UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

CARNEGIE LINEN SERVICE, INC.
Respondent

and **Case No. 2-CA-39560**

LAUNDRY DRY CLEANERS AND ALLIED
WORKERS JOINT BOARD, WORKERS UNITED
a/w SERVICE EMPLOYEES INTERNATIONAL UNION
Charging Party

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO THE RESPONDENT'S EXCEPTIONS

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Dated at New York, New York
This 9th day of September 2011

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I. PROCEDURAL HISTORY

On a charge, amended charge, and second amended charge, in Case No. 2-CA-39560, filed by Laundry-Dry Cleaning & Allied Workers United, a/w, Service Employees International Union, ("the Union"), respectively on October 29, 2009, November 23, 2009, and January 26, 2010, the Region issued a Complaint alleging that Carnegie Linen Services, Inc., ("Respondent"), engaged in surveillance of the employees' Union activities and discharged Elida Guzman, to discourage employees from engaging in Union activity; offered money, inflicted bodily injury and discharged Jose Luis Diaz ("Diaz"), to discourage employees from engaging in Union activity; and, engaged in further surveillance, threatened plant closure, promised employee benefits and interfered with employees' exercise of their protected rights, in violation of Sections 8(a)(1) and (3) of the Act. On May 13, 2010, the Regional Director issued a Notice of Hearing on Objections (2-RC-23436) and Order Consolidating Cases.

On June 1, 2010, Administrative Law Judge Steven Davis ("ALJ Davis") opened the hearing in this matter. Respondent opposed proceeding in this case on two grounds. First, Respondent claimed that the temporary order of protection obtained by Diaz against Respondent's owner, Gary Perlson, not only precluded Diaz's reinstatement, it prevented Perlson and Diaz from simultaneously attending the hearing. Second, Respondent contended that, litigating the Board case prior to the prosecution of the criminal case deprived Perlson of the privilege against self-incrimination protected by the Fifth Amendment. ALJ Davis adjourned the hearing to permit the parties to attempt to resolve these procedural roadblocks and to further explore a global settlement.

At the resumption of the hearing on June 23, 2010, ALJ Davis approved an informal, partial settlement Agreement which resolved all Complaint allegations, except those relating to Diaz, and he remanded the representation case to the Regional Director.

As to the Diaz case, the General Counsel ("the GC") and the Union asserted that the matter should proceed because the protective order plainly excluded "place of employment" and "other," such as, the courtroom. Unless Perlson intended to assault Diaz at the hearing, no issue was presented. Respondent, nevertheless, insisted that the hearing should not proceed because Perlson's Fifth Amendment rights would be violated.

In an effort to resolve this issue, on June 30, 2011, the ALJ, pursuant to Section 103.31(c) of the Board's Rules and Regulations, recommended that the Board issue an Order compelling Perlson to testify or provide other information. (GC Ex 23(b)). By Order dated October 28, 2010, the Board directed the ALJ to proceed with the hearing. (GC Ex 23(a)). Accordingly, the hearing was conducted on January 31, February 1 and 3, 2011.

On July 11, 2011, ALJ Davis issued a decision and recommended Order, in which he concluded that Respondent violated the Act by offering Diaz money to cease his Union activities, by inflicting bodily injury on Diaz in response to his Union activities, and by discharging Diaz because he engaged in Union and concerted activities. On August 18, 2011, Respondent timely filed exceptions to the ALJD with the Board. The undersigned hereby respectfully submits this answering brief to Respondent's exceptions.

II. RESPONDENT'S EXCEPTIONS ARE MERITLESS

In its submission, Respondent essentially argues that ALJ Davis erred both procedurally and substantively. Both arguments should be rejected as neither claim is substantiated on the record.

A. Procedural Issues

Regarding Fifth Amendment concerns, Respondent claims that had its president, Gary Perlson testified, his "testimony very likely would have caused the finder of fact to reach different conclusions." (Exceptions, p. 3). As a threshold matter, Respondent failed to timely motion to quash Perlson's subpoena *ad testificandum* which had been issued and served on Perlson prior to the opening of the hearing. Further, had Perlson bothered to appear, he could have asserted the privilege on a question-by-question basis and answered any questions that did not directly bear on the criminal case. As an example, Perlson presumably could have corroborated Garlasco's claim that the entire night shift crew was transferred to the day shift, not just Diaz, or that Garlasco routinely ate a very late lunch in his car. Although the Board's Order specifically provided that the ALJ may draw an adverse inference from Perlson's failure to testify, ALJ Davis found that "[h]ere, I need not draw an adverse inference from Perlson's failure to testify. I find that the credited testimony and circumstantial evidence present in the record are sufficient to support the finding of violation which I make, even absent Perlson's testimony." (ALJD, p. 14, ln 33-38). Moreover, ALJ Davis found that even if Diaz lunged at Perlson and possessed confidential information as Respondent contended, all four *Atlantic Steel* factors weigh in favor of Diaz retaining the protection of Section 7. (ALJD p. 15, ln 43-44; p. 17, ln 24-26). Accordingly, Perlson's testimony is superfluous because even if all credibility determinations favored Respondent's version of events, the ALJ's conclusion that Diaz was unlawfully discharged is still warranted.

More importantly, Respondent's Fifth Amendment right would not have been compromised by testimony regarding the assault. Due process requires that witnesses are privileged against compelled self-incrimination. Here, unless Respondent is claiming that the

only truthful testimony Perlson could give would be to *admit* that he assaulted Diaz, no procedural safeguards are at stake. Perlson's silence is wholly inconsistent with innocence.

With respect to the DVDs, Respondent's mockery of the Board's subpoena powers throughout the litigation colors the arguments presented in its submission. As reflected in the Complaint, Respondent waged a vigorous anti-union campaign. Part of that campaign included conducting captive audience meetings, during which the employees were subjected to watching various DVDs. Accordingly, the GC subpoenaed all videotapes that Respondent showed to employees during the course of its anti-Union campaign. (GC Ex 5). Respondent proffered Spanish versions of the DVDs. The GC had reasonable cause to believe that English versions were shown to the employees, and therefore, requested production of the DVDs in English. Respondent's counsel stated that he had no knowledge of whether the English version had been shown to the workers, however, he stated that he would discuss the matter with his client.

On the resumption of the hearing several weeks later, the GC again requested production. Respondent claimed that it had no additional information regarding precisely what languages were shown to the employees. When the hearing resumed on January 31, 2011, the GC demanded production. Respondent's counsel conceded that English versions *were* shown to employees, however, he argued that Respondent no longer possessed them and therefore, it was not obliged to produce the English version. Notably, the subpoena broadly defines the term "document" as "each document which is or was in the possession, custody or control of Respondent or its agents or representatives." (GC Ex 47).

On February 3, 2011, ALJ Davis ordered that the record be held open to permit the GC to transcribe, translate and assess whether the subpoenaed material would be offered as evidence of animus. On February 11, Respondent received the English transcripts in an electronic format

from the management consulting firm. Rather than immediately producing the transcripts, Respondent filed a motion dated February 15, objecting to the admission of the DVDs on the basis of relevance, which was denied. By the time Respondent actually forwarded the English versions to the GC in late February, the government had already incurred transcription and translation costs, which tallied about $3,000, in taxpayer money. (GC Ex 47, p. 2, par. 1). Respondent's recalcitrance in obtaining documents that were indisputably in the custody of its agent, the management consulting firm hired to conduct its anti-Union campaign, demonstrates Respondent's bad faith in the conduct of the litigation.

In its submission, Respondent resurrects the issues surrounding the admission of the DVDs. Specifically, Respondent claims that the ALJ erred in admitting the DVDs because: the Spanish versions that were produced pursuant to subpoena were not shown to the employees; the Complaint does not allege that showing DVDs during its campaign is unlawful; and, the DVDs were shown after Diaz' discharge.

First, the subpoena specifically requests only "videos that were used during the course of a presentation to employees." Respondent's claim that they were not shown to employees is contrary to very production of the DVDs. ALJ Davis found in his Order receiving the exhibits that the DVDs were produced pursuant to subpoena which asked for the videos shown to employees and that during the hearing, no claim was made by Respondent that the videos that it produced were not shown to the employees. Accordingly, Board should affirm and adopt the ALJ's ruling in this matter. (GC Ex 48).

Second, it is well-established that while protected speech, such as an employer's expression of its views or opinions against a union, cannot be deemed a violation in and of itself, it can nonetheless be used as background evidence of antiunion animus on the part of the employer. *Mediplex of Stamford,* 334 NLRB No. 111 (2001); *NACCO Materials Handling Group, Inc.*, 331 NLRB No. 164 (2000);

Affiliated Foods, Inc., 328 NLRB 1107 (1999); *Meritor Automotive, Inc.*, 328 NLRB 813 (1999); *Gencorp*, 294 NLRB 717, 731, n. 1 (1989). Further, Board law permits the use of evidence of an employer's election campaign in order to show animus in an unfair labor practice trial. *See e.g.*, *Sunrise Health Care Corp.*, 334 NLRB 903 (2001). The ALJ noted that "[t]he videos stated, in part, that job loss and plant closure are not unusual results of unionization, and that the union 'is not in the future of this organization.'" Contrary to Respondent's assertions, he explicitly found these comments to be evidence of animus, not independent violations of the Act. (ALJD p. 11, ln, 43-46-p. 12, ln 1-3).

Finally, evidence arising after an adverse employment action, such as Diaz's discharge, may properly be considered as to the question of animus. *Davey Roofing, Inc.* 341 NLRB 222, 223 (2004)(Board affirmed ALJ's finding of animus based on the employer's post-layoff comments).

The transcript of the DVDs amply demonstrates Respondent's anti-union animus. As an example, the DVD presentation repeatedly predicted that collective bargaining would be at best, futile, and at worst, punitive. (GC Ex 45, p. 14, par. 2; Ex 46, p. 3, par. 17-25 and p. 4, par. 33; Ex 47, p. 4-5, p. 11 and p. 16). Further, by misrepresenting the union's LM-2 form, the employees were given the impression that unions spend nothing on individual members. (GC Ex. 45, p. 5). False predictions that unions act in an unlawful and unreasonable manner were presented. (GC Ex 47, p. 9). More outrageously, unions were painted as brutal institutions that would seek to punish its members. (GC Ex 46, p. 5, par. 40 and p. 6, par. 43). Finally, generalized and anecdotal predictions of strikes and shutdowns went well beyond an objective factual basis. (GC Ex 46, p. 5, par 40; 47, p. 10). Respondent opposed, delayed and otherwise obstructed production of the DVDs throughout the litigation and continues to object to their admission in evidence for the obvious reason that they reveal its vociferous anti-union animus.

Even if the DVDs were somehow improperly admitted in evidence, the ALJ's conclusion that the discharge was unlawful is fully supported by the record. In addition to independent 8(a)(1) violations, i.e., the unlawful bribe and subsequent assault, ALJ Davis found animus based on Garlasco's unrebutted statement to Diaz that "if the union comes in we will close the company." Garlasco did not deny making this statement. (ALJ p. 4, ln 35-38; p. 11, ln 39-41).

B. Factual Findings

Respondent's substantive exceptions turn on the ALJ's credibility findings. The GC submits that the credibility findings of the ALJ should be affirmed by the Board. *Standard Dry-Wall Products*, 91 NLRB 544 (1950).

The record demonstrates that Garlasco's testimony at the Board hearing was inconsistent with his prior testimony at the grievance arbitration and with his incident report which was allegedly written shortly after the assault. Garlasco testified that he told Diaz, "I believe you're fired, but I'm going to call [Local 1964]." (ALJD p. 7, ln 8-11). Garlasco also testified at the Board hearing that Perlson fired Diaz by announcing that he could not have him working there. However, the arbitrator's decision noted that Garlasco testified that it was *his* decision to terminate Diaz immediately. (ALJD p. 7, ln 47-50).

Similarly, the arbitrator's decision stated that Diaz's prior misconduct did not play a part in the decision to discharge Diaz. Yet, at the Board hearing, Garlasco testified at length regarding incidents for which he conceded that Diaz was not disciplined, but claimed that he considered them in the decision to terminate Diaz. (ALJD p. 8, ln. 28-29; p. 9, ln 21-22, p. 14, fn 9).

Further, Garlasco's testimony could not be credited because he overstated any alleged misconduct on Diaz's part. When asked why Perlson did not call the police if Diaz attacked him,

Garlasco stated "an incident like this in comparison to some of the other things that go on at work, if I were to call the police every time we had incidents of something like this, somebody getting bumped and not liking it, the police might as well just set up, stand outside and wait for us to ask them to some in." (ALJD p. 7, ln 53 and p. 8, ln 1-4). The ALJ also found that Garlasco's credibility was harmed by his exaggeration of the nature of alleged confidential information and the loss of the Park Central account. (ALJD p. 13, ln 46-52).

III. THE BOARD SHOULD AFFIRM ALJ'S FINDINGS AND ADOPT DECISION

Under *Wright Line*,[1] the GC has the initial burden to prove that the employees' Section 7 activity was a substantial or motivating factor in the discharge. The elements commonly required to support the GC's initial showing are union or protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. See, e.g., *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). If the GC makes the required initial showing, the burden shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even in the absence of the union or protected concerted activity. *See, Manno Eklectric*, 321 NLRB 278, 280 n. 12 (1996), *aff'd*, 127 F.3d 34 (5th Cir. 1997).

In the instant case, the GC has established a prima facie case under *Wright Line*. Diaz was primarily responsible for getting the Union's foot in the door at Respondent's facility. He made the initial contact with the Union, organized the first Union meeting, and distributed authorization cards to his co-workers. The record indisputably shows that Diaz was engaged in Union activity.

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

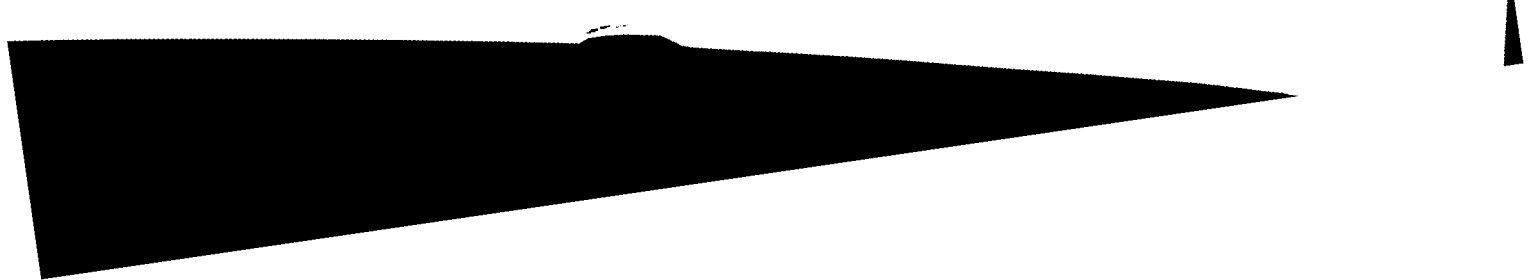
Although Respondent denies knowledge of Diaz's Union activity, the record demonstrates that Garlasco engaged in surveillance and directly observed Diaz with Union representatives. In explaining his whereabouts, Garlasco claimed that eight hours after he started work, he took a lunch break in a borrowed car. He parked on the street to eat, rather than returning to his office which was just two blocks away. (Tr. 390-393, 408, 412). The ALJ correctly found that Garlasco's testimony that he just happened to be in someone else's car, on that street, on that day, at that time, is contrived. *Ivy Steel & Wire, Inc.*, 346 NLRB 404 (2006). (ALJD p. 11, ln. 23-30).

As set forth above, the record is replete with evidence of animus based on video presentations that Respondent made to employees during captive audience meetings. Respondent's animus is also amply demonstrated on the record by its numerous, contemporaneous 8(a)(1) violations.[2]

The facts surrounding the unlawful bribe are as follows: On November 6, Garlasco told Diaz to stop by his office when he finished his shift. At about 6:00 am, Diaz reported to Garlasco's office. They were alone. Garlasco said that he wanted to talk about Diaz's shift, but he also wanted to talk about the Union. He offered Diaz $3,000, in cash, to stop organizing for the Union. Because of the language barrier, Garlasco wrote the sum down on a piece of paper and told Diaz to think about it and let him know the next day. (Tr. 110-111). During that one-on-one meeting, Garlasco threatened to close the facility if the Union prevailed.

It strains credulity that Garlasco, as the general manager in charge of the overall operation, would invite Diaz to his office for the sole purpose of discussing his schedule. (ALJD p. 10, ln. 40-47). Garlasco admitted that he wrote something down on paper. He claimed,

[2] Contrary to Respondent's claim, the ALJ did not rely on any testimony adduced regarding Elida Guzman's discharge. (Exceptions p. 10, #4; ALJD p. 12, ln 5-11).



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however, that he wrote down the hours of the shift. (Tr. 469). When asked what the hours were, Garlasco stumbled through the following response: "They used to come in at 3:00, then they came in at 5:00, 6:00, 4:00, so it would have been the morning shift and I don't know exactly what it would have been, starting the floor at 6:00, it had to be 4:00 o'clock, somewhere in that vicinity that the washroom comes in at..." (Tr. 470). In contrast, Nelson Astacio, the morning shift floor manager, stated simply and unequivocally that the morning shift is from 6:00 am to 3:00 pm. (Tr. 485). Diaz worked the morning shift for years so that he was familiar with the scheduled hours. Even if Respondent changed the scheduled start time, Diaz would have known when the tunnel washer for the morning shift arrived to relieve him. Accordingly, Garlasco's claim that he wrote the morning shift hours on a piece of paper for Diaz is implausible and, therefore, Diaz's testimony regarding the bribe was credited. These credibility findings were clearly explained in the ALJD and should be affirmed. (ALJD p. 10, ln, 40-47).

In addition to the Judge's reasoning, Diaz's credibility is bolstered by a similar promise made by Respondent to adjust the schedule of employee, Miguel Velez, if he voted against the Union. Briefly, the facts of Velez' discharge: by memo dated March 11, 2010, Garlasco recounted that Velez failed to perform a special delivery which he had volunteered to do. Garlasco explicitly noted that "[t]hese actions and your total disregard for me, Carnegie and our customers, as well as the many previous write ups lead me to no other alternative but to terminate your position at Carnegie." When Velez submitted his grievance to the Union, he stated that, "back in January, I was told by Gary, the owner, that in the month of March 2010, that I could have Sundays off if I voted for Local 1964 health & insurance. That was the deal that we both agreed on." Within weeks, Glenn Blict, the president of the ILA, Local 1964, (the

incumbent union) got Velez reinstated despite an abysmal driving record. (GC Ex 37; Tr. 363-366).

Based on the above summary, the record establishes and the ALJ properly found that, in promising benefits, offering money and threatening to close, Respondent violated Section 8(1) of the Act. *Tilden Arms Management Co.*, 276 NLRB 1111, 1118-1119 (1985); *Beach Lane Mgmt.*, 2009 NLRB LEXIS 356 (NLRB Nov. 12, 2009).

Respondent additionally violated Section 8(a)(1) by physically assaulting Diaz. *Extreme Building Services Corp.*, 349 NLRB 914 (2007)(physically assaulting an employee is a violation of Section 8(a)(1) of the Act); *Fortuna Enterprises*, 354 NLRB No. 95 (2009). Garlasco's testimony that the assault was an accident is refuted by the nature of Diaz's injury. While he claimed that the coffee projected forward and then, splattered on everyone when the cup dropped to the floor, the severity of Diaz's injury suggests that the coffee was intentionally thrown in his face. (Tr. 442-451). At the hospital, Diaz was diagnosed with a corneal abrasion and referred to an ophthalmologist for follow-up treatment. (Tr. 119, GC Ex 13). Hours after the incident, Marchelli described Diaz' eye as red and watering. (Tr. 205-207). An independent medical examination ordered by the Workers' Compensation Board resulted in disability benefits awarded to Diaz. In the practitioner's report, Dr. Miskin noted: "there appears to be a consequential causal relationship between the incident of 11/07/09 and purported psychiatric symptoms." [3] (GC Ex 20).

The record demonstrates that Perlson accused Diaz of disloyalty for bringing in the Union and became belligerent when Diaz refused to accept the shift change and the money to

[3] While backpay is not in issue in this case, the compliance manual at 10560.3 finds an exception to the general policy regarding unavailability where the injury suffered is from an unfair labor practice. *Greyhound Taxi Co., Inc.*, 279 NLRB 1080 (1986)(discriminate entitled to backpay for the entire period of his psychological disability which was caused by Respondent's unlawful conduct).

walk away from the Union. The fact that Diaz mentioned the loss of an account should not have prompted Perlson's disgusting tirade, which is unrebutted on the record. Accordingly, as the ALJ found, the weight of the evidence supports that Perlson intentionally inflicted bodily injury in violation of Section 8(a)(1). (ALJD p. 12, ln. 15-17).

Regarding the defense, the ALJ discredited Respondent's version of events as improbable and exaggerated. First, Respondent's assertion that Diaz was dangerous is unsubstantiated and insufficient to warrant discharge. In that regard, the evidence indicates that he would likely have been suspended as demonstrated by the facts surrounding employee, Gloria Quinones's discharge. Screaming, cursing, slamming her hands on the desk and pointing her finger in supervisor, Cherika Alvarez' face, resulted in a two-day suspension. It was only after Quinones threatened to bring her daughter back to blow the supervisor's head off that she was terminated. (GC Ex 36).

Moreover, Respondent generally reinstated employees after Local 1964 got involved. In fact, Respondent claimed that Diaz was the first and only case that the parties actually arbitrated. Disparate treatment is illustrated by the facts surrounding the discharge of employee, Rafael Cornelio.[4] The triggering event is memorialized by letter, dated May 13, to Local 1964, with a date and time of termination. Perlson wrote: Cornelio was terminated that afternoon for yelling at him in the office while staff members were on the phone with clients. Perlson asked him to "simmer down," but he persisted and did not calm down or lower his voice. Two days later, Local 1964 president, Glenn Blicht intervened and Cornelio's discharge was reduced to a one-day suspension for insubordination. (Tr. 369; GC Ex 39).

[4] The documents regarding Cornelio's discharge were produced pursuant to subpoena by Local 1964, not Respondent, even though these records were encompassed by the GC's subpoena. (GC 5, par B. 4).

Another example of reinstatement after gross misconduct is the discharge of employee, Jose Luis "Jay" Rodriguez.[5] (Tr. 82; 356-359; GC Ex 34). Rodriguez had an atrocious history of lateness for which he received disciplinary warnings. On July 2, Rodriguez took five hours to complete the Park Lane run, which should have taken only two hours. Later that evening, he logged fourteen hours to complete two runs. After Rodriguez' termination, his helper, Juan Carlos, reported to management that Rodriguez routinely left his truck parked right outside Park Lane for 60 to 90 minutes. Two weeks later, Blicht met with management and the discharge was reduced to a 30-day probation.

The Board has held that where it is shown that the employer's proffered reasons are pretextual – that is, either false or not in fact relied on – the employer fails by definition to show that it would have taken the same action o those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003)(citing *Limestone Apparel Corp.* 255 NLRB 722 (1981), *enfd* 705 F.2d 799 (6th Cir. 1982). The Board recognizes that shifting rationales is evidence that an employer's proffered reasons for discharging an employee are pretextual. See, e.g., *City Stationary, Inc.*, 340 NLRB 523, 524 (2003).

At Diaz's arbitration, Respondent claimed that Diaz was discharged immediately for attacking Perlson. In the instant case, however, Respondent relied on its claim that Diaz was also terminated because he had confidential information regarding a competitor, Miron & Sons, Inc. ("Miron").

Garlasco confirmed that the clients are easily identifiable: their names are displayed on the bins that are moved on and off the trucks; the bins are marked with the hotel's name

[5] Again, Local 1964 produced these documents, not Respondent; these records showing progressive discipline stand in stark contrast to Diaz's file.

throughout the production cycle. The bins are readily visible to anyone who walks through the plant or happens to be on the street when the bins are loaded and unloaded at the hotels. (Tr. 414-415). All of the drivers have pick-up reports listing the clients which are on clipboards posted near the shipping department. Many of Respondent's current employees are former employees of Miron, and they still have friends and family working there. (Tr. 407). Clearly, the client list is not confidential information and it stands to reason that Miron's clients are just as easily identified by his employees who have ties to Respondent's employees.

To the extent that the bidding process was confidential, Diaz has no control over whether Miron informed his employees that he was bidding on a new account. Garlasco testified that because Diaz learned of the bid – mere knowledge - he has committed a dischargeable offense. (Tr. 465). Respondent's defense boils down to a claim that Diaz was terminated for *Miron's* breach of confidentiality. (Tr. 457-459).

Garlasco insinuated that there was some link between Diaz's inadvertent error in July regarding discolored linens owned by the Broadway Hotel and the Trump International Hotel, and the loss of the Park Lane account in November. (Tr. 459-461). Here, Garlasco is grabbing at straws to explain why Diaz' knowledge that the bid was awarded to its competitor even mattered. *Joseph Chevrolet, Inc.*, 343 NLRB 7 (2004)(characterization of employee conducting competitive business on work time substantial overstatement and thus, pretextual). Based on all of the above, the ALJ's findings regarding Garlasco's credibility should be affirmed. (ALJD p. 7, ln. 26-36).

Finally, even if Garlasco were credited, Diaz was provoked by Perlson's obscenities. The Board has found that if the employee's conduct, including physical assaults, are found to have been provoked by the employer, the employer is precluded from relying on such misconduct to

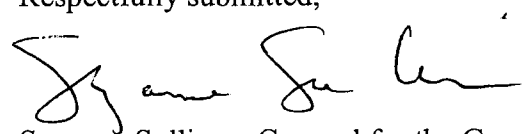
justify the discharge. *Caterpillar, Inc.*, 322 NLRB 674, 676 (1996)(employee called supervisor "motherfucking liar" threatened to deal with him outside, and struck him with his finger, did not exceed the protections of the Act); *Tubari, Ltd.*, 287 NLRB 1273, 1285 (1988)(employee threw gloves on floor, angrily headed towards company president, screaming and another employee had to stop him); *E.I. DuPont & Co.*, 263 NLRB 159 (1982)(open-palmed push of supervisor insufficient to justify discharge). Accordingly, the ALJ noted that even assuming that Diaz lunged at Perlson and that he possessed confidential information, Diaz retained the protection of Section 7. The ALJ's findings and conclusions in this regard should be affirmed. (ALJD p. 15, ln 41-52 through p. 17, ln. 1-16).

IV. REMEDY AND CONCLUSION

It is respectfully urged that the Board affirm the Administrative Law Judge's rulings, findings and conclusions, and adopt the recommended Order. The GC respectfully requests that the Board grant any other relief it deems appropriate in this matter.

Dated: September 9, 2011
New York, New York

Respectfully submitted,



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NLRB-877

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Respondent

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LAUNDRY DRY CLEANERS AND ALLIED WORKERS JOINT BOARD, WORKERS UNITED a/w SERVICE EMPLOYEES INTERNATIONAL UNION
Charging Party

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I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated below I served the Acting General Counsel's Brief via postal mail service upon the following persons, addressed to them at the following addresses:

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Subscribed and sworn to before me
This 9th day of September, 2011

Designated Agent
NATIONAL LABOR RELATIONS BOARD