Carnegie Linen Services, Inc. *and* Laundry Dry Cleaning & Allied Workers Joint Board, Workers United, a/w Service Employees International Union

Carnegie Linen Services, Inc. *and* Laundry Dry Cleaning & Allied Workers Joint Board, Workers United, a/w Service Employees International Union and International Longshoremen's Association, Union Local 1964, AFL–CIO. Cases 2–CA–39560 and 2–RC–23436

December 31, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

On July 11, 2011, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions with supporting argument. The Acting General Counsel filed an answering brief.

The Board has considered the decision and the record in light of the exceptions, supporting argument, and brief and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions[3] and to adopt the recommended Order as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Carnegie Linen Services, Inc., Bronx, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(e).

"(e) Within 14 days after service by the Region, post at its facility in the Bronx, New York, copies of the attached notice marked 'Appendix.'[12] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such

[1] The Respondent excepts to the judge's denial of its motion at the hearing to adjourn until after the criminal case filed by employee Jose Luis Diaz against President Gary Perlson had been tried. It contends that the denial was unduly prejudicial because Perlson could not testify without compromising his Fifth Amendment right against self-incrimination in the criminal case. We find that the judge did not abuse his discretion in denying a continuance. In an October 28, 2010 order, the Board directed the judge to proceed with the hearing although it declined his recommendation to issue an order compelling Perlson to testify. See Sec. 102.31 of the Board's Rules and Regulations. Moreover, the Respondent has not shown any prejudice to Perlson's Fifth Amendment rights because he was not compelled to testify at the hearing; nor did the judge draw any adverse inferences based on Perlson's failure to testify.

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

The Respondent also excepts to what it perceives as the judge's improper reliance on facts regarding employee Elida Guzman's discharge. We find that this exception is without merit because the judge specifically rejected the Acting General Counsel's argument that Guzman's discharge was additional evidence of animus toward the Union.

Additionally, we do not pass on the Respondent's exception to the judge's admission of antiunion DVDs shown to employees after Diaz was discharged and before the January 20, 2010 representation election. We find it unnecessary to rely on the judge's finding that the DVDs are evidence of additional animus because animus is already established from Michael Garlasco's statement to Diaz that the Company would shut down, Garlasco's attempt to bribe Diaz to stop his union activities, and Perlson throwing coffee at Diaz.

[3] Although the judge did not explicitly rely on *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), we adopt his finding that Diaz' discharge was in violation of Sec. 8(a)(3) and (1) because his findings satisfied the analytical objectives required by *Wright Line*. Thus, the Acting General Counsel established that union animus was a motivating factor in Diaz' discharge. Specifically, the Acting General Counsel showed that Diaz engaged in union activity when he contacted the Union and attended the meeting at the restaurant, the Respondent was aware of this activity through Garlasco's knowledge of the meeting and his attempt to bribe Diaz, and the Respondent displayed animus towards Diaz when Garlasco attempted to bribe Diaz, Perlson threw coffee in Diaz' face, and Garlasco told Diaz that the Respondent would close if the Union came in. Furthermore, we agree with the judge that the timing and context of the discharge—3 days after the attempted bribe and Perlson's assault—supports finding that the Respondent was motivated by Diaz' union activities in discharging him. Finally, we agree with the judge that the Respondent's proffered explanations for the discharge—Diaz' communication with a competitor about confidential bidding and lunging at Perlson—were pretextual. Consequently, the Respondent necessarily failed to show that it would have taken the same action even absent Diaz' protected conduct. See *Golden State Foods*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp*., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982)). Accordingly, we do not reach the judge's alternate analysis applying *Atlantic Steel Co.*, 245 NLRB 814 (1979).

[4] We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 6, 2009."

2. Delete paragraph 2(g).

IT IS FURTHER ORDERED that Case 2–RC–23436 is severed and remanded to the Regional Director for Region 2 for the purpose of conducting a second election as directed below.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the election directed herein and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the date of the election directed herein, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Laundry Dry Cleaning & Allied Workers Joint Board, Workers United, a/w Service Employees International Union or International Longshoremen's Association, Union Local 1964, AFL–CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances.

Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. December 31, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Suzanne Sullivan, Esq., for the General Counsel.
Larry M. Cole and *Nicholas Stevens, Esqs. (Starr, Gern, Davison & Rubin, Esqs.),* of Roseland, New Jersey, for the Respondent.
Bryan C. McCarthy, Esq. (O'Connor & Mangan, P.C.), of New Rochelle, New York, for Local 1964.
Liz Vladeck and *Ira Katz, Esqs.,* of New York, New York, for Workers United.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge, an amended charge, and a second amended charge filed on October 29, 2009, November 23, 2009, and January 26, 2010, respectively, by Laundry Dry Cleaning & Allied Workers Joint Board, Workers United, a/w Service Employees International Union (Workers United or the Union), a complaint was issued on March 30, 2010, against Carnegie Linen Services, Inc. (the Respondent or the Employer).

The complaint, as amended at the hearing, alleges that the Respondent engaged in surveillance of employees engaged in union activities, discharged Elida Guzman, offered Jose Luis Diaz (Diaz) money to cease his union activity, inflicted bodily injury on Diaz in response to his union activities and discharged him, threatened employees with plant closure if Workers United won the election, promised employees benefits if they voted against the Union, and caused police officers to be present in and around the Respondent's facility on the day of the election. The Respondent's answer denied the material allegations of the complaint.

On December 4, 2009, Workers United filed a petition for an election in a unit of production and maintenance employees including all packers, dockworkers, and delivery employees, and on January 20, 2010, an election was held. The tally of ballots showed that the election was won by the Intervenor, International Longshoremen's Association, Union Local 1964, AFL–CIO (Local 1964). Workers United filed objections to the election and on May 13, 2010, the Regional Office issued a notice of hearing on objections and order consolidating cases, which consolidated for hearing the unfair labor practice and the objections cases.

On June 1, 2010, the hearing opened before me in New York, New York. On June 23, a Partial settlement agreement was executed by counsel for the General Counsel, the Respondent, and Workers United, and was approved by me. The agreement settled all the allegations in the complaint except those relating to Diaz, and also provided that the election would be set aside and the objections portion of the complaint would be remanded to the Regional Director to schedule a new election "which will be directed upon resolution of the remaining allegations in this matter."

The hearing continued on June 23, 2010, and on January 31, and February 1, 2011.[1]

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent, a New York corporation, having an office and place of business at 874 East 139th Street, Bronx, New York, is a commercial laundry. Annually, the Respondent purchases and receives at its Bronx, New York facility, products, goods, and materials valued in excess of $50,000 directly from suppliers located outside New York State. The Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent also admits and I find that Workers United has been at all times a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

As set forth above, the only complaint allegations before me are those which allege that on or about (a) November 6, 2009, the Respondent through its general manager, Michael Garlasco, offered Diaz money to cease his union activity; (b) November 7, 2009, the Respondent through its owner, Gary Perlson, inflicted bodily injury on Diaz in response to Diaz' union activities; and (c) November 10, 2009, the Respondent discharged Diaz because he joined or assisted Workers United and engaged in concerted activities.

A. The Facts

1. Diaz' union activities

Diaz began work for the Respondent in December 2006, as a machine operator, working at the tunnel washer. His duties included taking laundry from bins and loading them into the washer. When he was hired, and until June 2008, he worked the day shift, from 6 a.m. to 3 p.m.

In June 2008, Diaz was asked by General Manager Garlasco to work the night shift until a new machine was installed. Thereafter, he worked at night for about 6 months, until November 2008, when the new machine was put in place. Later, he worked 1 week on the day shift and was then returned to the night shift. Diaz stated that about once per month while he was working on the night shift he asked Garlasco for a transfer to the day shift. On July 29, he gave Garlasco a letter requesting a change to the day shift due to his health and personal issues. Diaz' request was denied and he continued working on the night shift.

Some time thereafter, Diaz spoke with a friend regarding Workers United and contacted that Union's agent, Jorge Deshan. Inasmuch as the Respondent had a collective-bargaining agreement with Local 1964 which was not due to expire until February 28, 2010, Deshan advised Diaz that Workers United could not file a petition for an election until shortly before the contract's expiration.

Deshan further advised Diaz that he wanted to meet with him and his coworkers on October 26, 2009, at the Caridad Restaurant which was located about two blocks from the Employer's facility. Diaz told his fellow workers about the meeting.

Diaz stated that while walking to the restaurant for the meeting, he noticed Garlasco sitting in a car, and waved to him but Garlasco did not respond.[2] Diaz phoned Deshan and told him that he saw Garlasco nearby. When Diaz arrived at the restaurant, union agents told the employees present that they should leave that establishment by the rear exit and enter another restaurant through the rear door. They did so and the meeting was held at the second restaurant, during which Diaz noticed Garlasco walking in front of that restaurant.

As the meeting ended, employee Guzman left to return to work. About 30 minutes later, she returned and, according to Diaz, advised those present that she had been fired by Perlson "because she had participated in the meeting." Union Agent Marcia Marchelli testified that Guzman told the group that Garlasco fired her, explaining that "maybe he called Gary [Perlson] and told him that I was at the meeting." Marchelli corroborated Diaz' testimony concerning the employees' move from one restaurant to the other, adding that during their transfer, Garlasco followed them to the second restaurant.

Garlasco testified that he drove to the area of the restaurant that day in a borrowed car because his car had been stopped by the police earlier for having a faulty light. He was in the area to purchase parts for his car and buy lunch. He noted that this is the area he usually visits for car parts and lunch. Garlasco stated that his workday begins at about 6 a.m., and that when he arrived in the area at about 3 p.m. he was on his usual lunchbreak. He conceded that no one would recognize the car he drove that day because it was not his vehicle. He stated that as he was eating lunch in the car, he observed several union

[1] Following the close of the hearing, pursuant to a motion made during the hearing, I received in evidence as General Counsel's exhibits the transcripts of three video recordings shown to employees. They will be discussed below.

[2] Diaz testified inconsistently that Garlasco was standing at a train station.

agents exit their car, but did not see any employees of the Employer in the area.

Garlasco stated that as he drove back to the facility, he saw a Miron & Sons, Inc. (Miron) truck, and one of its employees.[3] At that time he believed that the Union was in the area to speak to Miron's employees about their upcoming contract negotiations with the Union.

Garlasco denied knowing that there would be a union meeting at the restaurant that day, and also denied being in the area in order to discourage employees from meeting with the Union. However, he admitted being told by certain employees, whose names he could not recall, that employees were signing cards for the Union.

2. The alleged bribe and the physical assault

a. Diaz' version

Diaz stated that 2 weeks after the restaurant meeting with the Union, on Friday, November 6, Day Manager Nelson Astacio told him that Garlasco wanted to speak with him regarding his work shift, and asked him to go to Garlasco's office.[4] Diaz reported to the office and asked that someone be present with him, but Garlasco refused. Diaz testified that Garlasco told him, "[W]e're here to talk about your shift. Forget about that. I really want to talk to you about the union. I really want you to stop talking about Union here. But I'm going to pay you, I'm going to give you" and then he wrote on a piece of paper the numbers $1000, $2000, and $3000, followed by a question mark. Garlasco then asked him, "[W]hat is your price and don't speak anymore of Union," offering to pay him in cash. Garlasco asked Diaz to tell him the next day what his "price" was. Diaz then told Garlasco that he wanted an interpreter "just to make sure," but Garlasco said that an interpreter was not necessary since he "knew enough English." Diaz did not respond to Garlasco's offer, and went home.

Garlasco denied offering money to Diaz to induce him to stop campaigning for Workers United. He denied writing an amount of money on a paper, but conceded that he wrote the times of Diaz' new, morning shift.

Diaz stated that when he arrived at work the following day, Saturday, November 7, Garlasco asked him to report to his office at the end of his workday so that they could speak about his work shift. At the end of the day, Diaz went to Garlasco's office where they spoke alone. Garlasco said, "[G]ive me your price." Diaz responded, "I don't have a price." Garlasco then said that "if the union comes in we will close the company." Garlasco did not deny making this threat.

Diaz asked, "[W]hat you want me to do?" Garlasco told him, "[Y]ou have to leave," and Diaz left his office and the plant, and walked home. Supervisor Astacio came up to him and told him that Gary Perlson, the Respondent's owner, wanted to speak to him. Astacio did not deny following Diaz and asking him to return to the plant.

Diaz returned to the facility and went to the office with Astacio who acted as interpreter with him and Perlson. Garlasco was present. They all stood close to each other, with Diaz being between 2 and 4 feet from Perlson. Diaz quoted Perlson as asking, "[W]hy do you want to do this to my company?" Diaz replied that "I want my coworkers and I to be okay." Perlson responded, "Jose, I've kind of turn[ed] my head on a lot of things, that you've done." Diaz said, "I want better representation." Perlson then said that he would change his shift next week.

Diaz then asked Perlson if he was changing his shift "because Park Central Hotel is leaving?"[5] Perlson and Garlasco then asked how he knew that, and Diaz replied, "I just know it." Perlson then said, "[W]ell, next week, I'm going to change your shift, but you're not going to be washing but you're going to come and clean." Diaz replied that "I have no problem with that, but you're going to pay me the same." Perlson answered, "[W]ell, you in fact are going to be cleaning then. But you're not going to be cleaning the company. You're going to be cleaning my ass with your mouth, mother fucker, son of a bitch, stupid. Leave my company." Diaz then related that Perlson removed the lid from a cup of coffee that he was holding and threw it in his face. Garlasco and Astacio then escorted Diaz from the plant.

Outside the plant, Diaz phoned Marchelli, the Union's organizer and told her what happened. Diaz also told her that he felt ill, that coffee had entered his left eye in which he then had no vision, and, as a diabetic, he went into shock. Marchelli advised him to call the police, which he did. When the police arrived, Diaz told them that Perlson cursed him, threw hot coffee in his face, and fired him. The police left Diaz on the street and entered the plant. They returned and told Diaz that he had not been discharged, that they were told that it was "just [an] accident," and Perlson asked that he return to the plant so that they could "speak calmly."

Diaz stated that he entered the plant with the police and Perlson told him, "I understand how you're feeling right now. It was just an accident." Perlson said that he had not been fired, and that the Employer would be responsible if he stayed out of work and would also pay his bills. Diaz asked the police to check the surveillance cameras, but Perlson answered that the cameras had not been working for about 2 weeks. Diaz then said that he felt badly. Perlson told him to call an ambulance and that he would "take responsibility for any expenses and days missed from work."

Diaz testified that he was "confused" as to whether he was still employed, since Perlson first told him to leave and that he did not want him in the Company, but later, with the police present, Perlson told him to take as much time off as necessary.

The police called an ambulance and Diaz went to the hospital where he was seen by a physician who made a written diagnosis of left corneal abrasion. Upon leaving the hospital, Diaz called Marchelli who asked him to meet with her at the Union.

On Monday, November 9, Diaz saw a physician who gave him a note that he could return to work the next day. That day, November 9, Diaz visited the plant and gave the note to Garlasco, who told him that he had to first call Local 1964 before

[3] Miron & Sons, Inc., is a competitor of the Respondent.

[4] Astacio is an admitted supervisor.

[5] The Park Central Hotel was a major account of the Respondent. Diaz learned from a worker at competitor Miron & Sons, Inc., that the account was put out for bids and Miron won the bid.

he attempted to return to work. He left and called Marchelli who advised him to write a note as to what happened. His written description of the events, dated November 9, noted especially that Perlson "attacked me physically, throwing a large quantity of hot coffee in my face. I had done nothing wrong. Gary [Perlson] was angry with me for exercising my rights, that's all."

The following day, November 10, Diaz returned to work where he was told by Floyd Ellis, the evening manager, that Perlson "did not want me in the company. That I was fired. And to leave immediately."

b. The Respondent's version

Garlasco testified that Diaz wanted to return to the day shift when the Employer was in the process of purchasing and installing a large machine which would permit it to reduce the number of washing shifts from three to two. After its installation, the Employer used the new machine for 1 week, during which Diaz was transferred to the day shift, but then the machine was not working properly, and Diaz and the other seven night-shift employees were returned to the night shift until the machine was operating satisfactorily.

Garlasco testified that on November 7, he met with Diaz in his office to inform him that he would be transferred to the day shift beginning on Monday, November 9. Diaz told him that he knew why he was making the change. Garlasco replied that the change was being made because the new machine was then operational. Diaz answered that the change was being made because the Employer was losing the Park Central Hotel account. When Garlasco expressed disbelief, Diaz told him that "Miron" told him.[6] Garlasco asked how Diaz knew such information.

At that point, he and Diaz left the office and met Perlson, who was walking toward them at the bottom of the stairs near a production area. Garlasco stated that the noise from the machines was very loud and he did not know if the three or four workers in the general area could hear the conversation. Astacio joined the group. Perlson asked Garlasco if he coordinated the shift changes. Garlasco related that he told Diaz about the change of shifts, but that he mentioned some "very disturbing news" about the Employer's losing the Park Central Hotel account. Garlasco mentioned that he was not aware that the account was in jeopardy. Perlson mentioned that the contract was let for bids 1-1/2 weeks before. All four men stood close to each other.

Perlson then asked Diaz how he knew about the Park Central account. Garlasco interrupting, saying that Diaz said that Miron told him. A "very loud, back and forth" argument ensued between Perlson and Diaz, with Perlson asking him if he was working for Carnegie or Miron, adding that Miron was a competitor, and he (Diaz) shouldn't know anything about this." Then Perlson said to Garlasco, "I can't have that guy working here if he knows this information."

Garlasco stated that Diaz "lunged" at Perlson, making a forward motion with his hands, but did not make contact with Perlson. Perlson then stepped back, raised his hands in a defensive motion, and the coffee in the uncovered coffee cup that Perlson was holding was projected forward, hitting Diaz, Astacio, and Garlasco. The cup fell to the floor, hitting Garlasco's pants. Garlasco then escorted Diaz from the building.

Garlasco denied that Perlson threw the coffee at Diaz.

The incident report prepared by Garlasco after the incident differs from his testimony. The report stated that Perlson told Diaz that the Employer was planning to implement the new work schedule, whereas Garlasco testified that he told Diaz of the change in shifts. In addition, Garlasco's report stated that coffee was spilled on Perlson and Diaz, whereas Garlasco testified that the coffee also hit him and Astacio. Finally, the report states that he and Astacio escorted Diaz from the building, whereas Garlasco testified that only he walked out with Diaz, and that Astacio walked away with Perlson in a different direction.

Garlasco testified that he did not know if the plant's surveillance cameras covered the area of the dispute, but even if they did, those cameras had not been working for several weeks. However, Garlasco testified that surveillance cameras were very important because garments being cleaned are worth "thousands and thousands" of dollars—"you just want to make sure that everybody is seen and is taken care of."

Garlasco further testified that Diaz asked him if he had been discharged. Garlasco replied that he had just "attacked" the owner of the Company and he had "inside information" that the Employer was about to lose an account—information that no one else was aware of. "I believe you're fired, but I'm going to call" Local 1964. He also told Diaz to call that union.

Astacio testified that he was present when Garlasco and Diaz spoke about the shift change and Diaz mentioned that Carnegie would be losing the Park Central Hotel account. A "real loud" argument ensued concerning how Diaz knew that the account would be lost. At that time, Perlson told Diaz that people "giving information to another company can no longer work for the employer." He explained that the information that Diaz gave was that Diaz knew that the Park Central account was going to Miron. Astacio stated that "I think Diaz tried to approach Gary [Perlson] with a lunging forward motion." Perlson stepped back and, putting his hands forward, dropped the uncovered coffee cup, spilling the coffee on him, Perlson, and Garlasco.

Garlasco testified that Diaz was discharged because he attacked the Respondent's owner, and because he possessed "confidential" information concerning the Employer's loss of the Park Central account, information known only to Miron and Perlson.

Garlasco conceded that an employee of Miron would know the identity of Miron's accounts because the laundry bins are labeled with the account's name, and that such an employee could have advised Diaz that Park Central was a new account of Miron. However, Garlasco maintained that Diaz could control whether the Respondent's Park Central account could have become jeopardized by the manner in which he washed the linens. Garlasco claimed that "I have my suspicions" that the loss of the account was related to Diaz' duties, explaining that an employee intent on such a course of conduct has the "ability to jeopardize how we wash and how we process and how we handle that account." He further noted that if "somebody

[6] Miron Marcus is the owner of Miron.

wanted us to lose an account and was in the position, such as Jose [Diaz], it would very easily be tampered with." Garlasco admitted, nevertheless, that there was no evidence in October and November 2009, that any employee was tampering with the laundering work.

Garlasco further stated that he did not discipline any employee in the past for speaking to a competitor, but that doing so, under these circumstances, is a dischargeable offense, and that the worker would be considered "at fault" for possessing information from a competitor relating to the Employer's loss of an account, particularly where the account was lost in a "blind bid" process.

Garlasco denied that Diaz was fired because he helped Workers United in its effort to organize the employees of the Employer.

Local 1964 filed a grievance in Diaz' behalf. The arbitrator's decision noted that Garlasco testified there that it was his decision to terminate Diaz immediately. However, at the Board hearing, Garlasco stated that Perlson fired Diaz by announcing that he could not have him working there.

Garlasco, when asked why Perlson did not call the police if Diaz lunged at him, stated that "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 come in." Later, in response to a leading question by Respondent's counsel, Garlasco said that there was no need to call the police since Diaz had already done so, and they appeared at the plant within minutes.

Perlson did not testify at the hearing. A criminal charge was brought against Perlson in the Bronx County Criminal Court with respect to the November 7 incident. Perlson asserted his Fifth Amendment right to refuse to testify. Pursuant to Section 102.31 (c) of the Board's Rules and Regulations, I recommended that the Board seek the approval of the Attorney General for the issuance of an order requiring him to testify. The Board denied my recommendation, advising that the parties may present whatever admissible evidence was available and make any appropriate legal arguments concerning what, if any, inferences should be drawn based on the assertion of the privilege against self-incrimination. The General Counsel's brief requested that I make an adverse inference from Perlson's failure to testify.

3. The grievance meeting and arbitration hearing

On November 12, a grievance session was held at the office of Local 1964. Present were its business agent, Glenn Blicht, Garlasco, and Diaz.

Diaz related the events of November 6 and 7, including that Garlasco offered him money as a "payoff" not to bring in the Union, and that Perlson threw coffee in his face. Perlson denied throwing coffee at Diaz, adding, "I don't want him in this company. He's a dangerous person. And my machines are worth millions. I don't want him here."

Perlson mentioned four prior instances of Diaz' misconduct. Garlasco stated at the Board hearing that Diaz was not disciplined for any of these incidents. They are as follows:

1. *July 31, 2009*: The incident report stated that "Diaz loaded a red blanket into the washer with white items causing the white items to be dyed red. The report stated that Diaz failed to perform his job properly and the system had to be shut down for 4 hours. This misconduct cost the company thousands of dollars." At the Board hearing, Diaz claimed that the machine was shut down for only 20 minutes. He stated that, as a result of the incident, he was denied a regular bonus and was placed on probation for one month. He stated that he was first shown this incident report at the November 12 grievance meeting.

2. *August 2, 2009*: the incident report stated that "Diaz involved in a fight with Tyrone. Surveillance video shows Diaz attacking Tyrone. The police were called and Diaz was taken to the hospital." Diaz' explanation at the Board hearing was that Tyrone nearly touched him with a cart he was pushing. Diaz warned him to be careful. Tyrone laughed at him and Diaz told a friend that "that motherfucker" threw a cart at him. Tyrone then approached him, angered because Diaz described him that way, and they both fought. Diaz slipped, fell to the floor and became unconscious. He was taken to the hospital. Diaz stated that the first time he saw this report was at the grievance session.

3. *October 24, 2009*: The incident report stated that "Diaz had a verbal altercation with Rigoberto Guardado (Rigo)." At the Board hearing, Diaz claimed that Rigo displayed a knife and Diaz called the police. When the police arrived, no weapon was found. Diaz first saw this incident report at the grievance hearing. Garlasco did not discuss this incident with him and did not show him the report.

4. *October 28, 2009*: The incident report stated that "Diaz became threatening to employee Juan (Papo) Cuadrodo. Reason unknown." Garlasco's written explanation of the incident was that, as Papo was unloading his truck, Diaz approached him and complained about the way in which Papo was working. Diaz became very loud and verbally threatening. Diaz said that he was "going to get Papo." Diaz' explanation at the Board hearing was that Papo accused him of telling his co-workers that he (Papo) told Perlson that the workers were organizing for the Union, and they argued about that. Garlasco testified at the Board hearing that he heard from several employees that Workers United was collecting cards form the Employer's workers, but that this confrontation involved Diaz objecting to the way in which Papo unloaded a truck.

An arbitration hearing was held on February 22, 2010, which was attended by Blicht and the attorney for Local 1964. Garlasco was the sole witness. Diaz had attempted to withdraw the grievance on the ground that Local 1964 could not represent him fairly because he was fired for attempting to bring in another union. The request to withdraw the grievance was denied by the arbitrator who decided to uphold Diaz' discharge, finding that the Employer had just cause to fire him based on Diaz' confronting and lunging at Perlson.

The arbitrator's decision noted that Garlasco testified there that it was his decision to terminate Diaz immediately, whereas

at the Board hearing, Garlasco stated that Perlson announced that he could not have Diaz working there. The arbitrator's decision also stated that Diaz' prior misconduct did not play a part in the decision to discharge him.

4. The events of November 2009

On November 26 and 27, 2009, Diaz distributed flyers in front of the plant with Union Agents Marchelli and Alvero Arroyo. Marchelli and Diaz testified that Garlasco emerged from the plant and approached them. Garlasco asked Alvaro if he knew what he was doing. Arroyo replied that he did. Marchelli stated that Garlsaco told them to leave since they were on private property, and said that he would call the police. Marchelli stated that before the police arrived, she crossed the street and handed a flyer to an employee driving a Carnegie truck. While she was standing on the corner waiting to cross, a car attempted to run her over. She dodged the car and crossed the street. Diaz identified the driver as Perlson.

The police arrived and the union agents told them that they were campaigning for the Union. According to Diaz, the police told him that the Employer called, complaining that they were throwing papers on the floor. Diaz told them that Garlasco crumpled the papers he had in his hand, saying that he wanted to read them.

Diaz testified that Perlson approached him and asked him, "[Y]ou didn't have enough with the coffee? Do you want more coffee?" Marchelli's version is that Perlson asked Diaz "do you remember the coffee in your face?"

5. The organizing campaign

As set forth above, nearly 1 month after Diaz' discharge, the Union filed a petition for an election on December 4, 2009, and an election was held on January 20, 2010, which was won by Local 1964. During the course of the organizing campaign, the Respondent showed three videos to its employees, prepared by a consulting firm, which urged the workers to vote against the Union. The videos stated as follows: "Many unionized industries are trying to survive, and as a result of company unionization, job loss is not unusual; they end up shutting their doors. . . . Certainly, the union is not in the future of this organization, but you are. That is why your vote is of utmost importance in these elections. Choose intelligently and vote 'No.'" [7]

Analysis and Discussion

As set forth above, certain complaint allegations were settled pursuant to an informal settlement agreement. Accordingly, the only complaint allegations before me are (a) the alleged offer of money to Diaz to cease his union activities; (b) the alleged infliction of bodily injury on Diaz in response to his union activities; and (c) whether the Respondent discharged Diaz because he engaged in union activities.

I. THE ALLEGED OFFER OF MONEY TO DIAZ TO CEASE HIS UNION ACTIVITIES

As set forth above, Diaz testified that on November 6, he was told by Garlasco in his office that he wanted him to cease talking about the Union, and then, in writing, offered him a cash payment of $1000 to $3000. Garlasco told him to name his "price" the following day. At the end of his work shift the next day, November 7, Diaz was asked by Garlasco for his "price" and Diaz said that he did not have a price. Diaz then went home.

Garlasco denied offering a bribe to Diaz to cease speaking about the Union and also denied writing a sum of money on a piece of paper. However, he conceded writing the time of Diaz' new, morning shift on the paper.

I credit Diaz' testimony. Diaz gave precise, specific testimony about an event that would certainly have made an impression on him. The fact that Diaz did not give Garlasco an answer at the first meeting and then was asked for his response at a second meeting the next day lends credence to Diaz' testimony that he was offered a bribe.

It is significant that, after refusing Garlasco's offer on November 7, Diaz went home, but was called back by Supervisor Astacio to meet with Perlson. Astacio did not deny asking Diaz to return to the plant. Perlson then asked Diaz why he was "doing this to my company" and Diaz replied that he wanted him and his coworkers to benefit from representation. Perlson then subjected Diaz to a highly offensive comment, and threw coffee in his face.

A proper inference may be made, which I make, that after Diaz left the plant after having refused Garlasco's offer, Garlasco informed Perlson that Diaz could not be bribed to cease his activities in behalf of the Union. Diaz was then called back to the plant to face Perlson's fury. This sequence of events also supports Diaz' testimony that he was the subject of an attempted bribe.

I cannot credit Garlasco's testimony. Diaz was familiar with the morning shift's hours, having worked that shift for 2 years. Accordingly, it was unnecessary for Garlasco to have written the hours of the shift for Diaz. He could have simply told Diaz the hours of the new shift. In addition, Diaz was apparently selected for an individual meeting with Garlasco. There is no evidence that any of the other members of the night shift who would be transferred on the next workday were the subject of a similar one-on-one meeting with the general manager. Accordingly, I credit Diaz' testimony that Garlasco wrote the amount of the attempted bribe on a piece of paper.

I accordingly find and conclude that, as alleged, the Respondent offered money to Diaz to cease his union activities in violation of Section 8(a)(1) of the Act. *Storall Mfg. Co.,* 275 NLRB 220, 233 (1985); *Roth's IGA Foodliner, Inc.,* 259 NLRB 132, 133 (1981).

II. THE ALLEGED DISCRIMINATION AGAINST DIAZ

The complaint alleges that the Respondent inflicted bodily injury on Diaz in response to his union activities, and discharged him because of those activities.

A. The General Counsel's Case

Diaz engaged in activities in behalf of the Union. I find, as set forth above, that Diaz contacted the Union in October 2009, in response to the Respondent's repeated rejections of his requests to return to the day shift. He spoke to his coworkers

[7] GC Exh. 47, pp. 10, 17.

about a union meeting to be held at the Caridad Restaurant on October 26.

I also find that the Respondent possessed knowledge of Diaz' union activities. Garlasco was concededly in the area of the restaurant on the day of the meeting, and also admitted seeing union agents nearby. Diaz credibly testified that he saw Garlasco in a car near the restaurant and waved at him, and that he, his coworkers and the union agents took evasive action in order to avoid being seen by Garlasco, by exiting the rear door of one restaurant and entering the back door of another eatery.[8]

Garlasco denied being in that area to spy on the union meeting and also denied seeing any of the Respondent's employees there. However, his presence in a borrowed car and eating lunch in that car raise some suspicions as to his purpose in being in the area at that time. First, it is odd that Garlasco chose to eat lunch in a car 9 hours after he arrived at work at 6 a.m. Further, Union Agent Marchelli's testimony that Garlasco followed them from one restaurant to the other, and Diaz' testimony that he saw Garlasco walking in front of the second restaurant make an inference permissible that Garlasco learned about the meeting and was there to note who was in attendance.

Knowledge of Diaz' union activities is also established by Diaz' credited testimony and my finding, above, that Garlasco offered him a bribe to cease his union activities.

The General Counsel has proven that the Respondent possessed animus toward Diaz' union activities. As set forth above, I have found that the Respondent offered him money to cease his union activities, and I have also credited Diaz' undenied testimony that, in the course of that conversation, Garlasco told him that "if the union comes in we will close the company." That threat, which is a violation of the Act, was alleged in the original complaint and has been settled. Accordingly, I make no separate finding that the threat violated Section 8(a)(1) of the Act. However, it may be used to show union animus by the Respondent.

In addition, the Respondent mounted an antiunion campaign prior to the election in which urged its employees to vote against the Union and showed videos to them. The 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." The Board has held that "an employer's expression of antiunion comments . . . while not themselves violative of the Act, nevertheless did establish animus toward its employees' union activities." *Lampi LLC*, 327 NLRB 222, 222(1998); *Affiliated Foods, Inc.*, 328 NLRB 1107, 1107 (1999).

The General Counsel argues that additional animus toward the Union has been proven by the unlawful discharge of Guzman. On this record, I cannot find that it has been proven that Guzman was unlawfully terminated. As set forth above, Diaz gave hearsay testimony that Guzman returned to the restaurant and told those present that she had been fired for attending the union meeting. However, Marchelli stated that Guzman had been fired perhaps because Garlasco told Perlson that she had been at the meeting. Guzman did not testify. Accordingly, this record does not support a finding that Guzman was fired unlawfully.

It is significant that minutes after Diaz refused Garlasco's offer of a bribe to cease speaking about the Union, he met with Garlasco and Perlson during which Perlson threw a cup of coffee in his face and then discharged him. The close timing between the threat to close the Company, the offer to bribe Diaz and the assault on Diaz and his firing strongly support a finding that the Respondent was motivated by Diaz' union activities in taking these actions against him.

The Respondent denies that Perlson intentionally threw coffee into Diaz' face. Garlasco and Astacio testified that following a heated argument between Perlson and Diaz concerned with Diaz' knowledge of the loss of the Park Central account, Diaz lunged at Perlson who defensively stepped back and, in a defensive motion, raised his hand which held the coffee and spilled the coffee over Diaz and the others present.

I credit Diaz' testimony concerning this incident. He carefully quoted the outrageously hostile remarks made to him by Perlson, words which undoubtedly remained in his memory. He also precisely described how Perlson took the lid off the coffee cup and threw its contents in his face. I cannot credit the testimony of the Respondent's witnesses. As set forth above, the incident report prepared by Garlasco differed from his testimony regarding who was hit by the coffee and who escorted Diaz from the building. There was no evidence that anyone else was hit in the face with the coffee although all four men were standing very close to each other. Rather, Garlasco stated that when the cup, fell his pants were stained by the coffee. Diaz' eye injury was immediately confirmed by a physician at the hospital he visited immediately after the incident.

The events immediately following that incident also lend credence to Diaz' testimony. Thus, when Diaz left the plant he called the police and told them that Perlson had cursed him, thrown coffee in his face and fired him. Diaz' contemporaneous, written account of the incident is consistent with his testimony. Further, when Diaz entered the plant with the police officers, he asked them to check the surveillance cameras. That request establishes that Diaz sought to obtain documentation of Perlson's attack. If he had indeed lunged at Perlson it is not likely that he would ask the police to obtain proof of his alleged assault on Perlson. Significantly, Perlson responded that the cameras had not been working for about 2 weeks. At the hearing, Garlasco said that they had not been functioning for "several" weeks. Perlson did not tell the police, as Garlasco testified at hearing, that he was not certain whether the altercation was in an area covered by the cameras. Thus, it is clear that the cameras did record the event at issue. In addition, if the cameras were as important as Garlasco claimed they were—the garments were worth thousands and thousands of dollars and "you just want to make sure that everybody is seen and is taken care of," it is unlikely that the Respondent would have let the cameras go unrepaired for weeks.

Perlson's response to the police also supports Diaz' version of the incident. Thus, according to Diaz' credited testimony,

[8] I recognize that Diaz gave somewhat contradictory testimony regarding Garlasco's location when he waved at him. Nevertheless, I do not believe that this is fatal to a finding that his testimony, as to the critical events concerning his meetings with Garlasco and Perlson, is credible.

Perlson told him and the police that the coffee incident was "just an accident," that Diaz had not been fired, and that he could take time off to recover, and the Respondent would pay his bills. Clearly, if Diaz had lunged at Perlson and had been the actual aggressor in the confrontation, Perlson would have informed the police that the incident was Diaz' fault, and would not have offered to remedy the situation as he did. It must be concluded that, at that time, Perlson knew that he was responsible for the physical assault on Diaz and, at least with the police present, sought to minimize the damage he caused by offering to give Diaz time off from work and pay his physician's bills. Perlson's remorse apparently disappeared 3 days later when Diaz returned to the plant and was told that he had been fired.

In addition, the mutually corroborative testimony of Diaz and Marchelli concerning their distribution of flyers in front of the plant in late November, support a finding that Perlson intentionally threw the coffee at Diaz. Perlson approached them on the street and made a reference to the coffee incident, asking Diaz if he "did not have enough coffee, do you want more coffee" or "do you remember the coffee in your face?"

I accordingly find and conclude that the Respondent, by Perlson, inflicted bodily injury on Diaz by throwing coffee in his face. *Extreme Building Services Corp*., 349 NLRB 914, 914 (2007); *Staten Island Bus Co*., 312 NLRB 416, 416 (1993).

Diaz' discharge clearly grew out of his refusal to accept a bribe to cease his union activities minutes before the assault. Perlson's upset at Diaz was manifested by his throwing a cup of coffee in his face and then, either that day or within the next three days, discharging him. The close timing of the offer of money to Diaz to cease speaking about the Union, his refusal to accept a bribe, his telling Perlson that he was engaging in union activities in order to protect himself and his coworkers and that he wanted better representation, Perlson's cursing Diaz and throwing coffee at him, followed by his discharge, all support a finding that the discharge was motivated by the Respondent's animus toward Diaz' for engaging in union activities.

B. The Respondent's Defenses

The Respondent asserts, as set forth above, that Perlson did not throw coffee at Diaz, and that it did not discharge him because of his union activities. Rather, the Respondent contends that it fired Diaz because he possessed confidential information known only to Perlson that the Employer was losing the Park Central account to Miron, a competitor, and because he lunged at Perlson during their argument on November 7.

Diaz' source of information was a friend who worked at Miron. There is no allegation that he improperly obtained that information from any other source. The laundry bins at Miron contain the names of Miron's accounts, and Diaz was told by his friend that the Park Central account was obtained by Miron. Accordingly, the information possessed by Diaz was not confidential. Indeed, the Respondent's laundry bins are also labeled with the names of the accounts so that the laundry would not be mixed with other hotels' wash.

Perlson was upset that his worker possessed this information. But, nevertheless, it is apparent that the Respondent would not have discharged Diaz for possessing this information because Diaz did nothing wrong in obtaining it or mentioning it to Perlson. I find that Garlasco's credibility was harmed by his exaggeration of Diaz' alleged misconduct in this regard. He speculated that he was "suspicious" that Diaz intentionally caused the Park Central account to be lost by tampering with the laundry. However, Garlasco conceded that there was no evidence to support such a claim. See *Troxel Co*., 305 NLRB 536, 536 (1991), where the Board rejected the employer's argument that it fired an employee because it was concerned that her "attitude created a risk that in her capacity as a quality control inspector she might allow defective products to pass through or even sabotage its operations" where there was no evidence that the worker was inclined toward sabotage.

As to the Respondent's other defense, that Diaz was discharged for lunging at Perlson during their argument, as set forth above, I discredit the testimony of Garlasco and Astacio as to this incident.[9] I have found that Diaz did not lunge at Perlson. Garlasco and Astacio denied that Diaz made contact with Perlson. It would seem that if Diaz was intent on causing harm to Perlson he would physically attack Perlson rather than lunge at him. They were face-to-face. Therefore, I cannot credit their testimony that Diaz lunged at Perlson.

Even assuming that Diaz lunged at Perlson, it is significant that, in part of his testimony, Garlasco, when asked why he did not call the police immediately, stated that he did not consider it to be that serious—"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 come in."[10] Accordingly, a finding may be made that, at least initially, the Respondent did not regard Diaz' lunging at Perlson to be a dischargeable offense.

That finding is supported by Perlson's comments immediately following the incident. He told the police and Diaz that he had not been discharged, that he should take some time off and that the Respondent would pay his medical bills. Diaz' actions on November 10 when he returned to work are consistent with his belief that he had not been fired. Thus, he returned to work when his physician said he could and was told when he arrived that he had been fired.

Perlson did not testify, asserting his privilege against self-incrimination pursuant to the Fifth Amendment. The General Counsel asks that I draw an adverse inference from his failure to testify. In *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976), the Supreme Court stated that "the Fifth Amendment does not forbid adverse inference against parties to civil actions when they refuse to testify in response to probative evidence offered against them. . . . ."

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[9] No other misconduct committed by Diaz in the course of his employment was considered in making the decision to discharge him. Indeed, according to Garlasco, no discipline had been given to Diaz as a result of prior instances of misconduct.

[10] I note that later, in response to a leading question from his counsel, Garlasco stated that an immediate call to the police was not necessary since Diaz had already called them and they were at the scene within minutes. Significantly, the Respondent's witnesses did not testify that they told the police that Diaz had lunged at Perlson.

Here, 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 violations which I make, even absent Perlson's testimony. Thus, I have discredited the testimony of Garlasco and Astacio as to the critical events at issue here—the offer of money to Diaz so that he would cease speaking about the Union, and the incident in which Perlson threw coffee in Diaz' face.

Analysis

The Respondent discharged Diaz based on his conduct at the November 7 meeting with Perlson. It is clear that the meeting was an outgrowth and a continuation of Garlasco's unlawful attempt to bribe him the previous day. Thus, on November 6, Garlasco offered money to Diaz in an attempt to stop him from speaking about the Union. Diaz did not respond to the offer, and the next day, November 7, at the end of his shift, Diaz was again asked by Garlasco how much money he wanted to cease his activities in behalf of the Union. Diaz said that he was not interested in money. He left work and was approached by Supervisor Astacio who asked him to return to the plant to speak with Perlson.

At that meeting, Perlson asked Diaz, "[W]hy do you want to do this to my company" and Diaz replied that he wanted himself and his coworkers to be "okay" and he wanted better representation. Perlson announced that Diaz' shift would be changed the following week at which point Diaz mentioned that he knew that the Respondent had lost the Park Central account. Perlson then made a highly offensive remark to Diaz, cursed him and threw coffee in his face. Thereafter, Diaz was discharged.

The meetings between Garlasco and Diaz on November 6, and continuing on November 7 involved Diaz' activities in speaking about the Union. The Respondent violated the Act in those meetings by offering him money to cease his activities in behalf of the Union. Diaz engaged in union activities by refusing to accept an offer of money to cease speaking about the Union.

The meeting with Perlson also involved Diaz' union activities because Perlson asked him why he was doing what he was doing "to my company," a clear reference to his activities in behalf of the Union which he believed would harm the Respondent. Diaz' response that he wanted to help his coworkers and sought "better representation" also involved the exercise by Diaz of protected activity in defending his right to engage in union activities.

Because it is undisputed that Diaz' discharge was precipitated by his conduct at the November 7 encounter with Perlson, the appropriate analysis is whether the conduct for which he was discharged was initially protected under the Act and, if so, whether he lost that protection at any point. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979); *Alcoa, Inc*., 352 NLRB 1222, 1226 (2008). See *Hahner, Foreman & Harness, Inc.,* 343 NLRB 1423, 1425 fn. 8 (2004).

In *Atlantic Steel*, the Board identified four factors to be balanced in making that determination: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices. The Act allows some latitude for impulsive conduct by employees in the course of protected concerted activity, but, at the same time, recognizes that employers have a legitimate need to maintain order. The balance between these policy concerns lies at the heart of the *Atlantic Steel* analysis.

I must note, at the outset, as set forth above, that the evidence does not support a finding that Diaz lunged at Perlson or that he possessed confidential information concerning the loss of the Park Central account. But even assuming that he did lunge at Perlson and possessed confidential information, I will undertake the following *Atlantic Steel* analysis.

A. The Place of the Discussion

The first factor, the place of the discussion, favors protection in the circumstances of this case. According to Diaz, who I credit, the conversation took place in Perlson's office, in the presence of management officials, and not in a work area where other employees could overhear their conversation. Even according to Garlasco, who stated that the confrontation took place at the bottom of a staircase in an area near where three or four employees were working, because of the loud noise of the machines he did not know whether they could hear the conversation. Accordingly, there is no evidence that other employees heard the discussion. Accordingly, it has not been shown that Diaz' actions could have affected workplace discipline. I, thus, conclude that the first factor favors protecting Diaz' conduct.

B. The Subject Matter of the Discussion

The second factor, the subject matter of the discussion, strongly favors protection. The November 7 confrontation was a continuation of the dialogue between Garlasco and Diaz which began the previous day and continued in the morning of the day Diaz was discharged. Thus, Diaz was offered and refused to accept a sum of money to cease his union activities. After he refused and when he was walking home, he was called back to meet with Perlson who accused him of harming the Employer. Diaz defended his right to speak about the Union for the benefit of himself and his coworkers and in order to receive better representation. Accordingly, Diaz was plainly engaged in protected conduct. Because defending protected activity is itself protected, see *Network Dynamics Cabling, Inc*., 351 NLRB 1423, 1429 (2007), and because asserting fundamental rights under the Act strongly favors protection, see *Stanford Hotel,* 344 NLRB 558, 559 (2005), this factor weighs heavily in favor of protection.

C. The Nature of the Conduct

The third factor, the nature of the conduct, also favors protection. I have found, above, that Diaz did not possess confidential information and did not lunge at Perlson.

However, even assuming that Diaz possessed confidential information and lunged at Perlson, the record does not demonstrate that Diaz' conduct on November 7 was so egregious as to be considered indefensible. As noted above, the Board has allowed a degree of latitude in circumstances where employees are engaged in allegedly inappropriate, yet protected activities.

As set forth above, Diaz' knowledge that Miron obtained the Park Central account was obtained by a friend who worked at Miron. There was no allegation that Diaz acted improperly in any way in learning that information, or that he came upon such information from the Respondent's records. As to the allegation that Diaz lunged at Perlson, as set forth above, he made no contact with Perlson, and apparently just made a forward motion. Also, as set forth above, Garlasco testified that such conduct was not considered to be serious, and Perlson did not immediately discharge Diaz for his alleged conduct, but said that he could return to work when he felt better. Accordingly, the Respondent did not, at that time, consider his conduct to be a dischargeable offense.

The Board has found protected an employee who spoke loudly, stood up and moved toward a supervisor who threatened him with discharge. *Alton H. Piester, LLC*, 353 NLRB 369, 374 (2008). Here, Diaz and Perlson engaged in a heated argument. There was no evidence at all as to what Diaz said, if anything, during that argument. I find that Diaz' conduct on October, November 7, was not so opprobrious as to remove his protected, concerted and union conduct from the protection of the Act. *Atlantic Steel Co.,* above.

D. Provocation by the Respondent

The final factor, provocation by the employer's unfair labor practices, similarly favors protection. Diaz' alleged lunging at Perlson, and indeed the entire incident, were triggered by Garlasco's threat to close the shop, his unlawful offer to pay Diaz to cease his union activities, Perlson's highly offensive description of Diaz' upcoming work duties, the stream of obscenities directed at him, and his question to Diaz as to why he was acting against the Employer. Without these unfair labor practices, there would have been no discussion or confrontation between Perlson and Diaz. As such, this factor favors protection. See *Stanford Hotel,* 344 NLRB att 559.

Much more serious conduct, including physical assaults, if found to have been provoked by the employer, precludes the employer from relying on such misconduct to justify discharge.

In *Key Food*, 336 NLRB 111, 113 (2001), the Board stated that it has "long recognized that an employer cannot provoke an employee to the point where he commits an indiscretion and then rely on that conduct to terminate his employment." In that case, an employee touched a supervisor on the shoulder with his finger following the supervisor's "profane and abusive tirade." See also *Palagonia Bakery Co.,* 339 NLRB 515, 532 (2003), where the employee cursed at the supervisor and struck him with his finger; *E. I. du Pont de Nemours,* 263 NLRB 159, 159–160 (1982), where an employee's open palmed push of a supervisor who had harassed him was deemed insufficient to justify his discharge.

It is significant that here it is not alleged that Diaz cursed at Perlson or touched him. Rather, it is clear that the combined actions of Garlasco in asking Diaz on consecutive days to accept a bribe to cease speaking about his union activities, and Perlson's demand to know why he was acting against the Employer together with his cursing and offensive remarks provoked Diaz to allegedly lunge at Perlson.

In summary, all four *Atlantic Steel* factors weigh in favor of Diaz retaining the protection of Section 7. Because Diaz' activity remained protected, his discharge violated Section 8(a)(3) and (1) of the Act.

Conclusions as to the Representation Case

As set forth above, on January 20, 2010, Local 1964 won an election in Case 2–RC–23436. Workers United filed objections to the election and on May 13, 2010, the Regional Office issued a notice of hearing on objections and order consolidating cases, which consolidated for hearing the unfair labor practice and the objections cases. On June 23, a partial settlement agreement was executed by counsel for the General Counsel, the Respondent, and Workers United, and was approved by me. The agreement, in part, provided that the election would be set aside and the objections portion of the complaint would be remanded to the Regional Director to schedule a new election upon the resolution of the remaining complaint allegations.

It will be ordered that the representation proceeding be remanded to the Regional Director for the purpose of conducting a second election.

CONCLUSIONS OF LAW

1. By offering Jose Luis Diaz money to cease his union activity, the Respondent violated Section 8(a)(1) of the Act.

2. By inflicting bodily injury on Jose Luis Diaz in response to his union activities, the Respondent violated Section 8(a)(1) of the Act.

3. By discharging Jose Luis Diaz because he assisted and joined Workers United and engaged in concerted activities, the Respondent violated Section 8(a)(1) and (3) of the Act.

REMEDY

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

The Respondent having discriminatorily discharged Jose Luis Diaz, it must offer him reinstatement and shall make him whole for any loss of earnings and other benefits suffered as a result of the unlawful action against him. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). The Respondent shall also be required to remove from its files any and all references to the unlawful discharge, and to notify Diaz in writing that this has been done and that the warning and discharge will not be used against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Carnegie Linen Services, Inc., Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Offering money to employees to cease their union activity.

(b) Inflicting bodily injury on employees in response to their union activities.

(c) Discharging employees because they joined and assisted Laundry Dry Cleaning & Allied Workers Joint Board, Workers United, a/w Service Employees International Union, or any other labor organization and engaged in concerted activities.

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

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

(a) Within 14 days from the date of the Board's Order, offer Jose Luis Diaz full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

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

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Jose Luis Diaz in writing that this has been done and that the discharge will not be used against him in any way.

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

(e) Within 14 days after service by the Region, post at its facility in the Bronx, New York, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 6, 2009.

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

IT IS FURTHER ORDERED that Case 2–RC–23436 is severed and remanded to the Regional Director for Region 2 for the purpose of conducting a second election.

Dated, Washington, D.C., July 11, 2011

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT offer money to you to encourage you to cease your union activity.

WE WILL NOT inflict bodily injury on you in response to your union activities.

WE WILL NOT discharge or otherwise discriminate against you because you join or assist Laundry Dry Cleaning & Allied Workers Joint Board, Workers United, a/w Service Employees International Union, or any other labor organization and engaged in concerted activities.

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

WE WILL within 14 days from the date of the Board's Order, offer Jose Luis Diaz full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL make Jose Luis Diaz whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge, and within 3 days thereafter notify Jose Luis Diaz in writing that this has been done and that the discharge will not be used against him in any way.

CARNEGIE LINEN SERVICES, INC.