

# Nos. 12-335, 12-734

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## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CARNEGIE LINEN SERVICES, INC.,

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner

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ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD

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**BRIEF FOR  
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**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of Carnegie Linen Services, Inc. (“the Company”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Order against the Company. The Company committed multiple unfair labor practices, including discharging Jose Luis Diaz because he assisted and joined Laundry, Dry Cleaning and Allied Workers Joint Board, Workers United, affiliated with Service

Employees International Union (“Workers United”) and engaged in concerted activities. The Board had jurisdiction over the unfair-labor-practice proceeding below under Section 10(a)<sup>1</sup> of the National Labor Relations Act, as amended (“the Act”).<sup>2</sup> The Decision and Order, issued on December 31, 2011, and reported at 357 NLRB No. 188 (JA 741-53),<sup>3</sup> is a final order with respect to all parties under Section 10(e) and (f) of the Act.<sup>4</sup>

The Company petitioned for review of the Board’s Order on January 26, 2012, and the Board cross-applied for enforcement of the Order on February 24. (JA 754, 757.) The Court has jurisdiction over the Company’s petition and the Board’s cross-application pursuant to Section 10(e) and (f) of the Act, because the unfair labor practices occurred in New York state. Both the petition and cross-application were timely filed, as the Act imposes no time limit for such filings.

### **STATEMENT OF THE ISSUES PRESENTED**

1. Whether substantial evidence supports the Board’s findings that the Company violated Section 8(a)(1) of the Act by bribing employee Diaz and

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<sup>1</sup> 29 U.S.C. § 160(a).

<sup>2</sup> 29 U.S.C. §§ 151 *et seq.*

<sup>3</sup> “JA” refers to the Joint Appendix, which the Company filed with its Brief. Where applicable, references preceding a semicolon are to the Board’s findings; those following, to the supporting evidence.

<sup>4</sup> 29 U.S.C. § 160(e) & (f).

inflicting bodily injury upon him, which rest upon credibility determinations that are not “hopelessly incredible.”

2. Whether substantial evidence supports the Board’s conclusion that the Company discharged Diaz for engaging in union activities in violation of Section 8(a)(3) and (1) of the Act.

3. Whether the administrative law judge clearly abused his discretion in denying the Company’s second request to continue the unfair-labor-practice hearing until criminal proceedings pending against a witness were resolved.

### **STATEMENT OF THE CASE**

This unfair-labor-practice case came before the Board on a complaint issued by the Board’s General Counsel, pursuant to charges filed by Workers United. (JA 742; JA 13, 15, 24-25, 30-38, 54-55.) Objections to a related representation election were consolidated with the complaint and set for hearing before an administrative law judge. (JA 743; JA 18, 27-29, 42-46.) The election objections, along with other allegations in the complaint, were settled prior to the hearing date. (JA 743.) Only the remaining allegations, which concerned the Company’s treatment and discharge of employee Jose Luis Diaz, proceeded to trial before Administrative Law Judge Steven Davis. (JA 743.)

On July 11, 2011, the administrative law judge issued his decision. (JA 742-53.) The judge found that the Company violated Section 8(a)(3) and (1) of the Act

by discharging Diaz because he assisted and joined Workers United and engaged in protected concerted activities. (JA 751.) The Company also committed additional violations of Section 8(a)(1), the judge found, for having offered Diaz money to cease his union activities and inflicted bodily injury on him in response to his union activities. (JA 751.)

After considering the Company's exceptions to the judge's decision, the Board agreed with the judge's findings, with some modifications in reasoning and to the order. (JA 741-42.)

## **STATEMENTS OF THE FACTS**

### **I. THE BOARD'S FINDINGS OF FACT**

#### **A. Background**

The Company operates a commercial laundry in Bronx, New York. (JA 743; JA 40-41.) At all relevant times in this case, the Company's production and maintenance workers have been represented by the International Longshoremen's Association, Union Local 1964 ("Local 1964"). (JA 743; JA 20-23, 306.) A rival union, Workers United, seeks to represent this same bargaining unit of employees. (JA 743; JA 20-23, 306.)

#### **B. Diaz Experiences Difficulties with His Work Shifts and Reaches Out to Workers United**

When Jose Luis Diaz began working for the Company in 2006, operating its washing machines, he enjoyed a day-time shift from 6:00 a.m. to 3:00 p.m. (JA

743; JA 301.) In June 2008, the Company switched Diaz to the night shift. (JA 743; JA 301-02.) The night shift created personal and health problems for Diaz. (JA 743; JA 305, 350-51.) On July 27, 2009, he communicated these problems in writing to his supervisor along with a request to return to the day shift. (JA 743; JA 59, 304, 350.) His request was denied. (JA 743; JA 305.) Nevertheless, Diaz continued to seek transfer to the day shift, renewing his request about once a month. (JA 743; JA 302, 305, 352.)

Around October 2009, Diaz reached out to Workers United through a friend. (JA 743; JA 305-06, 397.) Because the collective-bargaining agreement with the incumbent union, Local 1964, did not expire until February 28, 2010, Workers United advised Diaz that no rival election petition could be filed until shortly before then. (JA 743; JA 306.) Nevertheless, Workers United scheduled a meeting with Diaz and his co-workers. Diaz told his co-workers about the meeting. (JA 743; JA 306-07.)

**C. The Company's General Manager Surveils the Meeting Between Workers United and the Company's Employees**

On October 26, 2009, Workers United representatives met with Company employees around 3:00 p.m. at the Caridad restaurant, located about two blocks from the Company's building. (JA 743; JA 307-08, 593, 613-14.)

While walking toward the restaurant, Diaz saw the Company's general manager, Michael Garlasco. (JA 743; JA 307.) Garlasco was sitting in a borrowed

car and wearing dark glasses. Diaz waved to him, but Garlasco did not acknowledge Diaz. (JA 743; JA 307, 408, 415, 592, 667.) Diaz informed the Workers United representatives that he had seen Garlasco outside. (JA 743; JA 307-08.) A Workers United representative checked outside to confirm Diaz's sighting of Garlasco and then instructed the company employees to leave the restaurant by the back door and meet at a second restaurant a few blocks away, which they did. (JA 743; JA 308.) But a Workers United representative saw Garlasco again, walking in front of the second restaurant, Pio Pio. (JA 743; JA 308, 413-15.)

**D. Garlasco Offers a Bribe to Diaz in Exchange for Ceasing His Union Activities**

About 10 days after the Workers United meeting, on November 6, Company Day Manager Nelson Astacio informed Diaz that Garlasco wanted to speak to him about his work shift. (JA 744; JA 309.) When Diaz appeared at Garlasco's office, he asked that someone else be present for the meeting, but Garlasco refused. (JA 744; JA 309-10.) Garlasco then told Diaz that "[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 [the] Union here. But I'm going to pay you, I'm going to give you . . . ." (JA 744; JA 309.) Garlasco then wrote three numbers on a piece of paper—" \$1000," "\$2000," and "\$3,000" —and said "[w]hat is your

price and don't speak anymore of Union." (JA 744; JA 309-10.) Garlasco offered to pay Diaz in cash. (JA 744; JA 310.)

At this point Diaz asked for an interpreter to make sure he understood what Garlasco was proposing. (JA 744; JA 310.) Garlasco again refused Diaz's request, stating that Diaz "knew enough English." Without responding to Garlasco's offer, Diaz went home. (JA 744; JA 311.).

**E. After Another Failed Attempt to Bribe Diaz and a Threat to Close the Plant, the Company's Owner Tells Diaz He Is Fired in a Stream of Obscenities and Throws Hot Coffee in Diaz's Face, Injuring Diaz's Eye**

The next day, Saturday, November 7, Diaz was again summoned to Garlasco's office. Garlasco told Diaz to "[g]ive me your price." (JA 744; JA 311.) When Diaz stated that "I don't have a price," Garlasco responded by threatening that "if the Union comes in we will close the company." (JA 744; JA 311-12.) Garlasco then told Diaz to leave the plant, which he did. (JA 744; JA 312.)

While Diaz was walking toward his home, Astacio called Diaz and asked him to return to the plant to talk to the Company's owner, Gary Perlson. (JA 744; JA 312.) Diaz returned to the plant and met with Perlson and Astacio in Perlson's office. (JA 744; JA 312.) All three men were standing close to one another, with Diaz about two to four feet from Perlson. (JA 744; JA 370, 643.)

Perlson confronted Diaz, asking him "[w]hy do you want to do this to my company?" Diaz responded that he acted as he did because "I want my coworkers

and I to be okay.” (JA 744; JA 313.) When Perlson warned that “I’ve kind of turn[ed] my head on a lot of things, that you’ve done,” Diaz again emphasized that “I want better representation.” (JA 744; JA 313.)

Garlasco entered the room at this point, and Perlson offered to transfer Diaz to the day shift. (JA 744; JA 313.) Diaz inquired whether this change was “because Park Central Hotel [wa]s leaving” the Company as a laundry client. (JA 744; JA 313.) Perlson and Garlasco asked Diaz how he knew that they had lost the Park Central account. Diaz responded that he “just kn[e]w it.” (JA 744; JA 313.)

Perlson then told Diaz that “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.” (JA 744; JA 313, 365.) Diaz replied, “I have no problem with that, but you’re going to pay me the same.” (JA 744; JA 313-14, 365.) Perlson, however, retorted “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.” Perlson then removed the lid from the cup of coffee he was holding and threw it in Diaz’s face, hitting Diaz in the left eye. (JA 744; JA 314, 365.) Astacio and Garlasco then escorted Diaz outside the plant. (JA 744; JA 314.)

**F. The Police Arrive and Investigate the Scene; an Ambulance Takes Diaz to the Hospital; the Company Fires Diaz; Diaz Files Criminal Charges Against Perlson**

Owing to the attack, Diaz could not see out of his left eye and went into diabetic shock. (JA 744; JA 315, 368, 404-05.) Feeling ill and disoriented, Diaz called a Workers United representative, Marcia Marchelli, for advice. (JA 744; JA 315, 403-04.) Marchelli instructed Diaz to call the police. (JA 744; JA 315, 404.)

When the police arrived, Diaz told them that Perlson had cursed at him, thrown coffee in his face, and fired him. (JA 744; JA 315-16.) The police took Diaz with them into the plant to talk to Perlson about the incident. (JA 744; JA 316.) In front of the police, Perlson stated that what happened “had just been an accident.” (JA 744; JA 316.) He further told the police that Diaz was not discharged and that the Company would pay Diaz for any hospital expenses or lost work time caused by his injury. (JA 744; JA 316.)

Diaz asked the police to look at the Company’s video surveillance footage. (JA 744; JA 317.) Surveillance cameras are installed throughout the plant, because, as Garlasco stated, the Company cleans “garments that are worth thousands and thousands of dollars” and it is important that “everybody is seen and taken care of.” (JA 745; JA 609-10.) When Diaz requested that Perlson show the surveillance footage to the police officers, however, Perlson told the police that the

surveillance system had not been functioning for the last two weeks. (JA 744; JA 317.)

After this discussion with Perlson, the police called an ambulance to transport Diaz to the hospital, where a physician diagnosed him with an abrasion of his left cornea. (JA 744; JA 60, 317-18.) Diaz had a follow-up appointment with an eye specialist the subsequent Monday, November 9. This physician gave Diaz a note stating that he could return to work the next day. (JA 744; JA 319-20.) Later that day, Diaz stopped by the plant to give Garlasco the doctor's note. (JA 744; JA 320.) Garlasco told Diaz that he first had to call Local 1964 before returning to work. (JA 744-45; JA 320-21.) Local 1964 instructed Diaz to "put everything in writing," so Diaz faxed to Local 1964 a written description of the events of two days prior, stating 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." (JA 745; JA 61, JA 321-22.)

The next day, on November 10, Diaz reported to work. Evening Manager Floyd Ellis told Diaz that he had been fired because Perlson did not want him in the Company. (JA 745; JA 322-23.) Ellis told Diaz to leave the Company premises immediately, and Diaz complied. (JA 745; JA 323.)

On the basis of the November 7 coffee incident, Diaz filed criminal assault charges against Perlson in Bronx Superior Court. (JA 746; JA 376.) As of the filing of this brief, the charges against Perlson are still pending.<sup>5</sup>

**G. Perlson Threatens a Workers United Representative and Diaz While They Distribute Union Flyers in Front of the Plant**

Workers United's organizing drive continued after Diaz's termination. Several weeks after Diaz's discharge, around November 26 and 27, Marchelli and Diaz stood outside the Company's plant handing out flyers with another Workers United representative. (JA 747; JA 377, 407-08.)

After being warned by Garlasco that they were on private property and he would call the police, they moved to the corner across the street from the plant. (JA 747; JA 408-09.) While on the corner, a car attempted to run Marchelli over. (JA 747; JA 409.) Diaz identified the driver of the car as Perlson. (JA 747; JA 409.)

Police officers eventually arrived to investigate a complaint of littering made by the Company. (JA 747; JA 388-89.) Diaz spoke with the officers, and ultimately neither he nor Marchelli were cited for any violation. (JA 747; JA 409-11, 419.)

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<sup>5</sup> See *New York v. Gary Perlson*, No. 76477C-2009 (Bronx County Crim. Court) (currently set for trial on Sept. 20, 2012), docket *available at* [http://iapps.courts.state.ny.us/webcrim\\_attorney/DefendantSearch](http://iapps.courts.state.ny.us/webcrim_attorney/DefendantSearch) (last visited Aug. 1, 2012).

After Diaz finished speaking with the policemen, Perlson accosted him. He asked Diaz, “[y]ou didn’t have enough with the coffee? Do you want more coffee?” (JA 747; JA 388, 390, 410.)

#### **H. Workers United Loses the Representation Election and Objects to Its Fairness; the Parties Agree to a Rerun Election After This Case Concludes**

The organizing drive by Workers United culminated in a January 20, 2010 representation election. Workers United lost to the incumbent union, Local 1964. (JA 743; JA 23.)

Workers United contested the election result, filing objections with the Board. Those objections were consolidated with the charges in this unfair-labor-practice proceeding. The parties reached a partial settlement agreement resolving other allegations (including surveillance, another discharge, and other unlawful statements) and providing for a second election upon the resolution of the remaining allegations in this case. (JA 743.) The Board severed the election case from this unfair-labor-practice case. (JA 742.)

#### **I. Diaz’s Discharge Goes to Arbitration**

Diaz filed a grievance over his discharge, in which he was represented by the attorney for Local 1964. (JA 746; JA 172.) Prior to the February 12, 2010 arbitration, Diaz requested that his grievance be withdrawn, asserting that the attorney provided by Local 1964 could not fairly represent him because Diaz had

been disciplined while advocating for another union, Workers United. The arbitrator denied Diaz's request and heard the case, which featured only one witness, Garlasco. (JA 746; JA 176-78.) The arbitrator upheld Diaz's discharge, believing that the Company had just cause for discharging Diaz for lunging at Perlson. (JA 746; JA 183.) Although the Company alleged four prior incidents of misconduct by Diaz, the arbitrator did not rely upon any of these incidents in his decision. (JA 747; JA 181.)

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

Based on the foregoing facts, the Board (Chairman Pearce and Members Becker and Hayes) adopted the administrative law judge's findings and order, with some modifications. In agreement with the judge, the Board concluded that the Company had violated Section 8(a)(1) of the Act by offering money to Diaz to cease his union activities and by inflicting bodily injury on Diaz in response to those union activities. (JA 741, 751.)

The Board also agreed with the judge that the Company violated Section 8(a)(3) and (1) of the Act by discharging Diaz because he assisted and joined Workers United and engaged in concerted activities. (JA 741, 751.) The Board relied upon the judge's factual findings and determined that the General Counsel had proven a violation of Section 8(a)(3) and (1) under the analysis set forth in

*Wright Line* for determining discriminatory employment actions.<sup>6</sup> (JA 741.) The Board therefore did not reach the judge's alternate analysis.

Finally, the Board found that the judge had neither abused his discretion nor caused prejudice to the Company by denying its request to adjourn the hearing until the criminal case against Company Owner Gary Perlson had been tried. (JA 741 n.1, 749-50.)

To remedy the Company's unfair labor practices, the Board's Order requires the Company to cease and desist from: offering money to employees to cease their union activities; inflicting bodily injury on employees in response to their union activities; discharging employees because they have joined or assisted Workers United or any other labor organization and engaged in concerted activities; and, 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. (JA 751-52.)

The Order also affirmatively mandates that the Company: make Diaz whole for his unlawful discharge by offering him reinstatement, paying him backpay with daily compounded interest, removing any reference to his unlawful discharge from the Company's files, and notifying Diaz in writing that his discharge will not be used against him in any way; and post remedial notices, both written and electronic, as set forth in the Order. (JA 741-42, 751-52.)

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<sup>6</sup> 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), and *approved by NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 403 (1983).

## STANDARD OF REVIEW

The Company misstates the relevant standard of review. (Br. 9.) None of the Board determinations challenged in this review proceeding involve mixed questions of law and fact, and none are to be reviewed *de novo* by this Court. The determinations under review here all constitute factual findings—whether of historical fact or of the Company’s knowledge, motive, or pretext under the *Wright Line* analysis—and are therefore conclusive if supported by substantial evidence in the record considered as a whole.<sup>7</sup> Evidence is substantial when “a reasonable mind might accept [it] as adequate to support a conclusion.”<sup>8</sup>

This standard of review is significantly heightened and becomes nearly insuperable in those instances where the Board grounds its factual findings upon the administrative law judge’s assessment of the credibility of the witnesses at the hearing. Owing to the administrative law judge’s superior vantage upon witness demeanor, among other things, such credibility-based findings “will not be

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<sup>7</sup> 29 U.S.C. § 160(e). *See, e.g., Abbey’s Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 580 (2d Cir. 1988) (reviewing General Counsel’s case and respondent’s affirmative defense under *Wright Line* for substantial evidence); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *accord NLRB v. G & T Terminal Packaging Co.*, 246 F.3d 103, 114 (2d Cir. 2001).

<sup>8</sup> *Universal Camera*, 340 U.S. at 477; *see also Allentown Mack Sales & Svc., Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998) (“Put differently, [the Court] must decide whether on th[e] record it would have been possible for a reasonable jury to reach the Board’s conclusion.”); *accord G & T Terminal Packaging Co.*, 246 F.3d at 114.

overturned unless the testimony is hopelessly incredible or the findings flatly contradict either the law of nature or undisputed documentary testimony.”<sup>9</sup>

### **SUMMARY OF ARGUMENT**

The record amply supports the Board’s conclusions that the Company aggressively countered Diaz’s organizing for Workers United with three contested unfair labor practices: attempting to bribe Diaz to stop his union activities, inflicting bodily injury upon him in response to those activities, and discharging him in retaliation for those activities.

Supporting these conclusions are multiple factual findings made by the Board, many of which are anchored in witness credibility determinations made by the administrative law judge. After hearing conflicting accounts from witnesses for the Company and General Counsel, respectively, the judge found the General Counsel’s witnesses more believable and credited their account of how Garlasco surveilled Diaz’s union activities, how Garlasco attempted to bribe Diaz to cease those activities, and how Perlson physically assaulted Diaz in retaliation for those activities. The Board also found that the Company’s animus against Diaz’s union activities motivated his discharge and that the proffered reasons for Diaz’s dismissal were pretextual.

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<sup>9</sup> *NLRB v. Thalbo Corp.*, 171 F.3d 102, 112 (2d Cir. 1999) (citing *NLRB v. J. Coty Messenger Serv., Inc.*, 763 F.2d 92, 96 (2d Cir. 1985) (internal quotation marks omitted)); see also *Kinney Drugs, Inc. v. NLRB*, 74 F.3d 1419, 1427 (2d Cir. 1996) (same).

In order to prevail, the Company must successfully overturn these factual findings. It entirely fails. At its best, the Company's Brief presents speculative and unsupported arguments as to why the Board's factual findings are implausible. These arguments do not undermine the account of events found by the Board, much less show that account to be "hopelessly incredible," the relevant standard of review for factual findings rooted in an administrative law judge's credibility assessments. As for the Board's finding that the Company's reasons for firing Diaz were pretextual, the Company fails to address the substantial evidence that the Board relied upon. In its place, the Company offers a completely unfounded theory that Diaz deliberately sabotaged the Company's laundry services and/or obtained confidential business information in order to funnel the Company's clients to its competitor.

Finally, the Company raises a procedural issue, challenging the administrative law judge's denial of its second request to continue the hearing. Since the Company fails to show that it was prejudiced by that denial, this challenge, too, should be rejected.

## ARGUMENT

### **I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY BRIBING AND INFLICTING BODILY INJURY UPON DIAZ, WHICH REST UPON CREDIBILITY DETERMINATIONS THAT ARE NOT “HOPELESSLY INCREDIBLE”**

#### **A. Applicable Principles; the Company’s Section 8(a)(1) Violations Turn on Credibility**

Section 8(a)(1) of the Act prohibits employers from “interfer[ing] with, restrain[ing], or coerc[ing] employees” in the exercise of their right to engage in protected concerted activities.<sup>10</sup> The Board found that the Company violated Section 8(a)(1) when Garlasco offered a bribe to Diaz to cease his activities on behalf of Workers United and when Perlson threw coffee in Diaz’s face in response to those activities. (JA 741, 747-50.)

At all relevant times, Diaz was aiding Workers United in its efforts to become the collective-bargaining representative of the Company’s employees—a concerted activity unquestionably protected under the Act.<sup>11</sup> (JA 741, 750; JA 305-07, 313.) And it is axiomatic that offering bribes to union organizers and

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<sup>10</sup> 29 U.S.C. § 158(a)(1).

<sup>11</sup> *See* 29 U.S.C. § 157 (“Employees shall have the right . . . to form, join, or assist labor organizations.”).

assaulting them is prohibited coercion.<sup>12</sup> The Company does not dispute either of these points.

Instead, the Company challenges the factual basis for the Board's findings that it tried to bribe Diaz and inflicted bodily injury upon him. (Br. 16-17, 22-24.) At the hearing, the Company's witnesses offered an account of events directly in conflict with that of the General Counsel's witnesses. After hearing and observing the witnesses' testimony first-hand and considering the evidence as a whole, the administrative law judge credited the General Counsel's account of both the bribery and coffee-throwing incidents. (JA 747, 749, 750.) The Board in turn adopted these determinations as the basis for finding that the Company had violated Section 8(a)(1). (JA 741.)

The Company's defense to the Section 8(a)(1) violations therefore boils down to credibility: it believes the Board should have credited its witnesses over Diaz and his corroborating witnesses. But, as shown below, the Company entirely

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<sup>12</sup> See, e.g., *NLRB v. Price's Pic-Pac Supermarkets, Inc.*, 707 F.2d 236, 240 (6th Cir. 1983) (employer violated Section 8(a)(1) by offering employee "a raise and promotion to cease her union involvement"); *NLRB v. Bel-Air Mart, Inc.*, 497 F.2d 322, 323 (4th Cir. 1974) (employer violated Section 8(a)(1) by "promising [employee] benefits if she would cease supporting the union"); see also, e.g., *Torrington Extend-A-Care Employee Ass'n v. NLRB*, 17 F.3d 580, 594 (2d Cir. 1994) (upholding credibility determination that employer assaulted employee in reprisal for union activity and thereby violated Section 8(a)(1)); *Extreme Building Services Corp.*, 349 NLRB 914, 914 (2007) (physical assault); *Staten Island Bus Co.*, 312 NLRB 416, 416 (1993) (physical assault of spitting on and ripping clothes of union advocate).

fails to meet the stringent standard of review to reverse those credibility resolutions. Accordingly, its challenge to the Board's factual findings fails.

**B. The Company Fails to Overcome the Stringent Standard of Review for the Credibility Determinations Underlying Its Unlawful Bribery and Bodily Injury Violations**

In seeking to overturn the unfair-labor-practice findings, the Company faces a forbiddingly high standard of review: as this Court stated in *Thalbo*, “[w]hen the Board’s findings are based on the ALJ’s assessment of the credibility of the witnesses, they will not be overturned unless the testimony is hopelessly incredible or the findings flatly contradict either the law of nature or undisputed documentary testimony.”<sup>13</sup> The Company utterly fails that test. The administrative law judge thoroughly considered the competing accounts and reasonably concluded that Diaz’s precise, specific version was more coherent and consistent. The Company provides no reason to overturn this conclusion.

**1. The Company offered Diaz money to end his union activities and surveilled his meeting with Workers United**

Whereas the Board credited Diaz’s testimony that Garlasco had asked Diaz to cease working on behalf of Workers United and then wrote the specific amounts of money he was willing to offer Diaz on a piece of paper (JA 747; JA 309-12), the Company argues (Br. 16-17, 24) that the Board should have credited Garlasco’s

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<sup>13</sup> *Thalbo Corp.*, 171 F.3d at 112 (internal quotation marks omitted).

testimony that he never offered Diaz any form of bribe and only wrote down the hours of Diaz's new daytime work-shift when the two met (JA 745; JA 671-73).

The judge, however, identified numerous weaknesses and inconsistencies in Garlasco's denial of his attempted bribe, including 1) that it would have been unnecessary for Garlasco to speak to Diaz on two separate occasions if Garlasco were merely informing Diaz about his new work-shift; 2) that Garlasco did not conduct one-on-one meetings with any other employee being transferred to the day-shift; 3) that it would have been unnecessary to write the hours of the day-shift down for Diaz, since Diaz had worked that shift previously; and 4) that after Diaz's second meeting with Garlasco, Perlson angrily recalled Diaz to the plant – an act that is difficult to explain if Garlasco had met with Diaz merely to discuss his new shift. (JA 747.)

In its Brief, the Company fails to even address many of these details in the administrative law judge's analysis, much less demonstrate that Diaz's testimony is "hopelessly incredible." In challenging Diaz's description of the bribe offered to him by Garlasco, the Company raises objections that either rest upon a misunderstanding or mischaracterization of the record. For example, the Company errs in arguing that Diaz should have produced at the hearing the sheet of paper upon which the amount of the bribe was written. (Br. 24.) Garlasco specifically

testified that he did not give Diaz the sheet of paper. (JA 671-72.) Diaz therefore cannot be faulted for not retaining it.

The Company further argues that Garlasco could not have possibly attempted to bribe Diaz, since Diaz “never testified how Mr. Garlasco knew [Diaz] was campaigning for United prior to November 7, 2009.” (Br. 17.) To determine whether the Company tried to bribe Diaz or not, however, it is irrelevant *how* the Company knew of his union activity. Moreover, Diaz twice provided testimony showing the Company’s knowledge of his union activities. First, Diaz testified that, just before Garlasco offered him a bribe on November 6, Garlasco stated that he knew Diaz was organizing on behalf of Workers United: “I really want to talk to you about the Union. I really want you to stop talking about [the] Union here. But I’m going to pay you, I’m going to give you . . . .” (JA 744; JA 309.) Second, both Diaz and Marchelli provided convincing testimony that Garlasco surveilled Diaz during his October 26 meeting with Workers United. They identified Garlasco outside the Caridad restaurant on October 26, parked in a borrowed car and wearing dark glasses. (JA 748; JA 307-08, 413-15.) This was confirmed by Garlasco, who admitted to parking in a borrowed car outside the Caridad restaurant that day. (JA 748; JA 592-93.) Then, when the meeting moved to another restaurant nearby, Pio Pio, to evade Garlasco, he followed them there, where the Workers United representatives noticed him outside. (JA 743; JA 413-15.)

The Company unsuccessfully contests this underlying finding that Garlasco surveilled Diaz's union activities. (Br. 14-15) Like the bribery violation it supports, this factual finding of surveillance also rests upon a sound credibility determination. At the hearing, Garlasco testified that he was innocently eating his lunch across from the Caridad restaurant on October 26, with no intent to surveil Diaz. (JA 747-49, 750; JA 592-95, 667.) But the administrative law judge rejected this alibi because Marchelli saw Garlasco appear outside the second restaurant, Pio Pio, as well; furthermore, it was generally suspicious that Garlasco would eat his lunch nine hours after his shift started at 6:00 a.m. in a borrowed car parked across the street from the very restaurant where Workers United was meeting with the Company's employees. (JA 747-49, 750; JA 413-15, 614.) The Court need not overturn the Board's thoroughly explained credibility determination in favor of the Company's account that Garlasco was present in the area of both restaurants by mere happenstance. In language applicable to this case, the First Circuit observed that, "[o]nly if the record is read with the most singleminded reverence for coincidence could [the employer witness's] lame assertions be entitled to any credit."<sup>14</sup>

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<sup>14</sup> *NLRB v. Horizon Air Servs., Inc.*, 761 F.2d 22, 28 (1st Cir. 1985) ("The ALJ chose to disregard [the witness's] polemical vendaval in favor of a more rational appraisal of the credible evidence before him.").

Lastly, the Company claims that Marchelli “could not testify that Mr. Garlasco saw any Carnegie employee at the time” (Br. 14), but this is firmly rebutted by the transcript. Marchelli unambiguously testified that “[Garlasco] saw us when we crossed to the other restaurant.” (JA 748; JA 413.)

Because the Company has not shown that the testimony of Diaz and other General Counsel witnesses was hopelessly incredible, the Court should affirm the Board’s finding that the Company offered Diaz money in exchange for ending his union activities.

**2. The Company’s owner threw hot coffee on Diaz after he refused to stop organizing for Workers United**

The events occurring shortly after the failed bribery attempt rest on equally strong credibility resolutions. Whereas the Board credited Diaz’s testimony that, after he refused to back off his advocacy for Workers United, Perlson grew angry with him and threw hot coffee in his face (JA 744; JA 312-14), the Company contends that the Board should have believed Garlasco and Astacio, who testified that it was Diaz who lunged at Perlson, causing coffee to accidentally spill out of Perlson’s cup (JA 745; JA 600-01, 689-91).

The judge identified numerous factors supporting Diaz’s account of the coffee-throwing incident over those of Garlasco and Astacio. Specifically, the judge noted that 1) it was Diaz, not Perlson, who called the police after the coffee incident; 2) it was Diaz, not Perlson, who requested that the police inspect the

Company's surveillance camera footage; 3) while talking with the police, Perlson described the incident as an "accident" and offered to pay for Diaz's medical expenses and lost work-time; 4) in his testimony, Diaz carefully quoted Perlson's "outrageously hostile" and memorable remarks and precisely described the coffee-throwing incident consistent with his contemporaneous written statement, whereas the Company's witnesses provided accounts that were inconsistent with prior statements offered at the arbitration; 5) shortly after the incident, Diaz received an objective diagnosis of a left corneal abrasion; and 6) Perlson later taunted Diaz with the coffee incident when confronting him and Marchelli about their handbilling. (JA 748-49.)

The Company only offers scattershot and unsubstantiated arguments in its attempt to convince the Court to reverse the Board's crediting of Diaz's account over those of Garlasco and Astacio. The Company claims that Perlson could not have thrown coffee in Diaz's face because then Diaz "would have been able to react by ducking or moving away" and Perlson "would have gotten much more [coffee] on Diaz." (Br. 22.) This line of argument amounts to nothing more than speculation: undeveloped claims on complicated topics including fluid mechanics and the relative speed of Diaz's reflexes, for which there is no support in the record. Such arguments do not undermine Diaz's testimony in any way, let alone render it "hopelessly incredible."

**3. Lacking any persuasive challenge to the Board's credibility determinations, the Company attacks Diaz's character**

The Company closes its brief with a misguided *ad hominem* attack upon Diaz's credibility *per se*. (Br. 26-28.) The Company first makes the unproven accusation that five years previously Diaz stole a co-worker's cell phone at his former place of employment, Princeton Laundry, and is therefore not to be believed. (Br. 26.) Garlasco also worked at Princeton Laundry, however, and knew about this accusation when Diaz was hired at the Company. (JA 590-92.) Nevertheless, Garlasco permitted Diaz to continue as an employee at Carnegie and, when asked to provide the reasons for discharging Diaz, never mentioned this incident. (JA 591-92, 608-09.) This mudslinging, which the Company itself appeared not to believe or concern itself with before firing Diaz, hardly warrants overturning the Board's decision.

The Company additionally attacks Diaz's credibility by claiming that Diaz's injury was minor and that he has "exaggerated" the physical and emotional distress he has suffered in the aftermath of Perlson's attack. (Br. 28.) The Company's claim is both callous and contradicted by the record evidence. On his way home from work on November 7, Diaz was instructed to return to the plant where Perlson attacked him, unprovoked, by throwing hot coffee in his face while screaming obscenities. (JA 744; JA 314.) As a result, Diaz suffered an abrasion to his left cornea, memorialized that same day by a physician's diagnosis, and went

into diabetic shock. (JA 744, 748; JA 60, 315.) At the time of the hearing, Diaz continued to have problems with his left eye. (JA 316.) Such an unwarranted attack, resulting in lasting injury to the eye and diabetic shock, would be traumatic for any normal person. The Company's insistence (Br. 26) that Diaz's injury was "relatively minor" is insensitive and obtuse. And the Court need not be drawn into the details of Diaz's personal injury case (Br. 27) to review the Board's credibility determinations.

In short, the Company's challenges utterly fail to surmount the standard of review, which erects a formidable barrier to overturning factual findings when they are based upon an administrative law judge's evaluation of the credibility of witness testimony. The Board's findings that the Company violated Section 8(a)(1) by bribing Diaz and causing bodily injury to him should therefore be affirmed and the corresponding portions of the Order enforced.

## **II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S CONCLUSION THAT THE COMPANY DISCHARGED DIAZ FOR ENGAGING IN UNION ACTIVITIES, IN VIOLATION OF SECTION 8(a)(3) AND (1) OF THE ACT**

### **A. Employers Cannot Discharge Employees in Response to Protected Activity**

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor

organization.”<sup>15</sup> An employer thus violates Section 8(a)(3) by discharging employees for engaging in union activity.<sup>16</sup> Such discriminatory discharge also derivatively violates Section 8(a)(1).<sup>17</sup>

In assessing discriminatory discharge cases, the critical inquiry is whether the employer’s action was unlawfully motivated.<sup>18</sup> To answer this question, the Board employs its analysis articulated in *Wright Line*, which has been approved by both this Court and the Supreme Court.<sup>19</sup> Under that framework, the Board’s General Counsel has the burden of demonstrating that the employer had knowledge that employees were engaged in activity protected by the Act, and that the employer was motivated to take the adverse employment action based on its

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<sup>15</sup> 29 U.S.C. § 158(a)(3).

<sup>16</sup> See *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98 (1983).

<sup>17</sup> 29 U.S.C. § 158(a)(1); see *Office & Prof’l Employees Int’l Union v. NLRB*, 981 F.2d 76, 81 n.4 (2d Cir. 1992) (“A violation of 8(a)(3) in fact constitutes a ‘derivative violation’ of Section 8(a)(1) when ‘the employer’s acts served to discourage union membership or activities. . . . The same proof is therefore required to establish a violation of either section.’”) (quoting *Ind. & Mich. Elec. Co. v. NLRB*, 599 F.2d 227, 229 n.2 (7th Cir. 1979)).

<sup>18</sup> See *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 957 (2d Cir. 1988).

<sup>19</sup> *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir. 1981), and approved by *Transp. Mgmt. Corp.*, 462 U.S. at 403; see also *NLRB v. Fermont*, 928 F.2d 609, 613 & n.2 (2d Cir. 1991) (explaining and affirming *Wright Line* analysis).

hostility or animus toward that activity.<sup>20</sup> The General Counsel may rely upon circumstantial evidence to carry its burden of showing knowledge or motive<sup>21</sup>; indeed, where evidence is probative of both knowledge and motive – such as a bribe offered to an employee to stop his union activities – the General Counsel may rely on the same evidence to prove both.<sup>22</sup> Once the General Counsel satisfies that burden, the Board will find a violation of the Act unless the employer shows, by a preponderance of the evidence, that it would have taken the same action even in the absence of the protected union activity.<sup>23</sup>

On appeal, the Board’s factual findings regarding knowledge and motive are reviewed for “substantial evidence.”<sup>24</sup> The Board’s motive findings are afforded particularly deferential review, however, because “the Act vests primary

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<sup>20</sup> See *NLRB v. Matros Automated Elec. Const. Corp.*, 366 F. App’x 184, 187 (2d Cir. 2010); *Abbey’s Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 579 (2d Cir. 1988).

<sup>21</sup> See *Abbey’s Transp. Servs., Inc.*, 837 F.2d at 579; *NLRB v. Windsor Indus., Inc.*, 730 F.2d 860, 863 (2d Cir. 1984).

<sup>22</sup> See *Abbey’s Transp. Servs., Inc.*, 837 F.2d at 579; *Long Island Airport Limousine Serv. Corp.*, 468 F.2d 292, 295 (2d Cir. 1972).

<sup>23</sup> See *Transp. Mgmt. Corp.*, 462 U.S. at 397-98, 401-03; *Wright Line*, 251 NLRB at 1089.

<sup>24</sup> See *Abbey’s Transp. Servs., Inc.*, 837 F.2d at 580.

responsibility in the Board to resolve these critical issues of fact.”<sup>25</sup> Furthermore, as explained above,<sup>26</sup> factual findings based upon the administrative law judge’s credibility assessments will be overturned only if “hopelessly incredible.”<sup>27</sup>

Here, the Board concluded under *Wright Line* that the Company violated Section 8(a)(3) and (1) by discharging Diaz due to his efforts to organize for Workers United. Substantial evidence supports each of the subsidiary findings underlying that conclusion. The Company’s challenges (Br. 9-28) fail to satisfy the stringent standard of review for overturning factual findings by the Board, especially those based upon witness credibility. Accordingly, this Court should affirm the Board’s conclusion that the Company violated the Act by discharging Diaz for engaging in union activities, and the corresponding portions of the Board’s Order should be enforced.

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<sup>25</sup> *S.E. Nichols*, 862 F.2d at 956 (citing *NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 59-60 (2d Cir. 1982)); see also *Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995) (“Drawing . . . inferences from the evidence to assess an employer’s . . . motive invokes the expertise of the Board.”).

<sup>26</sup> See pp. 15-16, 20, *supra*.

<sup>27</sup> See *Thalbo Corp.*, 171 F.3d at 112; *Kinney Drugs, Inc.*, 74 F.3d at 1427.

**B. Substantial Evidence Supports the Board’s Finding that, Prior to Terminating Diaz, the Company Possessed Knowledge of Diaz’s Union Activities**

In its Decision and Order, the Board found that the Company possessed knowledge of Diaz’s protected union activity when it discharged Diaz. (JA 741 n.3, 748.)

First, it is undisputed that Diaz contacted Workers United in order to secure better representation for his co-workers as well as himself. He also told his co-workers to come to the meeting at Caridad. (JA 741 n.3, 743-44; JA 307, 313.)

Next, the Board found that the Company was aware of this union activity when it discharged Diaz. In support of that finding, the Board relied on Garlasco’s attempts to bribe Diaz, offering Diaz up to \$3,000 to not “speak anymore of Union.” (JA 741 n.3, 744, 748.) The Board additionally grounded its finding on Garlasco’s surveillance of Diaz’s union activities on October 26. (JA 741 n.3, 744, 747-48.) As shown above,<sup>28</sup> the Board’s credibility resolutions regarding these two incidents easily meet this Court’s deferential standard of review. Having failed to overturn the Board’s determinations that Garlasco surveilled and bribed Diaz, the Company necessarily fails to undermine the Board’s conclusion that the Company knew of Diaz’s union activities when it fired him. The record therefore

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<sup>28</sup> See pp. 20-24, *supra*.

amply supports the Board’s finding of employer knowledge and should be affirmed.

The Company argues that, since Diaz and Workers United engaged in union activities off the Company’s premises, it was improper for the Board to “infer” that the Company was aware of those activities. (Br. 14.) But this mischaracterizes the Board’s finding, which was based on direct eyewitness accounts of Diaz being bribed and surveilled by Garlasco, not on any “inference.” (JA 741, 748; JA 307-08, 309-12, 413-15.) Moreover, the Company’s authority for its broad assertion that off-premises union activity is irrelevant to employer knowledge (Br. 13) involved the inapposite “small plant doctrine” for inferring knowledge, which the Board did not invoke here.<sup>29</sup>

**C. Substantial Evidence Supports the Board’s Finding that the Company Discharged Diaz Because of Its Animus Toward His Union Activities**

The Board concluded that the Company discharged Diaz because of its animus toward Diaz’s union activities. (JA 741 n.3.) The Board rested this finding of animus upon several incidents well supported by the record, including Garlasco’s attempt to bribe Diaz to stop his union activities, Perlson’s assault upon Diaz with hot coffee, and Garlasco’s threat to Diaz that “if the Union comes in we will close the company.” (JA 741 n.3; JA 312.) Further confirming this result, the

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<sup>29</sup> *Mantac Corp.*, 231 NLRB 858, 858 n.2 (1977).

Board noted that “the timing and the context of the discharge—3 days after the attempted bribe and Perlson’s assault—supports finding that the [Company] was motivated by Diaz’ union activities in discharging him.” (JA 741 n.3.)

The record strikingly demonstrates the Company’s animus towards Diaz’s union activities. As discussed above, the properly credited evidence showed that the Company twice tried to bribe and then assaulted Diaz out of antagonism toward his union activities.<sup>30</sup> Since the testimony regarding this assault and attempted bribe is not “hopelessly incredible,” it serves as an independently sufficient basis for the Board’s finding of animus. In any event, Garlasco’s undisputed threat to Diaz that “if the Union comes in we will close the company” (JA 741 n.2 & 3, 748; JA 312)—which can be a serious violation of the Act, though it is encompassed in the settlement—supports a finding of animus and unlawful motive.<sup>31</sup> Completing the picture, the Company terminated Diaz on his first workday following his rejection of the Company’s bribe to coerce him into ceasing his union activities.

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<sup>30</sup> See pp. 6-8, 20-25, *supra*.

<sup>31</sup> See *NLRB v. J. Coty Messenger Serv., Inc.*, 763 F.2d 92, 98-99 (2d Cir. 1985) (threat to close the company if a union were voted in demonstrated employer’s animus and unlawful discharge).

(JA 745; JA 322-23.) Under well-established precedent,<sup>32</sup> the timing of Diaz's dismissal therefore also serves as a basis for the Board's finding of animus.

Against this substantial evidence of animus, the Company argues that its ongoing relationship with the incumbent union, Local 1964, demonstrates that it could not have been hostile toward Diaz's union activities. (Br. 16.) Diaz worked on behalf of rival union Workers United and the evidence showed that, for whatever reason, the Company wanted Diaz to stop. It is perfectly and logically consistent for an employer to discriminate in favor of one union over another.<sup>33</sup> The credited evidence supports the Board's findings of animus and unlawful motive and should be affirmed.

**D. Substantial Evidence Also Supports the Board's Determination that the Company's Proffered Reasons for Terminating Diaz Were Pretextual**

Under *Wright Line*, the employer can raise an affirmative defense to liability by demonstrating by a preponderance of the evidence that it would have

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<sup>32</sup> See *NLRB v. Montgomery Ward & Co.*, 242 F.2d 497, 502 (2d Cir. 1957) ("The abruptness of a discharge and its timing are persuasive evidence as to motivation."); see also *Abbey's Transp. Servs., Inc.*, 837 F.2d at 580 (same).

<sup>33</sup> See, e.g., *NLRB v. Richard W. Kaase Co.*, 346 F.2d 24, 29-30 (6th Cir. 1965) (affirming Board's finding that employer discriminatorily discharged employees in order to discourage membership in one union and encourage membership in a rival union).

discharged an employee regardless of his protected activities.<sup>34</sup> But “if the evidence establishes that the reasons given for the [employer’s] action are pretextual—that is, either false or not in fact relied upon—the [employer] fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct.”<sup>35</sup>

The Board rejected the Company’s two reasons for discharging Diaz—first, that Diaz had possessed confidential information concerning Carnegie’s loss of a client; and second, that Diaz had lunged at Perlson—as pretextual. (JA 741, 749.) The Board credited the Company’s assertion that Diaz learned that it had lost a client to a competitor, Miron & Sons, before that fact was even known by certain company managers, such as Garlasco and Astacio. (JA 749.) The Board saw nothing suspicious in Diaz’s knowledge, however, since Diaz testified without contradiction that his friend who worked at Miron & Sons discovered that his employer had won the business of the Company’s former client and told Diaz. (JA

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<sup>34</sup> See *Transp. Mgmt. Corp.*, 462 U.S. at 397-98, 401-03; *Wright Line*, 251 NLRB at 1089; *Abbey’s Transp. Servs., Inc.*, 837 F.2d at 580.

<sup>35</sup> *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enforced*, 705 F.2d 799 (6th Cir. 1982)); see also *Matros Automated Elec. Constr. Corp.*, 366 F. App’x at 187 (“If the employer’s proffered reason for the adverse employment action is shown to be pretextual, then the employer will be found not to have carried its burden.”); *NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 64 (2d Cir. 1982) (“[I]mplicit in the finding of pretext is the judgment of the court that the employer has not marshalled any convincing evidence to support its position.”).

749; JA 346, 374, 617-19.) This reason for discharging Diaz was therefore pretextual, since there was no evidence that Diaz “improperly obtained that information” or that the information was “confidential”; therefore, “it is apparent that the Company would not have discharged Diaz for possessing this information.” (JA 749.) The Board described as “exaggeration” and “speculation” Garlasco’s related claim that Diaz had sabotaged his laundry work in order to cause the Company to lose this particular client to its rival. (JA 749.) Nothing in the record corroborated the claim that Diaz had ever engaged in sabotage or would ever do so. (JA 749; JA 696.)

The Board found the Company’s other reason for discharging Diaz—that he had “lunged” at Perlson—to be pretextual as well for two reasons. First, the Board relied on its prior finding that Diaz had not lunged at Perlson and that, in fact, it was Perlson who had attacked Diaz. (JA 749.) Second, the Board reasoned that, even if Diaz had lunged at Perlson, the Company’s actions in the aftermath of the coffee incident were inconsistent with its contention that Diaz’s conduct warranted discharge. Specifically, Perlson described the altercation as an “accident” to the police officers, never mentioned any lunging by Diaz to them, and offered to pay Diaz for his medical expenses and time off from work. (JA 749; JA 316-17.) Furthermore, it was Diaz who had called the police; Garlasco stated that he did not call the police after allegedly witnessing his boss attacked by an employee because

similar incidents of “someone getting bumped and not liking it” occurred very frequently at the Company. (JA 749; JA 677.) Thus, the Company’s own witness undermined its position that Diaz’s supposed lunging warranted discharge. (JA 749; JA 677.)

Finally, the Board noted that the Company appeared to offer four prior incidents as additional reasons for its discharge of Diaz: one incident involving Diaz incorrectly mixing colored and white linens, and three incidents involving altercations between Diaz and his co-workers. But the Board disregarded these incidents in its analysis, since Garlasco had specifically testified that they did not constitute prior discipline and had played no role in Diaz’s discharge. (JA 741, 749; JA 657-58.)

In its Brief, the Company backpedals from its “lunging” defense, claiming that since it supposedly happened moments after Diaz learned he was fired it only “sealed his fate” rather than prompted his discharge. (Br. 22.) Instead, it relies on its specious claim—that Diaz was a corporate spy and/or saboteur—as the “single” reason for the discharge. (Br. 21, 24.) Yet, the Board rightly rejected that defense where there is no evidence that Diaz knew anything about the bidding process, such as specific bids made by Carnegie or its competitor; the evidence only shows that Diaz learned from a friend that the Company had lost a client to his friend’s employer. (JA 749; JA 346, 374.) The Company presents no reason to disbelieve

Diaz’s explanation that his knowledge came from simple industry gossip relayed by his friend. Diaz’s previous one-off mistake of mixing white and colored linens in the washing machines hardly proves him to be a saboteur. (Br. 21.) Indeed, the Company’s own witness, Astacio, testified that this mistake by Diaz was “unintentional.” (JA 696.) The Company’s defense—that Diaz sabotaged its laundry operations and “orchestrated” his altercation with Perlson, which landed him in the hospital, at the direction of Workers United (Br. 25-26)—is thus nothing more than a conspiracy theory, unsupported by any record evidence. The continued pursuit of this theory evinces desperation on the part of the Company, not error on the part of the Board.

Accordingly, substantial evidence supports the Board’s conclusion that the Company unlawfully discharged Diaz because of union animus and that the Company’s proffered reasons are pretextual. The nature of this determination—i.e., a finding of motive—is one for which the Act entrusts primary responsibility to the Board.<sup>36</sup>

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<sup>36</sup> *S.E. Nichols*, 862 F.2d at 956 (citing *NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 59-60 (2d Cir. 1982)); see also *Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995) (“Drawing . . . inferences from the evidence to assess an employer’s . . . motive invokes the expertise of the Board.”).

### **III. THE ADMINISTRATIVE LAW JUDGE DID NOT CLEARLY ABUSE HIS DISCRETION IN DENYING THE COMPANY'S SECOND REQUEST TO CONTINUE THE UNFAIR-LABOR-PRACTICE HEARING UNTIL THE CRIMINAL PROCEEDINGS PENDING AGAINST A WITNESS WERE RESOLVED**

Before the unfair-labor-practice hearing began, the administrative law judge granted the Company a continuance so that the criminal proceedings against one of its witnesses, owner Gary Perlson, could be resolved and he could testify on the Company's behalf without risk of self-incrimination. (JA 703.) When those criminal proceedings were themselves continued, the Company again requested a continuance, which the judge denied. (JA 587, 705.) The Company argues that the denial of its second continuance request constituted prejudicial error. (Br. 7-9.)

The Company's challenge has no merit. "[M]atters of continuance rest in the sound discretion of the hearing officer or examiner and his decision should ordinarily not be interfered with by a reviewing court except upon a clear showing of abuse of discretion."<sup>37</sup> Such "[a]buse of discretion justifying reversal requires that the ruling 'is demonstrated to clearly prejudice the appealing party.'"<sup>38</sup> Since

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<sup>37</sup> *NLRB v. Air Control Prods. of St. Petersburg, Inc.*, 335 F.2d 245, 247 (5th Cir. 1964); *see also J.M. Tanaka Constr. v. NLRB*, 675 F.2d 1029, 1035 (9th Cir. 1982) ("Grant or denial of a continuance is within the ALJ's discretion."); *NLRB v. Pan Scape Corp.*, 607 F.2d 198, 201 (7th Cir. 1979) (same); *NLRB v. Glacier Packing Co., Inc.*, 507 F.2d 415, 416 (9th Cir. 1974) (same).

<sup>38</sup> *J.M. Tanaka Constr.*, 675 F.2d at 1035 (quoting *Pan Scape Corp.*, 607 F.2d at 201); *see also NLRB v. Catalina Yachts*, 679 F.2d 180, 182 (9th Cir. 1982) (denying request for continuance made by company in order to make witness

the Company has neither shown that the judge abused his discretion in managing his docket nor that his denial of the second continuance request clearly prejudiced the Company, its challenge to that denial must fail.

As the Board stated in its Decision and Order, the judge’s denial of the second continuance request did not constitute an abuse of his discretion, since it neither deprived Perlson of his constitutional rights nor unduly prejudiced the Company. (JA 741.) Perlson chose not to testify at the hearing, and the judge never compelled him to testify against his will; his Fifth Amendment rights were therefore not even implicated, let alone compromised.<sup>39</sup> (JA 741.) Nor was the Company unduly prejudiced by Perlson’s absence: the judge denied a request by the General Counsel to draw a negative inference against the Company based on Perlson’s absence from the hearing, even though the Constitution permits one to be drawn.<sup>40</sup> (JA 741, 749-50.)

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available for trial because the company “has failed to show how the absence of [the witness] prejudiced the case”).

<sup>39</sup> *Burke v. Bd. of Governors of the Fed. Reserve Sys.*, 940 F.2d 1360, 1367-68 (10th Cir. 1991) (“Because the petitioners *themselves* chose not to testify, the fifth amendment protection against *government* compulsion was not implicated.”) (emphasis in original).

<sup>40</sup> *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (“[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.”).

In fact, the administrative law judge took substantial steps to accommodate the Company's desire to have Perlson testify at the hearing. Based on company counsel's representation that the criminal trial would begin January 11, 2011, the judge granted one continuance until January 31, 2011.<sup>41</sup> (JA 703.) When the prosecution continued the trial against Perlson, the administrative law judge declined to wait indefinitely for a criminal proceeding over which he had no control. (JA 271, 704-05.) He therefore denied the Company's second request for a continuance in accordance with the Board's direction to proceed "as promptly as possible." (JA 704.)

There is thus ample support for the judge's decision to proceed with the hearing. As the Supreme Court has recognized, the interest in promptly resolving cases represents an undoubtedly important policy of the federal labor laws, especially when the case must be resolved before a disputed election can be rerun.<sup>42</sup> Indeed, to date, the criminal case against Perlson is still pending after serial postponements. The Company also ignores other interests at stake, including

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<sup>41</sup> JA 703 (Order Postponing Hearing, *Carnegie Linen Servs.*, Case No. 2-CA-39560 (Nov. 29, 2010)).

<sup>42</sup> *See, e.g., NLRB v. Gissel Packing Co.*, 395 U.S. 575, 611 n.30 (1969) ("[F]igures show that the longer the time between a tainted election and a rerun, the less are the union's chances of reversing the outcome of the first election."); *Boire v. Greyhound Corp.*, 376 U.S. 473, 478 (1964) ("[T]he union, unless an election can be promptly held to determine the choice of representation, runs the risk of impairment of strength by attrition and delay while the case is dragging on through the courts.") (quoting H.R. Rep. No. 74-972 at 5 (1935)).

the likely erosion of witnesses' memories over time and the effect of delay on the related representation election.

To the extent that the Company argues its choice not to put Perlson on the stand under the circumstances weakened its defense (Br. 7, 9), this argument is undermined by the fact that the Company presented testimony from eyewitnesses, decisionmakers, or both concerning every disputed event in this case. General Manager Garlasco testified regarding the surveillance of Diaz (JA 592-95), the attempt to bribe Diaz (JA 671-74), the Company's reasons for terminating Diaz (JA 608), and Diaz's grievance proceeding (JA 683-85); and both Garlasco and Day Manager Astacio testified regarding the crucial November 7 coffee-throwing incident (JA 599-602, 689-91). The Company additionally could have presented testimony from Garlasco as to "what occurred when United distributed flyers" on November 27 (Br. 8), but chose not to.

In passing, the Company characterizes the judge's denial of another continuance as a deprivation of "due process." (Br. 7.) This due process angle, merely adverted to in a section heading of the Company's brief,<sup>43</sup> is supported by no argument or case law. By inadequately briefing its "due process" claim, the

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<sup>43</sup> See Br. 7 ("PETITIONER CARNEGIE WAS DENIED DUE PROCESS BECAUSE THE ADMINISTRATIVE LAW JUDGE PROCEEDED WITH THE HEARING BEFORE RESOLUTION OF CRIMINAL CHARGES BY DIAZ AGAINST CARNEGIE'S OWNER, DEPRIVING CARNEGIE OF THE BENEFIT OF MATERIAL TESTIMONY").

Company has waived this issue on appeal.<sup>44</sup> Additionally, the Company failed to present any such due process challenge to the Board in its Exceptions to the administrative law judge's decision. (JA 709-11 (failing to mention due process).) This deprives the Court of the jurisdiction to consider the Company's due process challenge, since "[n]o objection that has not been urged before the Board" shall be considered in a review proceeding.<sup>45</sup> In any event, the Constitution's due process clause does not necessitate the indefinite postponement of an administrative hearing given a parallel criminal proceeding.<sup>46</sup>

In the absence of any demonstrable prejudice, the Company simply has not shown that the judge abused his discretion by not indefinitely staying the Board proceedings until the resolution of the criminal proceedings against Perlson.

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<sup>44</sup> See *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001) ("It is a 'settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.'" (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990))).

<sup>45</sup> See 29 U.S.C. § 160(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982).

<sup>46</sup> See *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 326 (9th Cir. 1995) (no denial of due process where administrative law judge rejected request for stay of administrative proceedings pending parallel criminal proceedings); *see id.* (observing that it is "permissible to conduct a civil proceeding at the same time as a related criminal proceeding, even if that necessitates invocation of the Fifth Amendment privilege"); accord *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 96-104 (2d Cir. 2012) (no abuse of discretion for district court to deny stay in trademark infringement case until resolution of related criminal counterfeiting case; rejecting Fifth Amendment claims).

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

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NATIONAL LABOR RELATIONS BOARD  
AUGUST 2012

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

CARNEGIE LINEN SERVICES, INC.,	*
	*
Petitioner/Cross-Respondent	* Nos.: 12-335,
	*      12-734
v.	*
	* Board Case No.:
NATIONAL LABOR RELATIONS BOARD,	* 2-CA-39560
	*
Respondent/Cross-Petitioner.	*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 10,137 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

**COMPLIANCE WITH CONTENT AND VIRUS SCAN REQUIREMENTS**

Board counsel certifies that the contents of the accompanying CD-ROM, which contains a copy of the Board's brief, is identical to the hard copy of the Board's brief filed with the Court and served on the Petitioner/Cross-Respondent. The Board counsel further certifies that the CD-ROM has been scanned for viruses

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Dated at Washington, DC  
this 14th day of August, 2012

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 14, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are a registered user, or, if they are not, by serving a true and correct copy at the address listed below:

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