the employer's communications were within the bounds of the freedom of expression.

[69] In *Rygiel Home*, [1980] OLRB Rep. March 354, another decision of the OLRB, the Canadian Union of Public Employees applied for certification of a group of employees of the employer. The union failed to win a majority of the votes cast and sought to have the results of the vote set aside. The union complained that the employer had violated the *OLRA* by issuing a letter to employees that included a paragraph stating that employees should not be fooled by union catchphrases stating that the union was the only one that could provide employees with job security. The letter asserted that it was really employees who create and control their own job security every day, by the way they perform their job functions. The OLRB found that the letter fell within the parameters of acceptable employer response to propaganda efforts by the union.

[70] The employer also referred the Board to a decision of the Manitoba Labour Board (MLB) in *Marusa Marketing Inc. and U.F.C.W., Local 832*, [2000] 63 C.L.R.B.R. (2d) 141 (MLB), dealing with facts and issues that it argued were similar to the instant case. In that case, the union filed an application seeking remedies for unfair labour practices, alleging that Marusa Marketing Inc. (Marusa) had made reference to the fact that the premises might be closed if the union succeeded in its application; that Marusa held a series of meetings with the employees and, in effect, compelled them to attend; that Marusa belittled the validity of the union; that it dismissed two employees for union activity; and that it improperly laid off a number of employees.

[71] The MLB dismissed the applications. In reaching its conclusions the MLB stated as follows:

... In *Romzap Ltd.*, *supra*, and at p. 19 [p. 151 CLRBR], we note:

> 65. ... As stated earlier in this decision, the case law has established that there is nothing improper for an employer, in the face of a union-organizing drive, to express to employees that it does not want a union; in fact, that position is often what is expected as employer's response to the prospect of unionization.

...

We also note the comments of British Columbia Labour Relations Board in *Cardinal Transportation B.C. Inc*., *supra,* which said on p. 33, at para. 196 [p. 52 CLRBR]:

> 196. It seems therefore that in this jurisdiction, as well as others, the definition of intimidation, coercion and undue influence in a labour relations context is well settled. In our view it contains this basic element: any effort by an employer to invoke some form of force, threat, undue pressure or compulsion for the purpose of controlling or influencing employee's freedom of association. This is what we mean by the term "coercion" in this decision.

(page 155)

[72] The employer also argued that the Board should look at the enormity of the union's communications campaign in assessing the employer's conduct in authoring and distributing written material and referred the Board to a decision of the British Columbia Labour Relations Board (BCLRB), *Excell Agent Services Canada Co. and I.U.O.E., Local 882*, [2003] 96 C.L.R.B.R. (2d) 161 (BCLRB), where the BCLRB, on analogous facts, observed at page 180:

> 79. Another factor to assess in considering the context in which the statements are made and the probable effect on a reasonable employee, is the means used. How the bulletins were delivered to the employees alleviates to some extent potential concerns about interference. ... circulation of written material is the preferable mode. The choice of written text is less intrusive than captive audience meetings or private discussions with employees.

[73] In *Camp Canada Ltd.*, [2003] OLRB Rep. October 744, another case referred to by the employer, the OLRB again had occasion to comment on the scope of employer free speech permitted under the Ontario statute. In that case, the OLRB concluded that the materials the company provided to employees in their pay envelopes were within the bounds of employer free speech permitted under section 70 of the *OLRA*, stating as follows:

> 57. ... An employer may point out to employees the advantageous working conditions they already enjoy. It is also true that having a union is a significant change in an employee's relationship with the employer.

> Furthermore, terms and conditions of employment are ultimately subject to negotiation. ... Thus, suggesting that unionization may lead to changes in working conditions is not a threat although suggesting that voting for the union would lead to less satisfactory conditions might be. The list of "accomplishments" drafted by the supervisors in this case was not a threat that all items on the list could be lost. It was an attempt to take advantage of the good will which had accumulated...

3–Board's Conclusion

[74] Section 94 of the *Code* provides, in part, as follows:

> 94. (1) No employer or person acting on behalf of an employer shall
>
> (*a*) participate in or interfere with the formation or administration of a trade union or the representation of employees by trade union; or
>
> ...
>
> (2) An employer is deemed not to contravened subsection (1) by reason only that they
>
> ...
>
> (*c*) express a personal point of view, so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

[75] Section 94(2)(c) was added to the *Code* in 1999 as result of a recommendation contained in *Seeking a Balance: Canada Labour Code, Part I, Review* (Ottawa: Human Resources Development Canada, 1995) (the Sims Report):

> Employer Expressions of Opinion
>
> We alluded previously to the fact that employers must be circumspect when employees choose or change union representation. However, while these decisions are for employees alone, acting freely, the law has never been that employers must remain absolutely silent. Several employers groups urged us to recommend a statutory recognition of what constitutes the employer's right to free speech.
>
> The Board has recognized this right to communicate and described how this fits with the prescriptions against coercive activity. Several provinces have expressed this right directly in the legislation, and we recommend that the Code include a similar recognition. This would in no way diminish the unions' exclusive rights to represent employees.
>
> RECOMMENDATION
>
> Section 94(2) should be amended by adding a subsection to provide that an employer be deemed not to have contravened subsection (1) by expressing its views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.
>
> (pages 63 64)

[76] In *Air Canada*, 2001 CIRB 131, the airline issued a communiqué to its flight attendants describing the outcome of a meeting at which their union had refused a one-time bonus package of $25 million being offered to them as a result of Air Canada's merger with former Canadian Airlines International Ltd. The flight attendants' bargaining agent complained to the Board of improper communication by the airline's CEO.

[77] In finding that there had been no improper communication, the Board commented on the 1999 amendment to section 94 as follows:

> [24] Although this section is new to the *Code*, it is similar to corresponding provisions in provincial labour legislations, such as Alberta and Ontario. In those provinces, labour boards have generally interpreted the "expression" and "coercion, intimidation, threats, promises or undue influence" at face value, creating a fairly straightforward factual test... If, therefore, a communication is found, as a matter of fact, to consist of personal expression, and is not found to contain coercion, intimidation, threats, promises or undue influence, it should fall into the exception created by section 94(2)(c) and be deemed not to constitute a violation of the *Code*.

[78] In *Canadian National Railway Company*, 2005 CIRB 315, the United Transportation Union filed bad faith bargaining and unfair labour practice complaints with the Board, including a complaint that the CEO had made statements that contravened the *Code*. Having reviewed the impugned communications, the Board concluded as follows:

> 100. In the present matter, the Board finds that Mr. Harrison's views as they appeared in the *BUSINESS* magazine, were balanced. He speaks of a "dream", which can be interpreted as a wish list, and expresses how greater productivity could be achieved through greater efficiencies. There is nothing coercive, intimidating, threatening or of the nature of undue influence in his hopes of being able to trade job security for the giving up of work rules. These are personal views to which he is entitled as the CEO of a large international corporation. ... The views reported in this article cannot be considered as a threat to the union's representation of its employees.

[79] In *Hamlet of Kugaaruk*, 2010 CIRB 502, the Public Service Alliance of Canada filed an unfair labour practice complaint during the course of certification proceedings with regard to the Hamlet's communication with its employees. The acting senior administrative officer of the Hamlet distributed a letter to all employees, suggesting that employees might lose the benefit of certain work practices by certifying the union as their bargaining agent. The Board found that, while section 94(2)(c) enshrined certain employer free speech, the letter went beyond permissible communications that the

Code envisaged, as the suggestion of the loss of existing workplace practices could have a serious impact on employees and the exercise of their fundamental freedoms under the *Code*.

[80] Although section 94(2)(c) is relatively new to the *Code*, it is similar to corresponding provisions in various provincial legislation. The provincial Boards have generally interpreted the expressions coercion, intimidation, threats and promises at face value, creating a fairly straightforward factual test namely, if a communication is found, as a matter of fact, to consist of personal expression and not found to contain coercion and intimidation, threats, promises or undue influence, it should fall into the exception created in section 94(2)(c). These decisions based on the comparable statutory provisions are of assistance in resolving the issues presented in this case.

[81] From the case law, the Board derives the following non-exhaustive principles:

> An employer is entitled to express its views and is not confined to mere platitudes. There is a middle ground, between mere platitudes and interference and undue influence, in which an employer is free to express its views.
>
> In evaluating employer conduct, the Board should seek to establish whether the employer's conduct has detrimentally affected the employees' ability to express their true wishes. In other words, has the employer's conduct deprived the employees of the ability to express their true wishes in exercising their decision to associate or not?
>
> The definition of intimidation, coercion and undue influence in a labour relations context contains this basic element: the invocation of some form of force, threat, undue pressure or compulsion, for the purpose of controlling or influencing an employee's freedom of association.
>
> The fact that an employer does not want a union and expresses its opinion to that effect is not necessarily a violation of the *Code*; a factual analysis must be conducted to determine whether the manner in which this opinion is expressed contains an element of coercion, intimidation, threats, promises or undue influence.

> The Board should consider the context in which the statements are made and the probable effect on a reasonable employee of the means used. Circulation of written material is the preferable mode, as the choice of written text is less intrusive than captive audience meetings or private discussions with employees.

[82] The Board finds, as a matter of fact, that no employees were actually intimidated or unduly influenced by the letters of October 6 and October 20, 2009. None of the witnesses called by the parties, including the inside organizers, said that they were intimidated by the letter. RM stated that she was happy to see the first letter, because it meant the union was at the door and she was eager to join them. In fact, the letter was the catalyst for her to contact the union and start the organizing campaign for the administrative associates.

[83] Applying the straightforward factual test articulated above, the Board finds that the content of the October 6 and October 20, 2009 letters fall within the limits of employer freedom of speech protected by section 94(2)(c) and do not constitute a contravention of the *Code*.

B–Allegation that one of the managers told an employee in November 2009 that if the union was certified, FedEx would shut down the facility, thereby intimidating employees in violation of the *Code*

[84] Ms. Crystal Todd (CT), a part time FXG package handler for four years and an inside organizer for the union, testified concerning a discussion she had with her manager, Mr. Devin Elliott (DE) after one of her shifts in late November 2009. She stated that she asked DE, in confidence, what would happen if the union came in, and alleges that he answered that "if the union came in, they would shut down the facility because it would be a lot easier than to compete with a union." CT stated that she had approached DE in confidence because she felt he was a manager she could trust for an honest opinion and she had a good working relationship with him. CT stated that she discussed DE's statement with RM later the same day.

[85] CT was asked in cross examination what DE's exact words were. She answered that his words were: "if the union were to have a chance to come into FedEx., they would shut the facility down." She acknowledged that her response to the question placed in examination in chief was not exactly the same response. In cross-examination, CT stated that she could not be sure that DE had said it was "because it would be easier to compete with(out) the union." She acknowledged that it had been a year since the conversation, and it was difficult to remember the exact words he used and she was not sure.

[86] CT was shown her affidavit dated February 3, 2010, filed in the Board's proceedings, in which she attested that DE had said approximately the following:" If it happens, it's not gonna happen because FedEx is gonna shut down the facility." She suggested that her answer in evidence was the same as this, although not word for word.

[87] CT was unable to provide the exact date or the day of the week of the discussion, but confirmed that it took place near the end of her shift. She had originally approached DE to ask if there were extra hours for the day and he had answered yes. She left and went to the staging area and then doubled back, found him alone and initially asked him a question about staging. She said she asked him about a new method for dealing with Y50 packages, as there had been a recent change in operational procedure that she did not understand, which he clarified for her.

[88] She testified that the conversation got sidetracked and DE made a comment to her about her being involved with the union, at which time she asked him what would happen if the union came in.

[89] CT acknowledged that she could not remember DE's exact words about her involvement in the union and agreed that that comment did not appear in any of the materials on file with the Board, nor in her February 3, 2010 affidavit concerning the incident. She stated that he had made a comment that opened the door for her question. She testified that she responded to DE's comment about the union with shock.

[90] She was asked again when the conversation with DE took place, as she testified it had taken place in late November. The unfair labour practice complaint filed December 3, 2010, stated that the conversation had taken place in early November and her affidavit stated mid-November. She answered that she could not recall the exact date and time.

[91] She was asked again about her affidavit, in which she stated: "on Sunday, November 22, 2009 I repeated that to Mrs. Reshma Mahabir." She was asked whether her report to RM regarding the conversation took place on the day it occurred, as she had testified, or on the following Sunday, as her affidavit indicated. CT acknowledged that she had testified that she had repeated the information to RM on a weekday night other than a Friday. When given the opportunity to clarify which statement was correct, she answered that it was the affidavit.

[92] DE is a Sort Manager at the Mississauga FXG hub and has been an FXG employee since October 2006. During the month of November 2009, he was working as a service manager on the 3:30 to 7:30 p.m. shift. During November 2009, he started work at approximately 2:30 p.m. There were approximately 16 package handlers who reported to him at the time and their shift started at 3:30 p.m. CT was one of the package handlers reporting to him. She had started working for him on the day shift on October 5, 2009. Prior to that time, she had worked the twilight shift starting at 7:30 p.m.

[93] DE denies that the conversation alleged by CT ever took place and states that he never had a conversation of this nature with any employee. He would not threaten shutting down the hub. He testified that he never made that comment to anyone at any time, because he knew he could get himself into a lot of trouble if he did so. He first learned of the allegation several months after November 2009, when JM called him into his office.

[94] DE explained that Y50s are packages flagged by customs that are held in a bonded area in the facility. Employees working as northbound package handlers deal with Y50s on a daily basis. There are upwards of 100 such packages a day. There was no operational change in the way Y50s were processed by the company during or after November 2009. There had been a change in the manner in which these packages were processed in April 2009, due to renovations at the facility.

[95] In cross-examination, DE was asked how he knew that a manager should not threaten employees concerning unionization. He responded that, sometime in the fall of 2009, the employer had advised all managers of this restriction.

[96] The issue for the Board is whether the statement attributed to DE was actually made, and if so, whether it constituted a violation of the *Code*.

1–Position of the Union

[97] The union argues CT's evidence is credible and DE's alleged statement that, if the union got in, the employer would close down the facility, is a violation of the *Code*. The union argues that it is not unexpected that DE would not admit making the statement attributed to him before the Board, as the employer would not be happy. It argues that CT's evidence has the ring of truth.

2–Position of the Employer

[98] The employer argues that the Board should have many concerns about CT's story. Those concerns include the premise about why CT approached DE in the first place to inquire about the change in procedure for the tagging of Y50s, when the change happened in April 2009 and not November; discrepancies about when the alleged conversation took place; and the differences in CT's evidence regarding the words DE allegedly said in examination in chief, in cross-examination, and in a previously sworn affidavit.

3–Board's Conclusion

[99] CT presented her evidence concerning her discussion with DE in a confident and self-assured manner. She testified that at the end of one of her shifts in late November 2009, she had asked DE questions about staging and a new procedure for the handling of Y50s prior to asking him the question about unionization. As this was the premise for CT's approach to DE in the first place, the Board questions whether the alleged discussion regarding the union took place at the alleged time,

given that the procedure for handling the Y50s had last been changed in April 2009. The time period for the alleged conversation is important, as the union's organizing campaign had begun in September 2009 and concluded with the filing of its application for certification on February 12, 2010.

[100] CT's recollection of the timing of the conversation with DE is further undermined by the conflict in her evidence as to when she reported the content of the discussion to the other inside organizers, including RM. In her oral testimony, CT indicated that she reported the conversation on the day it happened, a weekday, when she called RM on her cell phone from the bus on the way to the subway after her shift. This testimony contradicted her sworn affidavit, in which CT stated that she reported the conversation to RM on a Sunday. At various points in the Board's proceedings, CT suggested that the conversation took place at various times, namely, early, mid or late November. The words she attributed to DE in examination-in-chief were different than those attributed to him in cross-examination, and both were different from those attested to in the affidavit. These conflicting factors cast doubt on the likelihood that the statement was made at the critical time in the union's organizing campaign that it is alleged to have been made and on whether it was made at all.

[101] Nevertheless, even if the statement attributed to DE was made by him at some point in November 2009, the Board is of the opinion that it does not constitute a violation of the *Code*. CT indicated that she approached DE "in confidence" because she felt she could trust him for an honest answer. DE was aware of the union organizing campaign and that there were restrictions on the statements that managers could make during such a campaign. The circumstances described by CT suggest that, if it occurred, this was a confidential discussion between two co-workers. CT did not testify that she was intimidated by the statement or that it caused her to cease her support for the union. The alleged statement was a one-time event, and was not intended to be heard by FXG employees generally or circulated to them. It was made in the context of what was admittedly a confidential conversation between two people who had a good working relationship. Accordingly, the Board is unable to find that the statement, if it was made, was intended to or did have the effect of intimidating or threatening any FXG employees.

C–Allegation that management representatives conducted captive audience meetings and interfered with the union organizing campaign

[102] The union alleges that FXG representatives held captive audience meetings with the administrative associates on November 23 and 24, 2009 that intimidated employees and caused some of the employees to withdraw their support for the union. It alleged that, at the meetings, the employer informed the employees that the company had a policy prohibiting union solicitation on and off company premises at any time, because it constituted harassment, that any such solicitation would be subject to investigation and that appropriate measures would be taken.

[103] The union also alleges that during the November 23, 2009 meeting, RM asked whether the employer would close the shop if the union came in and manager LR refused to answer the question. The union alleges that LR told the employees in attendance at the meeting that they could ask the union to return their membership cards, and provided the address (URL) of a website that provided information on that subject, and that anyone with questions could obtain further information from their managers.

[104] RM testified that on November 23, 2009, a normal workday, her manager called her to an impromptu meeting of all the administrative staff in the Gateway office. All of the administrative employees at work were in attendance, as well as several managers including JM, LR, Ms. Tara Darby (TD) and Ms. Sabrina Suite (SS). She stated that approximately 20 to 30 people were in attendance and the meeting was chaired by LR.

[105] RM testified that LR stated that the employer was facing a union drive with a third party organization. The employer valued its employees and the communications it had with them and the company would prefer to deal with its employees one on one as opposed to with a third party organization. The employer had received complaints from co-workers who had been contacted at home to join the trade union. LR indicated that the employer has an anti-solicitation policy that governs its employees. If employees feel they are being harassed at home, the employer believes it would fall under the harassment policy.

[106] RM testified that she raised her hand and asked whether it was illegal if she was called at home and asked to join a union. LR said no. She then asked what would happen if someone called her and started talking about a union and she did not say that she was uncomfortable, but then complained to the company. LR said that the employer would conduct an investigation and deal with the matter accordingly.

[107] RM informed LR that one of the managers had said that the employer would shut the building down if the union got in, and asked him whether this was "what we can expect if we join a union?" LR allegedly replied "We are responsible for the logistics of this company and that's what we are here to do." She testified that she then said: "I think it is a valid concern if I sign a card and FedEx closes the place down." LR replied that he had already answered the question.

[108] RM testified that LR then proceeded to speak of a website that provided information on how to withdraw union membership cards, and that employees could go to their managers and ask about that website. RM testified that she felt embarrassed that she had been dismissed in front of her peers. She felt intimidated that she had done something wrong by wanting to join a union.

[109] RM subsequently contacted the union organizer, Mr. John Hull. Mr. Hull and RM testified that after the November meetings, it became more difficult to get employees to consider signing a union card. However, in cross-examination, Mr. Hull admitted that the CCT was not specifically targeting the FXG administrative associates and did sign up new members subsequent to the meetings.

[110] In cross-examination, RM acknowledged that she had met with the union, was instructed on how to sign cards and how to run a successful campaign. She acknowledged that she had known about the union years earlier. It was suggested that she knew employers could not make threats, coerce or intimidate employees and, if an employer threatened job security and came out and said it would close the company, it could constitute a significant violation of the *Code*. She did not disagree.

[111] It was suggested to RM in cross-examination that this meeting was not about the company staying open or closing, and that the first mention made of closing the facility came from her. It was suggested that she was instructed by the union to plant the question. She answered no, as she had not anticipated the meeting.

[112] DC2, an administrative associate and an inside organizer for the union, testified that on November 23, he was outside shunting trailers when one of the managers, Ms. Felicity Breiter (FB), asked him to attend a meeting in the back office. All of the full-time and afternoon part-time administrative associates were present, and he saw a number of managers. He testified that the meeting was chaired by LR, who talked about the employer's solicitation and anti-harassment policies. Apparently, several employees alleged they had been called at home and harassed to sign union cards. He testified that RM, as well as other employees, had asked questions at the meeting. He could not say exactly what the questions were, as he was more intent on listening to LR's answers. DC2 testified that LR stated that some employees had advised management that they were being called and harassed at home. LR stated that any shutdown of the company would be based on profitability and logistics, not on whether the union got in.

[113] LR indicated that, during the time in question, he was responsible for all facets of Human Resources for FXG's Canadian operations. Although his office was some 10 kilometers from the Toronto hub, he spent considerable time at that facility. He testified that the November 23, 2009 meeting was prompted by concerns he had received from employees about being contacted at work and at home to join the union. They indicated that they felt harassed and intimidated and it was affecting them at work. LR testified that the purpose of the meeting was to ensure that employees were aware of existing company policies and knew that they had a choice. The message LR said that he wanted to convey to employees was that some employees had raised these concerns to the company; that the company had a solicitation and distribution policy and an anti-harassment policy that governed employee conduct and that the company expected the policies to be followed. LR testified that as he was responsible for the HR function in Canada, it fell under his responsibility to address this issue with the employees; he had met with this group from time to time in the past.

[114] The November 23, 2009 meeting was attended by the administrative associates who were working that afternoon, as well as by management representatives JM, SS and Mr. George Rajic (GR). LR advised the administrative associates that employees had expressed concerns to the employer about being contacted by the union at work and at home. LR told them that individuals have the right to join or not to join a union but that the company had a solicitation and distribution policy as well as an acceptable conduct policy. He stated that, if people felt intimidated or threatened into signing a membership card, they could go to the union or to the Board, but that managers could not help them with this, they would have to do it on their own. LR says that he also mentioned the anti-harassment policy and the employer's internet site, where employees could find copies of all the employer's policies. LR denied providing the URL to a website containing information on how to withdraw a union membership card.

[115] LR testified that the meeting lasted about 15 minutes. He was asked a number of questions by employees, including RM, who asked whether FXG would close the doors if the union got in. LR testified that he told her that FXG does not make decisions to open, close or relocate a facility on the basis of there being a union or not, but that those decisions are made on the basis of profitability, strategy and position in the marketplace. LR testified that RM pursued the question again and he gave her the same answer again. He stated that he responded the way he did because it was the truth, and he knew everyone in the room was waiting for his response and wanted everyone to hear clearly his answer to the question. Given his experience with trade unions, he expected the question would arise during the course of the organizing campaign and was therefore prepared for it. LR said he knew that his response could have serious consequences. LR testified that the intention of the meeting was to let employees know that concerns had been brought to the employer's attention and that the company had policies that they needed to be aware of.

[116] JM testified that he was present at the November 23 meeting with the administrative associates. Management had been receiving complaints from employees, and the purpose was to address the application of the employer's anti-harassment and solicitation/distribution policies. He testified that the atmosphere of the meeting initially was like any other, however it became tense when questions were asked about the facility closing. Management did not want to say anything wrong; did not want to breach the law or do the wrong thing. He stated that LR did not refer to an

anti-union website but did refer to the in-house intranet, where employees could access the company's policies online. When asked why the November 23 meeting was called on such short notice, JM testified that it was scheduled quickly because there had been multiple complaints from employees claiming to be harassed and when the employer received a further complaint on November 23, 2009, it decided it needed to address the concerns quickly and therefore called the meeting.

[117] RM testified that the day following the November 23 meeting, several part-time workers who were not present on the November 23 meeting or who had left before noon on November 23 were called to a meeting. JM confirmed that on November 24, 2009, he met with the administrative associates who had not been present at the previous afternoon's meeting, to give them the same consistent message, which he did. He was not asked any questions, and the meeting lasted only three to four minutes.

[118] The union did not adduce any evidence with respect to what transpired at the November 24 meeting.

[119] RM also testified that, after November 23, 2009, she observed managers coming around the workplace more often. She alleged that she saw senior managers BW and Mr. Mike Panasiak (MP) bringing employees donuts and talking to them more frequently than usual.

[120] The issue for the Board is whether the meetings held by the employer on November 23 and 24, 2009 constituted interference with the formation of the union or an attempt to intimidate or coerce employees to refrain from becoming members of the union.

1–Position of the Union

[121] The union argued that the union drive was going well at the Toronto hub until late November 2009. In the union's submission, its campaign stalled in late November after the two captive audience meetings. It alleges that the employer normally holds meetings on Thursdays and schedules them in advance. These two meetings were convened on short notice, were held on

company time, and attendance was mandatory. It alleges that the employer intervened directly in the organizing drive when it held these captive audience meetings of the administrative associates.

[122] Although there was contradictory evidence about who was present and what took place, the union argues that there is some common ground in the testimony. The meeting was held on short notice; the meeting concerned union recruiting activities; there was a reference to employees being called at home; there was an implied threat of discipline; RM asked questions of LR about possible closure of the facility. The union suggests that LR's refusal to answer RM's question directly implied that the employer would close down if the union campaign was successful. The union alleges that the November meetings had a chilling effect on the organizing campaign as people would not sign cards and some asked to have their cards returned.

[123] Despite the employer's denial of various conversations and statements, the union argues that the union witnesses are more credible, and the Board should prefer their evidence.

2–Position of the Employer

[124] The employer denies the union's characterization of the November meetings and argues that meetings between FXG managers and employees are a regular part of the employer's commitment to open and honest communication. It argues that FXG convened the November meetings solely to make the employees aware of the employer's existing policies, as a result of receiving complaints from employees who reported feeling harassed and pressured to sign union membership cards.

[125] The employer denies that FXG has a policy of prohibiting union solicitation on or off company premises. To the contrary, as the employer explained at the November meetings, discussions about unions, including solicitation of memberships, are permitted both at the workplace and away from the workplace, as long as the activity does not disrupt employees' work or constitute unlawful intimidation.

[126] FXG argues that, contrary to the union's claim that LR refused to answer RM's question concerning the potential closure of the Toronto facility, LR answered the question directly by explaining that FXG does not make decisions about whether to close a location based on whether or not employees are represented by a union, but on the basis of profitability, strategic objectives and position in the marketplace.

[127] Regarding the allegations that there was a greater management presence in the Gateway facility following the November meetings, TD, the Employee Relations Manager at the facility during the period of the union organizing campaign, testified that it was not unusual for senior management to be present at the facility, as the district management offices were only 12 minutes away. Senior management is specifically mandated to promote employee engagement. In particular, she stated it was not unusual for senior management to be present when there were concerns such as those that had been raised by employees about being intimidated, both at home and in the workplace.

3 – Board's Conclusion

[128] The Board finds, on a balance of probabilities, that the meetings held on November 23 and 24, 2009 were called to address the concerns reported to management by some employees that they were feeling harassed and intimidated by the union organizing campaign. The employer's intent was to inform employees of the company's solicitation and anti-harassment policies, which govern employee conduct in the workplace. The Board accepts the evidence of LR that he prepared carefully for the meeting and that he did not inform the employees that FXG prohibits union solicitation on or off company premises. LR's evidence was corroborated by JM and DC2, one of the union's inside organizers.

[129] The Board also accepts LR's evidence that he referred employees to the company's intranet site, where its anti-harassment and solicitation policies could be accessed, as opposed to a website that provided information on how to withdraw union membership cards. The Board also accepts LR's evidence that, in response to RM's question, asking whether the company would shut its doors if the union got in, he stated that those decisions are made on the basis of profitability, strategy and position in the marketplace, and not on the basis of there being a union or not. Again, this evidence

was largely corroborated by the evidence of DC2, as well as JM. Based on these findings of fact, the Board concludes that LR's comments during the November 23 and 24, 2009 meetings were not intended to, and did not, constitute intimidation, coercion or undue influence within the meaning of the *Code*.

[130] The Board finds, on the balance of probability, given the union organizing drive together with the heightened tensions in the workplace, that there likely was an increased presence of senior management at the facility at various times during the campaign. There is no evidence, however, that this increased presence of senior management, in and of itself, constituted coercion, intimidation, threats, promises or undue influence on employees. There was no evidence led by any employee to this effect. Accordingly, the Board finds no merit in this allegation.

D–Allegation that FXG amended its policy on solicitation and distribution in the workplace in response to the union organizing campaign

[131] LR testified that FXG has a long-standing company policy with respect to solicitation and distribution. Non-employees, with certain exceptions, are prohibited from soliciting and/or distributing on FXG property. Individual employees may solicit other employees, provided solicitation does not disrupt their work or the work of others. Employees may only distribute literature or other materials during non-work time in non-work areas to non-working employees.

[132] In FXG's policy, solicitation is defined as any form of invitation, petition, or request for: support [financial or otherwise]; membership; subscriptions; money; gifts; other things of value; or the purchase of merchandise, tickets, or services.

[133] Distribution is the handing out, posting, or leaving of any literature, merchandise, or thing that is not distributed in the normal course of the business of the company.

[134] The copy of the policy filed with the Board indicates that it was revised on November 23, 2009.

[135] LR was asked if FXG amended its distribution policy in response to the union organizing campaign. He testified that the sole revision that was made to the policy in November 2009 dealt with the collection of cash for charitable events. This section was added to address the collection of cash at corporate sponsored fund raising events because there had been instances when cash had not been accounted for. The amendment to the policy applied to all of the offices of FXG in North America.

[136] The union did not present any evidence to refute the employer's explanation of the change that was made to its solicitation/distribution policy in November 2009.

1–Board's Conclusion

[137] The Board has reviewed the copies of the pre- and post-November 23, 2009 policy that were entered into evidence and satisfied itself that the sole revision to the policy at that time was, as LR testified, directed at the collection of cash at corporate sponsored fund raising events. The Board finds as a matter of fact that the company's solicitation and distribution policy was not changed in response to the union's organizing campaign. As there has been no violation of the *Code*, the Board dismisses this portion of the complaint.

E–Allegation that FXG hired seven new clerical employees, without business justification, in order to artificially enlarge the bargaining unit and make it more difficult for the union to recruit a majority of the employees

[138] RM testified that seven employees were hired as administrative associates in November and December 2009. She identified some of them as Mr. Dean DaCosta (DD), KC, Ms. Barbara Monks (BM2), Ms. Julia Cousins and Ms. Mary Johnson. She stated that two of these individuals, DD and KC were hired from within the company, as they were previously working as package handlers. RM said BM2 had worked at FXG ten years earlier. She alleged that the others were hired from outside the company and that when these employees came into the Gateway, there was not enough work for them to do, requiring the manager to reevaluate and reassign work on an ongoing basis.

[139] TD provided extensive testimony in response to this allegation. The evidence she presented indicated that the company had hired only one new employee during the period identified by the union, a part-time administrative associate who was hired on December 14, 2009. TD produced and reviewed the Human Resources Information Systems staffing records for administrative associates from the period prior to and after the union organizing campaign began in mid-September 2009. This evidence demonstrates that, overall, there was a net increase of only one part-time position in the administrative associate group during the period June 1 to December 31, 2009. Although there had been staffing actions during the June to December period, the majority of them were replacements for employees who had resigned, been promoted or otherwise left the workforce.

[140] TD testified that the budget for administrative associates provided funding for the equivalent of 44 full-time positions. Even with the new hire in December, the complement at the end of the year was 38 positions and the equivalent of six full-time positions were vacant.

1– Board's Conclusion

[141] On the basis of the evidence presented, the Board finds that there is no merit to the union's allegation that the employer was artificially enlarging the bargaining unit, in violation of the *Code*. This portion of the union's complaint is dismissed.

F–Allegation that FXG encouraged and supported anti-union activities by two administrative associates

[142] The union alleged that on Tuesday, December 8, 2009 around 1:00 p.m., two clerical employees, CH and Sandeep Teja (ST), were permitted by the employer to conduct anti-union solicitation during their work hours. These employees allegedly stood outside on company property, holding a sign asking employees to reject the CCT; approached employees coming into or leaving work and asked if they supported or opposed the CCT; and when they finished their demonstration, they reentered the workplace in the company of a senior manager.

[143] RM testified that, on December 8, 2009, she learned that two colleagues, ST and CH, had been outside the facility with anti-union signs, standing in the same location as the union had used. RM stated that, when she was going out for her break at 2:30 p.m., she observed these employees coming back into the building with a manager, identified as DC. They were carrying a folded paper sign. She stated that the sign read: "if you don't want the Teamsters honk your horn."

[144] In cross-examination, RM acknowledged that she did not see the picketing, nor did she personally see the wording on the signs. She maintained that the two employees performing this picketing activity were on company time, and that it took place at 2:30 p.m., and not at one o'clock, during the lunch hour.

[145] CH testified that, during December 2009, she worked from 6:00 a.m.until 3:00 p.m., with a lunch break between 12:00 and 1:00 p.m. Her lunch hour was flexible, because she worked in an office dealing with customers. She testified that on December 8, 2009, she and a co-worker, ST, protested against the union on their lunch break. She had made two signs at home that read: "no union". She stated that she paid for the material to make the signs and brought them in to work on the bus and kept them rolled up under her desk until she and ST went outside. They protested outside the facility because she was told by FXG security that she could not protest on FXG property. She and ST walked up and down with their signs for a period of some 15 to 20 minutes. She identified her signature in the security sign in/out sheets to the facility for December 8, 2009, noting that she signed out at 12:48 and back in at 1:10 p.m.

[146] CH testified that no one from FXG management encouraged her to protest against the union, nor did management assist or provide her with any resources. She saw DC at the security office when she was coming back in from picketing. DC did not encourage her or provide her with any assistance in carrying out the protest. DC was just returning from an appointment outside the facility.

[147] ST, a full-time service agent employed by FXG since 2006, testified that on December 8, 2009, he protested against the union during his lunch break, together with CH. He testified that he was not pressured or influenced by management to do so, nor did the protest take place on company time.

[148] ST's shift commenced at 6:00 a.m. and ended at 3:00 p.m.. His lunch hour is not scheduled at a fixed time, because he deals with customers. He usually has lunch for one hour between 12:00 and 1:00 p.m., but he has flexibility. He testified that on December 8, 2009, he went to lunch at approximately 12:45. He was told by a security guard that he could not protest on company property and therefore he and CH went out near Goreway Drive. As it was very cold, they only stayed out for approximately half an hour. No one at FXG encouraged them to protest nor did they report back to anyone in management. When asked why he engaged in the protest, ST stated "Canada is a free country. People are free to express their feelings. That's what I did."

[149] ST was questioned regarding the entries in the security sign in/out log book for the day in question. There is an entry for his signing in at the commencement of his shift and for signing out at the completion of his shift. However, the in/out times for his lunch break are not in his handwriting. ST is of the opinion that an unknown person had made those entries. He testified that his actual times in and out for lunch were closer to CH's and he has no idea who changed the log or why.

[150] In cross-examination, ST testified that CH had asked him if he wanted to join her in protesting the union; that she prepared the signs and gave them to him to wear. He had initially put the signs on when they were in an area near the security station, but then was told he would have to leave the company's premises. He recalled seeing DC when he and CH re-entered the building after the protest.

1–Position of the Union

[151] The union argues that it is unbelievable that employees, of their own volition, would make anti-union signs, picket the facility and come back in with a manager and call it a coincidence. It asserts that this activity took place because of employer interference with the union organizing drive. The union points to a conflict in testimony between the evidence in chief, when CH stated that she did not speak with anyone while she was picketing and in the evidence in cross-examination when she admitted talking with Mr. Brad Malcolm (BM).

2–Position of the Employer

[152] The employer argues that the evidence supports the conclusion that the employees acted independently of the employer. They wanted to exercise their own rights to free speech. The security logs confirm their evidence that they were picketing during their unpaid lunch hour. The employer argues that it is significant that, when the employees were on FXG property, they were told to leave. The employer argues that it was pure coincidence that DC met CH and ST at the security office when they were returning to work after the protest. It submits that there is no evidence that the employer was behind the protest.

3–Board's Conclusion

[153] The Board finds as a matter of fact that CH and ST were exercising their freedom to express their views with respect to union representation outside FXG premises on their unpaid lunch break and that they undertook this protest on their own initiative. There is no evidence to support the allegation that they were acting with the permission, encouragement or support of the employer. The Board accepts the evidence of CH that the two employees' reentry into the building at the same time as DC was coincidental. Accordingly, this portion of the unfair labour practice complaint is dismissed.

G–Allegation that the union's inside organizers were subjected to differential treatment

[154] On January 13, 2010, DC2 and RM filed individual unfair labour practice complaints against FXG. The complaints were also adopted by union. On January 25, BM filed a similar individual unfair labour practice complaint against FXG. All three employees allege that each was ordered not to discuss or reveal the content of the meeting with anyone and threatened with disciplinary measures if they did. They believe that they were subjected to this investigation, meeting, threats and intimidation because of their union activities.

[155] Specifically, DC2 testified that on December 4, 2009, he was called into a meeting with TD and LR in the training room. He was advised that a complaint had been made by another employee, SB.

DC2 was asked by LR if he was trying to ostracize SB. She reportedly felt that he was being coerced by a co-worker to ostracize her. He denied ostracizing SB and indicated that she was still talking to him. LR advised him that the meeting was confidential, and if he did discuss what had occurred at the meeting, he could be disciplined. DC2 felt that he was subjected to the investigation because he was an inside organizer and because of who he was hanging around with at work, since he was a friend of RM's.

[156] In cross-examination, DC2 acknowledged that there had been no discussion of his activities as a union organizer during the meeting. He acknowledged that he had not been disciplined or counseled and that, despite formal identification as being a union organizer, he was still an FXG employee in the same position.

[157] BM testified that on December 11, 2009, he was asked to attend a meeting with TD and LR. He was asked questions with respect to his work relationship with SB. She claimed that he was rude to her, ostracized her and made her time at work uncomfortable. BM responded that his job did not coincide with SB's that frequently. He stated that he was shocked and surprised by the allegation, as he did not think he had a problem with SB. The employer representatives advised him that the discussion was confidential. BM testified that he believed that he was interrogated because he was part of a union association and because of his affiliation with DC2 and RM, who were known union organizers. BM's union affiliation was not well known at the time of the interview.

[158] In cross-examination, BM acknowledged that there was no discussion of his union activity. He had no information that SB was assisted in her complaint by anyone else. He acknowledged that he had neither been disciplined nor counseled following the interview. He confirmed that, at the time of the interview, he had not been identified by the union as an inside organizer.

[159] RM testified that on December 21, 2009, she was called into a meeting with TD and LR. LR advised her that SB had made a complaint alleging that she was being ostracized in the workplace by RM and her friends. RM was told that the interview was confidential, that she was not to speak to anyone about it, and that if she did, it could lead to discipline. RM was asked whether she was encouraging her colleagues to laugh at SB and to ostracize her. RM denied the allegation. She was

asked if she knew why SB was feeling this way. RM informed the employer she had had an argument with SB outside of work that resulted in SB alienating herself from her co-workers. RM testified that she believed that she was subjected to the interview because of her union affiliation and that she was a target of FXG, who wanted to see how miserable they could make her life.

[160] In cross-examination, RM acknowledged that she had had a friendship with SB and that the relationship had fallen apart outside of the workplace in September 2009. She agreed that she had been involved in a number of complaints and that, in the course of the investigation of each of these complaints, she was advised about maintaining confidentiality, and also advised about not retaliating against persons making complaints and was informed that employees could be subject to disciplinary action if they did not comply with these conditions.

[161] RM acknowledged that SB's complaint was not about union organizing activity, but rather the alleged ostracizing of the complainant. She agreed that, despite the fact she was identified as a union organizer, she was not disciplined or counseled as a result of the complaint. She stated that her perception was that she was being targeted, as she was one of the last to be interviewed. She testified that, prior to the union organizing drive, she had never been called into the office.

[162] SB, an administrative associate and FXG employee since 2005, testified that she and RM were good friends long before they worked at FXG. However, in September 2009, an incident of a personal nature occurred outside of the workplace that led to a deterioration in their relationship. A week after the incident, SB was given a verbal warning by her manager for taking extra time away from work, allegedly based on a complaint lodged by RM. This led to an acrimonious telephone conversation at the end of November, during which SB claimed that RM was behind the complaint. RM allegedly stated that the basis for the complaint was true and that SB was accorded favouritism. She described the relationship thereafter as horrible.

[163] SB claims she was ostracized by RM and her friends, namely BM and DC2. SB said that when she walked into a room where these persons were present, the conversation immediately ceased. She described it as a lot of high school behaviour. At the end of November 2009, SB complained to management about the fact that she was being ostracized. SB testified that her complaint had nothing

to do with union activity. At that time, she was supporting the union, had signed a membership card but had not attended any union meetings. Her complaint was investigated by TD and she was advised that each of the parties denied ostracizing her. However, following the investigation, DC2 and BM's attitude towards her did warm up. SB testified that she was not happy with the length of time that management took to deal with her complaint.

[164] TD testified regarding FXG's complaint process. Employees can lodge a complaint with Human Resources or through the "FedEx Alert" system. Complaints can be anonymous. The employer has a structured process to investigate all complaints. Harassment complaints are taken particularly seriously. After the complaint is logged in, a primary investigator (usually the HR Manager or ER Manager) completes an investigative report form. It is routine for an interview to commence with a review of the employer's policies, the need to maintain confidentiality and a warning that there is to be no retaliation. The completed report form and recommendation for remedial action is sent to Legal Services and the HR office in the U.S. The length of time that it takes to complete an investigation and report depends on a number of factors.

[165] TD testified that, with respect to SB's complaint against RM, she and LR interviewed numerous people who were alleged to be engaged in ostracizing SB at RM's direction. The investigation took approximately two and one-half months to complete, and the complaint was held to be unfounded.

[166] LR was asked about the unfair labour practice complaints filed by RM, DC2 and BM and whether they were interrogated, threatened and intimidated by the employer because of their union activities. LR acknowledged meeting with these three employees in December 2009, but stated that the interviews were the result of the complaint filed by SB and her concern with respect to how she was being treated by fellow employees. LR testified that he was required to investigate the complaint in accordance with company procedure, as he was responsible for the human resource management function at FXG.

[167] LR testified that, after conducting the investigation, he concluded that there had been no violation of company policy and did not recommend imposing discipline. As a result, no disciplinary action was taken. At the time of the interviews, only DC2 and RM had been identified as union

organizers. LR testified that the topic of the union or the employees' organizing activities was not raised in any of the interviews.

1–Position of the Union

[168] The union argues that RM, DC2 and BM were subjected to the investigation and mistreatment because of their union organizing activities. It alleges that the company was trying to provoke something and was looking for some reason to discipline them. It suggests that SB's motives are suspect because of her intense personal dislike for RM.

2–Position of the Employer

[169] The employer contends that it simply conducted a routine investigation into SB's complaint that she was being ostracized by the complainants. It states that the investigation had nothing to do with the complainants' respective union organizing activities. Nothing was mentioned during the interviews about the union, nor were any of the employees involved disciplined or counseled as a result of the complaint. The only caution mentioned during the interviews was the standard one related to the confidentiality of the interview process, in accordance with the company's policies.

3–Board's Conclusion

[170] Section 94(3)(*a*)(I) of the *Code* provides, *inter alia*, that no employer shall refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person because of that person's union activities.

[171] In *Denis Rousseau*, *supra*, the Board reviewed its approach to issues arising in the context of unfair labour practices filed pursuant to sections 94(3)(*a*)(I) and 96 of the *Code* when employees allege that they have been dismissed or disciplined because of union activities. At paragraph 95 of the decision, the Board refers to *National Pagette* (1991), 85 di 1 (CLRB no. 862), where the CLRB stated as follows:

> When the Board examines the merits of an unfair labour practice complaint, particularly one involving dismissal, its role is very different from that of an arbitrator. The reasons for the decision to dismiss an employee are relevant only insofar as they reveal, through their nature, their occurrence in time, their severity or their impact, that the decision was motivated by anti-union animus. In discharging the reverse onus of proof imposed in section 98(4) of the *Code*, the employer must show that its reasons for dismissing an employee are **in no way** motivated by anti-union animus. ...
>
> (pages 9-10, emphasis in original)

[172] Section 98(4) of the *Code* provides that, with respect to complaints under section 94(3), the burden is on the employer to refute, on a balance of probabilities, the allegations giving rise to the complaint, namely that it was aware of the complainant's union activities and that those activities were a factor in its decision to terminate or discipline the employee.

[173] The Board finds that the three employees were interviewed in light of SB's complaint to management that she was being ostracized and that the interviews were conducted in accordance with long-standing company policy and procedures for the investigation of employee complaints. There is no evidence that LR threatened these employees or discriminated against them in any way due to their union activities or otherwise. He ultimately concluded that there had been no violation of company policy and, as a result, no disciplinary action was taken against any of the employees.

[174] The Board concludes that there is no substance to this portion of the unfair labour practice complaint.

H–Allegation that FXG intimidated employees

[175] On January 25, 2010, Ms. Shamarra Besley (SB2) filed an individual unfair labour practice complaint against FXG pursuant to section 94 the *Code*, alleging that, in late November 2009, on or around 3:30 p.m., she was called into a meeting with all the other pre-sort package handlers then at work, at which time their manager, JM, said approximately the following: "we know the Teamsters are out there with their tactics, they can't guarantee you anything. We know who are signing cards and we can find out."

[176] SB2 did not appear and testify in support of her complaint.

[177] Instead, CT appeared and testified in support of this complaint. She stated that, around the same time period as her discussion about unionization with DE in November 2009, outlined above, she attended a pre-sort meeting on the day sort at around 3:30 p.m. involving all of the managers and JM. JM was discussing incoming freight and injuries in the workplace. She stated that usually all of the managers are present at pre-sort meetings, but that JM does not normally attend these meetings. She testified that, at the end of this particular pre-sort meeting, he said: "the Teamsters are out there with their tactics. I know people are signing cards, and I can find out who." She testified that this made her feel nervous and threatened.

[178] In cross-examination, CT acknowledged that she could not narrow the date of the meeting to any part of November. She believed that the meeting lasted five to ten minutes and that all of the managers were there. Although she was not certain, she thought that the managers present included Mr. Tomas Lumsden (TL) and MP. She stated that perhaps 25 or more package handlers from various areas of the building were present, although she did not know their names. As pre-sort meetings are mandatory, everyone who was working the day shift on that day would have attended. The meeting started with a rundown of the freight for the day and a talk about safety. TL spoke for some three to four minutes about the freight and the injury report. TL said that it was going to be an average day for freight and that they were okay on injuries, although she did not remember his exact words.

[179] She testified that, after TL finished but before the meeting ended, JM made the statements she had described previously. The meeting wrapped up with everyone going to their assigned work areas.

[180] MP is a sort manager at the FXG Mississauga facility, a position he has held since September 2008. He has been an FXG employee since 2005. He reports to JM, the Senior Manager of the Toronto hub, and has four service managers reporting to him. The service managers supervise the package handlers.

[181] MP testified that, throughout the month of November 2009, he was assigned to work the twilight/midnight shifts. The twilight shift starts at 7:30 p.m., and the midnight shift starts at 11:00 p.m. The day sort commences at 3:30 p.m. Managers come in earlier, prior to the start of the

shifts. The evidence showed that, throughout November 2009, MP started work at 6:30 p.m. and finished at 3:00 a.m.

[182] MP testified that a pre-sort meeting is held at the beginning of each shift. Its purpose is to convey information on expected volumes, safety tips etc. They are generally held by the service managers. MP testified that he did not attend any of the day shift pre-sort meetings in November 2009. He reviewed the attendance records for November 2009, filed as an exhibit with the Board, and confirmed that he signed in and out every day at the security guard office and the earliest he came into work was 6:15 p.m. He also confirmed that, based on a review of the records, he did not attend any day pre-sort meetings at 3:30 p.m. during November 2009. Therefore, in his view, CT's allegation that he attended a day shift pre-sort meeting in November 2009 was not accurate. MP testified that he had never attended a meeting of any kind at which JM said the words attributed to him.

[183] TL is a service manager at the FXG Mississauga facility, has held that position since 2008 and has been an employee since 2006. He testified that during the month of November 2009, he was working on the twilight and midnight shifts, typically starting work 7:00 p.m. and finishing between 2:30 and 3:00 a.m. the following morning. He reported to MP.

[184] TL testified that he did not attend any day shift pre-sort meetings during November 2009. He reviewed the sign-in logs for the month of November 2009, and confirmed that the earliest he came in to work was on November 25, when he came in at 6:15 p.m. Therefore, he could not have attended the day shift pe-sort meeting at 3:30 p.m. in November, as alleged by CT. TL testified that he had never attended any meeting at which JM said that management could find out who had signed union cards and has never heard JM say this.

[185] Mr. Ken Odamura (KO) had been a package handler at FXG since 2003 and retired in October 2010. In November 2009, he worked as a northbound package handler on the day shift. During this time, he worked with CT. He testified that he had never attended any meetings at which

JM said that management could find out who signed a union card, and never heard any managers talking about the union. He also stated that the employees were not pressured by the company not to join the union.

[186] JM testified that he became the hub manager at the FXG Mississauga facility in 2007. This is the most senior position in the facility and he reports to the Managing Director for Ontario Operations. JM confirmed that he and his managers have meetings to talk with employees concerning company policies on a frequent basis. He testified at length concerning the nature of these meetings, and advised the Board that he is directly involved in these meetings, as a large part of his role is employee engagement. JM testified that he never made the statement attributed to him by CT.

[187] In cross-examination, JM confirmed that he does not attend all pre-sort meetings. He emphatically denied making the statement attributed to him, either to a group or one-on-one to anyone.

1–Position of the Union

[188] The union argues that CT had no interest in inventing such a story. It argues that her testimony makes sense, as the company was reacting to the union organizing drive. They wanted it to stop, and they were successful.

2–Position of the Employer

[189] The employer argues that CT's testimony cannot be believed. She testified that managers MP and TL attended the day shift pre-sort meeting in November 2009 at which the alleged statement was made, and provided detailed information as to what TL said at that meeting. However, the evidence demonstrates that during November 2009, neither TL nor MP were ever in the building at the material time, as they were working on the twilight/midnight shifts. This evidence, the employer argues, is fatal to CT's credibility. The only other package handler called as a witness, KO, a retiree with no personal interest in the dispute, testified that neither JM nor any of the other managers talked about the union during day shift pre-sort meetings during the month of November 2009.

3– Board's Conclusion

[190] CT testified in some detail, not only about her recollection of JM's statement at the end of the five to ten minute pre-sort meeting in November 2009, but also about TL's alleged three to four minute discussion of the freight for the day and issues relating to safety. She also recalled that MP asked her to attend the meeting. However, both TL and MP testified that, during the entire month of November 2009, neither of them worked on the day shift or attended any day shift pre-sort meeting. Their evidence was corroborated by the daily sign in/out sheets kept in the ordinary course of business by FXG.

[191] None of the other 25 employees who worked on the day shift in November 2009 came forward to support CT's testimony. As the evidence supports the employer's version of events, the Board is forced to conclude that CT was either mistaken or was not telling the truth when she gave her evidence. As a result, the Board finds that, on the balance of probabilities, the statement attributed to JM was not made and therefore dismisses this aspect of the complaint as being without merit.

I–Allegation that KC harassed and intimidated fellow employees during working hours

[192] On February 25, 2010, the union added KC as a personal defendant in file 27851-C. The union alleged that from on or about February 18, 2010, KC had harassed and intimidated fellow employees during working hours to convince them to withdraw their support of the union and to ask for the return of the union membership cards they had signed.

[193] RM testified that, in mid-February 2010, KC and another administrative associate, Ms. Rajinder Lally (RL), were going around to various employees and asking them if they had signed union membership cards. RM stated that her shift began at 8:30 a.m. and that she saw KC speak to five other employees after 9:00 a.m. on the day in question. She testified that she overheard a conversation between KC and one of the employees, Ms. Dianne Stacey (DS) in which he asked her if she had signed a card. He also told her that if she wanted her card back, she could ask for it. RM testified that

she felt intimidated because KC could could do this during working hours, with managers watching, and no one was disciplining him. She felt threatened, as it was known that she was the primary union organizer.

[194] DS, an employee for over four years and a senior administrative associate, testified that KC came into the office where she was working around 8:25 or 8:30 a.m., just before her shift started, and asked if he could talk to her about the union and what she thought of it. She told him that it was an individual choice and it was none of his business if she had signed a card. When he said the union was lying, she told him to get out, but he stayed. He told her that he was representing FXG and that she could get her union membership card back. She told him that she knew her rights and he should get out of her office or there would be some serious issues.

[195] DS could not recall what day of the week this incident had taken place, although she thought it was on a Thursday or a Friday in February 2010. Early in the week following the conversation, RM asked her to make some notes, although she could not remember word for word everything that was said. DS could not recall whether there was anyone in the outer office who could have overheard the conversation, and did not recall seeing RM there. DS was asked what KC meant when he said he was representing FXG. She answered that she had no idea, although it startled her when he said this. There was no other information that she was aware of that suggested he was representing FXG.

[196] KC was hired as a part-time package handler in April 2007 and was appointed to a part-time administrative associate position in November 2009. He became a full-time administrative associate in May 2010. In November 2009, KC was 19 years old. He testified that, initially, he was supportive of the union and had signed a membership card. He had a good working relationship with RM, the main inside organizer for the union. However, his views of the union changed and he had shared his views with RL and another employee, Hyancinth Gregory (HG), on February 17, 2010. The following day, RM made two complaints about him to management. He speculated that HG, who was a union supporter, had informed RM of his change in views.

[197] Based on his change in views, KC decided to try to get his union membership card back. He spoke with John Hull at the CCT and was told to call the Board. He denies that he spoke to any other employees about getting their union membership cards back, although he acknowledged that he had a conversation with DS on the morning of February 19, 2010. He was telling her about his views of the union. He did not talk to her about getting her card back. He acknowledged that he told her that he represented FXG, meaning that he sided with FXG in the sense that he did not want a union. He did not mean that he was acting on behalf of management. He asserted that he did not have any discussions with management whereby he would encourage employees to get their cards back. He contended that he did not harass anyone at any time.

[198] RL, a senior administrative associate and an FXG employee for ten years, was asked about RM's allegation that, on February 18, 2010, she asked employees if they had signed union cards. RL testified that she worked in a different area of the facility from RM and had not asked any of the other employees if they had signed a union card. She had no knowledge of KC's activities. RL claimed that she was not interested in the union. She expressly denied acting on behalf of management. In cross-examination, RL testified that RM had called her at work and at home about joining the union, but RL told RM she wasn't interested.

[199] TD testified that she investigated RM's concerns and met with her as well as KC. KC advised her that he had had a conversation with DS in which he expressed his views on the union. She concluded that two employees were simply engaged in expressing different views on their support for the union.

1–Position of the Union

[200] The union argues that KC did in fact go around the office, advising employees on how to get their union membership cards back and telling them that he represented the employer. The union argues that, although KC tried to qualify the statement, he would not have made it if it was not true. If it was not true, he would have been disciplined by the employer.

2– Position of the Employer

[201] The employer argues that there is no evidence that KC acted on behalf of management nor are there any complaints from employees claiming intimidation or harassment by KC or RL.

3–Board's Conclusion

[202] The evidence supports a finding that a discussion took place between KC and DS, two administrative associates, concerning their respective support for the union. However, in light of DS' evidence concerning the manner in which she expelled KC from her office, it does not appear that DS was in any way intimidated by KC. In the absence of complaints from any employees claiming that they were intimidated or harassed by KC or RL, the Board is not prepared to conclude that intimidation or harassment occurred. In the Board's view, RM's feelings that she was being treated as a second-class citizen, allegedly because KC was given freedom of access to people by management, does not constitute intimidation or harassment and, in any event, is predicated on the assumption that KC was acting on behalf of FXG. Based on the totality of the evidence in the case, the Board concludes that on a balance of probabilities, KC and RL were acting on their own and not on behalf of FXG. This portion of the complaint is dismissed.

J–Allegation that KC engaged in anti-union activities with the support of the employer

[203] In its February 25, 2010 complaint, the union also alleged that KC had distributed a letter that was defamatory and libelous of the union and that this letter was prepared and distributed using company resources. The union further alleged that the company was aware of KC's actions and supported, encouraged and was responsible for them.

[204] RM testified that, when she came in to work on February 22, 2010, she was asked by BM if she had seen the anti-union letter that KC was handing out. Another colleague also advised her that KC was going around with an anti-union letter. She testified that she observed KC in conversation with an employee, who retrieved a copy of a letter from the recycle bin and that KC then photocopied the letter and gave it to several other employees. RM testified that she went back to her desk feeling that

the letter was in circulation and there was nothing she could do about it. She did not think FXG would help her. Later that afternoon, another employee allegedly photocopied the letter to give to the package handlers. At that point, RM went to see the operations manager, FB and reported that she believed that the federal *Labour Code* was being violated. Although FB took note of RM's concern, RM does not know what, if anything, FB did about it.

[205] RM testified that she raised only a verbal concern concerning the distribution of the letter and did not launch a formal complaint. The reason she gave for not initiating a formal complaint was that she was tired of being interviewed. The next day, she had a meeting with TD concerning the distribution of the letter. RM advised TD that four employees had been handed a letter on company time, but refused to give TD the names of the employees who may have received a copy of the letter. RM said she wanted TD to talk to every administrative associate to find out the information herself. She told TD that she did not appreciate this happening in the office. RM was aware that the company investigated her concern, but was not aware of the employees that were interviewed.

[206] DC2 testified that he was given a copy of the letter by a co-worker, DB, while he was at work in the southbound bubble. He read it and disregarded it. He did not see anyone else with the document.

[207] BM testified that KC gave him a copy of the letter outside the FXG gate in the morning, before he started his shift. KC characterized it as an information letter. BM did not think the letter was accurate. He testified that he did not see any other copies of the letter in the workplace.

[208] RL testified that she was not aware of any of KC's activities and did not see his letter.

[209] JA, an administrative associate at the time in question, was asked if he had seen the letter allegedly distributed by KC in February 2010. He testified that he had not seen the letter prior to meeting with counsel in advance of the hearings in this case. He was advised that RM alleged that he was given a copy of this letter during working hours in the workplace by KC. He testified that he was not given a copy of the letter.

[210] KC identified a letter entitled "Reasons Not to Join the Union" and confirmed that he had written it. He testified that FXG had not encouraged him to draft a letter unfavorable to the union. He was not pressured by the employer to write it, nor was he forced to write it. The reason he had written the letter was because he was angry about the conduct of certain union representatives, RM in particular. He alleged that, when she learned he no longer supported the union, RM tried to intimidate him by filing complaints to management. One complaint alleged that he had physically assaulted her, another alleged that he had engaged in racially motivated misconduct towards another employee.

[211] KC testified that he wrote the letter at home on the night of February 18, 2010 and worked on it on February 19, 2010. He knew that he could not distribute non-work material on FXG property, so he distributed the letter outside FedEx property on February 22 between 7:00 and 7:55 a.m., prior to his shift, which started at 8:00 a.m. He had about 100 copies of the letter, and gave out about 20 of them and then put the rest in his car. He gave some people multiple copies and expected that they would distribute it, but could not control what others did. He started work normally at the beginning of his shift and testified that he did not see any of his fellow employees circulate a copy of the letter.

[212] KC testified that he thought something might happen when the union organizers became aware of his letter, so he kept his head down. He did not give a copy of the letter to anyone during working hours, and expressly denied giving a copy of the letter to JA, as alleged by RM. Another employee asked him for a copy of the letter; he advised her that he did not have any copies with him because he was not allowed to distribute them on work premises. He had left them in his car for that express reason.

[213] TD testified that she investigated RM's allegation that KC was distributing non-working material on company time using company resources. She interviewed RM on February 23, 2010. RM advised her that KC had been observed by co-workers distributing material in the office area during working hours. She refused to give any names. RM advised her that she had seen KC photocopy something. RM did not want a full investigation but wanted the distribution stopped. TD also interviewed KC and three other employees, including JA.

[214] When TD interviewed KC, he advised her that he had created the letter himself of his own volition at home and had arranged for photocopying himself. He advised her that he distributed the letter in non-work areas of the facility during non-working hours.

[215] Another employee interviewed by TD advised her that he had received a copy of the letter from a co-worker. He had gone to make a photocopy of the letter when he was approached by RM, who advised him that it was against company policy to photocopy non-work related documents. He told TD that he apologized to RM.

[216] TD testified that, following her investigation, the employer concluded that there was no evidence that the letter was created or distributed on company property during working hours. Nevertheless, KC was subjected to a counseling interview and she recommended to management that the solicitation and distribution policy be reinforced during a general staff meeting.

[217] TD also testified that, to her knowledge, no member of management directed KC to write the letter, and he was not writing on behalf of management.

1–Position of the Union

[218] The union argues that, when KC learned of the complaints filed against him, he retaliated against RM and the union by writing the letter that he distributed to employees. The union argues that the Board should prefer the evidence of RM that copies were distributed in the workplace during working hours. The union suggests that KC circulated copies of the letter at work and the fact that he was not disciplined for so doing by the employer creates a presumption that he was acting on behalf of the employer. The union points to KC's statement to DS that he was acting for the employer as further evidence supporting its contention and that KC's attempt to recharacterize this statement during his testimony is a lie.

2–Position of the Employer

[219] The employer argues that the evidence does not support the conclusion that KC circulated the letter in the workplace on company time or that he used company resources in preparing the letter. The employer investigated RM's allegations, but was unable to conclude that there had been a contravention of the company's policies. In addition, there was no evidence that indicated the employer provided assistance to KC in composing the letter. The employer argues that there is no evidence to support RM's perception that KC was acting for the employer. KC was originally a union supporter; he changed his mind and RM turned on him when she found this out. The employer points out that DS testified that she had no idea what KC meant when he said he "represented" FXG. KC is the only person who knows what he meant, and his evidence was that he meant that, like FXG, he did not want a union. The employer argues that there is no evidence on which the Board could conclude that the employer encouraged or assisted KC with the preparation or distribution of his February 22, 2010 letter.

3–Board's Conclusion

[220] The Board is satisfied on the evidence that KC prepared a letter expressing his views with respect to unionization on his own time, utilizing his own resources. There is no cogent evidence that he prepared the letter using company resources or photocopiers or that FXG assisted in the writing of the letter, or supported or encouraged KC's actions. Further, the evidence does not support a finding that KC distributed the letter on company premises during working hours. Finally, no evidence was called that any employee was harassed or intimidated by KC' s letter. Accordingly, this portion of the union's complaint is dismissed.

V–Board File No. 27995-C

[221] On March 5, 2010, FXG filed a complaint against the union, pursuant to section 97(1) of the *Code*, alleging a violation of section 96 of the *Code*. Specifically, the complaint states that, on February 15, 2010, the union issued a press release claiming that it represented FXG's 48 administrative workers in Mississauga, Ontario. FXG alleges that the press release implied that a

majority of administrative workers supported the union. FXG further alleges that the press release denigrated it as an employer. FXG alleges that the purpose and effect of the press release was to lead employees to believe that they would be left behind to fall victim to an anti-union employer if they did not sign union cards. FXG alleges that the press release constitutes an attempt to intimidate, coerce and/or compel individuals to become union members, contrary to section 96 of the *Code*.

[222] The employer's complaint also alleges that the union's complaint against KC personally also constitutes a violation of section 96 of the *Code*. It alleges that the union was seeking to penalize and intimidate KC for expressing his opinion, and attempting to silence him and any other employee who sought to express a view that did not support the union's campaign. It alleges that the union was attempting to use the complaint against KC to intimidate and coerce other FXG employees into becoming members of the union. FXG alleges that the union's complaint contains a threat against KC to sue him for damages, thereby threatening his and other employees' freedom of choice and freedom of speech.

[223] The FXG complaint also alleges that the union published a letter on its public website signed by the members of the inside union organizing committee, naming KC publicly, singling him out, scorning him and using him as an example of the mistreatment that would be suffered by employees who expressed opposition to the union. As well, FXG alleges that other comments in the letter were designed to instill fear among employees by suggesting that they will lose their jobs if the organizing drive fails, thereby attempting to intimidate and coerce them into joining the union.

[224] LR testified, based on his labour relations experience, on the ways in which this organizing campaign differed from a traditional campaign. In particular, this campaign involved significant use of electronic and social media, as well as a litigation aspect in which the employer was targeted with numerous unfounded unfair labour practice complaints. He identified a number of documents in the union's on-line materials referring to the unfair labour practice complaints. LR also identified a number of press releases stating that the union had organized and now represented FXG workers, even though the union had not been certified by the Board as the bargaining agent for these employees.

[225] In particular, LR identified a number of press releases dated February 15, 2010, filed as exhibits in the proceeding, entitled: "FedEx workers join the Teamsters Union!". The press releases read in part:

> For the first time in the history of organized labour in North America, FedEx workers have decided to unionize and have chosen the Teamsters Union to represent them... Thanks to the relentless efforts of its organizers, the Teamsters Union announces that it now represents FedEx's administrative workers in Mississauga, Ontario.
>
> "This is a historical event for FedEx workers and the entire labour movement," claims Robert Bouvier, president of Teamsters Canada. "This company is well-known for its anti union attitude, but this develoa.m.ent demonstrates beyond all doubt that these workers had had enough of their employers arbitrary decisions."
>
> ...
>
> The application for certification was filed on Friday February 12 with the Canada Industrial Relations Board (CIRB). An application for certification is a formal document confirms that union represents a group of workers.
>
> ...
>
> The Teamsters intends to continue to help all FedEx workers legal right to form a union. ...

[226] Mr. John Hull, the Director of Organizing for the union, a position he has held since 2004, testified that he led the organizing campaign for FXG employees in the greater Toronto area. He was not involved in composing the union's press releases of February 15, 2010, but was involved in the distribution of it. He admitted that he knew, at the time of the press release, that the union was not certified to legally represent FXG's administrative employees in Mississauga.

1–Position of the Employer

[227] The employer argues that the purpose and effect of the union's press releases was to lead employees at the Toronto facilities and other locations to believe that they would be left behind to fall victim to an anti-union employer if they did not sign union cards, and that the press release constitutes an attempt to intimidate and coerce employees to join the union, contrary to section 96 of the *Code*.

[228] The employer submits that the union subjected anyone who opposed it to intimidation. In particular, it suggests that the union is seeking to penalize and intimidate KC for expressing his opinion and that the CCT's communications and legal actions are an attempt to silence him and any other employee who dares to express a view that does not support the union.

2–Position of the Union

[229] The union submits that the word "represents" in its press release does not have the meaning attributed to it by the employer. It suggests that, once an employee signs a union card, the union represents that person for all intents and purposes, whether or not the Board has certified it as the bargaining agent. The union also argues that, in his letter, KC accused the union of lying and that it was therefore within its rights to threaten him with a defamation action. The union submits that the Board does not have jurisdiction to police communications between the union and its would-be members. It only has authority to determine if there has been intimidation or coercion. It argues that nothing in the union's communications constitutes prohibited activity.

3– Board's Conclusion

[230] The Board notes that the CCT filed an application with the Board for certification to represent the FXG administrative employees in Mississauga on February 12, 2010. However, the Board finds as a fact that the wording of the press release dated February 15, 2010 was designed to intentionally mislead FXG employees into believing that the union had been legally recognized to represent the administrative associates in Mississauga, Ontario, and was intended to encourage other FXG workers to join the union.

[231] Section 96 of the *Code* reads as follows:

> 96. No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union.

[232] The employer's complaint presents two issues for the Board to determine: (1) whether intentional misrepresentation by a trade union that it represents employees, made for the purpose of encouraging other employees to join the union, constitutes intimidation or coercion within the meaning of section 96 of the *Code*; and (2) whether the union's complaint against KC was an attempt to intimidate or coerce him and/or other employees.

[233] The words "intimidation" and "coercion" are also contained in section 94(2)(c) of the *Code* in the context of the exception to employer free-speech, as discussed at some length earlier in this decision.

[234] One of the presumptions of statutory interpretation is the presumption that the legislature uses language carefully and consistently so that, within a statute or other legislative instrument, the same words have the same meaning (see Ruth Sullivan, *Sullivan on the Construction of Statutes, 5th ed.* (Markham: LexisNexis, 2008)). The Board concurs with the comments of the British Columbia Labour Relations Board in *Cardinal Transportation BC Inc.*, [1996] B.C.L.R.B.D. No. 344, that the definition of intimidation, coercion and undue influence in a labour relations context contains a basic element, namely, any effort to invoke some form of force, threat, undue pressure or compulsion, for the purpose of controlling or influencing an employee's freedom of association.

[235] With respect to the alleged intentional misrepresentation in the union' s campaign literature, the Board does not find that the necessary element of force, threat or compulsion present such as to constitute a contravention of section 96 of the *Code*. This portion of the employer's complaint is dismissed.

[236] However, the Board does find that the element of threat was present in the union's actions towards KC. In his testimony, KC identified a union document entitled "Reasons to Join the Union: Shame on FedEx," filed as an exhibit in the proceedings. He testified that he viewed the letter on the internet shortly after he had distributed his letter, entitled "Reasons Not to Join the Union". KC recalled that he probably found the letter by googling his name. The letter reads in part:

> We are Reshma, Brad, Duane and Crystal and we all work with you at FedEx ground. Shame on FedEx for putting Keshav Chumber in the terrible position he now finds himself in. We have no doubt that Keshav did not write this letter on his own and we ask you not to blame him. We have seen some examples of anti-union letters, and they all look exactly like Keshav's letter. You can see for yourself by visiting www.nobusters.org. Sadly, what happened to Keshav could have happened to anyone that

works here given the pressure of one on one meetings. Can you imagine putting someone who was recently hired part-time in a position where you're forced to lie about your co-workers and the Teamsters.... not to mention being forced to put all these lies on paper putting this person in a position possibly having to testify falsely before the Labour Board? Shame on you Fedex!

(emphasis in original)

[237] The letter also stated :

We, the inside organizing committee want to set the record straight. First, the number of cards that have been signed is confidential between the Teamsters and the Labour Board. Second, we have never pressured anyone to sign a card and have followed the law. As of this date we have had no charges filed against us while the charges against FedEx keep on growing.

...

When you think about it, Keshav's union-busting letter really tells us why we need a union... Please don't be fooled. This is just another company tactic to keep us divided and weak in our dealings with them.

[238] Also filed in the proceedings were extracts from the union's website dealing with the organizing campaign at FXG. One extract, dated February 22, 2010, entitled "Some guy running around trying to cancel our cards at FedEx ground!" reads, in part:

Ask away.

This guy who obviously got intimidated by management into revealing that he signed a card is now trying to intimidate the rest of us into admitting that we signed a card. ...

Teamsters Canada Response:

I am very familiar as to what is happening at FedEx Ground. So much for the company's "respect for your right to choose". Unfortunately the tactic of using worker against worker is a very old trick used by management, as well as the tactic of trying to get people to disclose that they signed a card. Management typically tries to intimidate the workers one on one to find out who signed a card. Even though this tactic is totally illegal and immoral they do it anyways. Management sometimes will then use this information to fire the employee who signed a card if the organizing drive fails. The joke is Management will also fire the worker that they sucked into running around doing their dirty work for them. I've seen these tactics at every single organizing drive that I have been involved with.

The answer to this problem is.....

#1 Let us file charges against the company and the person intimidating the workforce.
...

> Remember, the best protection is to sign a card and unionize. The only way FedEx can "get rid of people" without cause is if the organizing drive fails. The very second you are unionized the Teamsters will put a stop to all this non-sense.

[239] The Board concludes, as a matter of fact, that the union and the members of its inside organizing committee, by their actions, were seeking to deter KC from expressing his opinion, as it was not supportive of the union's organizing campaign. In particular, the filing of an unfair labour practice complaint against KC personally was clearly intended by the union to deter KC and any other employee from expressing views that were not supportive of the union's campaign.

[240] The complaints to management instigated by RM were designed to deter KC and others from expressing their opinions. These complaints were vexatious and were designed to place KC's employment in jeopardy. The references to KC on the union's website and the nature of the complaints that the union filed against him with the Board, lead the Board to conclude that the union's intention was to ensure that KC and other employees were deterred from speaking out against the union. In the Board's view, the union's actions in this regard were intimidating and coercive and constitute a contravention of section 96 of the *Code*.

VI–Board File Nos. 28123-C and 28124-C

[241] On May 5, 2010, the union filed an unfair labour practice complaint in its own right pursuant to section 94 of the *Code* and an unfair labour practice complaint on behalf of RM. Both complaints related to the same two incidents.

[242] The complaints allege firstly that, in late January 2010, KC physically assaulted RM, who was pregnant at the time. RM alleges that KC was personally guilty of violating section 94(3)(a) of the *Code*, and was acting on behalf of FXG when he committed the assault. She further alleged that, although she reported the incident to FXG management on February 18, 2010, no investigation was undertaken, KC was not disciplined and, on the contrary, was promoted. The second incident complained of related to an altercation between RM and SB that took place on March 5, 2010. RM alleges that she filed a complaint with FXG management over the incident on the same date but that

her complaint was not properly investigated by management. The union and RM contend that she has been subjected to differential treatment because of her status as a union organizer, in violation of section 94(3)(a) of the *Code*. Specifically, she alleges that FXG management investigated complaints from other employees in a timely manner, while neglecting to investigate her complaints.

A–Alleged Incident involving RM and KC

[243] RM testified that one of her job responsibilities was to put paperwork into bunkers that were located near KC's desk. She alleges that while she was performing this task one day in late January 2010, KC slapped her on the back of her head with his hand. She described the strength of the hit as being a flick of the hand. She turned around and said to him "Don't do that or I'll hit you back." KC replied that he was joking, but he did not apologize or express any remorse. She recalls that the event took place in late January 2010, as she had just found out that she was pregnant. She did not report the incident to management at the time, as KC was a fairly new employee.

[244] Howver, RM reported the incident to TD by email on February 18, 2010. She alleged physical abuse by KC and asked the employer to look into the situation and address the matter. TD met with her and advised her that there would be an investigation. RM provided TD with the name of a witness, Ms. Diane Peters (DP). RM did not hear anything further about the investigation until she raised it with TD on March 5, 2010 at a counseling meeting with TD regarding an incident involving SB that occurred after RM's complaint about KC.

[245] TD invited RM to come to her office to talk about her complaint. However, RM felt that a long enough time had passed and she refused to meet with TD. In RM's view, her complaints were not being dealt with because of her union activities, while complaints against her were being investigated in a timely way. Rather than dealing with the employer, RM contacted John Hull at the CCT and advised him that her complaints were put on the back burner by the employer.

[246] In cross-examination, RM acknowledged that she was interviewed the day after her complaint. She was not aware that DP was interviewed twice regarding the complaint, and that both DP and KC indicated that the incident had happened at the end of December 2009, not January 2010. She

admitted that in December 2009 and January 2010 she had a good relationship with KC; she stated that it changed after he allegedly slapped her. It was also around that time that KC started asking questions about the union organizing campaign. RM also acknowledged that she was advised of the outcome of the investigation around the end of May 2010. She was asked if she understood the process whereby the company does interviews locally and then sends a report to the Employment Equity Office in Pittsburgh, at which time that office may send the matter back with a request to ask further questions or call for a further investigation. She admitted that she was aware of the process.

[247] With respect to the incident itself, RM admitted that KC did not physically hurt her, although she felt it was hard enough to hurt. She stated that she was pregnant and questioned why someone would hit a pregnant woman. She admitted that KC did not know she was pregnant. She also acknowledged that she did not report the incident to a manager or call the police at the time the incident happened and did not complain to management until February 18, 2010. At that time, she also complained to management about an inappropriate comment KC had allegedly made to DB.

[248] KC testified that he was involved in an incident with RM at the end of December 2009, approximately two months prior to the complaint that was filed against him with management on February 18, 2010. In his view, he and RM had been good friends. He was sitting at his desk, and RM was talking with a work colleague. He got up and went around to the back of RM and tapped her on the head with a piece of paper. He said that she told him not to touch her and he apologized. He stated she was okay with the situation and that they continued to joke around with one another thereafter.

[249] KC testified that he was interviewed by TD, and during the interview, he informed her that he believed the complaint was made because he no longer wanted to join the union. He recalled that he had spoken with RL and HG, who was pro-union, about his change of views the day before the complaint was made and speculated that HG had told RM.

[250] TD testified that RM filed a complaint by e-mail with her on February 18, 2010 alleging that KC had engaged in physical abuse and racial profiling. She met with RM on February 19, 2010 to discuss her complaint. RM informed her that she had been filing invoices into a mailbox when KC

came up behind her and slapped her across the back of the head. RM told her that the assault occurred on the last Thursday in January. She delayed filing a complaint because she did not have faith in the process but she was encouraged by her spouse to report it. RM advised TD that DP had witnessed the incident.

[251] TD stated that she interviewed DP, who recalled the incident and advised her that it had occurred sometime near the end of December 2009. DP told TD that she was about three or four feet away when she observed KC tap RM on the side of the head with a piece of paper. It was DP's opinion that KC was joking around. She described the relationship between KC and RM as friendly, manifested by laughing and joking. DP described KC as a nice guy and respectful. DP told TD that she was approached by RM, who asked her to be a witness. She stated that she did not want to be involved.

[252] TD stated that she also interviewed KC. He advised her that the incident occurred near the end of December 2009, the same time period described by DP. He stated he was at the fax machine, and as he walked by RM, he tapped her on the back of the head with a piece of paper in a friendly manner to say hello. RM said it was not appropriate, at which time he apologized. In his view, they continued to be friendly after the incident.

[253] Based on the information collected from the parties, including an independent witness, the employer concluded that the incident occurred at the end of December 2009 or early January 2010. Following the incident RM and KC continued to have a positive working relationship up until February 18, 2010, when the complaint was made. The employer concluded that there had been no violation of the Acceptable Conduct Policy, the Anti-Harassment Policy or the employer's Code of Conduct and Ethics.

[254] TD testified that she attempted to report back to RM on May 27, 2010 regarding the conclusions the company had reached after its investigation into her allegations. However, RM left her a voice message indicating that she was not willing to meet with her to discuss the outcome.

[255] In response to the allegation that RM's complaints were treated differently than those of other employees, TD indicated that between the start of the organizing campaign in September 2009 and June 30, 2010, 13 complaints were filed; eight of them by RM. TD indicated that complaints generally take between one and three and one half months to conclude. This investigation took approximately three months (February 18, to May 25, 2010) to complete. TD testified that there is no truth to the allegation that the employer delayed dealing with RM's complaints because she was a union organizer. She also testified that KC had applied for a full-time administrative associate position and was one of eight candidates for the vacancy that arose in March 2010. She testified that KC was selected because he was the best qualified.

1– Position of the Union

[256] The union argues that the incident happened: KC hit RM on the head, either with his hand or a piece of paper and KC was not disciplined for hitting her. The union considers this very serious, as RM was one of the union's inside organizers and KC was the main employer representative, who was anti-union. The union alleges that not only was KC not disciplined for the incident, he was promoted.

2– Position of the Employer

[257] The employer argues that, according to KC and an eyewitness, he tapped RM lightly on the head with a piece of paper in a friendly gesture. Although RM claimed he slapped her with his hand, she did not complain for two months, and only then when she learned that KC was no longer supporting the union. The employer suggests that the delay is an indication of the alleged seriousness of the incident and RM's motivation in complaining. In any event, the employer argues that there is no truth to RM's perception that her complaints were not dealt with in a timely manner; they were dealt with in the same time or even more quickly than some others. The employer argues that, given the number of complaints that were filed in Toronto during the CCT's organizing campaign, the time frames for investigation of RM's complaints were reasonable.

3–Board's Conclusion

[258] The Board accepts the evidence of KC, which was corroborated during the company's investigation, that there was an incident in late December 2009 in which he tapped RM on the head with a piece of paper, apparently in jest. RM asked him to stop, which he did and he apologized. No complaint was made at the time. RM complained to management on February 18, 2010. Management met with RM the next day, February 19, 2010 and conducted an investigation that included interviews with KC and an independent witness. On the basis of its investigation, the employer ultimately concluded that there was no violation of any of its policies. The Board does not find any evidence that supports the allegation that KC was acting on behalf of FXG when he tapped RM on the head with a piece of paper, as described above or that KC's actions were in any way related to RM's union activity.

B–Alleged Incident Involving RM and SB

[259] In January 2010, RM made a verbal complaint against SB, alleging that SB had referred to her as a "rat". She was invited to meet with a manager the afternoon of the day she made the informal complaint, and testified that she asked the manager to speak to SB about the way she speaks to co-workers. RM was surprised to learn at the hearing that the employer did conduct an investigation and that SB was disciplined for the comment, claiming that she was never advised of this outcome. However, following the complaint, RM states that she requested that she be moved to another office. She alleges that LR showed favoritism when he decided that SB should be moved instead.

[260] SB testified about the continuing deterioration in her personal relationship with RM during the winter of 2010, that was manifested by each of them filing complaints with management concerning the conduct of the other. At the end of February 2010, SB went on stress leave. When she returned to work, she requested that her workstation be moved. This request was supported by a physician's note, but it was not granted at that time.

[261] SB testified that on March 4, 2010 another incident occurred with RM. SB was participating in a discussion about religion and the concept of karma with other employees in one of the back

offices. RM came into the room and joined in the discussion. An argument between SB and RM ensued. SB testified that RM became angry and threatened her by pointing at her and saying that she would deal with her later. SB complained to her manager. She testified that the filing of the complaint had nothing to do with RM being a union organizer. After the complaint was filed, SB was moved to a workstation in another area.

[262] TD testified that she was involved in the investigation of the March 4, 2010 complaint. She met with RM on March 8, 2010. RM denied threatening, pointing her finger or saying the words attributed to her by SB. TD met with eight other people during the investigation. One of the persons she interviewed, Ricardo Jiminez, corroborated SB's account of what had happened. At the end of the investigation, it was concluded that RM had engaged in inappropriate behavior and she was given a written warning on April 9, 2010. TD testified that, given the nature of the complaint, SB's workstation was moved initially on an interim basis, and on a permanent basis subsequent to the investigation.

[263] TD also investigated RM's January 8, 2010 complaint that SB was referring to RM when she stated on that day that "there are rats in the office." RM was interviewed the same day and the investigation was concluded on March 11, 2010, a period of approximately two months. The investigation resulted in discipline to SB. TD testified that she fully investigated all of the complaints filed by RM in a timely manner.

1–Position of the Union

[264] The union argues that RM was unfairly disciplined for the March 4, 2010 incident, and that the only independent evidence is a video recording taken that day which does not show the incident as claimed by SB. The union suggests that the employer only sought out video evidence when a complaint was made against RM, but did not produce any video of incidents supporting RM's complaints or the union's version of events.

2–Position of the Employer

[265] The employer admits that the video recording it submitted of the March 4, 2010 event is inconclusive, at there is no soundtrack and there is a two second delay in the recording. Consequently, the incident would not necessarily have been recorded. However, the employer argues that the employer was entitled to rely on the evidence of SB, which was corroborated by an independent witness. It argues that the written warning issued to RM for the threat to SB was warranted. It submits that, if anything, RM was treated more leniently than other employees.

3–Board's Conclusion

[266] Based on the evidence it heard, the Board concludes that the company fully investigated the complaint against RM over the March 4, 2010 incident with SB and was justified in imposing the discipline that it did. The Board is satisfied that the employer's treatment of RM was not tainted by anti-union animus nor was the discipline imposed because RM was acting as an inside organizer for the union. The evidence does not support the allegation that RM's complaints were not dealt with in a timely manner.

[267] The union's complaints are dismissed.

VII–Board File No. 28209-C

[268] On June 16, 2010, the union filed an unfair labour practice complaint on behalf of RM, alleging that FXG had contravened section 94(3)(a) and 94(3)(c) of the *Code* by discriminating against RM in its handling of an incident involving RM and KC that occurred on June 3, 2010.

[269] RM testified that on June 3, 2010 she was in the kitchenette in the FXG facility preparing her lunch when KC came up behind her, reached up to grab a paper towel, and hit her left shoulder with his elbow. She testified that he startled her, as he did not say anything. She told him not to do that again, he said "What?" and she told him she already had a physical abuse charge against him and he should stay away from her. She admits that they were yelling at one another.

[270] RM testified that she did not know whether KC intended to hit her, but he did not care if he hit her and did not apologize. She yelled at him and he yelled back. In her opinion, KC has a lot of power at FXG and the employer would not help her, although all she wants is for the employer to tell him not to approach or touch her.

[271] After the incident in the kitchenette, RM decided to talk to the operations manager, FB. FB was not in her office and no one knew where she was. RM knew that her own manager was at lunch, so she went to see KC's manager, SS. SS was in her office with the door closed; KC was in the office with her. RM testified that she knocked on the door and asked if she could speak to SS. SS did not open the door. RM testified that she asked again "could I talk to you for a minute." SS asked RM to give her a minute, but RM replied "I'm the victim in this situation; can I talk to you please?" SS again asked RM to give her a minute. RM then said "don't worry about it, I'll call the police." RM denied having kicked or banged on SS' office door or yelling during her exchange with SS.

[272] RM proceeded to call the police and spoke with a Detective Akerman. He advised her to write down the details of the incident and submit it to the Board. She then ate her lunch, and went back to see SS, who was not in her office. RM then went outside for a smoke break. When she returned, JM was at the security desk waiting for her. He asked her to speak with him, but she replied that, if it was concerning KC, she had already called the police and had been told what to do. JM repeated his request that she speak with him. RM assumed it was regarding the incident with KC and asked whether she could have an unbiased witness. JM suggested TD, but RM informed him that she wanted a witness of her own choice. JM asked whether she was refusing to meet with him, and RM replied that she was not going to his office without an unbiased witness. At that point, JM informed her that she was suspended until further notice.

[273] On the way back to gather her belongings, RM called John Hull of the union. JM escorted her out of the building. As they were leaving the building, RM informed JM that KC was trying to sell iPhones to FXG employees and intimated that this was related to thefts from the package division. JM said he would look into it.

[274] TD called RM the day after she was suspended, indicating that she wanted to discuss three events that had occurred on June 3: the incident in the kitchenette with KC; the incident outside SS' office; and the refusal to meet with JM. RM advised TD that she wanted to be able to record the conversation; TD refused. RM informed TD that if she could not record the conversation and could not have a neutral party as a witness, then she would not have the conversation as she did not trust the FedEx system. RM subsequently contacted TD by e-mail to ask when she could return to work and was advised that an investigation was ongoing. RM's suspension lasted for almost a month.

[275] KC testified that, during his lunch hour on June 3, 2010, he had heated some food in the kitchenette and had taken it back to his desk. He was on the telephone speaking with a broker when he spilled his meal on his desk. He asked SB, who was nearby, to get him some paper towel, but she said no. He left the broker holding on the phone and ran to the kitchenette to get paper towels. RM was standing at the microwave and started yelling at him not to touch her. He testified that he quickly grabbed some paper towel from a shelf over her head, but did not touch her. He asked her what he had done, as she was screaming loudly. He asserts that he was not yelling at her, nor did he tell her to shut up.

[276] KC testified that he returned to his desk and started cleaning up when he saw RM going to FB's office. He knew FB was not there, and he decided to go to his manager's office to tell SS what had happened. He was telling SS the story when RM arrived and knocked on the door. She appeared very angry and he recalls her saying that she was going to call the police. SS left her office; when she returned she told KC to go see TD. He told the story to TD and she told him to prepare a written statement.

[277] A few days after this incident, another employee came to him and expressed concerns about RM's behavior, saying there was a need to put a stop to it. KC spoke to FB, who referred him to TD. TD suggested they write an "employee concern" letter. KC and SB prepared the letter at work and a number of employees signed it. The letter was sent to LR.

[278] SB testified with respect to the June 3, 2010 incident. She was at the photocopier and had a clear view of the kitchenette. KC was on the telephone with a customer when he spilled some food.

KC asked her to get some paper towel from the kitchenette; she refused because she had observed RM in the kitchenette and she did not want to go in. KC ran into the kitchenette and reached over RM to get the paper towel. There was no physical contact; he came close, but did not touch RM. However, RM stated "don't do that. I have a lawsuit against you." It was loud enough that everybody could hear it.

[279] SB saw RM go to FB's office and KC go to SS' office. RM subsequently went to SS' office but the door was closed. SB observed RM banging on the glass in the door, stating in a loud voice: "I'm the victim here." She then heard her state "fine, I'm going to call the police then." SB testified that RM banged on the office door two to three times while raising her voice.

[280] SS is a service manager with over 10 years experience. She is a manager on the day shift and in June 2010, some 18 employees reported to her. She testified that on June 3, 2010, a clerk was in her office speaking with her when KC asked if he could interrupt the conversation. The other clerk volunteered to leave. KC started to explain what had happened in the kitchenette with RM. Before he could complete his story, RM came to her office door and started banging on it and shouting "I need to talk to you", while pointing at her. SS said she gestured, holding up one finger. RM started rapping at the door stating "I have him in court, you need to talk to me." SS described RM's behavior as hostile, aggressive and intimidating. She gestured again for her to wait a moment because she had not heard what KC had to say. Afterwards, she would have given RM her chance to talk. However, RM banged on the door at least three times and then stated "fine, I'm going to phone the cops."

[281] SS asked KC to stay in her office. She went out to find RM and observed her talking on her cell phone. SS assumed RM was calling the police. She returned to her office and told KC to go and tell human resources what had transpired. She felt there was a need to inform HR and the hub manager that the police might show up.

[282] SS described KC's demeanor as being a bit intimidated. She observed several of the staff, outside of their cubicles, watching the incident with their arms folded. SS testified that she felt

intimidated, nervous, embarrassed and humiliated in front of her staff by RM's actions. She went to JM's office and TD came with her. She was shaking as she explained to them what had happened. She stated that this type of conduct is not acceptable in the workplace.

[283] JM testified that he met with SS immediately after the incident. He described her as being upset, stating that she could not handle the way RM was behaving anymore. She was crying. He invited her up to his office to discuss the situation, at which time she recounted the story about the kitchenette incident and RM's behavior at her office door, and advised him that RM had stated that she would call the police.

[284] JM thought that RM's behavior was not appropriate and constituted direct insubordination to a senior manager. He decided to discuss the matter with LR, as he would probably want to get RM's side of the story. JM left his office, just as RM was coming in from outside the facility. He met her in the security area and asked if she would meet him in his office. She asked if it was about KC. When he said yes, she got angry, raising her voice and said "we are always lied to." She then said she did not want to meet with him without a witness. He said he would bring in TD, but RM wanted her own witness. JM asked her whether she was refusing to meet with him and she said yes. JM then told her to go home. RM called someone named John on her cell phone and then told JM that he was going to get another unfair labour practice complaint. JM told her that she was on a paid suspension but RM said she did not care.

[285] RM then told JM that KC was stealing and selling iPods. JM informed security, who subsequently informed him that there was no merit to the allegation. He personally was not aware of any customers complaining about missing iPods.

[286] TD was involved in the investigation of the incident. She testified that on June 4, 2010, she telephoned RM to ask if she could meet with her. TD stated that she had started to explain the nature of the investigation when she heard a male voice in the background saying "You don't have to talk to her. If you do, ask to record the conversation." RM asked if she could record the conversation and

TD said no. RM stated that if she could not record the conversation or have a witness of her choice present, she would not speak to her. TD testified that RM's refusal to speak with her resulted in a longer process than it needed to be and affected the length of her suspension.

[287] TD testified that Human Resources met with some 15 employees, both managers and non-managers, during the investigation. RM maintained her position that she wanted her own witness at an interview. However, after the employer said it would have to complete the investigation without her, RM agreed to meet with TD and LR on June 15.

[288] Based on the investigation, including the interviews with all of these employees, TD concluded that KC had not made physical contact with RM. All of the employees she spoke with heard a disruption in the work area. She concluded that RM's tone of voice and conduct was aggressive and inappropriate for the workplace. Her refusal to meet with JM constituted insubordination. The employer decided to issue a final written warning to RM but allow her to return her to work. RM was paid during her suspension and returned to work to the same position with no loss of pay.

[289] TD testified that the employer was concerned about suspending the main union organizer. The employer was sensitive to the circumstances and concerned that it could potentially be perceived as disciplining RM on account of her union activity.

[290] LR testified that on June 4, 2010, two employees brought forward a group employee concern about RM's conduct in the workplace. They gave him a letter signed by a number of employees, alleging that RM had been disrupting the office and had intimidated them by being loud and obnoxious. They alleged that many employees had been unable to do their work or concentrate due to her actions, which had made the environment very hostile and unprofessional. The employees requested that action be taken to deter RM's conduct.

[291] RM filed a counter-complaint against KC, alleging that he had forced people to sign the petition against her and was defaming her. LR conducted a separate investigation into RM's allegations. He testified that he contacted each and every one of the employees separately and concluded that all of the individuals had voluntarily signed the document. No one indicated that they felt pressured or

coerced to sign it, but they were afraid of retaliation from RM if she saw them talking with him. LR attempted to report back to RM with respect to her complaint, but she stated that she was going to pursue some other route.

[292] LR recommended that RM be disciplined for insubordination based on her aggressive and confrontational interventions with co-workers and her prior disciplinary record. He described the labour relations climate in the workplace at this time as being one of elevated emotions throughout the entire period during which the unfair labour practices were being filed. He testified that the employer understood that discipline it meted out was going to be under careful review and that it therefore took a lenient approach with RM. He testified that RM had returned to work following her suspension, and was still an active employee although currently on maternity leave.

1–Position of the Union

[293] The union argues that the employer's disciplinary response to the June 3, 2010 incident indicates that it was trying to find any reason to discipline RM, and was motivated to do so because of her union activities. As to the incident itself, the union argues that KC most probably touched RM in the kitchen, as this is consistent with her reacting the way she did. With respect to the situation at SS' office door, the union contends that RM should have been spoken to first, as she had just been the victim of another assault. The union suggests that this was an escalation of the earlier related incident. The union argues that RM had the right to call the police and was justified in not meeting with JM because she was not accorded an independent witness.

2–Position of the Employer

[294] The employer argues that RM's suspension with pay and a final written warning for disrespectful misconduct of this nature was minimal and that such conduct would normally lead to termination of employment. It suggests that, during the incident, RM was not exercising the role of a union organizer but was out of control, engaging in aggressive and insubordinate behavior in the

workplace. Because the company knew the risks of terminating a union organizer, RM in fact received more favorable treatment than another employee who engaged in similar misconduct would have received.

3–Board's Conclusion

[295] There is no compelling evidence to support the claim that the incident involving RM and KC was connected in any way with her union activities, nor is there any evidence that supports a conclusion that KC was acting as an agent of FXG with respect to his conduct during the incident. Furthermore, there is no cogent evidence to support a conclusion on the facts that RM's suspension with pay or the final written warning that was ultimately given to her were in any way related to any union activities that she may have been engaged in. Based on the overwhelming totality of the evidence outlined above, the Board has no difficulty in concluding that the suspension with pay and the written warning were imposed by management on account of the complainant's improper conduct on June 3, 2010, and that the employer has met its burden of proof that these disciplinary actions were not motivated by anti-union animus. Accordingly, the union's complaints are dismissed.

VIII–Board File Nos. 28225-C and 28249-C

[296] On June 23, 2010, DB filed an unfair labour practice complaint against FXG pursuant to section 94(3)(a) of the *Code* and the union filed an unfair labour practice complaint pursuant to section 94(1) of the *Code* arising from the same facts.

[297] DB alleged that she had been treated in a discriminatory manner and subjected to reprisals and an unjustified disciplinary measure by FXG because of her union activities. She was issued a verbal disciplinary measure on May 13, 2010, as a result of an incident with KC that occurred in February 2010. In her complaint to the Board, DB alleges that not only were the measures taken against her illegal, but FXG's refusal or neglect in failing to impose any disciplinary measure on KC for the same incidents is itself illegal, and in reprisal for her union activities.

[298] RM testified that she made a complaint to management on February 18, 2010, by e-mail to TD and LR, concerning an incident between KC and DB. RM alleged that the incident, which occurred in the workplace, involved racial profiling. She alleged that DB had asked KC why he was allowed to wear jeans in the office and suggested that if she were to wear jeans she would get into trouble. KC allegedly responded by saying "yeah, its 'cause you're black." In her complaint, RM stated that, as a person of colour, she felt as though this was a personal attack on anyone of colour in the office. She felt that this was a reckless mistake on KC's part and she wanted something done about it.

[299] RM was asked whether KC was a person of colour. She answered that he appeared to be. She was asked whether she overheard KC's alleged comment, and responded affirmatively. RM was asked whether she was aware that DB and KC had both been interviewed and stated that she was not. When she was advised that both DB and KC had stated that the conversation had occurred in the southbound bubble, not in the Gateway where RM worked, she suggested that neither of them had seen her.

[300] It was suggested to RM in cross-examination that she did not witness the incident and had filed the complaint to retaliate against KC for no longer supporting the union. She denied this allegation.

[301] DB has been an FXG employee since June 2002 and is an administrative associate level II. She testified that in January or February 2010, she had a conversation with KC in which she asked him why he was allowed to wear jeans when it was not a Friday, and suggested that if she wore jeans she would get into trouble. KC responded that it was because she was black. DB stated that this conversation took place in the southbound bubble area of the facility and that there was no one else present. DB was not aware that RM had filed a complaint against KC with management concerning the incident, nor had she asked RM to file a complaint. DB also testified that on another occasion, she saw KC leaving 10 minutes early and suggested to him that if she were to leave early, she would get in trouble; to which KC responded "I know, it's because you are black."

[302] DB testified that, in late February 2010, she was called into the office to meet with TD and LR to discuss the conversation with KC, as a complaint had been made and was being investigated. On May 13, 2010, DB was given a verbal counseling form and reminded of the company anti-harassment policy. The form stated that, on more than one occasion, she had engaged in conversations with a

co-worker that were inappropriate for the workplace. TD subsequently explained to her that it was not a disciplinary letter. DB did not know whether KC was counselled concerning this incident.

[303] KC testified that he and DB were friends at work. He acknowledged that a conversation of the nature complained of took place in early February 2010, some time prior to the February 18 complaint by RM. He wore jeans to work on that particular day, as he had run out of dress pants. DB had asked him why he was wearing jeans and how he could get away with that and she could not, and he told her it was because she was black.

[304] KC testified that he was interviewed by the employer as a result of the complaint and that he was counselled for making the statement on May 12, 2010.

[305] TD testified that she received the e-mail complaint from RM on February 18, 2010. She investigated the complaint and interviewed DB, KC and RM. DB advised her that she had approached KC in the southbound bubble area and asked him why he was allowed to wear jeans on a non casual work day. KC told her it was because she was black. DB advised TD that they both had laughed. DB characterized the exchange as a kind of banter, and stated that she was not offended by the comment.

[306] RM' s complaint stated that the conversation was overheard in the Gateway area of the facility. DB advised TD that the conversation took place in the southbound bubble and that there was only one other person in the area. DB did not believe that the other person had overheard the conversation. TD asked DB if she wished to file a complaint, but DB stated that she did not want to. She also advised TD that she had not asked RM to file a complaint on her behalf.

[307] TD also interviewed KC, whose recollection of the incident matched that of DB. TD testified that the employer's investigation confirmed that the alleged conversation had taken place. Even though DB had not taken offense, the employer's assessment of the incident was that the language used was inappropriate and could be deemed offensive. TD confirmed that verbal counselling was given to both DB and KC. TD joined FB in the counselling of DB, who was quite upset that she was being counselled for making an inappropriate comment that she denied having made. TD did not think DB understood the company's rationale for the counselling, which was non-disciplinary. KC

was also issued a verbal counselling and was treated no differently than DB. TD testified that DB's counselling had nothing to do with any of DB's union activities.

[308] TD testified that the entire investigation took approximately three months to complete. Although inconsistencies in the evidence suggested to the employer that RM had not herself overheard the conversation between KC and DB, TD attempted to report back to RM on the outcome of the investigation.

1–Position of the Union

[309] The union alleges that even mere counselling is discipline, as it is seen by the employees as a form of reprisal, and is therefore contrary to the *Code* if carried out due to anti-union animus.

2–Position of the Employer

[310] The employer argues that DB was treated no differently than KC with respect to the alleged racist remark. As there was no differential treatment, it suggests that there is no basis for DB's complaint. It also points out that there is no evidence that the employer was aware that DB played any role in the union organizing campaign.

3–Board's Conclusion

[311] The Board is unable to find any evidence that the employer was aware of DB's union activities, if any, or that DB was subjected to discipline as a result of those activities. Both DB and KC admitted that the allegedly racist comments were made during their conversation, but there is no evidence that KC's comments were in any way connected to DB's union activities or that they were made under the direction of, or on behalf of, FXG. Moreover, DB did not take offense at KC's remarks, nor did she wish to file a complaint about his conduct to the employer. It appears to the Board that the motivation for the unfair labour practice complaint is DB's perception that KC was not counselled for making the remarks to her, but that she was subjected to counselling for the same event. Given the employer's policy with regard to the confidentiality of its investigations, this misapprehension is

understandable. The Board accepts the evidence of TD and KC that he too was counselled and that both employees were treated in the same manner.

[312] Accordingly, the Board does not find a contravention of section 94(1) or 94(3)(a) of the *Code* with respect to this incident.

IX–Decision

[313] For the foregoing reasons, the Board:

(A) dismisses the unfair labour practice complaint alleging a contravention of section 94 of the *Code* by FXG, filed by the union on December 3, 2009, as amended (Board file no. 27851-C);

(B) upholds that part of the unfair labour practice complaint filed by FXG on March 5, 2010 against the Canada Council of Teamsters alleging a contravention of section 96 of the *Code* by the union. The Board finds that the union's conduct in response to Mr. Chumber's letter was designed to silence Mr. Chumber and any other employee who expressed a view that did not support the CCT's campaign, and was an attempt to intimidate and coerce other FXG employees. The union's actions constitute a clear violation of section 96 of the *Code*.

As a remedy for its breach of section 96 of the *Code*, the Board orders the CCT to cease and desist from any conduct that infringes on Mr. Chumber's right to freedom of expression.

The Board dismisses that part of the employer's unfair labour practice complaint alleging a contravention of section 96 of the *Code* relating to the union's press release claiming that it represented FedEx administrative workers in Mississauga, Ontario (Board file no. 27995-C);

(C) dismisses the unfair labour practice complaint alleging a contravention of section 94(3)(a) of the *Code* filed by Reshma Mahabir on May 5, 2010 against the employer and Mr. Keshav Chumber (Board file no. 28123-C);

(D) dismisses the unfair labour practice complaint alleging a contravention of section 94(1)(a) of *Code* filed by the union on May 5, 2010 against the employer and Mr. Keshav Chumber (Board file no. 28124-C);

(E) dismisses the unfair labour practice complaint alleging a contravention of section 94(3)(a) of the *Code* filed by Reshma Mahabir on June 16, 2010 (Board file no. 28209-C);

(F) dismisses the unfair labour practice complaint alleging a contravention of section 94(1)(a) of the *Code* filed by the union on June 23, 2010 (Board file no. 28225-C);

(G) dismisses the unfair labour practice complaint alleging a contravention of section 94(3)(a) of the *Code* filed by Ms. Deneise Brooks on June 23, 2010 (Board file no. 28249-C).

[314] Given the Board's disposition of the union's unfair labour practice complaints, it is not necessary for the Board to deal with the union's request that the Board issue an automatic certification order for the administrative associates pursuant to section 99.1 of the *Code*.

[315] This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

David Olsen
Member

Norman Rivard
Member